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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

INITIAL BRIEF OF ROBERT N. GRESHAM

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STATEMENT OF THE CASE AND FACTS

This appeal concerns the procedural pleading requirements for a facially sufficient Rule 3.853 motion for post-conviction DNA testing, whether the denial of an otherwise facially sufficient Rule 3.853 motion on the merits before the State responds can be reviewed for harmless error or is subject to *per se* reversal, and whether any error was in fact harmless.

Statement Of The Case

By information, the State charged Robert Gresham with capital sexual battery in violation of § 794.011(2)(a), *Fla. Stat.* (2003), and one count of lewd or lascivious molestation in violation of § 800.04(5)(b), *Fla. Stat.* (2003).[1] *See* R. 136-37. A jury found Mr. Gresham guilty of all charges. *See* App. B1. The trial court sentenced Mr. Gresham to life imprisonment for the capital sexual battery counts and 30 years' imprisonment for the lewd or lascivious molestation count. *See* App. B1. Mr. Gresham took a direct appeal, which was affirmed. *See Gresham* v. *State*, 908 So. 2d 1114 (Fla. 1st DCA 2005).

[1] "A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.141." § 794.011(2)(a), *Fla. Stat.* (2003). "An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." § 800.04(5)(b), *Fla. Stat.* (2003).

About a decade later, Mr. Gresham filed a post-conviction Rule 3.853 motion for DNA testing pursuant to § 925.11, *Fla. Stat.* R. 1-125. The post-conviction court never provided Mr. Gresham any opportunity to address any supposed facial insufficiency in his motion or directed the State to respond. *See* R. 132-60. Instead, it denied the motion on the merits. R. 132-60. Mr. Gresham moved for rehearing (App. C1-C10), which the post-conviction court denied (App. D1-D2).

After Mr. Gresham appealed and filed his initial brief, the First District issued a *Toler*[2] order and directed the State to respond. App. E. The State responded (App. F1-F4), and Mr. Gresham replied (App. G1-G15). Thereafter, the First District affirmed the trial court's denial of the Rule 3.853 motion. *See Gresham* v. *State*, 181 So. 3d 1207 (Fla. 1st DCA 2015); App. H1-H4. Mr. Gresham moved for rehearing en banc (App. I1-I16), which the First District denied (App. J1).

This appeal followed.

Statement Of The Facts

A. The Rule 3.853 Motion

In his Rule 3.853 motion, Mr. Gresham stated he was actually innocent and explained that, at trial, an investigator testified about many of the victim's unreliable hearsay statements, including that "white stuff came out of [Mr. Gresham's] 'pee pee' and landed on her stomach," that Mr. Gresham "wiped her stomach with

[2] *Toler* v. *State*, 493 So. 2d 489 (Fla. 1st DCA 1986).

a washrag," that Mr. Gresham "had touched her between her legs with his hand and tried to place his fingers inside her 'private area,'" and that Mr. Gresham had "kissed and licked her on her 'private area.'" App. A4, A6. Mr. Gresham claimed, however, that newly obtained documents from the Florida Department of Law Enforcement ("FDLE") indicated that when it had performed a saliva swab, labial swab, and genital swab, it found no semen (acid phosphatase) and inconclusive results for the presence of saliva. App. A38. Moreover, Mr. Gresham claimed FDLE had never looked for skin cells (EPI or epidermal cells) or sweat oils (Sebus or oils from the sebaceous gland). App. A2-A3.

Accordingly, Mr. Gresham asked the post-conviction court to order further DNA testing because that "evidence was found and never compared against the Defendant." App. A7. He claimed that DNA testing would exonerate him. App. A5. Additionally, Mr. Gresham asked the post-conviction court to order DNA testing of several articles of clothing. App. A1-A7.

B. The Order Denying Post-Conviction Relief

Without waiting for the State to respond or giving Mr. Gresham the opportunity to correct any pleading deficiency, the post-conviction court denied the motion on the merits. App. B1-B4.

First, it concluded Mr. Gresham's prior Rule 3.850 motion, which argued his trial counsel was ineffective for failing to determine whether he could pursue an

insanity defense, was "inherently an admission" that he "committed the charged act[s]." App. B3.

With respect to DNA testing the articles of clothing, the post-conviction court noted FDLE previously found no semen or saliva on the articles of clothing, so "there was no seminal or saliva DNA to test." App. B3. As such, the post-conviction court ruled there was "no purpose in testing the physical evidence listed in Defendant's motion for non-seminal and non-saliva DNA because Defendant and the victim lived together, meaning that the existence or absence of Defendant's non-seminal and non-saliva (i.e., from skin or sweat) DNA on these items is irrelevant." App. B4.

Additionally, the post-conviction court considered Mr. Gresham's argument about testing skin cells and sweat oils on the labial and genital swabs "nonsensical," because "[t]here was no DNA evidence presented in this case" and "the jury was aware there was no DNA evidence." App. B3. Accordingly, the post-conviction court concluded, "even if Defendant's skin cells or sweat were not found in the sexual assault kit, that fact would not have affected the outcome of this case." App. B3.

C. The Motion For Rehearing

In his motion for rehearing, Mr. Gresham contended the skin and saliva DNA found "was never tested," so his Rule 3.853 motion was "a facially and legally sufficient pleading." App. C5.

D. The Order Denying Rehearing

In a perfunctory order, the post-conviction court denied rehearing. App. D1.

E. The Appellate Proceedings

On appeal, the First District affirmed. App. H1-H4.

First, the First District concluded Mr. Gresham's Rule 3.853 motion was not facially sufficient because he was required to "allege that identification was a genuinely disputed issue at trial *and* explain how the DNA testing will exonerate him." App. H2 (emphasis added).

Mr. Gresham could not meet that standard, the First District ruled, because he "did not and cannot allege that identity was genuinely disputed." App. H3. Specifically, he could not allege identification was genuinely disputed because he "was the boyfriend of the victim's mother," "lived in the home with the victim," "confessed to police officers that he sexually abused the victim," and "implicitly admitted to committing the crime in a prior post- conviction motion." App. H3 & n.1. Additionally, he also could not 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," so further DNA testing "would only confirm a fact of which the jury was already aware, that Appellant's DNA was not found on the victim." App. H3. Because the First District ruled the motion was not facially sufficient, it further ruled "the trial court did not err in denying the motion without first receiving a response from the State." App. H3.

Second, the First District also ruled, "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." App. H3. In doing so, the First District expressly disagreed with the Second District's opinion in *Harris* v. *State*, 183 So. 3d 1065 (Fla. 2d DCA 2015), and distinguished its own opinion in *Girley* v. *State*, 935 So. 2d 55 (Fla. 1st DCA 2006), because "the portions of the record showing that Appellant's request for DNA testing was meritless are attached to the order on appeal." App. H4. In sum, the First District explained, "[b]ecause 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." App. H4.

Again, Mr. Gresham moved for rehearing en banc. App. I1-I16. In that motion, Mr. Gresham pointed out that if his Rule 3.853 motion was facially insufficient in some respect, he was entitled to an opportunity to amend it. App. I1-I2.

Additionally, Mr. Gresham pointed out that the First District misinterpreted Rule 3.853(b)(4) because it substituted the word "and" for "or." App. I2. Finally, Mr. Gresham noted that by jumping directly to the merits instead of ordering a State response, the post-conviction court undermined "confidence in the judicial system." App. I7. The First District denied rehearing. App. J1. This appeal followed.

SUMMARY OF ARGUMENT

1. The Rule 3.853 motion was facially sufficient: it adequately alleged identification was genuinely disputed at trial and explained how the DNA testing would exonerate Mr. Gresham. The First District erred when it substituted "and" for "or" in Rule 3.853(b)(4) and overlooked the motion's pertinent allegations.

2. If the Rule 3.853 motion was facially sufficient, its denial on the merits before the State responded was subject to *per se* reversal. Until the First District had ruled in this appeal, the case law throughout Florida's district courts of appeal had uniformly held post-conviction courts should never deny a facially sufficient Rule 3.853 motion until after the State had responded on the merits. Although this Court had previously held the denial of a facially insufficient Rule 3.853 motion could be reviewed for harmless error in *Sireci* v. *State*, 908 So. 2d 321, 325 (Fla. 2005), that case is distinguishable because the post-conviction court had waited for the State to respond before denying the Rule 3.853 motion as facially insufficient.

There are many policy reasons why dispensing with that procedural requirement should not be reviewed for harmless error.

3. Even if the Rule 3.853 motion was either facially insufficient or subject to harmless error review, its denial was far from harmless.

ARGUMENT

I. ISSUE 1: WAS THE RULE 3.853 MOTION FACIALLY SUFFICIENT?

Mr. Gresham's Rule 3.853 motion was facially sufficient because it adequately alleged identification was a genuinely disputed issue at trial and explained how the DNA testing would exonerate him. The First District erred when it substituted "and" in place of "or" in Rule 3.853(b)(4) and overlooked the motion's pertinent allegations.

Standard Of Review

The denial of a Rule 3.853 motion as facially insufficient is reviewed de novo. *See Sireci* v. *State*, 908 So. 2d 321, 324 (Fla. 2005) ("Sireci contends that the circuit court erred in ruling that his motion failed to meet the requirements of rule 3.853(b)(3) and (4). We agree."); *cf. Willacy* v. *State*, 967 So. 2d 131, 138 (Fla. 2007) (denial of Rule 3.850 motion without evidentiary hearing reviewed de novo).

Merits

A. To Be Facially Sufficient, A Rule 3.853 Motion Must Include Several Mandatory Allegations

The purpose of Rule 3.853 is to "provide[] procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes." Fla. R. Crim. P. 3.853(a). In addition to being verified under oath, a Rule 3.853 motion must include:

> (1) a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;
>
> (2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime;
>
> (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
>
> *(4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;*
>
> (5) a statement of any other facts relevant to the motion; and
>
> (6) a certificate that a copy of the motion has been served on the prosecuting authority.

Fla. R. Crim. P. 3.853(b) (emphasis added). The disputed language in this appeal is contained in Rule 3.853(b)(4), which this Court had modified in *Amendment to Fla. Rules of Crim. Procedure Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633, 634-35 (Fla. 2001). In that opinion, this Court explained, "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*." *Id.* at 634-45 (emphasis in original)).

Upon receipt of a Rule 3.853 motion, a trial court clerk "shall file it and deliver the court file to the assigned judge." Fla. R. Crim. P. 3.853(c)(1). At that point, a post-conviction 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." Fla. R. Crim. P. 3.853(c)(2). It is only after "receipt of the response of the prosecuting authority" that a post-conviction court "shall review the response and enter an order on the merits of the motion or set the motion for hearing." Fla. R. Crim. P. 3.853(c)(3). Moreover, when ruling on the motion's merits, a post-conviction court "shall make the following findings":

> (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.

Fla. R. Crim. P. 3.853(c)(5). The post-conviction court did not make any findings under Rule 3.853(c)(5)(A) or (B), but did find the requested DNA testing would not have changed the result at trial. App. B3-B4.

B. Contrary To The First District's Opinion, The Rule 3.853 Motion Was Facially Sufficient

The First District erred when it ruled Mr. Gresham's Rule 3.853 motion was facially insufficient because it misread both the requirements of Rule 3.853(b)(4) and the motion itself.

Rule 3.853(b)(4) requires a movant to swear under oath to "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). Case law has recognized the significance of the "or" in the middle of that rule: "[Rule 3.853(b)(4)] 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." *Gonzalez* v. *State*, 41 So. 3d 1050,

1051 (Fla. 2d DCA 2010) (emphasis added) (Rule 3.853 motion was facially sufficient under Rule 3.853(b)(4) despite failing to expressly allege identification was genuinely disputed issue); *see also Davis* v. *State*, 11 So. 3d 977, 978 (Fla. 1st DCA 2009) ("'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'" (quoting *Crow* v. *State*, 866 So. 2d 1257, 1260 (Fla. 1st DCA 2004)).[3]

Notwithstanding that "alternative" structure, the First District substituted the word "and" for "or" when it ruled, "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." App. H2 (emphasis added). This misreading is plainly contrary to the express language of Rule 3.853(b)(4) and its textually faithful interpretations in *Gonzalez*, *Crow*, *Alvarez*, and *Caldwell*. It is wrong and should be rejected. *E.g.*, *Wilson* v. *Salamon*, 923 So. 2d 363, 366 (Fla. 2005) (interpreting the "plain language of the rule").

[3] Federal courts read Rule 3.853(b)(4) the same way. *E.g.*, *Alvarez* v. *Att'y Gen. for Fla.*, 679 F.3d 1257, 1266 n.2 (11th Cir. 2012) ("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.'" (quoting Fla. R. Crim. P. 3.853(b)(4))); *Caldwell* v. *McCabe*, 2013 U.S. Dist. LEXIS 144734 (M.D. Fla. Oct. 7, 2013) ("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.'" (quoting Fla. R. Crim. P. 3.853(b)(4))).

1. The Rule 3.853 Motion Sufficiently Alleged How The DNA Evidence Would Exonerate Mr. Gresham

Mr. Gresham sufficiently alleged how the DNA evidence would exonerate him. Specifically, his Rule 3.853 motion alleged, "The tested evidence does exonerate the Defendant, and . . . new tests of EPI [skin cells] and Sebus [sweat oils] will support this fact." App. A3. The motion further alleged that the DNA test results, which were not disclosed to the jury, "demonstrate[d] the testimony of an alleged ejaculation to be false." App. A3. Additionally, the Rule 3.853 motion alleged that when FDLE compared the skin cells and sweat oils found in the victim's labial and genital swabs, they would not be consistent with his DNA, thereby exonerating him. App. A3-A4, A7 ("evidence was found and never compared against the Defendant"). Similarly, with respect to the articles of clothing, Mr. Gresham alleged, "the contact of these fabrics against his bare skin would have left DNA . . . in the form of epidermal cells and seba[ce]ous secretions." App. B7.

Additionally, based on its review of these allegations, the post-conviction court itself expressly recognized they were sufficient: "In support of his motion, Defendant contends that: (1) he is actually innocent of the crime; *(2) DNA testing of the limited items will exonerate him;* and (3) his identity as the perpetrator of the crime is a genuinely disputed issue." App. B2 (emphasis added).[4]

[4] To the extent the post-conviction court and the First District thought Mr. Gresham's prior Rule 3.850 motion fatally undermined his contention he was actu-

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

Mr. Gresham did not expressly allege identification was a genuinely disputed issue and why it was an issue, but he did so implicitly, the post-conviction court agreed, and he also was never afforded the opportunity to correct any shortcoming.

As an initial matter, the post-conviction court thought Mr. Gresham at least implicitly alleged "his identity as the perpetrator of the crime is a genuinely disputed issue." App. B2. But even if Mr. Gresham had not alleged his identity was genuinely in dispute, his supposedly "'facially insufficient Rule 3.853 motion'" should have been dismissed or denied "'*without prejudice* to permit refiling of a facially sufficient motion.'" *Rosa* v. *State*, 147 So. 3d 583, 583 (Fla. 4th DCA 2014) (emphasis added) (quoting *Bain* v. *State*, 963 So. 2d 913, 914 (Fla. 2d DCA 2007)); *cf. Spera* v. *State*, 971 So. 2d 754, 761 (Fla. 2007) ("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 tri-

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ally innocent, that theory falters at the gate because it is contrary to existing case law. *E.g.*, *Davis* v. *State*, 11 So. 3d 977, 978 (Fla. 1st DCA 2009) ("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.'" (quoting *Crow* v. *State*, 866 So. 2d 1257, 1260 (Fla. 1st DCA 2004))).

al court abuses its discretion when it fails to allow the Defendant at least one opportunity to amend the motion").

Gliding past this factual background and procedural framework, the First District appears to have been laboring under the misapprehension that identification could not be a genuinely disputed issue in a case like this because he "was the boyfriend of the victim's mother," "lived in the home with the victim," "confessed to police officers that he sexually abused the victim," and "implicitly admitted to committing the crime in a prior post- conviction motion." App. H3 & n.1. That is simply not the law.

For instance, the Second and Third Districts have reversed trial courts on precisely that basis. For instance, in post-conviction proceedings arising from a rape conviction based solely on the victims' eyewitness testimony and one pubic hair, where the movant's trial defense was mistaken identity, the Second District reversed the summary denial of DNA testing of the pubic hair:

> With regard to identity, we find it difficult to imagine circumstances under which identity could be any more genuinely disputed than it was here. *We have recently rejected the trial court's rationale that identity was not disputed simply because the victim identified the movant at trial.* Such a reading of the rule ignores both the rule's purpose and the general problems with eyewitness identification testimony.

Knighten v. *State*, 829 So. 2d 249, 251 (Fla. 2d DCA 2002) (emphasis added) (citing *Zollman* v. *State*, 820 So. 2d 1059 (Fla. 2d DCA 2002)). The Third District

reached a similarly expansive view of exoneration when it explained, "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." *Jordan* v. *State*, 950 So. 2d 442, 444 (Fla. 3d DCA 2007) (citing *Hampton* v. *State*, 924 So. 2d 34, 36 (Fla. 3d DCA 2006)).

Moreover, it would be extremely unwise to adopt the First District's unbending point of view, given the helpful ability of DNA testing to undermine wrongful convictions obtained through unreliable eyewitness testimony. "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States* v. *Wade*, 388 U.S. 218, 228 (1967). "The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country." *Perry* v. *New Hampshire*, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting) (citation and punctuation omitted). In fact, "[r]esearchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification." *Id.* at 738-39 (Sotomayor, J., dissenting) (citation omitted). Indeed, "[s]tudy after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; [and] that

jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy." *Id.* at 739 2012) (Sotomayor, J., dissenting) (collecting authorities). For instance, eyewitness identifications are often unreliable when they involve "cross-racial identification, identification after a long delay, identification after observation under stress, and such psychological phenomena as the feedback factor and unconscious transference." *United States* v. *Angleton*, 269 F. Supp. 2d 868, 873 (S.D. Tex. 2003).

C. If The Rule 3.853 Motion Was Facially Insufficient, This Court Should Vacate The First District's Judgment And Remand With Directions To Allow Mr. Gresham To Amend It

Even if the Rule 3.853 motion was facially insufficient, it should have been dismissed or denied "'without prejudice to permit refiling of a facially sufficient motion.'" *Rosa*, 147 So. 3d at 583 (quoting *Bain*, 963 So. 2d at 914); *cf. Spera*, 971 So. 2d at 761 ("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"). Accordingly, if this Court determines the First District Correctly determined the motion was facially insufficient, it should still vacate the First District's judgment and remand with directions to allow Mr. Gresham to amend it in the post-conviction court. *See infra* Arguments II & III.

II. ISSUE 2: IF THE RULE 3.853 MOTION WAS FACIALLY SUFFICIENT, WAS ITS DENIAL ON THE MERITS BEFORE THE STATE RESPONDED REVIEWABLE FOR HARMLESS ERROR, OR WAS IT INSTEAD SUBJECT TO *PER SE* REVERSAL?

If the Rule 3.853 motion was facially sufficient, its denial on the merits before the State responded was subject to *per se* reversal.

Standard Of Review

Many courts have held the denial of a facially sufficient Rule 3.853 motion is *per se* reversible. *E.g.*, *Harris* v. *State*, 183 So. 3d 1065, 1065 (Fla. 2d DCA 2015) (reversing denial of facially sufficient Rule 3.853 motion "on its merits" and remanding "for the postconviction court to comply with the procedural requirements of rule 3.853"). But this Court has previously reviewed the denial of a Rule 3.853 motion—after the State had responded—for harmless error. *Sireci*, 908 So. 2d at 325 ("we conclude that the circuit court erred in ruling that Sireci failed to meet the technical requirements of rule 3.853(b)(3) and (4)," but "[w]e find the error harmless").

Merits

A. Until The First District Ruled In This Appeal, Florida Case Law Uniformly Held The Denial Of A Facially Sufficient Rule 3.853 Motion On The Merits Before The State Responded Was *Per Se* Reversible Error

Until the First District decided this appeal, the case law throughout Florida's district courts of appeal had uniformly held post-conviction courts should never

deny a facially sufficient Rule 3.853 motion until after the State has responded on the merits:

> We note that 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. 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.

Zollman v. *State*, 820 So. 2d 1059, 1063 n.2 (Fla. 2d DCA 2002) (emphasis in original) (citing Fla. R. Crim. P. 3.853(c)(2) and (c)(3)); *see also 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."); *Harris*, 183 So. 3d at 1065 (reversing denial of Rule 3.853 motion on the merits for failure to wait for State's response); *Manual* v. *State*, 855 So. 2d 97, 98 (Fla. 2d DCA 2002) (error to summarily deny a legally sufficient rule 3.853 motion without ordering State to respond); *Cheshire* v. *State*, 872 So. 2d 427, 428 (Fla. 5th DCA 2004) (same).

B. Previously, However, This Court Had Held The Denial Of A Rule 3.853 Motion As Facially Insufficient After The State Had Responded Was Reviewable For Harmless Error

Previously, however, this Court had held the denial of a facially insufficient Rule 3.853 motion could be reviewed for harmless error: "we conclude that the circuit court erred in ruling that Sireci failed to meet the technical requirements of

rule 3.853(b)(3) and (4)," but "[w]e find the error harmless." *Sireci*, 908 So. 2d at 325. But in *Sireci*, and unlike cases such as *Zollman*, *Girley*, *Harris*, *Manual*, and *Cheshire*, the post-conviction court had already followed the procedural requirements of Rule 3.853(c)(2) by ordering the State to respond before addressing the motions merits. For that reason, *Sireci* is distinguishable and inapplicable.

C. This Court Should Reject The First District's New Minority Rule And Adopt The Majority Rule That It Is *Per Se* Reversible Error To Deny A Facially Sufficient Rule 3.853 Motion Before The State Has Responded And The Movant Has An Opportunity To Reply Or Address Any Facial Insufficiencies

There are numerous policy reasons why this Court should reject the First District's newly forged minority rule and adopt the existing majority rule that it is *per se* reversible error to deny a facially sufficient Rule 3.853 motion before the State has responded and the movant has an opportunity to reply or address any facial insufficiencies.

It is not an accident that Rule 3.850 allows trial courts to deny post-conviction motions on the merits before the State responds, whereas Rule 3.853 does not. *See, e.g.*, *Zollman*, 820 So. 2d at 1063 n.2. In the Rule 3.850 context, a post-conviction court can sensibly determine whether to grant relief based on the *existing* record. In contrast, in the Rule 3.853 context, the question is whether to give the movant the opportunity to *create* a forensic record from which he or she may be entitled to post-conviction relief. For that reason, the Legislature and this

Court saw fit to distribute post-conviction responsibilities between the movant, the post-conviction court, and the State: it is the movant's responsibility to make sufficient allegations, the post-conviction court's responsibility to ensure those allegations are sufficient, the State's responsibility to address those allegations on the merits by reference to the existing record, and the movant's responsibility to either correct any pleading deficiencies or to reply to any concerns on the merits. *See* Fla. R. Crim. P. 3.853(b)(1)-(4).

Instead of following that procedure, the post-conviction court short-circuited it. Whether or not that short circuit could have led to the correct result here (it did not, *see* Argument III), if permitted to continue, it inevitably would create inefficiencies and errors in the Rule 3.853 post-conviction procedure.

Often, the judge overseeing the post-conviction proceedings is not the same judge who oversaw the trial or sentence. It is a waste of judicial resources to allow post-conviction courts to plumb the depths of a trial court record without being directed to the pertinent portions by the State and the movant. Additionally, it is likely to lead to error, because the post-conviction court may focus on the wrong portion of that record or be unaware of the significance or context of other portions of the record.

Additionally, if the problem to be addressed is primarily one of pleading, then the movant ought to be entitled to a reasonable opportunity to remedy it. *E.g.*,

Rosa, 147 So. 3d at 583 (Fla. 4th DCA 2014); *cf. Spera*, 971 So. 2d at 914. But by skipping directly to the merits, a post-conviction court necessarily deprives a post-conviction movant of that opportunity.

These kinds of errors would necessarily be compounded on appeal, because it would often be too late for the movant to correct the record by asking the appellate court to supplement the record on appeal with the direct appeal record. *Cf. Hillsborough County Bd. of County Comm'rs v. Public Emp. Relations Comm'n*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982) ("Numerous cases have held that an appellate court may not take judicial notice of the record in a separate proceeding."). Obviously, this would frustrate appellate review of such orders.

For those reasons, this Court should continue to apply the existing bright line majority rule, even if for nothing more than its *in terrorem* effect to deter post-conviction courts from playing fast and loose with procedural rules under threat of *per se* reversal.

III. ISSUE 3: IF THE RULE 3.853 MOTION WAS EITHER FACIALLY INSUFFICIENT OR SUBJECT TO HARMLESS ERROR REVIEW, WAS ITS DENIAL HARMLESS?

Even if the Rule 3.853 motion was either facially insufficient or subject to harmless error review, its denial was far from harmless.

Standard Of Review

For an error to be harmless in the Rule 3.853 context, a court must determine whether "in light of the other evidence of guilt," there is any "reasonable probability" that the defendant "would have been acquitted." *Sireci*, 908 So. 2d at 325. Ordinarily, the State bears the burden of demonstrating an error was harmless by a reasonable doubt. *See Guzman* v. *State*, 941 So. 2d 1045, 1050-51 (Fla. 2006) ("Whatever terminology is used, the dispositive question is whether the State has established beyond a reasonable doubt [that the error was harmless].").

Merits

A. It Is Premature To Make Any Appellate Determination Whether Any Error Was Harmless Because This Court Does Not Have The Entirety Of The Direct Appeal's Record On Appeal

Without a complete record of all "other evidence of guilt," it is impossible for any post-conviction or appellate court to determine whether there is any "reasonable probability" that the defendant "would have been acquitted" after introduction of new DNA testing at a new trial. *Sireci*, 908 So. 2d at 325. For that reason, it was premature for the First District (and would be impossible for this Court) to rule any error was harmless. Accordingly, even if this Court determines that any error was subject to harmless error review, it should still vacate the judgment and remand for the First District to conduct that analysis in the first instance after reviewing the entirety of the direct appeal's record on appeal.

B. Based On The Post-Conviction Record, The State Cannot Meet Its Burden Of Proving Beyond A Reasonable Doubt That There Was No Reasonable Possibility The Jury Would Have Acquitted If The DNA Testing Established What Mr. Gresham Alleged It Would

Even if a harmless error review could be conducted on this limited post-conviction record, the State still cannot meet its burden of proving beyond a reasonable doubt that there was no reasonable possibility the jury would have acquitted if the DNA testing established what Mr. Gresham alleged it would.

The post-conviction court and the First District both drew a 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. Those are two very different things. The first is neither damning nor saving, whereas the second points toward innocence. At the very least, the existing post-conviction record does not "conclusively refute" Mr. Gresham's allegations. *Jordan* v. *State*, 950 So. 2d 442, 443 (Fla. 3d DCA 2007). That is why the DNA evidence would exonerate him, and that is why the denial on the merits of the Rule 3.853 motion was not harmless.

CONCLUSION

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

Respectfully submitted,

/s/ Thomas Burns

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 19, 2016, I electronically served the following via the Florida e-portal: AAG Trisha Meggs Pate (trisha.pate@myfloridalegal.com and crimapptlh@myfloridalegal.com) and AAG Michael Schaub (michael.schaub@myfloridalegal.com and crimapptlh@myfloridalegal.com) of the Office of the Attorney General, The Capitol PL-01, Tallahassee, FL 32399 -1050.

September 19, 2016 /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.

September 19, 2016 /s/ Thomas Burns
Thomas A. Burns