IN THE SUPREME COURT OF FLORIDA

MARSHALL LEE GORE,

Appellant,

v. CASE NO. SC07-678

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

BILL MCCOLLUM, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT DEPUTY ATTORNEY GENERAL
FLORIDA BAR NO. 158541

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE

The facts of the "instant capital murder case" in Gore v. State, 599 So.2d 978 (Fla.), cert. denied, 506 U.S. 1003 (1992), reveal that on June 28, 1989, the Grand Jury of Columbia County, Florida, returned an Indictment against Marshall Lee Gore, charging him with the first-degree premeditated murder, kidnapping and robbery of Susan Marie Roark. (OTR XXVI, pages 2758-2759). Following a jury trial, Gore was convicted as to all counts. At the conclusion of the penalty phase of Gore's trial, a death recommendation of 11-1 was made by the jury (OTR XXVII, page 3063), and the Court imposed a sentence of death April 3, 1990. (OTR XXVII, pages 3072-3081).[1] The Florida Supreme Court affirmed Gore's convictions and sentences, Gore v. State, 599 So.2d 978 (Fla.), cert. denied, 506 U.S. 1003 (1992), but concluded that the cold, calculated and premeditated manner aggravating factor was not found beyond a reasonable doubt.

In postconviction, the Capital Collateral Representative (CCRC-N), filed in February 1997, a forty-five claim amended postconviction motion. The trial court in June 1997, summarily denied forty-three of the claims based on various grounds, and permitted Gore's counsel to amend claims VII and XVIII, which

[1] Gore received a life sentence on the kidnapping and fifteen years on the robbery (OTR XXVII, pages 3065, 3072-3081), convictions, to be served consecutively with each other and the first-degree murder conviction.

challenged the effectiveness of counsel at trial and at the penalty phase. On July 22, 1997, an amended motion was filed with regard to claims VII and XVIII.

The evidentiary hearing was held on December 14, 2000, where Gore's original trial counsel, Jimmy Hunt, was the only witness called to testify. The trial court denied all relief, and again summarily denied the other forty-three claims. The trial court concluded as to the ineffectiveness claims, Gore failed to prove trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984) (PCR IX, pages 1498-1513).[2] An appeal was filed June 27, 2001, and an amended petition for writ of habeas corpus was filed April 24, 2002.

During the pendency of the appeal, Gore sought pro se to hold any appeal in abeyance in order to further litigate in the trial court the appropriateness of the denial of postconviction

[2] In April 1998, CCRC-N filed a motion pursuant to Carter v. State, 706 So.2d 873 (Fla. 1997), asking for a determination of Gore's competency to proceed. Following a series of hearings and litigation as to this claim, the trial court, in November 1998, issued an order finding Gore competent to assist in his 3.850 litigation. A new hearing date was set for February 1999, however, the hearing was continued until July 1999. In June 1999, CCRC-N filed a notice of conflict with Gore and asked the Court to appoint substitute counsel for Gore. In July 1999, the Court allowed CCRC-N to withdraw and appointed Registry Counsel R. Glenn Arnold to represent Gore. The record reflects that Mr. Arnold attempted to file an amended postconviction motion in July 1999, but Gore refused to sign the newest amendment. Mr. Arnold then sought to proceed on the July 1997 amended motion (originally filed by CCR) and the Court granted that motion and set the evidentiary hearing for December 14, 2000.

relief. He also filed a Bar complaint against collateral counsel, and in Gore's "Dual Traverse" and his "Praecipe and Petition for Reconsideration-(EN BANC)" filed March 20, 2001, asserted that collateral counsel, Mr. Arnold, rendered "inadequate assistance of counsel....". On June 27, 2001, the Court denied "Appellant's Pro Se Praecipe and Petition for Reconsideration (En Banc), Emergency (Time Critical) Motion for Protective Order, and Request for Allowance and Enlargement of Time to File Traverse to Response...." In that same order, the Court struck as unauthorized Gore's "Dual Traverse to Responses from the State and Registry Counsel...." Gore filed additional motions; ultimately, the Court denied collateral counsel's request to withdraw and the appeal proceeded. Gore v. State, 846 So.2d 461 (Fla. 2003).

Unsatisfied with the rulings of the Court as to the assortment of pro se motions during the pendency of the postconviction appeal and review of the state habeas, Gore filed September 27, 2002, his first federal petition for habeas corpus in Gore v. Michael W. Moore, et al, Case No. 3:02-cv-942-J-25, challenging the "adequacy of postconviction counsel" amid a number of other assertions. An Order of Dismissal without Prejudice was entered October 11, 2002. The record was sent to the Eleventh Circuit Court of Appeals January 28, 2003, and on

May 12, 2003, the Eleventh Circuit returned all pleadings and closed the case.

On or about May 21, 2003, Gore, *pro se*, filed another federal petition for writ of habeas corpus.[3] The District Court's order dated June 13, 2003, requested the State respond – addressing issues regarding exhaustion and ripeness. Ultimately, on or about April 22, 2005, Gore, represented by counsel, filed a modified petition and memorandum of law. Following further review, the District Court denied all relief.

The Eleventh Circuit entertained Gore's appeal and, following oral argument, affirmed the denial of federal habeas corpus relief in Gore v. Secretary, Dept. Of Corrections, et al., 492 F.3d 1273 (11th Cir. 2007), on the single issue -- whether the Florida Supreme Court's decision correctly decided that, the admission at trial of Gore's statements to Metro-Dade police, did not violate Gore's rights under the Fifth, Sixth and Fourteenth Amendments. On July 20, 2007, in Gore, supra, the

[3] Ground 1. Gore contends that his complaints against collateral counsel "largely-though not exclusively, stemmed from said counsel's" "negligent or otherwise deliberately deficient claim presentation..."; Ground 2. Gore challenges the correctness of the state court's rulings as to appointment of conflict-free counsel and/or substitute counsel; Ground 3. Gore argued that his postconviction appeal and state habeas were not properly decided and that he does not have adequate funds for counsel; Ground 4. Gore's capital conviction and sentence of death were based on a faulty indictment, because the State failed to inform him of the aggravating factors it would use at sentencing.

Eleventh Circuit concluding after extensive discussion of Gore's Fifth and Sixth Amendment claims that:

> In a well-reasoned and thoroughgoing opinion, the Florida Supreme Court concluded, among many other things, that the trial court did not deny Gore his Fifth and Sixth Amendment rights when it admitted into evidence statements Gore made to Detective Simmons. Gore v. State, 599 So. 2d at 980-83. The district court held that "the Florida Supreme Court's decision with respect to this issue was not contrary to clearly established federal law, and did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." Gore v. Crosby, No.3:03-cv-474 (M.D. Fla. Jan 31, 2006)(unpublished order). For the reasons we have expressed in this opinion, we agree.

Gore, 492 F.3d at 1308.

Gore's petition for writ of certiorari which was denied by the United States Supreme Court, Gore v. Secretary, Department of Corrections, 128 S. Ct. 1226, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1374 (2008). The issues raised therein pertain to suppression of statements made by Gore.[4]

[4] 1. Is a defendant's Fifth Amendment right to remain silent scrupulously honored under Michigan v. Mosley when interrogating state officials resume questioning about the same charges, after they were present in a federal criminal hearing where through his counsel, Gore again invoked his Fifth Amendment rights?

2. Are state officials prohibited from interrogating a defendant where in a federal hearing, defendant, through counsel, invokes his Fifth Amendment rights, when state officials are present for said invocation and defendant has been in custody for seven days?

3. Does the Sixth Amendment right to counsel attach to uncharged state crimes when a defendant is arraigned in a federal court hearing, and defendant's appointed counsel for the

Gore's litigation continued asserting problems with the appointment of counsel for postconviction. With the appointment of Mr. Frank Tassone as postconviction counsel on June 25, 2007, this Court acknowledged prior appointed counsel D. Todd Doss's Motion to Withdraw before this Court became moot, on August 1, 2007. Following appointment by the trial court, Mr. Tassone on June 29, 2007, filed a "Motion to Appoint Investigator and Incur Investigative Fees and Expenses" presumably based on the motion to investigate for the appeal.

In this interim, Gore, pro se, sought to secure additional postconviction review in the trial court pursuant to Rule 3.853, specifically seeking DNA testing, on or about June 14, 2006. The trial court, on July 11, 2006, denied his DNA request finding that "the statutory requirement of a question of identity has not been met, and the Rule 3.853 motion is facially insufficient." The trial court noted that the issue of identity of the perpetrator was not at issue based on the evidence. Reconsideration was sought on August 8, 2006, and rehearing denied August 25, 2006. A notice of appeal was filed September

---

federal charges, invokes defendant's Fifth Amendment rights in the presence of a federal judge, the prosecuting attorney, and interrogating officials, who are awaiting a custody transfer of defendant from federal to state custody?

22, 2006, with this Court.[5] On July 18, 2008, Gore's counsel filed an amended brief which is the subject of this appeal.

[5] In June 2007, Gore filed his pro se Petition for Writ of Mandamus and/or Alternative Relief, arguing that he was denied an opportunity to "adequately" present newly discovered evidence as to his DNA claim. The Court ordered the parties to respond and the state did so on August 14, 2007.

SUMMARY OF THE ARGUMENT

Issue I: The trial court specifically found no "genuine" disputed facts/issues as to the identification of the murderer of Susan Roark. As such Gore failed below to show the requisite nexus between the exhibit evidence listed in Appellant's Brief pp. 4-5 and other "evidence" collected near Ms. Roark's body in the dump where Susan Roark was found or any question as to the identity of Ms. Roark's murderer, Marshall Gore. As such the trial court was correct in finding Gore's Rule 3.853 insufficient.

Issue II: Any DNA testing of any collected items in either the Corolis and/or Novick cases is not germane to the instant murder. Use of that evidence to attack of Williams' Rule evidence/testimony presented in the instant Roark murder is unwarranted because this Court found the Corolis testimony admissible on direct appeal. Moreover, Gore is simply attempting to relitigate issues in those other cases.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING GORE'S MOTION UNDER RULE 3.853.

Gore argues that there was no direct evidence to support his first degree murder conviction of Susan Roark, rather he contends that "the jurors in this case concluded, based on the circumstantial evidence presented by the state combined with the William's rule testimony of Tina Corolis, that appellant had in fact murdered the victim." (IB 9). He asserts that he is innocent of the Roark murder and requested below, DNA testing of a number of items which he asserts will "establish that person(s) other than appellant were responsible for the death of Susan Marie Roark." (IB 9).

The trial court in entertaining Gore's *pro se* motion below, concluded that the statutory requirements of Rule 3.853, pertaining to the issue of identity of Gore as the murderer, was not at issue based on the evidence presented at trial. Specifically:

> The Defendant seeks to have DNA tests run on evidence that was collected near the victim. It should be noted that the victim was buried under a layer of leaves at an unauthorized trash dump in a rural part of Columbia County. The Defendant alleges, that because there is no physical evidence that ties him to the victim, crime scene, or county, DNA tests run on the evidence cited will reveal that he is innocent.

> The Defendant is incorrect in this assertion. The identity of the perpetrator of this crime is, was, and can be established without any direct evidence. Some of the means of identifying the Defendant are: the Defendant was the last person seen with the victim, the Defendant was in possession of the victims car (in which he was the last person seen with the victim), and the Defendant pawned personal items of the victims(sic).

(RA-11-12).

Rule 3.853 -- Motion for Postconviction DNA Testing, provides in material part:

> (a) Purpose. --This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes.
>
> (b) Contents of Motion. --The motion for postconviction DNA testing must be under oath and must include the following:
>
> (1) a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;
>
> (2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime;
>
> (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
>
> (4) **a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;**

(5) a statement of any other facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority….

(Emphasis added).

The trial court specifically found no "genuine" disputed facts/issues as to the identification of the murderer of Susan Roark. Moreover this Court had previously concluded in *Gore v. State*, 846 So. 2d 461, 464 (Fla. 2003), that:

> The facts of the case are set out in this Court's 1992 opinion affirming Gore's conviction and sentence.
>
> Susan Roark was last seen alive on January 30, 1988, in Cleveland, Tennessee, in the company of Marshall Lee Gore. Gore had planned to travel to Florida with a friend from Cleveland. While waiting for his friend at a convenience store, Gore struck up a conversation with Roark. Gore then entered Roark's car, a black Mustang, and they drove away.
>
> Gore accompanied Roark to a party at the home of a friend of hers. Roark had planned to spend the night at her friend's home. Sometime between 11:30 and 12:00, Roark left to drive Gore home. She never returned. The following day Roark's grandmother reported her missing. She had been expected home by 7 a.m. that morning.
>
> Gore arrived in Tampa on January 31, driving a black Mustang. He convinced a friend to help him pawn several items of jewelry later identified as belonging to Roark. Gore then proceeded to Miami, where police subsequently recovered Roark's Mustang after it was abandoned in a two-car accident. Gore's fingerprint was found in the car, as well as a traffic ticket which had been issued to him while he was in Miami.
>
> On April 2, 1988, the skeletonized remains of Roark's body were discovered in Columbia County, Florida. The naked body was found in a wooded area which had been used as an unauthorized dumping ground for household

> garbage and refuse. Expert testimony established that the body was placed in its location either at the time of death or within two hours of death.
>
> *Gore v. State*, 599 So. 2d 978, 980 (Fla.), *cert. denied*., 506 U.S. 1003, 121 L. Ed. 2d 545, 113 S. Ct. 610 (1992).
>
> **In addition to this evidence, the State introduced the testimony of two other witnesses. Specifically, Lisa Ingram testified that she "was riding in a car with Gore on February 19 when she saw a woman's purse in the back seat. She testified that Gore stated that the purse belonged to 'a girl that he had killed last night.'" *Id*. at 983. We concluded on appeal that "this testimony was admissible as an admission with regard to the Roark homicide." *Id.* . . .**

(Emphasis added)

Based on the allegations presented below and articulated on appeal, it is sheer speculation to suggest that any “credible evidence of innocence” exists between the exhibit evidence admitted at trial -- listed in Appellant’s Brief pp. 4-5 and other “evidence” collected near Ms. Roark’s body in the dump site where Ms. Roark’s body was found (Appellant’s Brief p. 5). The question as to the identity of Ms. Roark’s murderer, Marshall Gore, was overwhelming proven at trial. As such the trial court was correct in finding Gore’s Rule 3.853 defective and insufficient.

Rule 3.853 (b)(4) reads in material part: “a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA

evidence would either exonerate the defendant…." In Saffold v. State, 850 So. 2d 574, 576-77 (Fla. 2DCA 2003), the Court note:

> "...In the present case, because Saffold's statement of the facts was so lacking in detail that it did not even include the nature of the conviction or convictions he is challenging, we conclude that Saffold's motion was facially insufficient under subsection (b)(1) of the rule.
>
> As to subsections (b)(3) and (b)(4), Saffold asserted the following: "Movant hereby submits that he is innocent of this crime. Further, DNA testing will exonerate movant and show that the semen obtained from the virgina [sic] swabbing of the victim does not match nor [sic] belong to movant." While Saffold alleged that he was "innocent of this crime," his motion indicated that he had been convicted of five offenses. The motion does not indicate to which of the five offenses his claim of innocence is directed, and it is unclear if he is referring to a single crime or perhaps a criminal episode.
>
> Saffold also asserted several facts as reflecting that identification was a genuinely disputed issue. He claimed that shortly after the alleged crime, the victims could not pick him out of a photopack; that one of the victims testified during deposition that the suspect was wearing a mask, but she stated that she could identify her assailant; that all three victims observed Saffold at a hearing prior to trial, which enabled them to identify him at trial; and that the composite sketch of the suspect did not look like Saffold. However, Saffold did not allege that he employed a misidentification defense at trial or that there was no other evidence that he was the perpetrator of the offenses in question, apart from his identification by the victims.
>
> While some leeway is afforded to the pleadings of pro se litigants, subsection (b)(3) of the rule requires Saffold to state his innocence of the crime and how DNA testing will exonerate him or will mitigate his sentence for that crime. Subsection (b)(4) requires him to state that identification is genuinely disputed and why identification is an issue, or provide an

> explanation of how the DNA evidence would exonerate him or mitigate his sentence. Other than asserting general, conclusory information, Saffold has not shown how DNA testing will exonerate him from an unspecified crime or mitigate his sentence, or why identification is an issue in a case involving unspecified facts and a conviction of an unspecified crime. Without some information as to the primary evidence against him and any defense employed at trial, we conclude that Saffold's motion does not provide a facially sufficient statement to meet the requirements of subsections (b)(3) and (b)(4) of the rule."

Likewise, in Scarborough v. State, 906 So. 2d 379, 380 (Fla. 2DCA 2005), the Court observed:

> Artis Scarborough was convicted after jury trial of armed robbery of a supermarket. Scarborough appeals the summary denial of his motion filed pursuant to Florida Rule of Criminal Procedure 3.853 in which he sought DNA testing of a jacket that Scarborough alleges was recovered by the police at or near the supermarket. A review of the motion reveals that Scarborough made a sufficient showing that his trial identification was in dispute within the meaning of rule 3.853(b)(4). See *Saffold v. State*, 850 So. 2d 574, 577 (Fla. 2d DCA 2003); *Zollman v. State*, 820 So. 2d 1059, 1062 (Fla. 2d DCA 2002). Scarborough did not make a facially sufficient showing under rule 3.853(b)(4) as to the relevance of DNA testing of the recovered jacket in exonerating him. *See Hitchcock v. State*, 866 So. 2d 23, 28 (Fla. 2004).

While the Court in Scarborough, allowed a refiling of the Rule 3.853 motion, the Court observed that-- Scarborough shall state "how and where the jacket sought to be tested was recovered by the police, whether that jacket was introduced into evidence, and whether the witness who identified Scarborough, or any other witness, also positively identified that jacket as the one worn by a perpetrator of the robbery. **Scarborough must show**

that DNA testing of the recovered jacket is relevant to the issue of his identification as the perpetrator of the crime." (Emphasis added).

Indeed, Gore's failure to plead the requisite nexus in his motion, reflects the utter baselessness and speculation of his request. The trial court's ruling warranted the denial. See King v. State, 808 So. 2d 1237, 1247-1248 (Fla. 2002)(upholding denial of request for DNA testing of hair found on victim's nightgown as it was not possible to discern how, when or where the hair had been transferred to the victim); Tompkins v. State, 872 SO. 2d 230, 242-243 (Fla. 2003)(rejecting argument that DNA testing would have provided relief for defendant given that any DNA evidence obtained from items found on or near victim's body was, "unreliably contaminated due to the location of the remains").

Gore argues that the trial court "listed no case law" in denying the motion, "did not address any" of the requirements of the Rule, and did not acknowledge the fact that no direct physical evidence---was presented…." He contends that he is innocent of the murder of Susan Roark and urges that "available technology in 1989, could not link" him to "the crime scene where the body of Susan Roark was discovered." He now contends that with the advent of DNA the physical evidence will "establish the identity of the actual killer". (IB 9-10)

The trial record before the Court on direct appeal supports the trial court's conclusion that the fact that Gore committed this murder is not in dispute. While on direct appeal Gore sought to suppress collateral crime evidence that went to identity, the physical evidence presented showed that within 24 hours after Ms. Roark's disappearance, Gore was in Florida, in possession of Susan Roark's black Mustang (Susan Brown testified that unannounced, Gore showed up in Tampa, on Superbowl Sunday in 1988, driving the black Mustang); had Susan Brown pawn Ms. Roark's jewelry in Tampa, on January 31, 1988, with 24 hours of her disappearance on January 30, 1988;[6] Gore received a traffic citation in his name, while driving Susan Roark's car on January 31, 1988, in Tampa, Florida[7]; and Gore's fingerprints were found on the black Mustang. He was last seen with Ms. Roark at a party in Tennessee, January 30, 1988,[8] and, there was no

[6] Carolyn Roark, Susan's stepmother was able to identify the jewelry pawned in Tampa, Florida as belonging to Susan. (TR-2154-2160).

[7] Ralph Garcia, a Miami crime scene investigator testified at trial that he processed a black Mustang which had been impounded. He retrieved from the car a yellow chain with a teddy bear charm, earrings on the sun visor two pillows-- one multicolored, a textbook with Susan Roark's name inside, and other evidence that were part of the list of items "proposed" for DNA testing by Gore in his 3.853 motion.

[8] The trial record reflects that Eric Hammond, a party attendee, testified that he saw Susan leave with "Tony" Gore around 12:00 a.m., and heard her state that she was going to take "Tony" home. (TR-1367). Michelle Trammell, Susan's girlfriend,

"credible witness" who saw Susan Roark alive after that point. Her nude body was recovered from a dump in Columbia County, Florida, and interestingly, Gore admitted to Lisa Ingram, that a purse in the black Mustang belonged to "a girl that he killed last night."[9]

Moreover, at the December 14, 2000, evidentiary hearing wherein trial counsel's representation was challenged, defense counsel Jimmy Hunt testified that Gore admitted the murder of Ms. Roark. (PCR XVII, 1783-1785).[10]

---

testified that Susan was going to take "Tony" home and then spend the night with Ms. Trammell. Susan's grandmother confirmed that at 10:00 p.m. on January 30, 1988, Susan called and informed her that she, Susan, would be home in time to go to church the next morning. (TR-1310-1334)

[9] The admissions to Ms. Ingram were proven credible in light of Ms. Brown's testimony regarding the pawning of Susan Roark's jewelry.

[10] "He said that they got to a place near Lake City and he told me that's where the story ends. He told me he would not discuss what happened in this area because of his fear that the authorities were listening in on our conversation. He told me he would be glad to discuss this with me after he had been transferred to south Florida and discovery had been received in his case.

* * *

I pointed out that the indictment did not specify the cause of death and asked him how she was killed. His response was that he would not give me any details, but that the killing was painless. He also said that the killing was sparked by him learning that her middle name was Marie and said that he became aware of that when he saw her driver's license. He told me that the key to this case and all other cases lies in the name of the victims. All three have Marie either for the first or the middle name but he wouldn't explain that further."

In Overton v. State, 976 So. 2d 536, 568-570 (Fla. 2007), this Court rejected a similar "fishing" expedition in the Rule 3.853 motion therein. The Court noted that hair found on tape used to bind the victim, did not establish the requisite nexus to the crime for DNA testing. This Court embraced the trial court's conclusion that "In view of the fact that it is impossible to establish when and how the pieces of hair became attached to the tape, DNA testing is of no use or significance." Overton, 976 So. 2d at 567.

> Regardless of where the tape originated, Overton's assertion that the hair adhered to the tape only as fresh layers of tape were unwrapped from the roll does not establish the requisite nexus between the hair and the crime. Even if the hair adhered to a section of freshly unwrapped tape, that fact does not establish the source of the hair or the timing of placement within the home. The hair could have easily originated from a large number of sources, including the carpet, comforter, victim's nightshirt, or any of the items thought to have been emptied from her purse which was discovered under the comforter upon which her body was found. . . . Thus, the conclusory assertion that if the hair does not belong to Overton or the victim's, it must belong to a person who committed or participated in the crime, is far too tenuous because there is no way to determine when, why, where, or how the hairs attached to the tape. This assertion is the type of speculation that this Court has found to be a basis for denying a rule 3.853 motion. *See Lott*, 931 So. 2d at 821 (holding that the defendant "embarked on a fishing expedition for genetic material whose. . . potential relevance is pure

---

(PCR XVII, 1785-1788).

> conjecture," and that the defendant could not "obtain DNA testing based on the speculative allegations in his motion"); *Hitchcock v. State*, 866 So. 2d 23, 26 (Fla. 2004)(speculative claims cannot form the basis of granting a motion for postconviction DNA testing).

Overton, 976 So.2d at 568.

Likewise, Gore has not and cannot overcome his conclusory assertions that, if the listed articles found at the dump site where Susan Roark's body was found, do not belong to him or the victim, the evidence must belong to a person who committed or participated in the crime. His assertions, like Overton's, are far too tenuous because there is no way to determine when, why, where, or how that evidence was deposited at the dump site or how it ended up near Susan Roark's body. Hitchcock v. State, 866 So. 2d 23, 26 (Fla. 2004); Lott v. State, 931 So. 2d 807, 820-821 (Fla. 2006)(Rule 3.853 not intended to reward fishing expeditions—especially where the defendant merely lists a number of "items of clothing without relating their relevance" or how they are germane to any material fact).

Additionally, any argument that a reasonable probability of acquittal could result from testing is equally without support. As noted previously this Court in Gore, found the requisite proof that Gore was the perpetrator of Susan Roark's kidnapping, murder and theft of her belongings. As observed in Overton, *supra*, "the trial court correctly found that the *rule 3.853*

motion failed to assert a reasonable probability that the requested testing would exonerate Overton. . ..”

Gore notes that the trial court failed to attach or point to those portions of the record or specific evidence which would conclusively demonstrate he is not entitled to relief. In *Overton*, a similar claim was also made and rejected. Therein, the Court noted that the trial court did identify evidence from the record—and, in Gore, the Court below noted that evidence -- that the last person to see Roark alive was Gore; that Gore was in possession of Roark’s property and that he pawned her personal items. Moreover, absent a showing that Gore did not know Roark, did not have possession of her car and other personal property; and did not pawn her property, or end up in Florida within 24 hours of Roark last being seen alive, compliance with Ortiz v. State, 884 So. 2d 70, 71 (Fla. 2DCA 2004) has been met.

Gore concludes his first issue with a feeble attempt to distinguish this Court’s decision in Hitchcock. In spite of the fact that Susan Roark was not seen alive after midnight on January 30, 1988, in Tennessee, he suggests that although it took three months to locate her body in a Columbia County, Florida, dumpsite, testing of any physical materials collected would “serve to possibly exonerate him as they were recovered on or near the body of the victim.” Such a notion is incredible.

For example, the trial record reflects that the medical examiner testified that Susan Roark was dead within hours of her being killed near or at the dump. (TR-1150-1151). *See* Overton; Preston v. State, 970 So. 2d 789, 798-99 (Fla. 2007)(newly discovered DNA evidence viewed in light of evidence presented at trial demonstrates the nature of this evidence would probably not produce an acquittal on retrial.")

Moreover such a contention fails to meet Rule 3.853 "(b)(3) a statement that the movant is innocent and **how the DNA testing requested by the motion will exonerate the movant of the crime** for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime." *See* Galloway v. State, 802 So. 2d 1173 (Fla. 1DCA 2001)(mere allegation DNA would not match DNA evidence was insufficient to establish that the defendant was not the murderer). The illogical nature of this argument underscores its complete lack of merit.

Gore is entitled to no relief as to this issue.

ISSUE II

DNA TESTING OF COLLECTED ITEMS IN THE COROLIS AND NOVICK CASES WILL ASSIST IN THE ATTACK OF WILLIAMS' RULE EVIDENCE/TESTIMONY PRESSENTED IN THE INSTANT ROARK MURDER.

Next, Gore asserts that "the ability of the state to obtain his 1989 conviction for the attempted murder of Tina Corolis is due in part because the office of the State Attorney in the Eleventh Circuit transferred and used evidence between the Tina Corolis (cite omitted) and the Robyn Novick (cite omitted) investigations."

Apparently what Gore seeks is to obtain evidence from two other unrelated crimes for which he has been convicted, in order to " establish a DNA profile from both Tina Corolis and David Restrepo (a witness in the Novick murder case) in order to have a comparative sample testing on cell samples." (IB 17). However, a reading of the arguments as to this point clearly shows that his complaints have little or nothing to do with Susan Roark's murder. Ms Roark was killed January 31, 1988, in Columbia County, Florida, long before any of the circumstances referenced by Gore in this point. None of the physical evidence, in either the Corolis attempted murder or the Novick murder cases, was introduced in the Roark prosecution. The only "connection" was the State's introduction of Williams Rule testimony by Tina Corolis (TR-2054-2118) and Ms. Ingram's testimony of what Gore said to her about a purse in the black

Mustang. (TR-2029). Gore told her the purse in the backseat of "his car" "belonged to a girl that he killed last night (or several nights ago)".

Ms. Corolis related facts regarding her contact with "Tony" Gore in March 1988. On that date she received a call from Gore asking if she could give him a ride since his car had broken down. Ms. Corolis and her young son picked up Gore in her new red Toyota. A series of events followed which resulted in Ms. Corolis being beaten, stabbed and left for dead in a South Dade County dump, at the hands of Gore's criminal conduct. When she regained consciousness, her car and son were missing, and she had stab wounds at her neck, arms, legs and buttocks. All her jewelry was missing. (TR-2054-2061).

Gore personally crossed-examined Ms. Corolis, attacking her character and her reputation for veracity. (TR-2118). A majority of the transcript pages concerning Ms. Corolis as a witness, had nothing to do with her but rather, dealt with whether Gore was competent to personally cross examine Ms. Corolis. (TR-2079-2102).[11]

Without citation to any controlling authority, Gore is simply regurgitating complaints he has with unrelated cases that

[11] On direct appeal one of the main issues for review concerned the collateral crime testimony of Tina Corolis and Lisa Ingram. This Court ratified what the trial court found that this evidence was appropriate and admissible.

he is now attempting to blend into this murder. Having failed in the Novick and Corolis cases to gain succor for his complaints, he has done nothing here to warrant reconsideration here. As observed in Willacy v. State, 967 So 2d 131, 141-45 (Fla. 2007), citing Hitchcock, 866 So. 2d at 27:

> The clear requirement of these provisions is that a movant, in pleading the requirements of rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.

Gore is entitled to no relief as to this point.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

_____
CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General
Florida Bar No. 158541

OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email and U.S. Mail to Frank Tassone, Esquire, and Rick Sichta, Esquire, 1833 Atlantic Boulevard, Jacksonville, Florida 32207; Steven J. Hammmer, Esquire, 440 South Andrews Avenue, Ft. Lauderdale, Florida 33301; and Marshall Lee Gore, #401256, Union Correctional Institution, 7819 NW 228th Street, P-4112, Raiford, Florida 32026, this 8th day of September, 2008.

_____
CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General