No. SC16-359
L.T. Nos. 1D14-5913 & 382003CF000138XXXAXX

IN THE SUPREME COURT OF FLORIDA

ROBERT N. GRESHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Discretionary Review from a Decision of the
First District Court of Appeal

REPLY BRIEF OF ROBERT N. GRESHAM

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ARGUMENT

I. THIS COURT HAS JURISDICTION

The State spends an inordinate amount of its brief contending this Court lacks jurisdiction. Answer Br. 8-10, 20, 25. It is mistaken.

First, the State's unstated but overarching major premise (i.e., that Mr. Gresham must independently establish jurisdiction for each issue raised in this Court) is incorrect: it refuses to acknowledge black letter law that "once we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court." *Savoie* v. *State*, 422 So. 2d 308, 310 (Fla. 1982); *accord Jacobson* v. *State*, 476 So. 2d 1282, 1285 (Fla. 1985). As such, because this Court unquestionably has jurisdiction over the second issue based on the First District's express conflict with the Second District's decision in *Harris* v. *State*, 183 So. 3d 1065 (Fla. 2d DCA 2015),[1] it may also exercise jurisdiction over the first and third issues.

Second, even if the State's major premise were correct, its minor premises (that there exists no conflict as to each issue) are still mistaken. For the first issue, there is an implied conflict between the First District and the Second District's de-

[1] *See Gresham* v. *State*, 181 So. 3d 1207 (Fla. 1st DCA 2015) ("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. We disagree." (citing *Harris*).

cision in *Gonzalez* v. *State*, 41 So. 3d 1050 (Fla. 2d DCA 2010), because the First District misread Rule 3.853(b)(4) as including the word "and," whereas *Gonzalez* correctly read it as using the word "or." For the second issue, there is an express conflict between the First District and the Second District's decision in *Harris*, which held the denial of a facially sufficient Rule 3.853(b)(4) motion is automatically reversible rather than reviewable for harmless error. Although the third issue raises no express or implied conflict, this Court may still exercise its discretion to consider harmlessness. *Savoie*, 422 So. 2d at 310; *Jacobson*, 476 So. 2d at 1285.

II. ISSUE 1: THE RULE 3.853 MOTION WAS FACIALLY SUFFICIENT

The State acknowledges the First District misread Rule 3.853(b)(4) when it used the word "and" instead of "or." *See* Answer Br. 11 ("If the First District had found the motion was facially insufficient solely because the Appellant failed to allege one alternative without consideration of the other, then the Appellant might have an argument."). Accordingly, the State apparently agrees that Mr. Gresham's motion was facially sufficient if he met either alternative under Rule 3.853(b)(4). *See* Answer Br. 11. But the State still defends the First District's result because it nevertheless "considered both alternatives." Answer Br. 11. The State is incorrect.

A. The Rule 3.853 Motion Sufficiently Alleged How The DNA Evidence Would Exonerate Mr. Gresham, And Mr. Gresham Never Had An Opportunity To Correct Any Pleading Insufficiency

As to the exoneration alternative, the State concedes Mr. Gresham Rule 3.853 motion "does make conclusory statements DNA testing will exonerate him." Answer Br. 12. But it contends those statements were not sufficient because they "never specifically explain[ed] how the testing he want[ed] the court to order w[ould] exonerate him." Answer Br. 12. The State claims this was required by *Hitchcock* v. *State*, 866 So. 2d 23 (Fla. 2004).

But *Hitchcock* is distinguishable because that petitioner declined an opportunity to remedy any pleading defect. *Id.* at 26 ("Despite the State's suggestion that the court provide Hitchcock with additional time to file a more substantive motion, Hitchcock stood by his original motion, arguing that it met the statutory requirements."). The record does not show Mr. Gresham declined any similar opportunity. At best, then, the State's argument establishes the trial court should have rendered its denial without prejudice and with leave to file an amended motion.

For precisely the same reason, the State misplaces its reliance (Answer Br. 14) on *Rosa* v. *State*, 147 So. 3d 583 (Fla. 4th DCA 2014). *Rosa* did hold a Rule 3.853 motion was facially insufficient when it "alleged that none of his DNA would be found in the victim's sexual assault kit," but "d[id] not explain how, under the circumstances of this case, this would exonerate him or mitigate the sen-

tence that he received." *Id.* at 584. But *Rosa* also took pains to note "[o]ur affirmance is without prejudice to appellant filing a facially sufficient motion." *Id.*

Perhaps anticipating its misplaced reliance on *Hitchcock* and *Rosa*, the State contends this Court should not consider Mr. Gresham's argument that the denial should have been without prejudice because Mr. Gresham did not raise it below. But imposing such a requirement on pro se litigants like Mr. Gresham is pointless. *Compare Bank* v. *Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991), *with Wagner* v. *Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 & n.1 (11th Cir. 2002) (en banc))). Additionally, the State notes that the post-conviction court denied Mr. Gresham's second Rule 3.853 motion. Answer Br. 18-19. But the record's silence with respect to whether Mr. Gresham had an opportunity to cure any pleading deficiency is a point in Mr. Gresham's favor, not the State's favor.

Finally, the State complains Mr. Gresham cited "no scientific or legal authorities" regarding exoneration. Answer Br. 13. The State is mistaken. There is no such requirement, and Mr. Gresham already explained how his exoneration allegations were sufficient. Initial Br. 13.

B. The Rule 3.853 Motion Implicitly Alleged Identification Was Genuinely Disputed, And Mr. Gresham Never Had An Opportunity To Correct Any Pleading Insufficiency

The State contends Mr. Gresham did not implicitly allege his identification was disputed and that, even if he had, any implicit allegations were insufficient.

Answer Br. 16. This argument does not address the post-conviction court's ruling that Mr. Gresham did implicitly make precisely that allegation. App. B2.

III. ISSUE 2: THE DENIAL OF THE FACIALLY SUFFICIENT RULE 3.853 MOTION ON THE MERITS BEFORE THE STATE RESPONDED IS NOT REVIEWABLE FOR HARMLESS ERROR, BUT INSTEAD IS SUBJECT TO *PER SE* REVERSAL

Citing a 40-year-old case, the State contends that given Rule 3.853(b)(4)'s "context," the word "shall" does not mean "shall." Answer Br. 21 (citing *White* v. *Means*, 280 So. 2d 20 (Fla. 1st DCA 1973)). The State is mistaken.

First of all, even *White* acknowledged the "normal meaning of the word 'shall' is mandatory by nature." 280 So. 2d at 21. And the statutory context refutes the State's contention. In its entirety, Rule 3.853(c) reads as follows:

> (c) Procedure.
>
> (1) Upon receipt of the motion, the clerk of the court *shall* file it and deliver the court file to the assigned judge.
>
> (2) The court *shall* review the motion and deny it if it is facially insufficient. If the motion is facially sufficient, the prosecuting authority *shall* be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.
>
> (3) Upon receipt of the response of the prosecuting authority, the court *shall* review the response and enter an order on the merits of the motion or set the motion for hearing.
>
> (4) In the event that the motion shall proceed to a hearing, the court *may* appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and upon a determination of indigency pursuant to section 27.52, Florida Statutes.
>
> (5) The court *shall* make the following findings when ruling on the 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 a 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.

(6) If the court orders DNA testing of the physical evidence, the cost of the testing *may* be assessed against the movant, unless the movant is indigent. If the movant is indigent, the state *shall* bear the cost of the DNA testing ordered by the court.

(7) The court-ordered DNA testing *shall* be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, upon a showing of good cause, *may* order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or Forensic Quality Services, Inc. (FQS) if requested by a movant who can bear the cost of such testing.

(8) The results of the DNA testing ordered by the court *shall* be provided in writing to the court, the movant, and the prosecuting authority.

Fla. R. Crim. P. 3.853(c) (emphases added).

Here, when this Court promulgated Rule 3.853(c), it used the word "shall" whenever it wanted something to be mandatory and the word "may" whenever it wanted something to be permissive. *See The Florida Bar* v. *Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002) ("The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.'"). It is

simply inconceivable that the word "shall" as used in Rule 3.853(c)(2) is permissive when Rule 3.853 repeatedly uses the words "shall" and "may" to mean very different things.[2]

As a backstop, the State argues the error was not harmful. Answer Br. 22-24. As Mr. Gresham previously explained, the State is mistaken for many legal and policy reasons. Initial Br. 20-22. Moreover, this Court should remember state court post-conviction decisions are always subject to federal habeas review. To the extent this Court permits procedural shortcuts that deprive post-conviction petitioners of due process and prevent the creation of reviewable records, it may eventually undermine the deference with which federal courts treat those state court decisions. *See Patterson* v. *Sec'y, Fla. Dep't of Corr.*, 2017 U.S. App. LEXIS 3852, at *29 (11th Cir. 2017) (en banc) (Jordan, Wilson, Martin, Jill Pryor, JJ., dissenting) (suggesting "the trust we place in state courts to adjudicate issues of federal law (both statutory and constitutional)" might be "completely misplaced, and the deference we give them under AEDPA" could be "a colossal and unjustified mistake").

[2] *Compare* Fla. R. Crim. P. 3.853(c)(4) (court "may" appoint counsel), (c)(6) (court "may" assess costs against movant), (c)(7) (court "may" order certified laboratory or agency other than FDLE to conduct testing upon showing of good cause if requested by movant who can bear additional cost), *with id.* 3.853(c)(1) (clerk "shall" file motion and deliver to judge), (c)(2) (court "shall" review motion, deny it if facially insufficient, or order State to respond if facially sufficient), (c)(3) (court "shall" review response and enter order on merits or convene hearing), (c)(5) (court "shall" make findings), (c)(7) (FDLE or its designee "shall" conduct court-ordered DNA testing), (c)(8) (DNA test results "shall" be provided in writing to court, movant, and prosecutor).

Procedure is important. It exists to ensure that courts reach correct results for correct reasons. This Court should insist those mandatory procedures be followed.

IV. ISSUE 3: IN ANY EVENT, THE DENIAL OF THE RULE 3.853 MOTION WAS NOT HARMLESS

As an initial matter, the State does not acknowledge the heavy burden it would have to carry to establish harmlessness. *See* Answer Br. 25-29. Specifically, it is the State's burden to establish "beyond a reasonable doubt," *Guzman* v. *State*, 941 So. 2d 1045, 1050-51 (Fla. 2006), that "in light of the other evidence of guilt" there was no "reasonable probability" that Mr. Gresham "would have been acquitted," *Sireci* v. *State*, 908 So. 2d 321, 325 (Fla. 2005). The State cannot carry this heavy burden.

Second, the State also does not address whether the First District's harmlessness determination was premature because the record on appeal did not include the entirety of the trial transcripts or exhibits at trial. *Compare* Initial Br. 23, *with* Answer Br. 25-29.

Finally, the State does not address the false equivalency between (1) the jury knowing that the State would introduce no DNA evidence, and (2) the jury knowing that Mr. Gresham would introduce DNA evidence that showed that the saliva and sweat oils found in the victim's labial and genital swabs did not come from him. *Compare* Initial Br. 23, *with* Answer Br. 25-29. In that regard, the State misplaces its reliance on *Sireci* and *Scott* v. *State*, 46 So. 3d 529 (Fla. 2009).

Sireci involved a petitioner about whom "seven witnesses testified [he] admitted to them that he killed Poteet." 908 So. 2d at 325. *Scott* involved a petitioner who conceded he was present at the murder scene and was involved in an altercation with the victim, so he could not "reasonably show how the absence of his blood would give rise to a reasonable probability that he did not commit the crime." 46 So. 3d at 533. Here, however, the DNA evidence would show the saliva and sweat oils found in the victim's labial and genital swabs did not come from Mr. Gresham. *See* Initial Br. 24. Accordingly, the denial was not harmless.

CONCLUSION

For the foregoing reasons, the Court should reverse the First District's judgment and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 16, 2017, I electronically served the following via the Florida e-portal: AAG Trisha Meggs Pate (trisha.pate@myfloridalegal.com & crimapptlh@myfloridalegal.com) and AAG Michael Schaub (michael.schaub@myfloridalegal.com & crimapptlh@myfloridalegal.com) of the Office of the Attorney General, The Capitol PL-01, Tallahassee, FL 32399-1050.

March 16, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

March 16, 2017

/s/ Thomas Burns
Thomas A. Burns