

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

**MARSHALL LEE GORE
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**Appeal No.: SC07-678
L.T. Court No.: 88-607CF**

_____ /

REPLY BRIEF OF APPELLANT

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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SUMMARY OF THE ARGUMENTS IN REPLY

Claim One:

The state's reliance on *Saffold v. State*, 850 So. 2d. 574 (Fla. 2DCA 2003) and *Overton v. State*, 976 So. 2d 536 (Fla. 2007) is unfounded as the facts of both cases radically differ from those present in the instant case. Gore has sufficiently demonstrated all the necessary requirements of a motion filed under rule 3.853(b) to warrant DNA testing on evidentiary items collected and presented against him at trial. A defendant is not required to either re-litigate his case, or prove that results would be conclusive when asking for DNA testing on evidentiary items, but must show that the results could serve to exonerate or mitigate their sentence. Gore's identity as the perpetrator of the crime in question was the focus of the state's case in trial as no physical evidence or direct eyewitness testimony linked him to murder of Susan Roark. The state has failed to address the fact that the ruling of the trial court, in denying testing, was wholly inadequate per the requisite language of Rule 3.853(c)(5).

Claim Two:

Testing on items collected during the simultaneous investigations of Robyn Novick (90-11445, 11th Circuit) and Tina Corolis (88-9827, 11th Circuit) and the instant case is warranted due to the inextricable nature of the investigations into the cases. Tina Corolis was presented as a William's Rule witness against the appellant in both the instant (Roark) and Novick trials. Appellant is seeking DNA testing on items collected in and for these investigations so that he may attack the credibility of the William's Rule testimony presented against him at trial. Appellant holds that Ms. Corolis lied about her involvement with both him, and with Robyn Novick, and stated so at trial in the underlying instant case. DNA testing on items found in the Novick vehicle, when linked to Corolis, will serve to challenge the reliability of her testimony against him.

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

The crux of the argument for this claim coalesces around the requirements implicit in the language of Florida Rule of Appellate Procedure 3.853(b), and whether Gore has made a sufficient showing of all the required aspects of the rule in his initial brief.

In its answer brief pursuant to this claim, the state has relied on two cases almost exclusively in arriving at its position that Gore warrants no relief on this claim. Those cases will be addressed in turn.

1. Saffold v. State, 850 So. 2d. 574 (Fla. 2DCA 2003)

The state initially relies on Saffold v. State, 850 So. 2d 574 (Fla. 2DCA 2003) to support its contention that Gore warrants no relief. Saffold addresses each subsection of Rule 3.853(b), and each will be discussed in turn as to how the facts in Saffold relate to the instant case. Rule 3.853(b)(1) requires that a description of the facts and physical evidence be included along with a statement giving the current location of the objects upon which testing is being sought.

Per Rule 3.853(b)(1), in Saffold, the District Court denied the petitioner’s 3.853 petition as insufficiently pled, holding that in Saffold’s motion, the required

subsection (b)(1) 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.” *Id* 576.

The instant case is clearly distinguishable from *Saffold* as to subsection (b)(1). In his initial brief, appellant more than sufficiently met the requisite content demanded in the language of the rule. Gore has given a lengthy description of the facts relied on in support of the motion. (IB 3-5, 8-9), and listed in great detail the physical items collected during the investigation of this case and presented as evidence at trial, and their current whereabouts. (IB 3-5)

Saffold, on the other hand, gave no such descriptors, and did not even stipulate which of his multiple charges he was seeking to attack in the motion. *Saffold* at 576. Gore clearly has made it known in the initial brief that he is seeking to attack the conviction and sentence for the murder of Susan Roark. (IB 3)

In addressing 3.853 subsection (b)(3), the state holds that again Gore has failed to meet the requirements given in the rule, stating that it is “sheer speculation to suggest that any credible evidence of innocence exists between the exhibit evidence admitted at trial, and other evidence collected near the body of Ms. Roark”. Initially, it must be noted that not all of the items for which Gore is requesting testing were found near the scene where the body was found. A number

of the items are items collected from the Roark vehicle after it was found in Miami. (IB 4)

Moreover, the state cannot deny the unavoidable fact that a Florida Law enforcement agency thought it, 1) necessary to collect these items in relation to the investigation of the Roark murder; 2) Test these items in an attempt to link Gore to the crime scene using the available testing of 1988; 3) Present the majority of these items at trial as evidence as to Mr. Gore's guilt; and 4) retain these items in police/court storage for over 20 years. The entire listing of evidentiary items on page 4 of the initial brief lists the actual *exhibit numbers* each item was assigned at trial.

Now, some 20 years after the conclusion of the trial, the state argues that it is "sheer speculation" that evidence of innocence could exist on items despite the fact that they deemed these items important enough to *present against him* at trial. Given the advancements in scientific testing over the last 20 years, it is hard to logically follow the argument presented by the state or believe that testing of these objects could not possibly present any viable evidence as a result.

Rule 3.853(b)(3) also requires a movant to include a statement of innocence and how the requested DNA testing will exonerate the movant or mitigate the sentence received. Gore has adequately demonstrated both per the language set forth in the rule, and included in the initial brief.

The initial brief contained a statement of innocence (IB 9), and stated reasons why this testing will serve to exonerate him. To summarize: 1) no physical evidence was presented at trial linking him to the crime scene where Roark was found; 2) Forensic testing conducted in 1988 on evidence found near Roark could not link Gore to the crime scene; and 3) Circumstantial, Williams Rule, and suspect testimonial evidence were presented at trial which the jury relied on for his conviction.

As the serological testing ordered by the state in 1988 could not link appellant to the crime scene, it is entirely plausible that, given the advances in modern testing procedures, further information would be gleaned from a retesting of this evidence that would serve to exonerate or mitigate Gore's sentence.

In contrast to Saffold, Gore listed the physical items collected and investigated, the nature of the case and conviction for which he was found guilty and is now contesting for the purpose of DNA testing¹, explained how a retesting of said evidence could serve to exonerate him or mitigate his sentence, and has made repeated proclamations of innocence since his initial conviction, all pursuant to the requirements of 3.853(b)(3). The state's reliance on Saffold as the controlling case per this instant case is unfounded.

¹ Per the holding in Saffold, the petitioner did not stipulate as to which of his 5 convictions he was requesting testing for pursuant to Rule 3.853. Gore has specifically listed the conviction for the murder of Susan Roark and the resulting death sentence. See Saffold at 576.

Finally, in addressing 3.853(b)(4), the state again relies on *Saffold* in support of its position that Gore has not met the requirement of proving that identification of Gore as the perpetrator was an issue at trial. As stated in the initial brief, the entirety of the state's trial strategy against Gore was to show that Gore was the perpetrator as they had no direct physical or testimonial evidence linking Gore to the murder. Regardless of this fact, proving the identity of a perpetrator represents the cornerstone of any criminal case against any suspect at trial where there is, 1) no confession to the event, or 2) no direct eyewitness testimony. Identification of a defendant as the perpetrator is the requirement and key issue in any criminal case the state chooses to prosecute. In fact, it is the basic tenant of any legitimate criminal conviction.

The state also fails to address the fact that the specific language of Rule 3.853(b)(4), and as cited in the *Saffold* holding, reads as follows: "Subsection (b)(4) requires him [defendant] 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."

Gore met both requirements in the initial brief, and has done so again here. The state presented no physical evidence linking Gore to the crime scene, and relied on inference alone to convict him of the murder. The state showed that Gore was in possession of Roark's car, that he pawned jewelry belonging to Roark, and

that the car was wrecked while in possession of Gore. However the state did not present any physical or direct testimonial evidence that Gore physically committed the murder, despite collecting and testing the items listed in the initial brief in an attempt to directly link Gore to the crime (IB 4-5).

Therefore, proving the identity of Gore as the murderer of Roark was the cornerstone of the state's case against Gore at trial. *See Zollman v. State*, 820 So. 2d 1059 (Fla. 2nd DCA 2002); *Knigheten v. State*, 829 So. 2d 249 (Fla. 2nd 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. Id at 1149*]; *Manual v. State*, 855 So. 2d 97 (Fla. Dist. Ct. App. 2d Dist. 2003); *Riley v. State*, 851 So. 2d 811 (Fla. Dist. Ct. App. 2d Dist. 2003)

One year after the ruling in *Saffold*, the First DCA in *Crow v. State*, 866 So. 2d 1257 (Fla. Dist. Ct. App. 1st Dist. 2004), distinguished the fact that there is no mandatory requirement that a defendant show that identification was an issue at trial when requesting testing, per the language of 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. *See also: Zollman v. State*, 820 So. 2d 1059, 1062 (Fla. 2d DCA 2002) Gore has maintained his innocence since his arrest, has denied killing the victim, and has demonstrated that testing may serve to mitigate or exonerate his conviction and sentence.

As argued in the initial brief, and reiterated herein, the requirement of 3.853(b)(4) presents an “either-or” argument, and not an “and-both” argument. A defendant can establish that identity was contested, or show that testing may exonerate the defendant. As demonstrated in the initial brief and herein, Gore has evidenced both aspects of the requirement of Rule 3.853(b)(4).

Gore has maintained his innocence before and after his conviction, no eyewitness identifies Gore as the murderer of Roark, and Gore has shown the existence of previously tested evidence that may prove to exonerate him given the advances in scientific testing since 1988. *Saffold*, and the facts and circumstances

present in that case, have no relevant bearing and are not comparable to the instant case and the requirements of rule 3.853.

Lastly, for the state to initially test the items in 1988 in an attempt to link Gore to the scene, find nothing to support its case despite its best efforts, and then now contend 20 years later that these items are now somehow irrelevant to the case and investigation, represents revisionist history. Essentially the state is saying that despite it having had an opportunity to test the items collected in an attempt to support the case against Gore, he is now somehow not entitled to the same right and opportunity utilizing modern scientific advances.

Moreover, to suggest that the identity of Gore as the perpetrator was not the key requisite of the state's case at trial flies in the face of both the evidence presented by the state, and the defense offered by Gore at trial.

2. Overton v. State, 976 So. 2d 536 (Fla. 2007)

The second case on which the state predominantly relies is Overton v. State, 976 So. 2d 536 (Fla. 2007). Initially, Gore differs significantly from Overton in that Overton involves a suspect found guilty of murder through the introduction of DNA evidence at trial. Two distinct DNA testing facilities were used by the state to verify and confirm the results, once in 1996 and once in 1998. *Id* at 544. The state also fails to point out in its reliance on Overton that Overton raised a claim for additional DNA testing, *after two separate DNA tests had previously been*

ordered and conducted. Overton moved for additional testing based on the trial court's denial of a Rule 3.851 claim wherein Overton raised an unsubstantiated accusation that his DNA was planted at the scene of the murder by Law enforcement officers, thereby questioning the validity of the initial DNA tests and entirety of the trial. *Id.* at 545.

Finally, the state fails to point out that in *Overton*, the court actually *granted* a partial testing of the as yet untested evidence. Overton requested testing in a rule 3.853 motion on evidence which had not previously been DNA tested by the state. While the court denied testing on other items listed in this motion, specifically the hair sample that the State chooses to make a comparison to the instant case and Gore's request for testing, it did grant testing on other items listed by Overton *Id.* at 546. Moreover, counsel for Overton was allowed to participate in a *Frye* hearing prior to his trial to determine the admissibility of the (at the time) advanced STR DNA testing. *Id.* at 550.

The state's reliance and citation of *Overton* represents an attempt to cloud the actual issue at hand before the court. The actual issue is whether or not Gore's 3.853 motion adequately meets the statutory requirements of the language set forth in rule 3.853 to warrant DNA testing. Gore is not required to show that the results of his requested testing would prove conclusive when moving for testing. *See Schofield v. State*, 861 So. 2d 1244 (Fla. 2DCA 2003)[*Holding that: Rule 3.853*

does not require a movant to allege that previously untested evidence would be conclusive, and it does not provide conclusiveness as a factor to be considered in determining whether a movant is entitled to DNA testing.]

For argument's sake however, Gore will address the state's assertions and reliance on Overton. The differences between Overton and the instant case are many and obvious. 1) Gore's investigation and conviction occurred 8 and 10 years prior to the DNA testing in Overton that linked him to the murder, and before the actual discovery/implementation of the science of DNA testing. 2) The state presented positively matched DNA evidence against Overton at trial; but the state in Gore failed to produce a match on any of the evidence tested, using even the now primitive serological testing procedures of 1988. 3) In 1998, counsel for Overton was provided a chance to address the then new STR DNA testing in a Frye hearing prior to its admission at trial. Overton's counsel did not seek the services of an expert on his behalf. 4) The court actually granted *further* testing on specific items requested by Overton in his Rule 3.853 motion after having previously ordered two separate testings. 5) The hair follicle that Overton sought testing on was not used by the state in an effort to further their case. The items that Gore is seeking testing on were not only collected and tested by the state in 1988, but were presented against him *at trial* and used in furtherance of its case.

As stated in the initial brief and inherent in the facts as presented at trial, the probability that anyone other than the actual murderer of Roark was present at the crime scene is highly improbable given the scene's desolate and isolated location. Gore's case differs significantly from Overton, in that the victim in Overton was killed inside of a home that presumably had relatively high traffic (according to the opinion of this court in Overton, see Overton at 568) and therefore Overton had no legitimate argument to warrant DNA testing as he could not establish where, when, or who the hair found on the victim's body came from.

In contrast, Roark's body was discovered 3 months after her disappearance of Roark, thereby rendering the probability that someone other than the murderer was present at the scene much less likely due to the remote location. Given the proximity of the items collected in Roark, notably the panty shield, earrings, and hair found in the hand of the victim, combined with that fact that the state introduced these items at trial, the relevance of these items and their connection to Roark has already been established by the state itself at trial. It does not make logical sense that someone other than the murderer would have left refuse at the murder scene and not noticed or taken the time to report a decomposing human body, especially given the three month time difference from her disappearance and discovery of her body.

The state, in attacking this assertion, states that the medical examiner opined that Roark died within hours of her being left at the scene, presumably in an attempt to discredit the fact that Roark's body was found 3 months after her disappearance and thereby link Gore to the murder. However the state fails to mention that the trial record reflects that expert testimony presented by the state at trial was in conflict. Dr. William Maples, sworn in as an expert in forensic anthropology, stated that due to the level of decomposition, the body could have been in that location for a period of anywhere from 2 weeks to 6 months, (TT pg. 891) and continued saying that it is possible that Roark was alive as late as March of 1988.² (TT pg. 895). As such, the state, as they presented no eyewitnesses to the murder, cannot assert that the date and time of death was adamantly established through expert testimony at trial, when in fact the testimony reflects a large range of time in which the victim was killed.

Finally, in relying on *Overton*, the state is making the assumption that the requested DNA testing is not conclusive or could not possibly produce an acquittal on retrial. Such a statement is inaccurate, given the state's introduction of these items at trial, and irrelevant given the language of Rule 3.853. As stated above, the language of Rule 3.853 does not require a movant to show that the items would conclusively show innocence when requesting testing on items. *See Schofield v.*

² Roark's body was discovered in April 2, 1988. The state contends that the victim was abducted and killed on January 30, 1988.

State, 861 So. 2d 1244 (Fla. 2DCA 2003)[*Holding that: Rule 3.853 does not require a movant to allege that previously untested evidence would be conclusive, and it does not provide conclusiveness as a factor to be considered in determining whether a movant is entitled to DNA testing.*] See also: *Manual v. State*, 855 So. 2d 97 (Fla. Dist. Ct. App. 2d Dist. 2003); *Zollman v. State*, 820 So. 2d 1059, 1062 (Fla. 2d DCA 2002)

Again, and for the sake of argument, Gore has proven that the these items were: 1) collected by the state during a murder investigation; 2) tested by the state in an attempt to further their case against Gore; 3) entered and used against him at trial; and 4) still in existence and in storage at Columbia County. Gore has thereby met the four requirements of Rule 3.853(b). Should the requested testing show that another unknown person's DNA is present on any of the items, the validity of the state's conviction is therefore inherently undermined.

For example, one of the items collected and tested by the state was a panty liner found next to the victim's body that was briefly discussed herein. No serological evidence linked Gore to the item after testing by the state. Given the fact that the State introduced Williams Rule evidence in the attempt to show that Gore had a propensity for rape and attempted murder, it would thereby logically follow that the panty liner (found near the victim) should be tested for DNA in order to ascertain if any viable evidence can be obtained. According to the

rationale of the state, this potential evidence somehow has no bearing on the case at hand.

Moreover, not all the evidence that Gore is requesting testing on was taken from the scene where Roark's body was discovered. A number of items, specifically earrings, a pillow, assorted clothing, and a blood sample collected from the map light, come from *inside the Roark vehicle*. It is illogical that the state contends these items hold no relevance to the case at hand, when they were in fact collected and investigated in conjunction with this case by the state, and introduced against him at trial.

Continuing, the Overton case, on which the state relies, serves to further evidence the sub-claim argument raised by Gore in the initial brief in that the trial court failed to adequately address Gore's motion per rule 3.853 prior to denying it outright. (IB 9)

As addressed in the initial brief, and citing to Van Poyck v. State, 908 So. 2d 326 at 329 (2005 Fla. LEXIS 1118) (IB 9, footnote 1), Gore evidenced the fact that the trial court did not address any of the three requisite factors a trial judge must address when ruling on a motion pursuant to rule 3.853. As in Van Poyck before it, Overton lists that a trial judge must evaluate the following three factors: 1) Whether it has been shown that physical evidence that may contain DNA still exists; 2) 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; 3) 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. Overton at 567.

This court, in Overton, found that the trial judge had met all the requirements, and explained in detail how the trial court adequately addressed these aspects. Overton at 567. In the analysis given in Overton by this court, it is clear that the trial court did in fact address each of these components before its denial. The same cannot be said of the instant case.

The order of the trial court, the language of which is repeated in the state's answer brief (AB 9-10), contains no statement as to the first requirement of establishing the existence of physical evidence as required by Rule 3.853 and supported by cases such as Van Poyck and Overton. Gore has adequately addressed and established the fact that physical evidence, collected and tested by the state in preparation for the case against Gore, does in fact remain in existence with various Columbia County government offices. This evidence is also relevant and pertinent to the case as it was tested by the state and introduced against Gore at trial.

The order of the trial court further fails to address the question of the potential admissibility of the items in question. Gore has given adequate proof that

said evidence is in fact authentic and was previously found admissible at trial. Given the proximity of the items to the victim, found in a remote and isolated location, and the fact that a number of items were collected from inside the vehicle belonging to the victim, their authenticity, relevance, and admissibility are established under Rule 3.853(b)(2).

Finally, the court failed to reference the final requirement in its order by not explaining whether or not any DNA evidence would serve to acquit Gore if found. While the questionable wording of this aspect of the rule constitutes a veritable “chicken or the egg” argument, (in that in any court case, without either side having previously conducted a DNA analysis of evidence, it is impossible to determine whether or not said evidence would support or detract from a conviction), we can infer that the intent is to gauge the impact of the evidence at trial. Had DNA testing been conducted on the evidence in question herein and been found to contain the DNA of a person other than Gore, the impact of the evidence would have been monumental given that no witness or physical evidence linked Gore to Roark’s murder or the scene. *See Reddick v. State*, 929 So. 2d 34 (Fla. 4th 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.*]

The state's reliance on Overton is thereby unfounded given the differences present in the facts of both cases, the adequate ruling of the trial court per the language of this court in denying Overton's motion, and nature of the evidence collected and presented in Gore's case at trial.

Gore's case presents different facts and circumstances than found in Saffold and Overton. Moreover, the language of Rule 3.853 does not necessitate that Gore prove the entirety of his case when requesting testing, only that he make a sufficient showing to the court that testing is warranted, per the language of Rule 3.853. Given the testimonial and circumstantial evidence of the case against him and the lack of eyewitness testimony, a showing that plausible and direct physical evidence exists that may mitigate his sentence, or exonerate him completely, is more than adequate to warrant DNA testing of the evidence.

As such, Gore requests that the denial of his Rule 3.853 motion be reversed and remanded to the trial court with orders to proceed with DNA testing of the evidence.

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 attacking this claim, the state is attempting to disparage the relevance of both the Robyn Novick (90-11445, 11th Circuit) and Tina Corolis (88-9827, 11th Circuit) investigations and cases to the instant Roark case. Prior pleadings, court opinions, and case depositions have long since established that all three events were being investigated by the law enforcement agencies in Miami-Dade locale at the same time.³ Furthermore, Gore was indicted for the murder of Robyn Novick on March 21, 1988, and was arraigned for the assault of Tina Corolis on March 14, 1988. The indictment for the Roark case, occurring on April 25, 1989, did not occur until roughly a month after the completion of the Corolis trial on March 15, 1989. The initial trial for Robyn Novick's murder, at which Tina Corolis testified as well, did not conclude until May 5, 1995.⁴

The state is attempting to downplay the relevance and the interconnected nature of these investigations and cases by simply insisting that, "Susan Roark was

³ Roark's car was found wrecked and abandoned in Miami on February 14, 2008, Robyn Novick was murdered on March 12, 1988, and Tina Corolis was assaulted on March 14, 1988.

⁴ Gore was awarded a new trial by this court on grounds of prosecutorial misconduct in Novick trial on October 1, 1998. Gore was retried and found guilty for the murder of Robyn Novick on February 12, 1999.

killed on January 31, 1988...long before any of the circumstances referenced by Gore in this point.” (AB 22). However, the state cannot deny that the subsequent investigations into all three cases were occurring simultaneously in Miami prior to the trials for each case.

The delayed indictment in Roark presumably did not occur until after the completion of the Corolis trial so that the state could use her testimony in support its case against Gore in the Roark case. It is undeniable that her Williams Rule testimony, and the debacle surrounding her cross examination in the Roark trial, could reasonably have served to cause Gore’s ultimate conviction by the jury.

What is interesting now is that the state, in its answer brief, is attempting to denigrate the importance of the Corolis case and Corolis’ subsequent testimony against Gore in the Roark case. The state opines, “Apparently what Gore seeks is to obtain evidence from two other unrelated crimes for which he has been convicted...”. (AB 22) Essentially the state, while finding in 1988 that the testimony of Tina Corolis was important enough to warrant putting her on the stand as a William’s rule witness, now states that her case is completely unrelated and has no bearing on the Roark case, despite having been investigated in conjunction with Roark and Novick.

As presented in the initial brief, Gore is seeking to obtain DNA testing on items collected during the Novick and Corolis investigations in order to attack the

validity of the Corolis conviction and the subsequent use of her testimony against him in the instant Roark case. The state, through their simultaneous investigations into all three cases (by the same law enforcement agency, i.e. Miami-Dade Sheriff's Office) has irrevocably entwined these cases not only by using the same law enforcement officers and agency to investigate each case, but by the use of Tina Corolis and David Restrepo as witnesses against Gore.

Gore contends in his initial brief that by testing items collected in and for the Novick and Corolis investigations he can establish that Tina Corolis lied about her knowledge and involvement with both Gore and Robyn Novick, thereby challenging the validity of her testimony against him in the Roark case. (IB 20-21)

While it is admittedly not a traditional means of attacking a conviction, Gore is now left with very few options with which to attack the veracity of Corolis' testimony and its impact on the Roark case conviction. As such, he should be afforded the opportunity to attack the validity of the evidence presented against him in relation to this case.

CONCLUSION:

Gore has adequately met each and every requirement of the language of Rule 3.853(b). The state, in its answer brief, is attempting to re-litigate the case against Gore in an effort to detract from the fact that he is not required to conclusively demonstrate the outcome of the testing in order to warrant DNA

testing of the evidence. Instead, he must show that a reasonable probability exists that said testing could serve to mitigate his conviction and sentence.

The order of the trial court in denying Gore's motion was wholly inadequate and does not reflect the necessary findings of fact as required by Rule 3.853(c)(5) and supported by cases such as *Overton*.

More troubling is the fact that the state proposes to execute Gore without exhausting all possibilities to determine if in fact he is guilty. It is morally and ethically necessary, given the rash of nationwide death penalty exonerations resulting from DNA testing, that all available options be exhausted prior to taking a life. Given the lack of any physical evidence linking Gore to the murder scene, a conviction based on testimonial and circumstantial evidence, and the proven existence of items introduced against him at trial, and the fact that Gore has made all necessary showings per rule 3.853, the order of the trial court should be reversed and DNA testing ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S.

Mail to all counsel of record, on this 16 day of October, 2008.

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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.

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