

**IN THE SUPREME COURT  
STATE OF FLORIDA  
500 South Duval Street  
Tallahassee, Florida 32399-1927**

**MARSHALL LEE GORE**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appeal No.: SC07-678**

**L.T. Court No.: 88-607CF**

**Appellee.**

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**APPELLANT'S AMENDED RULE 3.853 INITIAL BRIEF, PURSUANT TO  
FLA. R. APP. PRO. RULE 9.140(1)(a)**

On Appeal from the Circuit Court, Third Judicial Circuit, and For Columbia  
County, Florida

Honorable E. Vernon Douglas  
Judge of the Circuit Court

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## **PRELIMINARY STATEMENT**

Appellant, MARSHALL LEE GORE, will be referred to as “Appellant.” The State of Florida will be referred to as “Appellee.” Attorneys Frank J. Tassone and Rick A. Sichta, who are representing Appellant in this matter, will be referred to as the “undersigned counsel.”

References to the Trial Transcripts will be designated “TT,” followed by the page number indicated on the Index to the Record on Appeal. Citations to the ROA will be designated “ROA” followed by a page citation.

Finally, Appellant discusses two other cases herein that have bearing on the issues as presented in this brief. 11<sup>th</sup> Judicial Circuit case *State v. Gore*, 90-11445 will be referred to as the “Novick Case”, and 11<sup>th</sup> Judicial Circuit case *State v. Gore*, 88-9827 will be referred to as the “Corolis Case”.

## STANDARD OF REVIEW

Pursuant to Florida Rule of Appellate Procedure 9.141(b)(2)(D), if a trial court summarily denies a defendant's motion for postconviction relief filed under Florida Rules of Criminal Procedure 3.800(a), 3.850, or 3.853, this court's standard of review is as follows: "On appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." *See Lopez v. State*, 917 So. 2d 256 (3<sup>rd</sup> DCA 2005)[*Holding that, "because the trial court has failed to attach portions of the record that conclusively demonstrate that the defendant is entitled to no relief, we reverse and remand for a hearing or for the trial court to attach record excerpts which conclusively demonstrate that the defendant is not entitled to any relief. Moreover, upon remand, the trial court may review and correct the order under review as it appears to be internally inconsistent. The form order provides that the trial court found that the defendant's pro se motion was "sufficient . . . to support the relief prayed," but the trial court then denied the motion without a hearing."*]. *Id*

## STATEMENTS OF THE CASE AND FACTS

On July 28, 1989, the grand jury of Columbia County returned an indictment against Marshall Lee Gore, charging him with premeditated murder, kidnapping, and robbery in relation to the death of Susan Marie Roark. Appellant pled not-guilty to all counts, and was tried by a jury on March 14, 1990. The Jury convicted Appellant on March 14, 1990. The Jury recommended Appellant be sentenced to death for committing premeditated first-degree murder (count-one), recommended life in prison for the kidnapping count (count-two), and recommended a term of fifteen-years for robbery (count-three). (TT pgs. 2729-2752) The jury vote for death was 11-1. (TT pg. 2723) The court followed the jury's recommendations.

There was no direct or physical evidence presented at trial that linked appellant to the crime scene where the body of Susan Marie Roark was located. Evidence found at the crime scene was collected by Columbia County officials and comparatively analyzed (using the pre-DNA serological and forensic testing means available in 1989) with samples taken from appellant, and were found to be negative. Testimony indicating same was presented at appellant's trial.

The undersigned's investigation into this matter has determined that the following potentially exculpatory DNA evidentiary items collected in

and for the Roark case still exist and are in the possession of the Columbia County Clerk of Court (parenthetical entries following description are exhibit numbers from trial):

1. Earrings (pierced variety) found near the victim. (S-4)
2. Shoe string found on victim's wrists. (S-9)
3. Socks (S-12a and S-12b)
4. Pink and blue shirt (S-14)
5. White Bikini panties (S-15)
6. Panty shield found in two pieces (S-16)
7. Blood sample taken from Marshall L. Gore (S-18)
8. Earring (pierced variety) taken from Car (S-28F)
9. Multicolored Pillow taken from Car (S-28H)
10. Grey shirt found in brown box (S-28I)
11. Multi-colored shorts in brown box (S-28J)
12. Blood sample taken from map light of Susan Roark's vehicle. (S-28K)
13. Fruit of the Loom underwear and 1 pair of socks (D-5)
14. Curling Iron and Hair Brush belonging to victim (D-6)
15. Debris from Underwear and Socks (exhibit D-5) (D-7)

16. Debris from panties (exhibit S-15), panty shield (exhibit S-16) (D-8)

In addition to the items listed above that were entered as exhibits, testimony at trial showed that other potentially exculpatory items were found at the crime scene, collected, and preserved by Columbia County officials, including:

- 1) Contact lenses found near the body of the victim. (Deposition of Neal Nydam, pg. 5, Line 21, 9/5/89, See also Deposition of Neal Nydam, pg. 9, Line 11, 5/13/92)
- 2) Empty package of Marlboro brand cigarettes (Testimony of Neal Nydam, TT pg. 828)
- 3) Three empty beer bottles (Testimony of Karen Cooper TT pg. 852)
- 4) Fingernails collected near victim's body (Deposition of Neal Nydam, pg. 9, Line 11, 5/13/92)
- 5) Strands of hair found in victim's right hand (Testimony of Karen Cooper, TT pg. 851, Testimony of Randall Roberts TT pg. 775, See Deposition of Neal Nydam, pg. 19, Line 16, 5/13/92)

None of the items listed herein were subject to DNA testing prior to appellant's trial as the technology was not yet available, nor have any of the listed items been tested since the conclusion of appellant's trial.



Appellant filed a pro se motion for DNA testing pursuant to Fla. Rule. Crim. Pro 3.853 with the Third Judicial Circuit of Florida on June 6, 2006. Circuit Judge E. Vernon Douglas dismissed appellant's pro se motion in an order dated July 11, 2006. In the Order, the trial court dismissed appellant's motion stating that appellant failed to meet the statutory requirement of Fla. Rule of Crim. Pro. 3.853(b)(4) in that he failed to establish that the identity of the murderer was ever in question at trial.

Appellant appealed this decision pro se to the Florida Supreme Court, who subsequently ordered the trial court to appoint counsel on this case. The undersigned attorneys were subsequently appointed by the trial court on June 16, 2007, after which the Florida Supreme Court ordered counsel to file a written response to Appellant's pro se 3.853 motion. A response was filed with the Clerk on or about October 1, 2007. This response was subsequently struck by the court, stating that it did not comply with Florida Rule of Appellate Procedure 9.210 and ordered counsel to file an amended brief with the court by July 21, 2008. The instant brief follows.

## **SUMMARY OF THE ARGUMENTS**

1. The trial court erred when it denied Appellant's pro se motion for post conviction relief per Fla. Rule of Crim. Pro. 3.853, holding that the identification of appellant as the murderer of Susan Roark was never in question at trial per Rule 3.853(b)(4). The order of the trial court was insufficient on its face in denying appellant's motion, and appellant has sufficiently met each and every requirement of Rule 3.853(b) to warrant DNA testing of the evidentiary items shown to remain in existence that were collected during the investigation of this case, including 3.853(b)(4).

2. DNA testing of the evidentiary items collected in Miami Florida during the simultaneous investigations of the Roark, Corolis, and Novick cases will allow appellant to successfully attack the introduction of William's Rule evidence entered against him in the instant (Roark) case at trial. The testimony of the State's witness Tina Corolis could successfully be attacked and rebutted by the DNA testing of evidence in the possession of Miami-Dade law enforcement and judicial officials.

## CLAIM ONE

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION PER FLA. R. CRIM. PRO. 3.853. APPELLANT HAS MET ALL STATUTORY REQUIREMENTS OF RULE 3.853(b) AND HAS CONCLUSIVELY ESTABLISHED THAT IDENTIFICATION OF APPELLANT AS THE PERPETRATOR OF THE CRIME WAS IN QUESTION AT TRIAL.**

Appellant was convicted of the murder of Susan Roark based largely upon circumstantial evidence and the William's Rule testimony of Tina Corolis. The state presented no eyewitnesses to the murder, and no physical evidence was collected that linked appellant to the murder, despite subsequent testing. The state's case was comprised of witnesses that put appellant with the victim at a party in Tennessee days or weeks prior to the estimated time of the murder, recovered items belonging to the victim that were allegedly pawned by the appellant in Tampa Bay Florida, and a traffic ticket issued to appellant while in possession of the victim's vehicle in Miami Florida. In denying appellant's 3.853 motion, the trial court stated:

“The identity of the perpetrator of this crime is, was, and can be established without any direct physical 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 victim's car (in which he was the last person seen with the victim), and the Defendant pawned personal items of the victim.”

The trial court listed no case law in support of its decision denying appellant's motion, did not address any of the three requirements when

ruling on a 3.853 motion<sup>1</sup>, and did not acknowledge the fact that no direct physical evidence (after serological and fingerprint testing of items collected from the crime scene by FDLE) was presented establishing appellant as the perpetrator.

Neither did the order of the trial court acknowledge the fact that no eyewitness testimony, or audio/video evidence of any kind, linked appellant to the murder of the victim. 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.

Appellant has consistently maintained since his arrest that he is innocent of the crimes for which he was convicted, and reaffirms this contention for the purpose of this motion. The requested testing of the items will serve to establish that person(s) other than appellant were responsible for the death of Susan Marie Roark. Forensic testing conducted by both

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<sup>1</sup> See *Van Poyck v. State*, 908 So. 2d 326 at 329 (2005 Fla. LEXIS 1118) In which this court determined that a trial court must address the following three issues when ruling on a 3.853 motion: A) Whether it has been shown that physical evidence that may contain DNA still exists. (B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing. (C) Whether there is reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

Columbia County officials and FDLE, using the available technology in 1989, could not link appellant to the crime scene where the body of Susan Roark was discovered. DNA testing of the items listed previously herein would serve to both establish the true identity of the actual killer of Susan Marie Roark and/or exclude appellant as the perpetrator of the crime for which he was convicted.

Florida courts have granted DNA testing in cases where forensic tests conducted prior to the availability of DNA testing showed that no direct physical evidence linked a defendant to a crime or crime scene. *See Reddick v. State*, 929 So. 2d 34 (Fla. 4<sup>th</sup> DCA 2006) [*Wherein the Appellate court reversed the decision of the trial court which stated that appellant had failed to show DNA testing could provide exoneration.*]; *See also, Schofield v. State*, 861 So. 2d 1244 (Fla. 2<sup>nd</sup> DCA 2003)

Likewise, Florida courts have addressed the issue of establishing the identity of a suspect per Fla. Rule of Crim. Pro. 3.853. *See Zollman v. State*, 820 So. 2d 1059 (Fla. 2<sup>nd</sup> DCA 2002) [*Holding that: Fla. R. Crim. P. 3.853(b)(4) requires the defendant to allege sufficient facts to establish two things: (1) that identification was a genuinely disputed issue at trial; and (2) that the requested DNA testing will either exonerate the defendant or mitigate his sentence.*]

In the instant case, identification of the appellant as the murder suspect formed the complete crux of the state's case against him. The defense attempted to show that despite the circumstantial evidence presented linking appellant with the victim, the state could not present any direct physical or testimonial evidence that appellant committed the murder.

In one of the few Florida Cases to directly address the issue of identification, *Hartline v. State*, 806 So. 2d 595 (Fla. 5<sup>th</sup> DCA 2002), the Appellate Court dismissed a 3.853 petition as identification of the perpetrator was not disputed at trial, as Hartline 1) admitted to performing the act for which he was convicted, and 2) an eyewitness testified that Hartline committed the acts. Neither of these two specific conditions for dismissal exists in appellant's case. Appellant did not confess to murdering the victim, in fact he has maintained his innocence, and the state presented no eyewitness testimony against him.

Likewise, in *Riley v. State*, 851 So. 2d 811 (Fla. 2<sup>nd</sup> DCA 2003) the appellate court reversed the trial court for dismissing a 3.853 motion and held that the petitioner sufficiently established that identification was in question when he questioned the blood stained items, and questionable *eyewitness testimony* against him. *Id.* Again, in the instant case, the state did

not present any eyewitness testimony against appellant, and the issue of Identification was the core of the State's case against him.

Florida's Second DCA has consistently held that "identity is at issue even when the victim provides a positive identification". *See Ortiz v. State*, 884 So. 2d 70 at 72 (Fla. 2<sup>nd</sup> DCA 2004); *Manual v. State*, 855 So. 2d 97 at 98 (Fla. 2<sup>nd</sup> DCA 2003) Again, as there is no eyewitness identification or testimony proving that Appellant murdered Susan Roark, and because of this appellant has more than met the statutory requirements of Rule 3.853(b)(4) in proving that identity is at issue herein.

This lack of credible direct physical or eyewitness evidence against defendant is sufficient for appellant to meet the identification requirement of 3.853(b)(4). *See Reddick*, at 35. Additionally, and as comparable to the *Reddick* case, appellant here has maintained his innocence since his conviction, and in his brief to the trial court as well as the instant brief, he has made a conclusive showing that evidentiary items remain in existence that could be tested and could potentially exonerate him of the crime.

Given the advances in scientific testing since 1989, it is entirely plausible that the evidence collected at the crime scene would exonerate the appellant. The testing procedures of 1989 could not link appellant to the scene through the items collected at the scene. Given that appellant was

sentenced to death for this crime largely through circumstantial evidence and William's Rule testimony, the state has a moral obligation to take strides to exhaust remedies to determine whether or not any of the remaining physical evidence either exonerates the appellant and/or proves the victim was murdered by another suspect.

Given the state's lack of eyewitness, that no physical evidence of any kind links appellant to the crime scene or location of the body; and that the numerous physical items found at the scene were collected and tested negative as to defendant's presence at the scene per 1989 technology, the appellant contends that these facts comprise a showing of the necessary "reasonable probability" that DNA testing would serve to exonerate or acquit him of the murder conviction. *See Knighten v. State*, 829 So. 2d 249 (Fla. 2<sup>nd</sup> DCA 2002) [*Reversing and remanding to the trial court, holding that defendant's 3.850 motion met the necessary factual showing and standards required under rule 3.853.*] *See also, Huffman v. State*, 837 So.2d 1147 (Fla. App. 2 Dist., 2003) [*Wherein the District Court reversed the decision of the lower tribunal in denying petitioner DNA testing of evidence despite the existence of (1) a matching fingerprint; (2) phone calls traced to defendant's house that were made to the victim's house after the attack; and (3) the victim's in-court identification of defendant's voice as the voice of her*



*assailant. The appellate court held that the victim's identification of defendant as her assailant did not mean that identity was not genuinely disputed for purposes of postconviction DNA testing. at 1149]*

Lastly, and in relation to the definition and meaning of the “identification requirement” of Rule 3.853, there exists a discrepancy between the appellate districts of Florida. As cited previously herein, the Second DCA held in the Zollman case that “Fla. R. Crim. P. 3.853(b)(4) requires the defendant to allege sufficient facts to establish two things: (1) that identification was a genuinely disputed issue at trial; and (2) that the requested DNA testing will either exonerate the defendant or mitigate his sentence.”

However, the First DCA held in Crow v. State, 866 So. 2d 1257 (1<sup>st</sup> DCA 2004) that there is no statutory mandatory requirement that the defendant show identity was at issue in pursuing testing per Rule 3.853, stating that, “testing may be available even if the defendant does not deny commission of the act alleged to be a crime. The pertinent part of the rule makes testing available if the result would show that the defendant was misidentified or if the result would otherwise exonerate the defendant.” Id at 1260 Appellant clearly stated that DNA testing would exonerate him, and

that he is absolutely innocent of the crimes (See Pro Se brief pg 4), therefore he has satisfied the requirement of Rule 3.853(4) per the holding in Crow.

Regardless of which holding the court uses to address the issue of identification, appellant contends that he has met the requirements of both cases. Per Zollman, the appellant has shown that proving identity was the core of the state's case at trial as there was no physical or eyewitness testimony linking him to the murder; and per the holding of Crow he has stated and shown that exoneration is possible through the testing of the evidence in the possession of the court.

In opposition to the appellant's position, the state will most likely cite cases such as Hitchcock v. State, 866 So.2d 23 (Fla. 2004) wherein this court upheld the lower tribunal's decision to deny petitioner's request for DNA testing because that petitioner failed to link how the evidence requesting to be tested would exonerate him of the crime.

Appellant's case is distinguishable from Hitchcock in that the items he is requesting testing on would serve to possibly exonerate him as they were recovered on or near the body of the victim. The probability that anyone other than the actual murderer was in the vicinity of the area where the body was found is improbable given: 1) the desolate location where her body was discovered, and 2) the fact that her body was not discovered until over 3

months from the time she was last seen alive in Tennessee (January 30, 1988 to April 2, 1988).

The state may also cite Galloway v. State, 802 So. 2d 1173 (Fla. App. 1 Dist., 2001), in support of its response, however appellant's case is again distinguishable from Galloway in that appellant had no co-defendants in his case that put him at the scene, was never linked to the site of the dumping through confession or physical evidence, and that appellant has conclusively demonstrated that should DNA be obtained from the evidentiary items that does not match the defendant, than the reliability of the conviction is called into question. At the very minimum such a finding would raise the possibility that someone other than the appellant could have been responsible for the death of Susan Roark. Appellant's case is distinguishable from cases such as Hitchcock and Galloway where testing has been denied, and has effectively demonstrated same.

Appellant asks this court to grant this claim and remand to the trial court with instructions to conduct a hearing to determine if DNA testing of the evidentiary items collected in this case is warranted.

## CLAIM TWO

**DNA TESTING OF ITEMS COLLECTED DURING THE SIMULTANEOUS INVESTIGATIONS OF APPELLANT'S COROLIS AND NOVICK CASES BY MIAMI-DADE LAW ENFORCEMENT WILL SERVE TO ALLOW APPELLANT TO ATTACK THE VALIDITY OF THE WILLIAM'S RULE TESTIMONY PRESENTED AGAINST HIM AT TRIAL IN THE ROARK CASE.**

In addition to testing the immediate items collected during the investigation of the instant case, DNA testing is requested on other items in order to combat the validity of the William's rule evidence presented at trial in the instant case in the form of testimony by Tina Corolis. Appellant contends 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 (Lower tribunal number 88-9827, Florida 11<sup>th</sup> Circuit) and the Robyn Novick (Lower tribunal number 90-11445, Florida 11<sup>th</sup> Circuit) investigations.

Specifically, appellant is seeking 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.

To predicate this argument, appellant was convicted of attempted murder in the Tina Corolis case prior to being tried in both the Roark and Novick cases. The state delayed the trial of appellant in the instant and

Novick cases (thus delaying divulging discoverable evidence and the deposing of witnesses/law enforcement officers involved in the Robyn Novick investigation), on the grounds that the case was subject to an “ongoing investigation”.

Counsel for appellant in the Novick case deposed detective Mike Decora of the Miami-Dade Sheriff’s office in November of 1990. Detective Decora was involved in the recovering of evidence from the yellow Corvette (belonging to Robin Novick) that was found crashed and abandoned in Miami on March 12, 1988. In Decora’s deposition the following facts were made known: 1) David Restrepo was the name of the individual in the Novick vehicle with Gore during the crash. 2) Both Gore and Restrepo had been injured in the crash. 3) Clothing matching the size of defendant was found in the Novick vehicle. 4) Blue jeans matching the defendant’s size were taken from the vehicle that were found to have both Types A and O blood on them. 5) Robyn Novick’s blood type was Type O. 6) The wreck of Novick’s vehicle occurred 2 days prior to the alleged assault of Tina Corolis by appellant.

These facts were unavailable to the defense in both the instant case and the Corolis case because the state did not list the pants found in the Novick vehicle until after it had secured a conviction in the Corolis case.

Had the forgoing facts been known to trial counsel in the instant case, the entry of Williams rule evidence in the form of testimony from Tina Corolis could have been challenged on the grounds of material unreliability.

The blue jeans that Detective Decora described in deposition were taken from the Novick vehicle, and said jeans were never disclosed to the defense in the Novick case. The discovery of the existence of these jeans occurred after the conviction in the Novick case in the preparation of filing a federal action in the instant case. However, a pair of bloody pants was claimed to have been discovered in the vehicle belonging to Tina Corolis after its recovery in Paducah Kentucky in March of 1988. These and other articles of clothing, combined with testimony from Corolis, were used to convict appellant of attempted murder in the Corolis case.

The delay of trial in the Novick case until after the conviction in Corolis put the defendant at an unfair disadvantage. Detective Decora stated in deposition that this piece of evidence was taken from the Novick Corvette, however it was not disclosed to the defense in the Novick case. A pair of pants containing blood was presented in the Corolis case however, and the alleged attack on Corolis took place two days after the wreck of the Novick vehicle occurred.

Appellant contended at the Novick trial, and still contends, that he owned and operated an escort service in Miami called “The Exchange”, and that both Corolis and Novick (among others, including Restrepo) worked for him. Appellant stated in the Novick trial that on the night of 3/11/88 (the night prior to the wreck of the Novick vehicle) both Corolis and Novick were contracted to meet some men in a warehouse in Miami. Appellant contended that both Corolis and Novick were picked up by a limousine and that Gore followed them in Novick’s vehicle. He later picked both of them up from the warehouse as they had been in an argument with the men who contacted Appellant to provide them with escorts.

At trial Ms. Corolis testified that she knew Appellant only briefly prior to the assault, had never worked for Appellant as an escort, and that she did not know Robyn Novick. DNA testing completed on the pants taken from the Novick vehicle would show that Tina Corolis’ DNA is present on the pants. This will allow appellant to attack the reliability of Corolis’ testimony in all three of appellant’s convictions. DNA testing on the blood samples taken from the Novick vehicle, if compared to DNA samples from that of Corolis and Restrepo, will help to establish that Ms. Corolis lied about her knowledge and involvement with appellant, as well as her

relationship with Robyn Novick, and therefore allow appellant to attack the Williams' rule testimony in each of his convictions.

### **CONCLUSION**

There was no physical evidence ever presented to link appellant with the murder of Susan Roark. Evidence was presented at trial showing that appellant was in possession of her vehicle after her disappearance, that he and Susan Brown had pawned jewelry belonging to Roark, but no physical or eyewitness evidence linked appellant to the murder scene in Columbia County. DNA testing on evidence found at the Roark scene would serve to establish the true identity of her killer. DNA testing conducted on evidence collected in and for the Novick and Corolis convictions will allow Appellant to contest the validity of the William's rule testimony as given in Appellant's trial from which the instant case stems. Finally, appellant contends that the pro se motion to the trial court, and the instant brief, both contain all the necessary statements, factual showings, and requirements demanded by Fla. Rule of Crim. Pro. 3.853(b) to warrant DNA testing of the items listed herein.

Appellant asks this Court to remand this matter to the trial court for hearing on the issues set forth in this initial brief.



**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing has been sent via U.S. Mail to Marshall Lee Gore and all counsel of record, on this 18th day of July, 2008.

RESPECTFULLY SUBMITTED,

**TASSONE & SICHTA, LLC.**

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**CERTIFICATE OF COMPLIANCE AND AS TO FONT**

**I HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

Respectfully submitted,

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