

IN THE SUPREME COURT OF FLORIDA

ROBERT N. GRESHAM,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case No: SC16-359
L.T. No(s): 1D14-5913
382003CF000138

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PETITIONER'S BRIEF ON THE MERITS

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Robert Gresham was charged in Information alleging two counts of Capital Sexual Battery and one count of Lewd or Lascivious Molestation.

June 30, 2004, after a jury trial, the Defendant was found guilty of two counts Sexual Battery and one count of Lewd or Lascivious Molestation.

On September 8, 2014, the Defendant filed a post-conviction motion for DNA testing pursuant to Fla.R.Crim.P. 3.853 and Section 925.11 Florida Statute.

On November 5, 2014, the Court denied the motion for DNA testing.

On November 18, 2014, Defendant filed a motion for rehearing.

On November 26, 2014, the Court denied the motion for rehearing.

On December 19, 2014, the Defendant filed his Notice of Appeal.

On May 14, 2015, the First District Court issued an Order to the Attorney General to show cause.

On June 3, 2015, the Attorney General filed its response.

On June 21, 2015, the Attorney General filed its response.

On December 8, 2015, the First District Court filed its opinion.

On December 21, 2015, the Appellant filed a Rehearing En Banc.

On January 25, 2016, the First District court summarily denied Appellant's Motion for Rehearing En Banc.

Whereupon the Petitioner filed his Notice to Invoke Jurisdictional Discretion to Review the Conflict of the First District Court's ruling in his case.

SUMMARY OF THE ARGUMENT

The First District Court ruled that the Petitioner's Motion was facially insufficient because the Petitioner failed to raise the claim that his identity was an issue in the case. The Court additionally held that because of pretrial confession and a summarization of information with a prior 3.850 post-conviction motion that this evidence prevented Petitioner from filing a facially sufficient motion. Lastly, the court also announced that Petitioner's motion failed on the grounds that the jury was aware of the test results.

The first issue centers around the fact that the Rule 3.853(c)(4) is written in the alternative, thus his Motion was facially sufficient by addressing that the "New" DNA testing would prove his innocence, therefore showing exoneration. Additionally, this issue shows that Petitioner could have raised the claim of disputed identity, thus, the trial court failed to afford the Petitioner an opportunity to amend the Motion.

The Second Issue arises from the fact that per case law and statutory intent, that the Appellate Court's decision on the DNA evidence from the original testing had been presented to the jury and where the Court's reliance on pretrial confessions and misunderstood summarizations of case and facts of a prior 3.850 Motion to bar Petitioner's Motion was error.

The Third issue is that the Court's decision that if the Motion had been facially sufficient, that any failure to issue an order upon the State amounted to harmless error, is error in light of the Harris Court's opinion.

ISSUE ONE

APPELLATE COURT ERRONEOUSLY DENIED PETITIONER'S APPEAL WHERE PETITIONER'S RULE 3.853 MOTION WAS FACIALLY SUFFICIENT IN THAT PETITIONER WAS NOT REQUIRED TO RAISE THE ISSUE OF DISPUTED IDENTITY IN ORDER TO FILE A FACIALLY SUFFICIENT MOTION UNDER RULE 3.853(b)(4)

The First District Court's ruling focuses on the presumption that Petitioner's Motion is facially insufficient, that in order for the Petitioner's Motion to be facially sufficient he had to allege that identity was genuinely disputed issue at trial "and" explain how the DNA testing will exonerate him. The State has also grasped this theory completely. There are a few factors which dispute this very concept, which was used to deny Petitioner's 3.853 Motion and subsequent appeal. Here, the Petitioner will explain these errors in chronological application to the case at bar.

The first factor is where the Courts and State are failing to realize the statute's and rule's plain language as well as legislative intent, not to mention this Honorable Court's intention of propose rule 3.853. In Amendment to Florida Rule of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So.2d 633 (Fla. 2001), this Honorable Court stated the following:

“We have modified proposed subdivision (a) of the proposed rule to explain that the new rule simply provides procedures for obtaining DNA testing under Section 925.11, Florida Statutes subdivision (b) of Rule 3.853 list the contents of a motion seeking DNA testing. In response to the comments and consistent with subsection (1)(a) 925.11, which authorizes DNA testing when the evidence tested may contain DNA that would exonerate the Movant or mitigate the sentence received, we have modified subdivision (b)(4) of the new rule to require:

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.*” (emphasis added) **ID.** At 634,635

Here, this Honorable Court created the alternative structure allowing that a Defendant seeking to use 3.853, the alternative chance to provide an explanation of how DNA evidence, if tested, could exonerate or mitigate his sentence. The Petitioner has advanced this alternative explanation since the rendition of his 3.853 Motion.

It is further shown by Gonzalez V. State, 41 So.3d 1050 (Fla. 2nd DCA 2010), that there are two different parts to Rule 3.853(b)(4), which states the following:

“. . . under Rule 3.853(b)(4). That rule is written in the alternative: the Movant must allege that identification is a genuinely disputed issue or he must explain how the DNA evidence would exonerate him.”

However, both the State and the Appellate Court overlooked that such an alternative exists and has advanced the argument that a Defendant must satisfy either the disputed identity factor or both factors to prove a facially sufficient motion. This lack of accepting the alternative part within this subdivision denies the Petitioner his Due Process rights of equal protection of the law.

If the rule states that a Defendant can give an explanation of how the DNA evidence would exonerate the Defendant, he therefore satisfies the technical requirements of 3.853(b)(4). The contention the Petitioner has is that the decision the courts have rendered do not take into account the alternative part of the rule. Another case that expresses the facts of this argument is found in Thoms v. State, 3 So.3d 387 (Fla. 2nd DCA 2009) which says:

“[T]he legislature codified a policy that DNA testing be ‘a means by which to challenge convictions when there is a credible concern that an injustice may have occurred and DNA testing may resolve the issue.’ Zollman v. State, 829 So.2d 1059, 1062 (Fla. 2nd DCA 2002).”
(emphasis added) *Id.* At 386, 387.

The legislative intent has been clearly defined so that upon examination of the Appellate Court’s response, it is plain to see that the decision is in conflict with the rules and is in error as to the motion’s facial insufficiency.

The second factor of this argument arises from what the Appellate Court and State perceive to be a facially insufficient motion. It premises its ideas on the fact that Petitioner’s Motion did not raise the fact of disputed identity as a factor at trial. As already stated in the first part of this argument, had the Lower Court, Appellate Court and State taken the time to accept alternative part of Rule 3.853(b)(4) which allows that a Petitioner may alternatively explain how DNA evidence would exonerate him, his Motion was therefore facially sufficient. The Petitioner concedes that no mitigation of natural life would be available if the testing was performed. Though

what has been the Petitioner's focus is that when tested, the new DNA results would exonerate the Petitioner. This concept is ignored by the fact that both courts and State are only accepting the disputed identity or both factors together have to be satisfied. The Court in Gonzalez, *supra*, holds a different view of this issue. This is what the Court held:

“Although Gonzalez’s motion did not allege that identification was an issue, it did, as previously discussed, explain how DNA testing would exonerate him. Accordingly, the motion was facially sufficient under Rule 3.853(b)(4).” *Id.* At 1052

The Gonzalez Court in its ruling distinguished the fact that although the Defendant didn't raise the issue of disputed identity that the Defendant's motion was facially sufficient for showing an explanation of how the DNA would exonerate him if tested. Gonzalez's Court relied on the definitions and distinctions of the First District's analysis of the Crow case.

In the Eleventh Circuit, that court noted in two cases that, in Fla.R.Crim.P. 3.853, that the rule does not require that identity be a mandatory requirement in order to file a facially sufficient motion. Caldwell v. McCabe, 2013 U.S. Dist. Lexis 144734 (11th Cir. 2013), which held:

“Rule 3.853 does not require that the applicant's identity be a disputed issue at trial, allowing instead for the additional possibility that the DNA evidence will only mitigate his sentence. Rule 3.853 requires that the motion contain either ‘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.’
Fla.R.Crim.P. 3.853(b)(4) (emphasis added)”

This is upheld in the holding of Alvarez v. State Attorney For The Eighteenth Judicial Circuit of Florida, 679 F.3d 1257 (11th Cir. 2012).

In another First District Case, the facts are more closely related to the Petitioner’s facts. In Davis v. State, 11 So.3d 977 (Fla. 1st DCA 2009), the court held the following:

“The trial court denied Appellant’s motion as facially insufficient, noting that Appellant’s own admissions demonstrate that identity was not at issue. This court has noted, however, that ‘testing [pursuant to Rule 3.853] may be available even if the Defendant does not deny commission of the act alleged to be a crime.’ Crow v. State, 866 So.2d 1257, 1260 (Fla. 1st DCA 2004). Because Appellant’s motion is facially sufficient as it relates to the knife, we reverse the denial of Appellant’s request for DNA testing of the knife for the trial court to ‘take any action authorized by 3.853(c) to determine whether the allegations of the Defendant’s motion are true and, if so, whether he is entitled to DNA testing.’”

Both courts acknowledge that even where the defendants did not or even could not raise the issue of disputed identity, these courts found both motions to be facially sufficient because they raised the facts that if the DNA was tested that it would lead to exoneration or mitigation of their sentences.

However, the State’s and Appellate Court’s argument is proven to be a nullity by the decisions of the aforementioned cases as well as several others. In Knighen v. State, 829 So.2d 249 (Fla. 2nd DCA 2002), the victims specifically identified Knighen, this is what the Second District Court found:

“ . . . the trial court was incorrect in finding that identification was not at issue simply because both victims identified the Movant as their attacker at trial.”

The Appellate Court’s finding was that because the Petitioner was the boyfriend of the victim’s mother and that because the Petitioner and victim lived in the same residence, that this fact necessarily prohibits the Defendant from raising a claim that identity was disputed, yet that is not how the Knigheten Court saw the issues. In reviewing a Third District Court case, Jordan v. State, 950 So.2d 442 (Fla. 3rd DCA 2007), the Court stated the following:

“In this case, as in Hampton, if DNA testing could separate out several individual DNA strands on the swabs, none of which matched Jordan, that evidence would tend to exonerate Jordan, particularly as the victim testified at trial that Jordan was the man she scratched . . .”

In both cases, where both sets of victims identified the defendants as the perpetrators of the crimes, these courts found that identity was a genuinely disputed issue at trial. Taking this into account, even with the proximity of the Petitioner and the victim, the Petitioner still could have raised the argument that identity was in fact a disputed issue at trial.

The Appellate Court uses a double standard by which it tries to prove that the Petitioner is not entitled to DNA testing. Once standard is that the Petitioner’s motion was facially insufficient because he did not establish that identity was a disputed issue. The second standard is that the Petitioner could not raise the issue of disputed identity because of several factors identifying him.

However, by both of these cases, Knighen and Jordan, Petitioner could have viably raised the claim of disputed identity. Therefore the Petitioner's motion would have been facially sufficient if the factor of the motion's requirements focused solely on disputed identity. Yet, as already mentioned, there is an alternative within Rule 3.853(b)(4), this alternative, therefore, quashes the Court's and State's reliance on the issue of disputed identity as a factor to bar Petitioner's 3.853 Motion.

The third factor in this argument arises from the fact that the Appellate Court states that Petitioner's 3.853 Motion was "facially insufficient." If this fact is true, the Petitioner's due process and equal protection rights, which has been violated by both the trial court and Appellate Court, in that the motion was never deemed as facially insufficient and without prejudice. Thus, offering the Petitioner a contemporaneous chance to amend his motion as expressed in the holding found in Spera v. State, 971 So.2d 7534 (Fla. 2007):

"Accordingly, when a Defendant's initial Rule 3.850 Motion for post-conviction relief is determined to be legally insufficient for failure to meet either the rule's or other pleading requirement, the trial court abuses its discretion when it fails to allow the Defendant at least one opportunity to amend the motion. As we did in Bryant, we hold that the proper procedure is to strike the motion with leave to amend within a reasonable period." *Id.* at 762.

In Spera the Court further explained as follows:

"We also stress that our decision is limited to motions deemed facially insufficient to support relief - that is, claims that fail to contain required allegations. When trial courts deny relief because the record

conclusively refutes the allegations, they need not permit the amendment of pleadings.

Finally, we warn that our decision today permits defendants to amend defective pleadings only if they can be amended in good faith.” **Id.** At 762.

In the scope of this Honorable Court’s ruling of the Spera case, the application is that under Rule 3.853(c), once the trial court received the court file, it was to review the motion and deny it if it was facially insufficient, otherwise the trial court was supposed to issue a Show Cause Order to the State addressing the factual claims of the Motion. In the case at bar, the trial court summarily denied the Motion upon the merits, attaching portions of the record expressing that because of pretrial confession and a mistaken perception of a confession in a prior procedurally-barred 3.850 Motion, that his issues lacked merit. The issue of confessions will be raised in another argument within this Brief.

However, as shown by the Grounds of the second factor, regardless of any confession or victim’s identification, the issue of disputed identity could have been raised, therefore curing any issue of facial insufficiency. Thus, the trial court did not find the Motion to be facially insufficient, only that it denied the Motion upon the merits, as shown by the Appellate Court’s ruling:

“Without requiring a response from the State, the trial court denied the motion on the merits.” (See Appendix I)

This fact clearly shows that the trial court’s intention was a straight denial of the issues, not a denial because of facial insufficiencies. In light of this fact, the motion

was found to be facially sufficient. The Appellate Court is the first to announce that the motion was facially insufficient. Because the trial court denied the motion on the merits, the court failed to follow the rules governing 3.853, thus the purpose of Petitioner's original appeal to the Appellate Court and subsequently the jurisdictional review by this Honorable Court.

In the case Rosa v. State, 147 So.3d 583 (Fla. 4th DCA 2014), in a 3.853 case, the Court acknowledged the need for allowing the Defendant an opportunity to amend his motion, as shown here:

“Ordinarily, a facially insufficient Rule 3.853 motion may be dismissed or denied without prejudice to permit refiling of a facially sufficient motion.’ Bain v. State, 963 So.2d 913, 914 (Fla. 2nd DCA 2007)”

Rosa's case revolved around the fact that he did not assert that identity was a genuinely disputed issue, nor did he explain how under the circumstances of his case the DNA would exonerate him or mitigate his sentence. Thus, even if the trial court found the motion to be facially insufficient, it should have denied the motion without prejudice, offering the Petitioner a choice to cure the insufficiency, and as noted above, the issue of disputed identity could have been raised, thus curing the insufficiency.

This issue has brought two questions to mind and was presented in Petitioner's Jurisdictional Brief:

- 1) “Is identity a disputed issue for the purpose of post-conviction DNA testing, even if the victim identifies the Defendant, or is the victim's

identification enough to prove that a Defendant cannot raise the claim of disputed identity for the purpose of post-conviction DNA testing?”

- 2) “Is Rule 3.853(b)(4) written where the Defendant must prove that identification is genuinely disputed in the case and explanation of how the DNA evidence would prove exoneration; or does Rule 3.853(b)(4) contain two options, one option being that a Defendant proves that identification is genuinely disputed in the case and the second option being that a Defendant proves how the DNA evidence would prove exoneration?”

ISSUE II

APPELLATE COURT’S RULING DID NOT PROPERLY TAKE INTO ACCOUNT THAT, UPON THE TRIAL COURT’S RULING UPON THE MERITS, THAT BOTH COURTS ERRONEOUSLY INTERPRETS EVIDENCE THAT DID NOT FACTUALLY BAR PETITIONERS MOTION FROM PROPERLY BEING HEARD

The second issue is that, the Appellate Court’s ruling that the trial court properly denied Petitioner’s motion for D.N.A. testing is in error. This is what the court said:

“without requiring a response from the state, the trial court denied the motion on the merits finding that the D.N.A. evidence would not have changed the outcome of the trial.”

And,

“As such, the trial court did not err in denying the motion without first receiving a response from the state.”

This reasoning is in error because of the ruling in Knighen V. State, 927 So.2d 239 (Fla. 2d DCA 2006), which states:

“In Knighthen, this court held ‘that a claim is facially sufficient with regards to exonerate issue if the alleged facts demonstrate that there is a reasonable probability that the Defendant would have been acquitted if the D.N.A. evidence had been admitted at trial.’”

Two factors show how Knighthen court’s ruling sets the precedence for how the Petitioner’s Motion would have changed the outcome of the trial. Factor one, the trail court and Appellate Court reasons that the jury was made aware of the original D.N.A. testing. This reasoning is incorrect. This is what the jury was told at trial:

“You will not be receiving and D.N.A. in this case. The State is not going to be providing and direct physical evidence of the acts of molestation.”
TT. Vol. I Pg. 42 Lines 11-13

This statement to the jury does not express that a D.N.A. test was preformed. This statement does not tell the jury that the clothing and sexual assault kit was tested and compared to the Petitioner’s D.N.A. and that the finding was that “NO SEMEN” was found, nor does this statement inform the jury that the testing also stated that “NO SALIVA” was found. It is a far stretch for any competent and reasonable individual to infer that the statement, “You will not be receiving any D.N.A. in this case.” depicts any kind of knowledge of the D.N.A. test results. Thus, the Appellate Court’s reliance on this statement to prove that the outcome of the trail would not have changed is in error. Had the jury heard this factual evidence, it would have created reasonable doubt about the Petitioner’s culpability of committing the crime, which is exactly what the Petitioner reasoned out in his 3.853 Motion.

Thusly so, the second factor is that both courts mistakenly believe that the testing of (EPI) and (SEBUS), would not create new factual evidence that would show that Petitioner is actually innocent. In the Petitioner's 3.853 Motion, he presented the fact that he had been accused of ejaculation on the victim, yet "no semen" was found, thus proving he was innocent of one accusation. He presented in his Motion, that the victim accused him of licking the victim's vagina, thus "no saliva" was present proves that the Petitioner is innocent of this second accusation. There was a third accusation made, that the Petitioner had touched and/or penetrated the victim. The new D.N.A. test, the 3.853 Motion in question, is to test (EPI) skin cells, and (SEBUS) skin oil and sweat, against that which was found within the original D.N.A. test, yet was never compared.

The Petitioner has reasoned in his 3.853 Motion that when tested, the D.N.A. will not match, thus proving that he never touched the victim and is in fact innocent of all crimes he was accused of. Petitioner additionally proves that the prior D.N.A. testing proves his pretrial confession is false and any perceived confession in the 3.850 post conviction motion does not exist.

The Appellate Court's decision is also proven erroneous by the holding in Montez V. State, 86 So.3d 124 (Fla. 2d DCA 2012), which held:

"However, neither the court's order nor its attachments refute Mr. Montez's claims that the nylon stocking would contain the D.N.A. of the person who strangled Ms. Martinez and that Mr. Montez's D.N.A. would

not be found on the stocking. These allegations in Mr. Montez's sworn motion must be taken as true." *Id.* at 1245

The Petitioner contends that, the Appellate Court's holding is a, by rote statement used by the lower court, and as such does not address that the (EPI) and (SEBUS) is the Petitioners, only that the Petitioner's Motion is "facially insufficient"! The "evidence" that was used to deny the Petitioner's Motion, was a pretrial confession and an erroneously perceived confession within a procedurally barred 3.850 Motion. The Petitioner addressed for the lower court, in his 3.853 Motion, that the pretrial confession was false due to investigators alteration of Miranda forms and coercive promises, which the Petitioner refuted under oath and upon the witness stand. As for the misperceived 3.850 Motion, the facts presented in the motion were the summarization of the accusations and the nature of the charges the Petitioner was facing. Thus, this information lacks any legal substance nor does it contain any evidence that shows that Petitioner is not entitled to D.N.A. testing. As stated earlier in this argument, the true fact is that the original D.N.A. test results proves that any form of confession is false.

The State and both Court's reliance on both form of evidence is in error by the fact that the Crow, Davis, and Gonzalez Court's recognized that if the D.N.A. could provide new evidence that could exonerate the Petitioner, then the test should be preformed.

Crow, supra:

“The pertinent part of the rule makes testing available if the results would show that the ... results would otherwise exonerate the Defendant.”

Id. at 1260

Davis, supra:

“the trial court denied Appellant’s motion as facially insufficient, noting that Appellant’s own admissions demonstrate that identity was not at issue. This court has noted, however, that ‘testing [pursuant to rule 3.853] may be available even if the Defendant does not deny the commission of the act alleged to be a crime.’ Crow V. State, 866 So.2d 1257,1260 (Fla. 1st DCA 2004).”

Id. at 978

Gonzalez, supra:

“Although Gonzalez’s motion did not allege that identification was an issue, it did as previously discussed, explain how D.N.A. testing would exonerate him. Accordingly, the motion was facially sufficient under Rule 3.853(b)(4).”

Thus, with Petitioner’s Motion showing that new D.N.A. exists, and with the Motion showing how this “New” D.N.A. when tested, would not match the Petitioner’s D.N.A., which shows how exoneration would exist. Rightly so, the Petitioner has filed a facially sufficient 3.853 motion.

The next part of this argument focuses upon the Trial Court’s failure to issue a order to the State. The Appellate Court recognizes that the trial court denied the merits.

“without requiring a response from the state, the trial court denied the motion on the merits...”

This decision is proven to be in err by the ruling found in Cheshire V. State, 872 So.2d 427 (Fla. 5th DCA 2004), which states:

“Although characterized as legally insufficient by the court, Cheshire’s motion was legally sufficient in that it contained all of the required allegations listed in Florida Rule of Criminal Procedure 3.853 (b). If a legally sufficient motion is filed, the trial court must order the prosecuting authority to respond. See Fla. R. Crim. P. 3.853 (c)(2). The court in the instant case should have ordered a response from the state. Under the proper procedure, once the court receives the response from the State, it then determines whether the motion should be summarily denied on the merits or scheduled for an evidentiary hearing. C.f. Manual v. State, 855 So.2d 97 (Fla. 2nd DCA 2003). Instead of following this procedure, the court incorrectly ruled the motion insufficient and then attempted to refute its allegations.”

Further, this is exemplified by the holding found in Saffold v. State, 850 So.2d 574 (Fla. 2nd DCA 2003), which states:

“Rule 3.853(c)(2) states that upon receipt of the motion, the trial court ‘shall review the motion and deny it if it is insufficient.’ If the motion is sufficient, the prosecuting authority shall be ordered to respond. Rule 3.853(c)(3) states that, after receiving the response, the trial court ‘shall review the response and enter an Order on the merits of the motion or set the motion for hearing.’”

Both rulings acknowledge that a motion is facially sufficient when the Petitioner of a Rule 3.853 satisfies all requirements of subsection (b)(1)-(6), thus making an automatic imposition of the court to issue a Show Cause to the State. This even includes the fact that the record conclusively refutes the Petitioner’s claims, as shown by the footnote in Zollman v. State, 820 So.2d 1059 (Fla. 2nd DCA 2002), which states as follows:

“². We note that the Rule 3.853, unlike Rule 3.850, does not allow the trial court to simply summarily deny the motion if the record conclusively shows that the Defendant is not entitled to relief. Rather, if a Rule 3.853 motion is facially sufficient, the trial court must order a

response. See Fla.R.Crim.P. 3.853(c)(2). However, after considering the State's response, the trial court may either enter an Order on the merits of the motion or set the motion for hearing. See Fla.R.Crim.P. 3.853(c)(3)."

Thus, from the holdings and footnotes of these three cases, not only was the Petitioner's motion facially sufficient under Rule 3.853(b)(1) - (6), the trial court was automatically compelled to issue an Order to the State as required by 3.853(c)(2). This error is further compounded by the Appellate Court's ruling when it is clearly shown by what the Second and Fifth District Courts have reasoned. By 3.853(2), when the judge assigned to the case got the motion, he was required only to determine that the Petitioner had fulfilled the technical requirements, (b)(1) - (6). Thusly so, the judge was to either dismiss the motion without prejudice, allowing the Petitioner a chance to amend the motion to cure the deficiency, or, if the motion met the requirements, then the State was to be ordered to respond to the motion's factual claims. However, the Appellate Court's ruling declared that, "as such, the trial court did not err in denying the motion without first receiving a response from the State."

This is not what the Appellate Court stated in Harris v. State, 40 Fl. L. Weekly D939 (Fla. 2nd DCA April 22, 2015), which the Petitioner's Appellate Court summarized:

"The Second District has held that it is reversible error for the trial court to deny a facially sufficient motion without receiving a response from the State, even where the record conclusively demonstrates that the Defendant is not entitled to relief." (See Appendix I)

And they further referred to Girley v. State, 935 So.2d 55, 56 (Fla. 1st DCA 2006), which the Petitioner's Appellate Court summarized with distinction:

("[a] court should deny a facially sufficient Rule 3.853 motion on the merits only after the State has responded." 935 So.2d at 56. However, this case is distinguishable from Girley because the portions of the record showing that Appellant's request for DNA testing was meritless are attached to the Order on appeal.) See **Appendix I**.

The footnote in Zollman depicts that, even with the record conclusively showing that the Defendant is not entitled to relief, that an Order was required to be issued to the State. The Harris Court found that it is reversible error when the court fails to do so. Saffold furthers this concept as shown here:

"We noted that a trial court may not summarily deny the motion even when the record conclusively shows that the Defendant is not entitled to relief; if the motion is facially sufficient, the trial court must order the State to respond." **Id.** at 577.

Thus, Petitioner's motion was facially sufficient, even if the record could show that no relief was entitled, the trial court reversibly erred in not issuing an Order for the State to respond and the Appellate Court erred in not weighing the case law that presented a clear solution to this error. The trial court could not summarily deny the motion as facially insufficient, then attempt to rule on the merits. When the trial court intended to make a response upon the merits, it was automatically required to order the State to respond as shown by Cheshire:

"The court stated that the motion was legally insufficient, but then addressed the motion on the merits . . ." **Id.** at 428.

But further states:

“We do not hold that Cheshire is entitled to relief, but because the motion is legally sufficient, the court should order a response from the State before deciding whether to deny the motion or schedule a hearing.”
Id. at 429.

Additionally, the fact that the Appellate Court announced that the trial court correctly ruled on the merits proves that the trial court violated the rules governing the motion for post-conviction DNA testing, which is further shown by the Saffold court, as shown here:

“Here, the trial court addressed the merits of the motion without first determining the allegations in the motion were facially sufficient and without requiring a response from the State as required under Rule 3.853(c)(2).”

Therefore, the trial court’s ruling and the Appellate Court’s affirmation has deprived the Petitioner from having his factual claims being heard. This fact creates a miscarriage of justice that if not cured will culminate in a manifest injustice.

ISSUE III

THE APPELLATE COURT'S DECISION THAT IF PETITIONER'S MOTION HAD BEEN FACIALLY SUFFICIENT, THAT THE HARMLESS ERROR DOCTRINE APPLIED WHERE THE TRIAL COURT FAILED TO ISSUE AN ORDER TO THE STATE TO RESPOND, IS IN ERROR

The third issue in the case at bar is that the Appellate Court stated that in an alternative view of the motion, had it been deemed to be facially sufficient, thus requiring the State to respond, that it was harmless error for the trial court to not follow the rules, as shown here:

“Additionally, we note that even if the motion had been facially sufficient, triggering the requirement for the trial court to receive a response from the State prior to ruling on it, we would still affirm under the doctrine of harmless error.” See **Appendix I**.

The view is in error because of the Appellate Court's summarization of the Harris case, as shown here:

“The Second District has held that it is reversible error for the trial court to deny a facially sufficient motion without receiving a response from the State, even where the record conclusively demonstrated that the defendant is not entitled to relief. Harris v. State, 40 Fla. L. Weekly, D939 (Fla. 2nd DCA April 22, 2015).” See **Appendix I**.

This harmful error is proven clear by the holding in Girley, *supra*; Cheshire, *supra*; and Manual v. State, 855 So.2d 97 (Fla. 2nd DCA 2002), these cases held that (it was error to summarily deny a legally sufficient Rule 3.853 Motion without ordering the State to respond.)

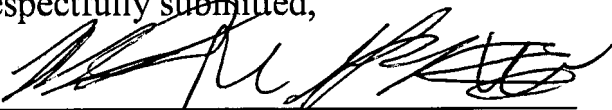
Therefore, the Appellate Court's supposition that in the alternative it would have been harmless error if the motion was facially sufficient, moreover, requiring a response from the State, which is in itself error. Thusly, the Petitioner reasserts the question:

"Is it reversible error for the Lower Court to summarily deny a 3.853 Motion without issuing a Show Cause Order to the State, or is it harmless error?"

CONCLUSION

WHEREFORE, based on the foregoing cited case law and rules, facts, cases and authorities supporting the cause discussed herein, Petitioner moves this Honorable Court to rule in favor of his non-certified questions, quash the District Court's decision and remand to the trial court for further proceedings and/or any other remedies this Court should deem appropriate.

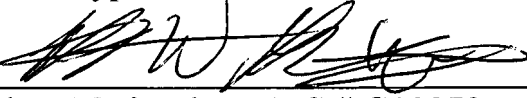
Respectfully submitted,

/s/ 

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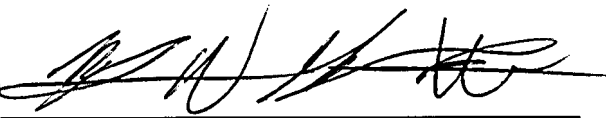
CERTIFICATE OF FONT AND TYPE SIZE

Pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a)(2), the Petitioner attests that the foregoing Initial Brief has been typed in Times New Roman, Size 14.

/s/ 
Robert N. Gresham, DC # G10973

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have placed a true and correct copy of the foregoing in the hands of institutional staff for mailing via first-class U.S. mail, postage pre-paid, to The Supreme Court of Florida, 500 South Duval Street, Tallahassee 32399-1925 on this 13 day of June, 2016.

/s/ 
Robert N. Gresham, DC # G10973

APPENDIX I

**Order From the First District
Court of Appeal
Denying Petitioner's Motion**

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ROBERT N. GRESHAM,
Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D14-5913

STATE OF FLORIDA,
Appellee.

Opinion filed December 8, 2015.

An appeal from an order of the Circuit Court for Levy County.
Mark W. Moseley, Judge.

Robert N. Gresham, pro se, Appellant.

Pamela Jo Bondi, Attorney General, and Kristen Bonjour, Assistant Attorney
General, Tallahassee, for Appellee.

ROWE, J.

Appellant, Robert N. Gresham, challenges the denial of his motion for post-conviction DNA testing filed pursuant to Florida Rule of Criminal Procedure 3.853. Because Appellant's motion was facially insufficient, we affirm the trial court's denial of the motion.

In 2004, following a jury trial, Appellant was convicted of two counts of capital sexual battery and sentenced to life imprisonment. After his conviction, he

filed a motion seeking testing of DNA evidence allegedly found on the victim. Without requiring a response from the State, the trial court denied the motion on the merits, finding that the DNA evidence would not have changed the outcome of the trial. Appellant argues that this was error because case law prohibits trial courts from denying facially sufficient rule 3.853 motions until after the State responds to the motion. See Girley v. State, 935 So. 2d 55, 56 (Fla. 1st DCA 2006) (“A court should deny a facially sufficient rule 3.853 motion on the merits only after the state has responded.”); Cheshire v. State, 872 So. 2d 427, 428 (Fla. 5th DCA 2004) (holding that it was error to summarily deny a legally sufficient rule 3.853 motion without ordering the State to respond); Manual v. State, 855 So. 2d 97, 98 (Fla. 2d DCA 2002) (same). However, these cases are not applicable to Appellant’s motion because it was facially insufficient; therefore, no response was required by the State.

In order to allege a facially sufficient claim for DNA testing, a defendant must allege that identification was a genuinely disputed issue at trial and explain how the DNA testing will exonerate him. See Fla. R. Crim. P. 3.853(b) (explaining requirements for facially sufficient motion); Robinson v. State, 865 So. 2d 1259, 1265 (Fla. 2004) (“It is the defendant’s burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant’s

sentence.”). Appellant did not and cannot allege that identity was genuinely disputed in his case. He was the boyfriend of the victim’s mother and lived in the home with the victim. Moreover, Appellant confessed to police officers that he sexually abused the victim.* Appellant also failed to explain how DNA testing would exonerate him in light of the fact that the State admitted at trial that there was no DNA evidence linking Appellant to the crime. Thus, DNA testing of the requested items would only confirm a fact of which the jury was already aware, that Appellant’s DNA was not found on the victim. Because Appellant failed to sufficiently allege that identity was a disputed issue and explain how DNA testing would exonerate him, his motion was facially insufficient. As such, the trial court did not err in denying the motion without first receiving a response from the State.

Additionally, we note that even if the motion had been facially sufficient, triggering the requirement for the trial court to receive a response from the State prior to ruling on it, we would still affirm under the doctrine of harmless error. The Second District has held that it is reversible error for the trial court to deny a facially sufficient motion without receiving a response from the State, even where the record conclusively demonstrates that the defendant is not entitled to relief.

Harris v. State, 40 Fla. L. Weekly D939 (Fla. 2d DCA Apr. 22, 2015). We

* Appellant also implicitly admitted to committing the crime in a prior post-conviction motion when he argued that counsel was ineffective for failing to present evidence that he was a pedophile, which would have led to a defense of insanity or to a mitigation of the charges.

disagree. A harmless error analysis should be applied when a trial court denies a facially sufficient rule 3.853 motion without first receiving a response from the State. We acknowledge that this Court held in Girley that, “[a] court should deny a facially sufficient rule 3.853 motion on the merits only after the state has responded.” 935 So. 2d at 56. However, this case is distinguishable from Girley because the portions of the record showing that Appellant’s request for DNA testing was meritless are attached to the order on appeal. Because it is apparent from the face of the record that Appellant’s claims are meritless, it would be futile to reverse and remand for the trial court to order a response from the State when it is clear that the failure to do so was harmless error.

We, therefore, AFFIRM the trial court’s denial of Appellant’s rule 3.853 motion.

LEWIS and THOMAS, JJ., CONCUR.