IN THE SUPREME COURT OF FLORIDA

MARSHALL LEE GORE,

Appellant,

v. CASE NO. 75,955

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Gore's statement of the case and facts with the following additions.

Dr. William Maples, a forensic anthropologist, reviewed Susan Roark's skeletal remains on April 7, 1988. (TR 1094-1096). He received the skeletal remains which contained mummified soft tissue, skin, muscle, fibers and a detached head which had been removed at the medical examiner's office. As a result of his observations, he found that in the right breast area the skin had been eaten away either due to maggots or having been cut away or a combination of both. (TR 1099). Dr. Maples observed that this condition was unusual in that in a hundred examinations he had performed similar to this one, he had only seen one other where the breast area had been in such a state. He also found that with regard to the neck region, similar trauma occurred because of the condition of the neck region. He found that more likely than not stab wounds occurred at the neck area which could have severed the spinal cord causing immediate death. (TR 1106). It was his opinion that the nick on the back of the neckbone probably occurred at the time of death and not when the medical examiner's office removed the head from the body. (TR 1109-1110). It was his estimation that based on the condition of the skin, that the body had been in the isolated area between two and six months. (TR 1112). He also observed that the victim's body was placed there before rigor mortis had set in and that that at one point the hands were tied at the wrists. (TR 1114). On cross examination, Dr. Maples testified that he believed there

was trauma to the breast area which encouraged the maggots and that the body did not have a lot of animal damage. (TR 1123-1125).

Dr. Vernon Bryant, Susan Marie Roark's dentist, compared his charts with those dental charts from the medical examiner's office and determined that body examined, was Susan Roark. (TR 1135).

Dr. Bonifacio Floro, deputy chief medical examiner, performed an autopsy on the remains of Susan Roark on April 3, 1988. (TR 1139). He testified that the condition of the skeletal remains reflected that maggots had eaten all the internal organs and that the skin on the remains was leathery due to exposure. He observed a small hole roughly three inches by two inches in the right breast region. (TR 1140). Based on his observations, he concluded that death was by homicidal violence because this was (1) a young woman with no history of chronic illness, and (2) she was found without clothing in the middle of a field. (TR 1142). He observed that the manner of death could have been either by strangulation or a stabbing or slashing in the neck area. (TR 1145). He made this conclusion because of the absence of a neck area; postulating that neck area must have had an open wound or trauma which would have caused its deterioration much faster than the rest of the body. (TR 1146).

In performing his autopsy, he did dislodge the head from the body and observed that the procedure went without incident. (TR 1147). It was his view that she either died there or was placed there within two hours of her death and that the death

occurred approximately two months earlier. (TR 1150-1151). On cross examination, he observed that he could not test for drugs in the blood because there was no tissue to examine for toxicological study. Although he could not rule out a drug overdose as the cause of death, Dr. Floro concluded that it was not likely that she would be naked in the woods away from her home and die from a drug overdose. (TR 1157-1158). With regard to the nick on the back of the neckbone, he doubted whether that was caused by the procedure used to sever the head from the body performed at the medical examiner's office. Rather, he observed that the nick was a result of a stabbing rather than a scraping or cutting motion, and that the nick was caused at the time of the murder. (TR 1161). The doctor, on redirect, testified that with a reasonable degree of scientific certainty, death was homicidal. (TR 1169).

Additionally, Susan Brown testified that the Appellant, Marshall Lee Gore (Tony), without any advance notice, arrived in Tampa, Florida, on Superbowl Sunday in 1988, driving a black mustang. He told her that he "got the car from his mother". (TR 1421-1424). He told her that he had driven all night to get there and had arrived around 6:00 p.m. (TR 1425). He asked her help in pawning some jewelry which he said his girlfriend had given him. (TR 1425). On January 31, 1988, Ms. Brown and Gore went to a number of pawn shops in Tampa, Florida, and pawned several items of jewelry. (TR 1426-1432). Ms. Brown testified that one of the items that could not be pawned was a class ring with the initials S.M.R. on it. (TR 1427). She recalled looking

at the initials to see if she knew who the ring belonged to and then returned it to Gore. (TR 1428). On cross examination she admitted that she pawned the jewelry in her name but that was what Gore asked her to do since he claimed not to have a driver's license. (TR 1450). Records from the Pawn and Gun Exchange supported Ms. Brown's testimony with regard to the pawning of jewelry on January 31, 1988. (TR 1475, 1480, 1489).

Gabe Alchediak, owner of a pawn shop on Nebraska Avenue in Tampa, Florida, testified that he purchased a necklace from Susan Brown in February 1988. It was a sixteen inch flat herringbone. He remembered the transaction because of the unusual length of the chain. (TR 1501). He testified that a white man with dark hair and slender built about 5'10" accompanied Susan Brown when she pawned the herringbone chain. (TR 1499).

Ralph Garcia, a crime scene investigator for the Miami Police Department, processed a black mustang, tag number 12811JX on March 17, 1988. The car had been in an accident and was impounded. (TR 1549). As a result of the search, he found a yellow metal chain with a teddy bear charm in the rearview mirror (TR 1524), earrings on the sunvisor (TR 1526), two pillows, one multi-colored with a goose on it (TR 1528, 1530), a psychology textbook with Susan Roark's name inside (TR 1537), a notecard from Beauty Craft Florist with the following inscription: "To Susan, just because I care. With love, Scott.", and a traffic ticket with Marshall Gore's name on it (TR 1541).

The State called a number of **Williams** Rule witnesses, one of which was Tina Corolis. She testified that in March 1988, she

knew a man named Tony who she identified in court as the defendant. (TR 2054). On March 14, 1988, she received a call from him that his car had broken down and he needed a ride. (TR 2054). She agreed to pick him up and as a result, she and her son drove her knew red toyota to where Tony said his car was. (TR 2055). She eventually picked him up and as a result of series of events, was ultimately beaten and stabbed and left for dead in a dump area in South Dade County. (TR 2058). When she regained conscienceness, her car and son were gone. (TR 2059). She had stab wounds about the neck, arms, legs and her buttocks. (TR 2059). Her jewelry: three gold rings, a diamond cut bracelet, necklace with a Jesus medallion, a plain chain and emerald earrings were also missing. (TR 2061).

Ms. Corolis was cross examined by the defendant personally following an extensive inquiry as to Gore's ability to serve as co-counsel. (TR 2079-2102). Mr. Gore's personal cross examination of Ms. Corolis was generally an attack on her character and her reputation for veracity. On redirect, Ms. Corolis testified that as a result of her injuries, she spent two weeks in the hospital. She described her physical appearance as 5'3" tall weighing one hundred and five pounds. (TR 2118).

Ashley Gore, Appellant's nephew, testified that in March 1988, Appellant arrived in Ledbetter, Kentucky, driving a red toyota. (TR 2164). He testified that Appellant told him his girlfriend gave him the car. (TR 2165). Mr. Gore also testified that at some point later, after Appellant had been arrested, Appellant called him and told him "I did not do it" -- "I was on

a plane over Miami when it happened" -- when Susan died. (TR 2167).

Rex Gore, Appellant's uncle, testified that when Appellant arrived on March 18, driving a red toyota, Appellant told him that a woman had bought the car for him. (TR 2169).

Following an extensive suppression hearing during the middle of trial, the following statements were admitted into evidence.

FBI agents L.D. McGuinty and Larry Faust transported Gore from Ledbetter, Kentucky, to Hopkinsville, Kentucky. During the course of this trip, no questions were asked of Gore. However, Gore made a statement to the officers that "they would be famous" because someone would write a book about him (Gore). (TR 2176, 2203-2205).

Officer David Simmons of the Metro Dade County Police Department testified when Gore arrived in Miami, he was advised of his rights but refused to sign the rights form. (TR 2211-2214). During this period, Gore acknowledged that he had spoken to the federal public defenders in Kentucky and they had told him not to cooperate with police. Officer Simmons testified that Gore said he wasn't going to listen to that and proceeded to talk with the officers. As a result of the discussions, the following "statements" made by Gore were admitted into evidence: that Gore told the officers that he never recalled driving a 1986 black mustang nor had he ever met Susan Roark before (TR 2217); that he did not know Tina Marie Corolis nor did he go to the Cash Mart Pawn Shop and he did not know what the officers were talking

about. He further stated he knew nothing about a red 1987 toyota. (TR 2218-2219).

During the defense's case, Gore sought a continuance in order to obtain the live testimony of Stephanie Refner. Ms. Refner's sworn deposition reflected that she saw Susan Roark in Cleveland, Tennessee, on February 6, after the period of time Susan had disappeared. Dewey Chastain, a member of the Cleveland, Tennessee Police Department, testified that they placed ads in newspapers regarding the whereabouts of Susan Roark. He received a call from Stephanie Refner on or about February 15, at which time Ms. Refner stated she thought she saw Susan Roark on February 6. (TR 2363). On cross, Officer Chastain testified that no one but Stephanie Refner made any reports of seeing Susan Roark after her disappearance. (TR 2367-2368). The State called Randall Giles and Harold Roark as rebuttal witnesses. Mr. Giles testified that the last time he saw Susan Roark was the day she was parked at the Aztec or Texaco station and that she was on her way to a party at Eades Bluff Road. He recalled that she was reported missing the next day. (TR 2379). He also testified that he took part in looking for Susan thereafter and occasionally saw a black mustang that he thought might be hers. None of the drivers turned out to be Susan Roark. (TR 2379-2380). Harold Roark testified that Susan Roark was reported missing on January 31, 1988. He assisted in searching for her car and although he saw one car that looked like hers, the driver was not Susan. (TR 2388).

At the penalty phase of Gore's trial, the State introduced, through the testimony of Lou Pazzaro, a certified copy of the judgments and sentences in Case No. 88-9827, Dade County Florida. (TR 2590-2593). On January 2, 1991, in **Gore v. State**, ____ So.2d ____ (Fla. 3rd DCA 1991), 16 F.L.W. D105, the Third District Court of Appeals affirmed all counts with the exception of Gore's conviction for attempted murder of the victim's child, James Corolis based on **Lane v. State**, 388 So.2d 1022 (Fla. 1980); and reversed Gore's conviction for possession of a weapon during the course of a criminal episode, pursuant to **Carawan v. State**, 515 So.2d 161 (Fla. 1987).

The defense, at the penalty phase, presented the testimony of Brenda Gore, Appellant's forty-six year old mother. (TR 2596). The bulk of her testimony concerned how she was brutalized and beaten by her husband in front of her children. She testified that she was married on April 4, 1961, and finally divorced in 1987, after twenty-six years of marriage. (TR 1597-2598). She had five children, two boys and three girls, Michael James Gore, age twenty-eight; Marshall Lee Gore, age twenty-six; Misty Diane Gore, age nineteen; Michelle Lee Gore, age eighteen; and Mindy Marie Gore, age thirteen. (TR 2598). She testified that early on in her marriage, she and her husband fought and that many times they separated. (TR 2600). Her husband beat her in the presence of her children and that was the reason she would leave periodically. (TR 2602). Although she never sustained broken bones, she had black eyes and had a ruptured eardrum from the beatings. (TR 2603). Her husband was constantly in trouble

with the law and she detailed how, on a number of occasions, he was under criminal investigation. (TR 2604-2606). She detailed an event when her husband was in trouble prior to Gore being born and that when Gore was a baby, her husband was arrested for cartage theft. (TR 2605). She noted that her husband would use aliases and would treat the children like dogs, especially the boys. (TR 2609-2614). She remembered one occasion when Gore got cut on the leg when his father tried to kick him and Gore fell on a nail. (TR 2615). Generally, she portrayed her husband as a bad person who would take his son's paychecks and brought marijuana into the house. (TR 2617-2618). When her husband was not present, she was the sole support for the family and had to rent out rooms in her house to borders. (TR 2619).

She testified her son, Marshall, loved his father no matter what his father did to him and that she believed he loved his father more than her. (TR 2620). Her other son, Michael, hates his dad and hasn't spoken to his father for some time. She recalled a time when Marshall was seventeen or eighteen years old and decided to change his name. He wanted to be called Whitey. (TR 2622). Marshall purportedly tried to commit suicide after a fight with his father by ingesting a bottle of Valium. (TR 2624). Although Mrs. Gore testified her sons were close, she also acknowledged that they fought a lot and her son Michael stabbed Marshall on at least two occasions. (TR 2624, 2625). Mrs. Gore indicated she loved her children. (TR 2626).

Rex Gore also testified in behalf of Appellant. He acknowledged that Marshall's parents' marriage was rather shaky

from the inception and that they constantly fought. (TR 2632). He further observed that his brother, Marshall's father, was a woman beater and he saw him abuse Brenda Gore on a number of occasions. (TR 2633). Rex Gore never saw his brother beat either Marshall or Michael but he did see his brother use foul language around the children. (TR 2634). He also testified to occasions when his brother displayed bad behavior and testified that his brother was involved in a number of criminal endeavors. (TR 2636-2637, 2639, 2641). He noted that Marshall was terrified of his father. (TR 2644).

Dr. Umesh Mhatre, a psychiatrist, interviewed Marshall Gore and determined that, based on Gore's upbringing, he suffered from an anti-social personality disorder. (TR 2660, 2661). In explaining what an anti-social personality disorder consists of, Dr. Mhatre testified that Gore was not "insane" but that his actions were a result of his upbringing. Dr. Mhatre testified that individuals with an anti-social personality disorder had their own code of ethics, there own ideas of right and wrong and their own morals. (TR 2660). On cross examination of Dr. Mhatre, the State asked whether the defendant appreciated the difference between right and wrong when he killed Susan Roark. Defense counsel objected, arguing that the issue of insanity was not at issue. (TR 2666). The court overruled the objection and allowed Dr. Mhatre to testify that on January 31, 1988, Gore knew the difference between right and wrong and understood the consequences and nature of his actions. He also testified that Gore was capable of conforming his conduct to the requirements of

law and that although he had an anti-social personality disorder, Gore had an above-average intelligence. (TR 2667-2668). Dr. Mhatre also observed that doing wrong and getting caught would not deter Gore from doing the same act again. (TR 2673).

The defense rested its case at this point. (TR 2687).

In closing, defense counsel argued that simply because an individual is sentenced to life imprisonment with a possibility of parole in twenty-five years, doesn't mean a defendant would be released in twenty-five years. (TR 2703). He explained what the aggravating factors were and what the standard was. He distinguished what mitigation was and what standard was required with regard to proof of mitigation. (TR 2705-2707). He discussed Gore's background, in particular his abusive childhood, and talked about the witnesses' testimony. (TR 2708-2712). He concluded that a natural tendency was to feel sympathy for the families, in particular the Roarks, the Gores, but that it was not appropriate to take another life. (TR 2714).

The jury deliberated for approximately an hour and by an 11-1 vote, recommended the death penalty for the first degree murder of Susan Roark. (TR 2723).

Sentencing occurred on April 3, 1990, at which point the trial court concurred with the jury's recommendation and imposed a sentence of death. (TR 2740-2748). The court found four statutory aggravating factors: (1) that Gore had been convicted of another capital felony or violent felony; (2) that Gore committed the murder while engaged in kidnapping; (3) that Gore committed the murder for pecuniary gain, and (4) that the murder

was cold, calculated and premeditated. With regard to mitigation, the court found no statutory mitigating factors and as to non-statutory mitigating factors, found that although his abusive childhood caused his anti-social personality disorder, the evidence in mitigation was insufficient to outweigh the aggravating factors.

SUMMARY OF ARGUMENT

I. The proper analysis to be used in assessing whether the State violated Gore's constitutional rights is **Michigan v. Mosley**. Gore never exercised his "right to counsel" to either the federal or state authorities. The ultimate question however, whether his (exculpatory) "statements" to Officer Simmons were admitted contrary to his constitutional rights must be answered in the negative. His "rights" were scrupulously honored once he indicated he no longer desired to talk to the federal agents. His later statements were the product of a voluntary waiver following additional **Miranda** warnings by the state authorities. Should this court disagree, beyond per adventure, the admission of "statements" were harmless error. **Arizona v. Fulminante**, Case No. 89-839 (Decided March 26, 1991).

II. The collateral crime evidence admitted was relevant and never became a feature in the presentation of the State's case. Gore's reliance on **Drake v. State**, 400 So.2d 1217 (Fla. 1981), is misplaced.

III. Gore was neither prejudiced nor was his constitutional rights violated by the court denial of a continuance of trial until such time as his witness Stephanie Refner gave birth. Her testimony was preserved by video-taped deposition. Gore was not deprived of his constitutional rights to be present at his deposition even though it ultimately was admitted at trial.

IV. The State proved beyond a reasonable doubt all elements of kidnapping **sub judice**. This was not a circumstance

where Susan Roark's movement from Cleveland, Tennessee to Lake City, Florida, can, by any stretch of the imagination, constitute movement "only" incidental to the homicide and theft.

V. The trial court did not abuse its discretion is permitting the victim's stepmother to be excused from the witness sequestration rule. Mrs. Roark's testimony was incidental at best and in no way resulted in prejudice to Gore.

VI. The State did not impermissibly question Gore's expert regarding whether Gore could appreciate right from wrong. Gore brought the issue into question and the State has wide latitude to cross examine the witness.

VII. The three aggravating circumstances challenged by Gore were all proven beyond a reasonable doubt. As such the trial court relied on them in support of the death sentence imposed.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING GORE'S MOTION TO SUPPRESS STATEMENTS SINCE THE STATEMENTS WERE NOT OBTAINED IN VIOLATION OF GORE'S RIGHT TO COUNSEL

Gore first argues that the trial court erred in not granting his motion to suppress statements he made to law enforcement officers after his arrest. Citing **Edwards v. Arizona**, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and **Minnick v. Mississippi**, 498 U.S. ____, 111 S.Ct. ____, 112 L.Ed.2d 489 (1990), he urges:

> . . . Since Gore had asserted his right to deal with the police only through counsel, Simmons was not free to conduct the interview, even though Gore may have said he did not wish to have a lawyer present early in the interview. The fact that Gore said, after the interview had commenced, that he decided not to follow his attorney's advice, did not permit Simmons to proceed. In *Minnick*, the Supreme Court clarified and explained that the bright-line rule of *Edwards* means that after the assertion of the right to have counsel, no initiation of interrogation may occur without a lawyer's actual presence. The fact that Gore consulted with counsel prior to the interview is insufficient. There could be no valid waiver without the presence of counsel at the time of any interview; prior consultation with a lawyer was insufficient. *Minnick*.

(Appellant Brief's, at 30-31).

The record reflects two misstatements with regard to Gore's conclusion: (1) Gore never "asserted his right to deal with the police only through counsel", and (2) the facts in **Minnick v. Mississippi** are distinguishable from the facts **sub judice**.

The record reflects that at the suppression hearing the following was brought out: that FBI Agent L.B. McGuinty arrested Gore at his cousin's trailer and immediately thereafter, advised Gore of his **Miranda** rights. (TR 1865-1866). Gore indicated he understood his rights and signed the rights form. He indicated he wanted to talk without an attorney present and did in fact talk to the FBI agents about his federal parole violation. (TR 1868, 1884). When asked about how he arrived in Paducah, Kentucky, Gore told the FBI Agents McGuinty and Faust that he didn't want to talk anymore. (TR 1869, 1872, 1880, 1886-1887). At that point both Agent McGuinty and Agent Faust terminated any conversation with Gore. (TR 1869, 1880, 1886-1887). Both agents testified that at no time did Gore request an attorney (TR 1869, 1881), and no other questions were asked of Gore. The agents transported Gore to a federal facility in Hopkinsville, Kentucky, and at some point, a federal public defender represented Gore in the federal proceedings and advised Gore not to cooperate with law enforcement on any other charges. (TR 1898). Gore was released from the federal authorities and transferred to the custody of the Metro Dade County Police Department.

On March 24, 1988, Detective David Simmons arrested Gore on state charges in relation to the attempted first degree murder and assault on Tina Marie Corolis. (TR 1890-1891). Gore made a statement in the patrol car that he felt quite "important" based on all the attention he had received from the FBI; the fact that he had flown in a private jet and that he liked the conditions in the federal prison where he stayed for a couple of days. (TR

1892). At approximately 3:15 p.m., on March 24, 1988, Gore arrived with Detective Simmons at the police department. (TR 1892). He was immediately advised of his rights and inquiry was made with regard to his education and sobriety. Questions were also asked with regard to his reading ability and ability to write. He was asked whether he was on drugs and Detective Simmons observed that Gore seemed calm, sober, coherent and cooperative. (TR 1893-1895). Gore declined to put his initials on the rights form and told Detective Simmons that he had been advised by the federal public defender with whom he spoke not to cooperate with law enforcement. He said he did not want to take their advise and wished to speak because he had done nothing wrong and didn't need the presence of an attorney. (TR 1898). Simmons asked Gore if he wished to speak with a local public defender but Gore said he had no desire to talk with counsel. (TR 1899). Gore told Detective Simmons about the initial arrest in Paducah, Kentucky, on March 17, 1988, which had to do with his federal probation violation and that at that point he, Gore, had been advised of his constitutional rights. Gore admitted that he executed a written waiver and said that he ended the interview so he could be transported back to the jail and contact his father so that he could tell him that he had been arrested. (TR 1900). Gore talked about his family, his background, his criminal record and the jobs he had held. (TR 1901). Detective Simmons testified that they took a break at 4:45 p.m. and reconvened at 5:10 p.m. At that point they talked about the halfway house where Gore had been incarcerated and took a second break at 6:15

p.m. (TR 1901-1902). At 6:45 p.m., they recommenced discussions and Gore talked about his numerous aliases and his criminal record. He admitted that "Tony" was one of his aliases and discussed his involvement in drugs. (TR 1903). At 7:30 p.m., they took another break and ordered food. They reconvened at 8:10 p.m., and Gore talked about his free-lance photography business and how he would trick females into taking photos and what he did with them. At 9:05 p.m., they took another break and at that point Detective Simmons testified he became aware that a state public defender was downstairs wanting to see Gore. Detective Simmons testified he advised Gore of the public defender's presence at 9:25 p.m., when they reconvened, and Gore said he did not care to speak with the state public defender. Gore told Detective Simmons that he had done nothing wrong and that once a judge heard this and realized that there was no evidence, he would be released. The interview continued until 10:15 p.m., and Gore was then taken to the county jail. (TR 1903-1909). Because Gore did not want to be seen on television, he was not removed from the building until after the 11:00 p.m. news. (TR 1909).

Gore took the stand at the suppression hearing and testified that throughout this entire period he continually asked for counsel after every question asked of him. (TR 1951-1952).

At trial, Detective Simmons testified that he interviewed at the Metro Dade County Jail and advised Gore of his rights. (TR 2211). Gore would not sign the rights form (TR 2214), and the officer observed Gore ask for a package of Marlboro cigarettes.

(TR 2216). The statements admitted at trial were that Gore never recalled driving a 1986 black mustang nor had he met Susan Roark, (TR 2217), and that he did not know Tina Marie Corolis, nor did he go to the Cash Mart Pawn Shop and he knew nothing about Tina Corolis' red 1987 toyota. (TR 2218-2219).

Gore never exercised his right to counsel, if anything, he exercised his right to remain silent in discussing how he got to Kentucky with the federal agents. A significant break in time occurred before Gore was released to the authorities in Dade County, Florida, at which point he was immediately advised of his constitutional rights. Although he refused to initial the rights form, he told Detective Simmons, although the federal public defender had advised him not to cooperate with law enforcement, he was willing to talk with them. The standard for reviewing whether the authorities wrongfully spoke with Gore is not the principles set forth in **Minnick v. Mississippi, supra**, or **Edwards v. Arizona, supra** (since the right to counsel was not invoked), but rather the reasoning in **Michigan v. Mosley**, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), which dealt with the voluntariness of a confession that came after a defendant initially informed police of his desire to remain silent. In **Mosley**, the United States Supreme Court found the confession was voluntarily made and rejected the argument that **Miranda** creates a "**per se** prescription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." **Michigan v. Mosley**, 423 U.S. at 102-103. The Court, in **Mosley**, concluded:

> The admissibility of statements obtained after the person in custody has decided to remain silent depends, under *Miranda*, on whether his 'right to cut off questioning' was 'scrupulously honored.'

Michigan v. Mosley, 423 U.S. at 104. **See also Henry v. State**, ____ So.2d ____ (Fla. January 3, 1991), 16 F.L.W. S58 (distinguishing **Long v. State**, 517 So.2d 664 (Fla. 1987), from **Michigan v. Mosley** issue).

The evidence introduced at the suppression hearing supports a finding that Gore's rights were scrupulously honored because questioning was immediately cut off at the point when Gore said he did not want to talk about how he got to Kentucky. No further statements were taken and, when he was placed in the Metro Dade County custody on March 24, 1988, he voluntarily waived all rights after being reinstructed of his **Miranda** rights by Detective Simmons. Although there is a dispute by Gore that he continually asked for counsel and did not want to talk to the police, the trial court reviewed all the evidence and concluded that Gore's "exculpatory statements" were voluntarily made. **See United States v. Nash**, 910 F.2d 749 (11th Cir. 1990). **Note: Patterson v. Illinois**, 487 U.S. 285, 801 S.Ct. 2389, 101 L.Ed.2d 261 (1989).

Gore points to the fact that "although Gore did not specifically request counsel at the time, he did later, as evidenced by his consultation with the federal public defenders." (TR 30). There is nothing in the record to support this conclusion. Albeit, Gore received Sixth Amendment counsel for his federal prosecutions (and they very well may have counseled

him not to cooperate with law enforcement), Sixth Amendment counsel is not the equivalent to the invocation of a Fifth Amendment right to counsel for subsequent unrelated charges for which proper **Miranda** warnings are given. **Arizona v. Roberson,** 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), in not to the contrary. To suggest herein that Gore was denied access to counsel misstates the facts. Indeed, the Dade County Public Defender, Judy Alves, went to the police station because **she heard about Gore on television.** (TR 1790-1791, 1795). The first time Detective Simmons knew about the public defender was at the 9:05 p.m. break and immediately upon recommencement of his interview with Gore at 9:25 p.m., he told Gore that a Miami public defender was outside. Gore indicated he did not want to speak with the state public defender. Pursuant to **Moran v. Burbane,** even where police failed to inform a suspect of his attorney's efforts to reach him, neither **Miranda** nor the Fifth Amendment requires suppression of prearraignment confession where there has been a voluntary waiver. **Harvey v. State,** 529 So.2d 1083 (Fla. 1988). **Note: Wilson v. State,** ____ So.2d ____ (Fla. 2nd DCA 1990), 16 F.L.W. D85, D87 (distinguishes **Minnick v. Mississippi, supra**).

Apart from the case authorities cited, it would appear that Gore is complaining about exculpatory statements made by him to Detective Simmons. The record reflects that Gore told Detective Simmons he knew nothing about the black mustang, he had never met Susan Roark, he did not know Tina Marie Corolis and he did not drive her red 1987 toyota. While not unmindful that this Court,

in **Spivey v. State**, 529 So.2d 1088, 1091 (Fla. 1988), held that the coercive atmosphere of a custodial interrogation prohibits the use of any statement, whether exculpatory or inculpatory, obtained in such a setting unless the procedural safeguards of **Miranda** are followed, the "statements" in the instant case, if wrongfully "obtained", constitute harmless error beyond a reasonable doubt.

The overwhelming evidence in this record that Gore was in the company of Susan Roark but also drove her car in Tampa and Miami long after he left Cleveland, Tennessee, is beyond question. Additionally, he was arrested in Paducah, Kentucky, in Tina Marie Corolis' 1987 red toyota. He pawned their jewelry, or had Susan Brown pawn Susan Roark's jewelry, and physical evidence placed him in the black mustang long after Susan Roark was reported missing (Florida traffic ticket). To suggest that his statements that he knew nothing about the mustang, Susan Roark or Tina Marie Corolis and her car, in any way added to the State's proof is sheer folly. Indeed, Gore has not even identified the specific statement(s) he finds repugnant. At best, his complaint must be viewed as one that police talked to him and he to them. In **Arizona v. Fulminante**, Case No. 89-839 (Decided March 26, 1991), the United States Supreme Court declared that even involuntary confessions are subject to a harmless error analysis. Albeit, the Court, in **Fulminante**, found the confession therein not admissible, the facts of the instant case certainly fall within a harmless error analysis. Should this Court ascertain that some wrongdoing occurred on the part of Detective Simmons in

continuing to talk with Gore following **Miranda** warnings on March 24, 1988, any statements that were made, and admitted at trial, were harmless error beyond a reasonable doubt.

Based on the foregoing, the State would urge this Court to affirm the trial court's denial of the motion to suppress and in the alternative, conclude that any error which may have occurred was harmless error beyond a reasonable doubt.[1]

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF COLLATERAL CRIMES

Gore next points to the presentation by the State of collateral crimes evidence through the testimony of Lisa Ingram and the testimony of Tina Corolis. The record reflects that Lisa Ingram testified to a statement Gore made on February 19, 1988, when asked about a light-colored clutch purse in the backseat of the car "Tony" was driving. (TR 2028). Gore said it belonged to a girl he had killed last night or a few nights ago. (TR 2029). Tina Corolis testified that Gore sexually assaulted and attempted to murder her on March 14, 1988. The circumstances surrounding these events were found to be relevant by the trial court and therefore admissible. (TR 1757-1786, 1811-1862, 2018, 2049).

Gore argues that the testimony of Lisa Ingram proved nothing more than Gore's criminal propensity. The record reflects that the trial court heard this evidence and rejected same. (TR

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[1] Gore's reliance on **Kyser v. State**, 533 So.2d 285 (Fla. 1988); **Long v. State**, 517 So.2d 664 (Fla. 1987), and **Smith v. State**, 492 So.2d 1063 (Fla. 1986), all concern cases where the defendant has specifically invoked his right to have counsel present. As such, each are inapplicable as is **Minnick v. Mississippi, supra.**

1786). The State argued that albeit Gore was a suspect in a number of rapes in the Miami area, ". . . there is no homicide in which he is a suspect. The only homicide in the time frame that we're talking about is the homicide of Susan Marie Roark, and she is the only one that we know of that had her purse stolen. Those are the facts and circumstances and we feel that this statement is relevant." (TR 1785).

Gore's reliance on **Jackson v. State**, 451 So.2d 458 (Fla. 1984), is misplaced. Clearly, the reference by the witness therein that the defendant pointed a gun at him and bragged that he had been a "thoroughbred killer" when in Detroit, in no way is similar to the admission **sub judice**. The court, in **Jackson**, found that the "thoroughbred killer" statement was irrelevant to the case. **Sub judice**, evidence was presented that Susan Roark had her purse at the party she and Gore attended in Cleveland, Tennessee on January 30, 1988. On January 31, 1988, Gore appears in Tampa, Florida, with Susan Roark's car and her jewelry. Susan Roark is never seen alive after she left the party with Gore. Certainly, the fact that property belonging to Susan Roark had been pawned by Gore through Susan Brown made relevant a statement by Gore to Lisa Ingram that the purse in the backseat of his car "belonged to a girl that he had killed last night (or several nights ago)". (TR 2029). Beyond per adventure, the statement was relevant and it was left to the trier of fact to consider what weight it should be given based on the time frame discrepancies pointed out by Gore. **Note: Amoros v. State**, 531 So.2d 1256, 1258-1260 (Fla. 1988), wherein the court observed:

> We recognize relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. However, almost all evidence to be introduced by the State in a criminal prosecution will be prejudicial to a defendant. Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded. *C. Ehrhardt, Florida Evidence Sec. 403 (2nd Ed. 1984).* The focus in this instance was establishing Amoros' prior possession of the specific weapon which caused Omar Rivera's death. *Perkins* is clearly distinguishable because in that case the focus was on a similar pattern of criminal conduct rather than the linking of a defendant to a critical piece of evidence. We conclude the evidence was relevant and its prejudice did not substantially outweigh its probative value.

531 So.2d at 1260.

There as a clear nexus between the physical evidence and Gore's statement (to Lisa Ingram). The trial court did not err in finding Lisa Ingram's testimony to be relevant. **See: Bryan v. State,** 533 So.2d 744 (Fla. 1988).

With regard to the testimony of Tina Corolis, Gore argues that the assault on Corolis was insufficiently similar to the Roark, moreover, and not unique enough to qualify as evidence of identification, citing **Drake v. State,** 400 So.2d 1217, 1219 (Fla. 1981). Gore is wrong. The record reflects when comparing the similarities between the attacks on Susan Roark and Tina Corolis, the following:

(a) Victim Profile - with regard to the physical appearances of Susan Roark and Tina Corolis, both were short, Susan Roark 4'11" and Tina Corolis 5'3", both had dark brown hair, and both weighed approximately 98 to 105 pounds.

(b) Preassault Phase - in both instances, Gore was without an automobile prior to meeting Susan Roark or had no vehicle before meeting Tina Corolis (Gore had wrecked Susan Roark's black mustang). Gore introduced himself to both women by his alias "Tony" and gained access to their vehicles after befriending both. Gore spent time with the victims before the attacks and there was evidence of a sexual motive as well as pecuniary motive for the attacks.

(c) Assault Phase - both attacks began when the victim tried to break off contact. In Susan Roark's case, she left with Gore to take him home and told her friends that she would return to spend the night with them. She was also expected to go to church with her grandmother the next morning at 7:00 a.m. Tina Corolis, picked Gore up after he had called and asked for a ride. He managed to take over control of the car and drove her some fifty miles from her destination in North Miami to South Dade. Gore used a knife in both attacks. Tina Corolis was stabbed about the body and her neck was slashed. The testimony of the medical examiner with regard to Susan Roark, concluded that, based on the deterioration of her body, wounds were made at the right breast area and stabbing wounds were made at her neck. In both instances Gore used or threatened to use binding. In the Susan Roark case, a shoelace was found about the left wrist of the skeletal remains. In the Tina Corolis case, Gore threatened her that he would tie her up with a seatbelt. Gore transported both victims in the victims' cars to trash piles a great distance from their respective homes, where he committed his assaults. He

disrobed both victims, he attacked both victims in the throat area with a knife and after the attack he left the bodies of both victims at trash dumps.

(d) Post Assault Phase - Gore stole both of the victims jewelry, attempted to pawn their jewelry shortly thereafter. Gore also stole the victims' cars and fled in the victims' cars. Gore represented to a number of people that both the black mustang and the red toyota were either given to him as gifts or loaned to him by his girlfriends or relatives.

In **Rivera v. State**, 561 So.2d 536, 538-539 (Fla. 1990), this Court, in distinguishing **Drake v. State, supra**, observed:

> In this case, the material issue to be resolved by the similar fact evidence was identity. Rivera relies upon *Drake v. State, 400 So.2d 1217 (Fla. 1981)*, and argues that the similarities between the two crimes were not of a 'special character' or 'so unusual' as to point to him. We reject that argument and find *Drake* distinguishable. There, the only similarity between the two crimes was that the two victims had their hands tied behind their backs and left a bar with the defendant. *Id. at 1219*.
>
> Here, there were numerous similarities between the two crimes. Both victims were eleven years of age, Caucasian, with blonde hair. Both were similar in stature, small and petite. Both were alone and approached from behind. Both abductions occurred during daylight, and within four miles of Rivera's home. After each crime, individuals received phone calls from a man who identified himself as 'Tony' and who stated that he was wearing pantyhose and leotards and had fantasized about raping young girls.
>
> We find that the similarities between the two crimes established 'a sufficiently unique pattern of criminal activity' to justify the admission of collateral crime evidence on the disputed, material issue of identity. *Chandler v. State, 442 So.2d 171, 173 (Fla. 1983)*.

> Moreover, we do not find that the evidence of this crime became a major feature of the trial. (cite omitted).

561 So.2d at 539. **See also Rogers v. State,** 511 So.2d 526, 531-532 (Fla. 1987); **Bryan v. State,** 533 So.2d 744 (Fla. 1988), and **Swafford v. State,** 533 So.2d 220 (Fla. 1988).

The trial court correctly admitted the collateral crimes evidence **sub judice.** Said admissions did not become a feature of the trial but rather, demonstrated identity and the **modus operandi.**

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING GORE'S MOTION FOR CONTINUANCE TO SECURE THE PRESENCE OF A DEFENSE WITNESS, WHO WAS TEMPORARILY UNABLE TO TRAVEL TO THE TRIAL, AND IN SUBSEQUENTLY DENYING GORE THE RIGHT TO BE PRESENT DURING A DEPOSITION TO PERPETUATE TESTIMONY OF THAT DEFENSE WITNESS

Albeit, Gore admitted the deposition of Stephanie Refner at trial, he now complains that the trial court erred in not granting a continuance of the trial until after the birth of Ms. Refner's child. (TR 214-216, 2868-2870). He further argues that since the deposition became a part of the trial, he had a constitutional right to be present during the video-taped deposition.

This Court, in **Holton v. State,** ____ So.2d ____ (Fla. Corrected Opinion January 15, 1991), 16 F.L.W. S136, S138, decided a similar issue adversely to the defendant. Clearly, **Holton** controls **sub judice.**

With regard to Gore's claim that he had a right to be present during the deposition taken to perpetuate testimony of

his own witness, it is clear he has misread and misunderstood Rule 3.190(j)(3), Florida Rules of Criminal Procedure. Said provision allows for the presence of the defendant when the deposition is taken "on the application of the State." The authorities cited by Gore in support of his contention that he has a right to be present during **his** deposition to perpetuate testimony is misplaced. For example, in **Chapman v. State**, 302 So.2d 136 (Fla. 2nd DCA 1974), the court reversed because of the use of a deposition in a rape prosecution absent the defendant where the "evidence was used against him" thus violating his right to be personally present during trial and his Sixth Amendment right to confront witnesses. Gore has presented no case authority nor logic that would warrant reversal in the instant case because he was not personally present during the deposition to perpetuate Stephanie Refner's testimony.[2]

POINT IV

WHETHER THE TRIAL COURT ERRED IN DENYING GORE'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE KIDNAPPING COUNTS SINCE THE STATE'S EVIDENCE SHOWED THAT ROARK VOLUNTARILY ACCOMPANIED GORE

Relying on **Hrindich v. State**, 427 So.2d 212 (Fla. 5th DCA 1983), Gore argues that the offense of kidnapping, pursuant to §781.01(2), Fla.Stat., was not proven. Gore argues that the State failed to prove any confinement or abduction against Susan Roark's will. Gore's reliance on **Hrindich** is misplaced.

---

[2] Stephanie Refner's video-taped testimony revealed that on or about February 6, 1988, she thought she saw Susan Roark driving her black mustang in Cleveland, Tennessee.

Kidnapping has been defined to mean: to forcibly, secretly or by threat, confining, abducting, or imprisoning another person against his will and without authority, with intent to commit or facilitate commission of any felony. In **Hrindich, supra**, the court found that where the victim voluntarily accompanied the appellant in his automobile and she was confined in the front seat of the car during the attempted sexual battery, "all confinement was incidental to the attempted sexual battery." Such is not the circumstances herein. The record reflects that Susan Roark did leave with Gore that Saturday evening for the sole purpose of taking Gore home. She told Michelle Trammell that she was going to take "Tony" home and that she wanted Michelle to accompany her. She planned to spend the night with Michelle Trammell and had earlier called her grandmother to inform her that she would be home in time to go to church the next morning. (TR 1310). Ruth Roark testified that her granddaughter called her at approximately 10:00 p.m., January 30, 1988, and told her that she, Susan, was going to spend the night with Michelle but that she would be back the next morning at 7:00 a.m. to go to church. (TR 1334). Eric Hammond, also a party attendee, testified that Susan had a purse that night and when she left around 12:00 a.m. with "Tony", she planned to take him home. (TR 1367). The next day on January 31, 1988, Gore shows up in Tampa, Florida, at the doorstep of Susan Brown with jewelry and the black mustang belonging to Susan Roark. When the skeletal remains of Ms. Roark were located, they found in a trash dump the body unclothed, with evidence beyond a reasonable

medical certainty that her death resulted from a homicide. There can be little doubt that Ms. Roark was the victim of a kidnapping. **See Smith v. State**, 541 So.2d 1275 (Fla. 1st DCA 1989), and **Bundy v. State**, 471 So.2d 9 (Fla. 1985).

POINT V

THE TRIAL COURT DID NOT ERR IN EXCUSING THE VICTIM'S STEPMOTHER FROM THE RULE OF WITNESS SEQUESTRATION SOLELY BECAUSE SHE WAS A RELATIVE OF THE VICTIM

The victim's stepmother, Carolyn Roark, was excused from the rule of witness sequestration at the prosecutor's request. The reasoning set forth was that Article I, Section 16(b), Florida Constitution, and Section 960.001(5), Florida Statutes, permits a homicide victim's relatives to be present at any critical stage of the proceedings, if that person's presence does not violate any right guaranteed to the defendant. In the instant case, contrary to Gore's assertion, Carolyn Roark was not a material witness to the crime charged. Rather, her testimony consumed all of six pages in over a two thousand page, eight day, trial on just the conviction. The sum total of Mrs. Roark's testimony was that she was Susan Roark's stepmother and she could identify a necklace she and her husband gave Susan Roark for Christmas. The necklace was one of the pieces of jewelry pawned by Gore. She also identified a number of rings that looked like the ones that Susan Roark owned. On cross examination, she testified that Susan Roark had a class ring and she believed the stone in the ring was purple. She was confident the necklace, a 16" herringbone chain, was the one her husband and she bought for

Susan because of its length. On redirect examination, she testified Susan sometimes wore rings on each of her fingers. (TR 2154-2160).

As recognized by the case authorities cited by Gore, it is within the sound discretion of the trial court to determine whether an exception should be made to the rule of sequestration. Herein, Gore has neither cited authority nor a legal basis upon which to suggest the trial court abused his discretion.

POINT VI

THE TRIAL COURT DID NOT ERR IN ALLOWING THE PROSECUTOR TO QUESTION A DEFENSE PSYCHIATRIST DURING THE PENALTY PHASE ON THE ISSUE OF GORE'S SANITY AT THE TIME OF THE OFFENSE SINCE SANITY WAS NOT AN ISSUE FOR SENTENCING

At the penalty phase, Dr. Umesh Mhatre was called for the defense and described some of the circumstances that made up Gore's anti-social personality disorder. To that end, Dr. Mhatre testified that after examining Gore and securing information about his background, it was his opinion that Marshall Gore was a result of his upbringing. Dr. Mhatre, on direct examination, testified that Marshall Gore was not insane but that his code of conduct and ethics were different based on his background and anti-social personality. He observed that Gore had his own code of ethics, his own idea of right and wrong and his own morals. (TR 2660-2661). Although most of the abuse discussed was not directed at Gore, but rather Gore's mother, Dr. Mhatre believed that it was traumatic to Gore to see someone he loved beaten. (TR 2667). On cross examination, the State asked Dr. Mhatre

whether Gore appreciated the difference between right and wrong and whether he knew right from wrong when he killed Susan Roark. (TR 2666, 2667). He asked Dr. Mhatre whether Gore appreciated the nature of the crime and the consequences of his actions and whether he was capable of conforming his conduct to the requirements of law. (TR 2667-2668). Dr. Mhatre answered yes to the aforenoted questions and added that although Gore did wrong and got caught for it, those factors would not have deterred him from doing the same crime again. (TR 2673).

Dr. Mhatre's testimony followed the testimony of Brenda Gore and Rex Gore who both testified that Marshall Gore was a product of his upbringing.

The inquiries by the State of Dr. Mhatre were fair cross examination based on that presented on direct. In light of **Campbell v. State**, 571 So.2d 415 (Fla. 1990), the State has a responsibility to rebut any evidence in mitigation and in particular, any expert testimony. In that vein, the State has a right to fully explore on cross examination any and all aspects of the defendant's character and his mental status once the issue comes to light. **Sub judice**, Gore sought to demonstrate, as nonstatutory mitigating evidence, that as a product of his background, he suffered from an anti-social personality disorder. His expert became fair game.

Based on the foregoing, the trial court did not err in allowing the State to question, on cross examination, Dr. Mhatre's opinions as to whether Gore appreciated right from wrong in conjunction with Gore's anti-social personality disorder.

POINT VII

THE TRIAL COURT DID NOT ERR IN FINDING AND WEIGHING THREE AGGRAVATING CIRCUMSTANCES IN SUPPORT OF GORE'S DEATH SENTENCE

(A)
The Court Properly Found that the Homicide was Committed in a Cold, Calculated and Premeditated Manner.

Gore argues that the trial court misapplied the aggravating factor that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. He reasons that (1) there is insufficient evidence with regard to the kidnapping; (2) that because the body was found unclothed in a remote area near a pile of trash does not establish any circumstance surrounding the killing and constitutes a nonstatutory aggravating factor; (3) that the trial court improperly concluded that the kidnapping and robbery was premeditated in a planned and calculated fashion; (4) that Gore's use of aliases or alleged flight are not relevant to the murders, and (5) that the court's reliance on collateral crime evidence was misplaced. This analysis is premised in material part on the decision of **Drake v. State,** 441 So.2d 1079 (Fla. 1983). The analysis as well as the reliance on **Drake, supra,** is incorrect.

The trial court found that the murder was committed in a cold, calculated and premeditated manner. In support of the aggravating factor, the court found:

> The court finds that the victim was a nineteen year old college freshman in Cleveland, Tennessee, living with her grandmother. The defendant met the victim on the evening of January 31, 1988, at a convenience store and went immediately as her

> date to a party of her friends. That evening or early morning, the victim left the party to drive the defendant home, to then return and spend the night with her girlfriend. The defendant kidnapped the victim that evening and her deteriorated body was found by a trash pile in rural Lake City, Florida, on April 2, 1988. The victim died of homicidal violence to the base of the skull. At the time the body was found it was unclothed and there were tears in a pair of panties found near the body. The court finds that the kidnapping and robbery was indeed committed in a cold, calculated and premeditated manner in that it was extremely wicked, shockingly evil, vile and with utter indifference to human life.
>
> Further, the evidence is undisputed that the victim, Susan Marie Roark, showed absolutely nothing but kindness to the defendant, Marshall Lee Gore. The defendant's response to the victim's act of kindness was to kidnap her, murder her, and rob her. There was no evidence whatsoever of any reason or justification for the murder of Susan Marie Roark other than financial enrichment in obtaining her car.
>
> The evidence further establishes that the defendant bound her, disrobed her, mutilated her underclothing and deposited her body near a trash pile. His use of an alias would indicate that he intended to conceal his identity pursuant to a preplanned design to harm Susan Marie Roark. His transportation of the victim several hundred miles from Cleveland, Tennessee, to Lake City, Florida, before killing her is further indication of his calculated plan to escape detection and escape punishment for his murder of Susan Marie Roark.
>
> Further evidence of the heightened premeditation that is required for this aggravating circumstance is that almost identical act, perpetrated against Tina Marie Corolis, under almost identical circumstances, using an almost identical method of operation.

In **Occhicone v. State**, 570 So.2d 902, 905 (Fla. 1990), this Court held that where there is a legal basis to support a finding

that the murder was committed in a cold, calculated and premeditated manner with no pretense of moral or legal justification, the Florida Supreme Court will not substitute its judgment for that of the trial court. **See also Brown v. State**, 565 So.2d 304 (Fla. 1990). **Sub judice**, the trial judge, in summarizing the facts and circumstances presented at trial, concluded that the totality of the circumstances supported this aggravating factor. For example, the trial court's finding that the murder was done to facilitate the robbery of Susan Roark's jewelry and automobile is similar to **Jones v. State**, 569 So.2d 1234 (Fla. 1990), wherein the court held that the record supported the conclusion beyond a reasonable doubt that Jones had murdered for the specific purpose of taking Brock's pickup truck and did so in a cold, calculated and premeditated manner. The court found that Jones had discussed killing the victims for the purpose of obtaining the pickup truck.

Gore is an opportunist and the consummate planner. Once he targeted Susan Roark and her black mustang, he methodically went through the motions of befriending her, gaining her trust, putting himself in a circumstance where he needed her assistance (to take him home), and then set forth on a two hundred mile trek to Lake City, Florida, where he sexually assaulted, murdered and dumped her body. He then carried out his plan by taking her black mustang and robbing her of her jewelry and headed south for Tampa, Florida, where the next day he had a former girlfriend pawn Susan Roark's jewelry. This **modus operandi** continued when he got to Miami, Florida, and needed money and needed to get rid

of the black mustang (because at this point, he thought the police were after him). He had an accident in the mustang and abandoned it. He then called Tina Marie Corolis and asked her for her help because he needed a ride. He then overpowered her and kidnapped Ms. Corolis and her son, drove her some fifty miles from her home, sexually battered her, attempted to murder her, and stole her jewelry and her car and drove to Paducah, Kentucky.

The instant case is identical to that of **Robinson v. State**, ____ So.2d ____ (Fla. 1991), 16 F.L.W. S107, S109, wherein this Court upheld the finding that the murder was committed in a cold, calculated and premeditated manner. In **Robinson**, the facts show that Beverly St. George left her home in Plant City, Florida, on the morning of August 11, 1985, en route to Quantico, Virginia. Her car broke down along the way and at that point she encountered the defendant and his codefendant. Her partially clothed body was found next to a cemetery in St. Johns County, Florida, with two gunshot wounds to the head. The record reflects that St. George was abducted at gunpoint, handcuffed, transported to a remote, desolate cemetery and sexually abused and then shot twice.

In contrast, in **Drake v. State**, 441 So.2d 1079 (Fla. 1983), relied on by Gore, the facts reveal that "late in November of 1977, Drake met Reeder at the Crown Lounge in Clearwater. At about 11:00 p.m., Reeder left the bar with Drake, indicating to friends that she would return in a few minutes. Her friends never saw her alive again. Her badly decomposed and nearly nude body was discovered some six weeks later. A bra had been used to

tie her hands behind her back. There were eight stab wounds in the lower chest and abdomen. The body's advanced state of decomposition made it impossible to rule out other possible causes of death." 441 So.2d at 1080. The court (following reversal on a conviction issue and granting a new trial), without discussion, merely stated that there was an "insufficient basis in the **present** record for the paragraph (5) finding that the crime was committed in a cold, calculated and premeditated manner so as to fall within the pervue of §921.141(5)(i), Fla.Stat. (1981)." 441 So.2d at 1082-1083.

The facts reveal that Gore did kidnap Susan Roark; that her body was found in a remote area practically two hundred miles away from her home; that the kidnapping and robbery was premeditated in a planned and calculated fashion of heightened proportion; that Gore used an alias to cover his tracks and in fact fled and then disposed of property taken from the victim. This **modus operandi** was also shown through the collateral evidence presented in Gore's assault against Tina Marie Corolis. It must be recalled that on the very night Gore met Susan Roark he was intending to travel with his friend Nathan Caywood, to Florida. He saw a better opportunity in Susan Roark and her black mustang and he seized that opportunity. The trial court correctly found this murder to be cold, calculated and with heightened premeditation.

(B)

The Trial Court Did Not Err in Using as an Aggravating Circumstance Previous Convictions

Gore argues that the trial court erred in relying on the attempted murder conviction, kidnapping, sexual battery and armed burglary in the case involving Tina Corolis to support the aggravating factor that Gore had been previously convicted of a violent felony. Arguing that the case was pending on appeal, he asserted that the trial court erred in finding same. On January 2, 1991, in **Gore v. State**, ____ So.2d ____ (Fla. 3rd DCA 1991), 16 F.L.W. D115, the Third District Court of Appeals affirmed Gore's conviction for the attempted murder, kidnapping, sexual battery and armed burglary of Tina Marie Corolis.

(C)

The Trial Court Properly Found the Aggravating Factor That the Murder Was Committed During a Kidnapping.

Gore argues that the kidnapping count was not proven and therefore the trial court improperly relied on said aggravating factor. As argued in Point IV, the kidnapping conviction was valid and therefore the trial court properly found this aggravating factor **sub judice**.

Appellee would urge, however, that should this Court determine that any of the aggravating factors were not proven beyond a reasonable doubt, that in light of the dearth of mitigating evidence presented and the three[3] valid aggravating factors proven, that death is still the appropriate sentence.

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[3] Gore did not challenge the finding that the murder was committed for pecuniary gain.

CONCLUSION

Based on the foregoing, the State would urge this Honorable Court to affirm the first degree murder conviction and sentence of death imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 28th day of March, 1991.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

Criminal law—Trial court acted within its discretion in finding that presence of electronic media did not render defendant incompetent to testify—Fact that defendant presented one psychologist's testimony that the presence of electronic media would interfere with defendant's ability to testify did not preclude trial court from considering weight and credibility of other expert opinions—Evidence—Error to permit state to introduce certified copies of defendant's prior convictions, charging documents, and arrest forms relating to those convictions after defendant had admitted that he had been convicted of prior crimes, including crimes involving dishonesty or false statement—Error harmless in light of overwhelming evidence of guilt—Trial court did not have territorial jurisdiction over charge of attempted murder based upon overt acts committed in Georgia

MARSHALL LEE GORE, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 89-990. Opinion filed January 2, 1991. An Appeal from the Circuit Court for Dade County, Harold Solomon, Judge. Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Richard L. Polin, Assistant Attorney General, for appellee.

(Before JORGENSON, LEVY, and GODERICH, JJ.)

(JORGENSON, Judge.) The principal issue presented by this appeal is whether the trial court abused its discretion by refusing to exclude the electronic media from the courtroom after defendant Marshall Lee Gore had presented medical evidence that the media's presence would adversely affect his ability to testify. We conclude that the trial court did not abuse its discretion in denying Gore's motion to exclude the electronic media and affirm his convictions for attempted murder, kidnapping, sexual battery, burglary, robbery, and theft.

Gore's motion to exclude the electronic media was made after the state had completed presenting its case, thirteen days into the trial. Defense counsel argued that, based upon a psychological evaluation made some months earlier, Gore would not be able to participate effectively in the trial or assist in his defense if the electronic media was present. The psychologist who examined Gore had concluded that Gore suffered from Attention Deficit Disorder and a severe personality disorder that would cause him to want to perform before the cameras, and that the presence of the television cameras would distract him. The trial court conducted an evidentiary hearing at which the examining psychologist was questioned by defense counsel, the state, and the court. In response to a question posed by the court, the psychologist admitted that he could not tell when Gore was lying and when he was telling the truth. Following the evidentiary hearing, the court found Gore competent to testify and denied the motion to exclude the electronic media.

Gore took the stand. When he complained that he was "not going to be able to do this," the court ordered the television camera repositioned so that it was out of Gore's view and would not be able to focus on the defense table. The court then appointed a team of three doctors to examine Gore to determine whether the presence of the television cameras was, in fact, affecting Gore's ability to participate in his trial.

On the next day, the three doctors testified. The first psychiatrist testified that Gore did not suffer from any major illness, was manipulative, and was simply "making an issue" of the presence of the camera. In his opinion, Gore was lying when he said that he would not be able to testify if a camera was present. The second doctor, a psychologist, testified that although Gore suffered from some social disorders the mere presence of the camera in the courtroom would not interfere with his ability to assist his counsel and would not affect his competency. The third doctor, a psychiatrist, testified that he found no evidence that Gore suffered from Attention Deficit Disorder or hyperactivity. He diagnosed Gore as suffering from a severe personality disorder and concluded that the camera's presence would affect Gore's testimony. However, the doctor could not conclusively determine whether Gore could answer questions posed to him before the cameras, if he so desired. The trial court then denied the defense motion to exclude the electronic media during defendant's testimony.

Gore resumed testifying but, after a short while, refused to answer any more questions, saying that he could not continue. The court directed Gore to submit to cross-examination. When the state asked Gore whether he had been convicted of any felonies, Gore answered, "Yes." The state asked, "How many?"; Gore stated that he did not know. The state then asked Gore if he had been convicted of any crimes involving lying; Gore answered, "Yeah." The state then introduced, over objection, certified copies of all of Gore's prior convictions, the charging documents, and the arrest forms for those convictions.

Following the jury's verdicts of guilt and the court's entry of judgments of conviction and sentencing, Gore appealed.

We hold that the trial court acted within its discretion in finding that the presence of the electronic media did not render Gore incompetent to testify.[1] Although the presence of electronic media in the courtroom does not constitute a *per se* denial of due process, *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L. Ed. 2d 740 (1981), a trial court is "constitutionally required to prohibit electronic media coverage of court proceedings in a criminal case upon a demonstration that such coverage would render an otherwise competent defendant incompetent to stand trial." *State v. Green*, 395 So. 2d 532, 535 (Fla. 1981). Upon a finding that "such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media," the court may exclude the media. *In re Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 779 (Fla. 1979). The "finding" required by *Post-Newsweek* must be on the record, either in writing or orally, in a transcript of the hearing. *State v. Palm Beach Newspapers, Inc.*, 395 So. 2d 544, 547 (Fla. 1981). Moreover, "[a]n evidentiary hearing should be allowed in all cases to elicit relevant facts if these points are made an issue, provided demands for time or proof do not unreasonably disrupt the main trial proceeding." *Id.* at 548. The exclusion of the electronic media is a matter that rests within the sound discretion of the trial court judge. *State v. Green*, 395 So. 2d at 536; *State v. Palm Beach Newspapers*, 395 So. 2d at 549.

On two separate occasions, the trial court complied with all of the requirements established by *Post-Newsweek*, *Green*, and *Palm Beach Newspapers*. Nevertheless, Gore argues that *whenever* a defendant presents competent substantial evidence that the presence of the electronic media will adversely affect his ability to testify, the electronic media must be excluded. That argument flies in the face of reason and a long line of cases which hold that where medical experts' reports conflict, a trial court has not abused its discretion in finding a defendant competent to stand trial. *See, e.g., Ferguson v. State*, 417 So. 2d 631 (Fla. 1982); *Fowler v. State*, 255 So. 2d 513 (Fla. 1971); *Holmes v. State*, 494 So. 2d 230 (Fla. 3d DCA 1986). The trial court employed every possible precaution to ensure that Gore's constitutional rights were protected, both before Gore began testifying and after he had taken the stand. The court exhibited commendable patience, especially because the state had completed its case before Gore even raised the issue of the presence of the electronic media.[2]

No case law in this or any other jurisdiction supports the argument that the trial court loses its broad discretion to determine competency once a defendant presents one psychologist's testimony that the presence of the electronic media would interfere with the defendant's ability to testify. No single expert's opinion

should ever be deemed binding on a trial court and preclude the court's consideration of the weight and credibility of other, perhaps conflicting, expert opinions. Accordingly, we hold that the trial court did not abuse its discretion in denying Gore's motion to exclude the electronic media during his testimony.

Next, Gore argues that the trial court erred in allowing the state to introduce certified copies of Gore's prior convictions, the charging documents, and the arrest forms relating to those convictions. We agree that the court committed error. Once Gore admitted that he had been convicted of prior crimes, including crimes involving dishonesty or false statement, the state could go no further. *See Jackson v. State*, 498 So. 2d 906 (Fla. 1986); *Williams v. State*, 511 So. 2d 1017 (Fla. 2d DCA), *rev. denied*, 519 So. 2d 988 (Fla. 1987); *Johnson v. State*, 361 So. 2d 767 (Fla. 3d DCA 1978), *cert. denied*, 382 So. 2d 693 (Fla. 1980). However, such error is subject to a harmless error analysis. *Blasco v. State*, 419 So. 2d 807 (Fla. 3d DCA 1982). In light of the overwhelming evidence against Gore, we hold that the erroneous admission of the prior convictions and the underlying documents was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

However, we reverse Gore's conviction for the attempted murder of the victim's child. Because the overt acts comprising the crime charged were committed in Georgia, not in Florida, the court did not have territorial jurisdiction over the crime charged. Section 910.005, Florida Statutes (1987); *Lane v. State*, 388 So. 2d 1022 (Fla. 1980). The trial court therefore erred in denying Gore's motion for judgment of acquittal as to that charge.

We also reverse Gore's conviction for possession of a weapon during the course of a criminal offense. *Hall v. State*, 517 So. 2d 6[illegible]la. 1988); *Carawan v. State*, 515 So. 2d 161 (Fla. 1987).

As to defendant's remaining points on appeal, we find no merit.

Reversed in part; affirmed in part; remanded.

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[1]Both in the trial court and before this court, Gore attempted to avoid characterizing the issue of his alleged inability to testify before the camera as one of competency. However, we can discern no meaningful difference between Gore's claim and that of the defendant in State v. Green, 395 So. 2d 532 (Fla. 1981). In *Green*, the defendant sought to exclude the electronic media because, in the opinion of a psychiatrist, the presence of the media would heighten the defendant's anxiety and depression and interfere with her ability to defend herself and communicate with counsel. 395 So. 2d at 535. The supreme court characterized the issue as one of competency to testify. *Id.* at 538. Likewise, Gore's claim that the presence of the camera would interfere with his ability to testify raised the issue of his competency to stand trial. *See also* Fla. R. Crim. P. 3.211(a)(2)(vi) (defendant's capacity to testify relevantly one factor to consider when determining competency to stand trial).

[2]Defense counsel had in its possession the medical report that formed the basis of the motion months before actually moving to exclude the electronic media.

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Criminal law—Argument—Prosecutor's personal attacks on defendant and defense counsel and remarks urging jury not to turn defendant loose and to remove defendant from society so egregious as to warrant granting of new trial

MANUEL EVERETT ALVAREZ, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 90-1394. Opinion filed January 2, 1991. An Appeal from the Circuit Court for Dade County, Harold Solomon, Judge. Bennett H. Brummer, Public Defender, and Beckham & Beckham, P.A., and [illegible]a Beckham, Special Assistant Public Defender, for appellant. Robert A. [illegible]tworth, Attorney General, and Anita J. Gay, Assistant Attorney General, for appellee.

(Before JORGENSON, LEVY, and GODERICH, JJ.)

(PER CURIAM.) Manuel Alvarez appeals his conviction and sentence for burglary of an occupied conveyance. For the following reason, we reverse and remand for a new trial.

On appeal, Alvarez alleges that the trial court erred in denying a defense motion for mistrial based on the improper remarks of the prosecutor during closing argument. Specifically, the prosecutor made the following statements:

(1) Use your common sense, as defense said. *Don't let them confuse you, because all you will get from the defense is tearing down. You will not get anything substantive, only inconsistencies*, like, 'you didn't say that on that day' or, 'where are the earrings.'

(2) What happened that night is the way they told it: Manuel, *on a rampage*, comes up huffing and puffing. "I need a ride; I need money." Of course, these gentlemen have no idea what to expect from him. *They see a madman, a violent animal*, come up to the window making demands. *These gentlemen can't go to the Farm Stores without being accosted by this man.* . . . It could have torn his lobe. Fortunately, there was no serious injury or disfigurement.

(3) What happens next? Did Manuel casually walk away? *I went nuts every time the defense asked*, "did he walk away?" He didn't walk away. Use your common sense. Did he walk away? No. If he walked away, he walked away fast, trying to make good his escape, or he ran. He was clearly not strolling away; he was trying to get away.

(4) Again, as we said in voir dire, let's not confuse minor inconsistencies with lies, because two people can see the same thing and describe it differently. *So, if you are nitpicking and trying to insult somebody's intelligence, as the defense is really doing today* . . . .

(5) [A] deposition where there is no state attorney present, just civilian witnesses or officers subjected to the cross-examination type questions of the public defender, *and you've got to watch both of them today, how they asked the questions, same as in deposition, leading questions; "yes, no, thank you and move on."*

(6) Not only is *he a burglar, he's a robber*, and let's see how.

(7) *I would certainly be surprised* if you don't believe force or violence was used to get them.

(8) What the defense wants you to do is walk him, find him not guilty and *turn him loose again.*

(9) The defense is now going to break up the elements of robbery and have you just pick one of the elements and give him a slap on the wrist. There are no lessers. By law we have to read them but there is no lesser. *He is a robber and a burglar, and don't go for anything less* . . . . *Can you live with the decision?*

(10) Law makers don't try to get any more than a reasonable doubt. The Judge will give you a definition. It goes to your heart, your gut. Do you buy it? Do you believe . . . . Nobody can describe what a reasonable doubt is, but you have to have it in your heart of hearts. *Don't walk him. The man is guilty. Don't let them confuse you or insult your intelligence.* . . . Use your common sense. *Do your part. Excise this cancer from society.*

(11) Nobody is in the man's head. That was what defense said. Since none of us are in that head . . . .

(12) Remember, the officers and victims and witnesses are not counseled in a deposition. *They're alone in a small room with two trained attorneys* . . . .

(13) *If the defense wanted to see the earrings so bad, they have subpoena powers.*

(14) Don't deny Steven Lutz his justice. This man is guilty, and the cloak he was wearing at the beginning of the trial is now off. *He is a robber and a burglar for all to see.*

(Emphasis supplied.)

The jurisprudence of this district requires reversal when egregious arguments such as these are made.[1] *See Rosso v. State*, 505 So. 2d 611 (Fla. 3d DCA 1987) (improper prosecutorial misconduct warrants new trial where prosecutor indulges in personal attacks upon accused, his defense, or his counsel); *Jackson v. State*, 421 So. 2d 15 (Fla. 3d DCA 1982) (prosecutor's personal attacks upon defense counsel were grossly improper warranting new trial); *Gomez v. State*, 415 So. 2d 822, 823 (Fla. 3d DCA