IN THE SUPREME COURT OF FLORIDA

MARSHALL LEE GORE,

Appellant,

v. CASE NO. 75,955

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case.

A Columbia county grand jury indicted Marshall Lee Gore for first degree murder, kidnapping and robbery in the connection with the death of Susan Marie Roark. (R 2758-2759) Gore pleaded not guilty on June 30, 1989, and proceeded to a jury trial (R 2764). The jury found Gore guilty as charged on March 14, 1990, and after hearing additional evidence during the penalty phase of the trial, the jury recommended a death sentence for the murder. (R 3043, 3063-3064)

Circuit Judge Vernon Douglas, adjudged Gore guilty on April 3, 1990 and sentenced him to death for the murder, life for the kidnapping, and fifteen years for the robbery. (R 3070-3083) In support of the death sentence, the court found four aggravating circumstances: (1) Gore was previously convicted for attempted murder, kidnapping, sexual battery, and armed burglary; (2) the homicide occurred during a kidnapping; (3) the homicide was committed for financial gain; and (4) the homicide was committed in a cold, calculated, and premeditated manner. (R 3072-3074) In mitigation, the court acknowledged as non-statutory mitigating circumstances Gore's mental and physical abuse as a child at the hands of his father, and the testimony of the psychiatrist that Gore suffered from an anti-social personality disorder as a result of his abusive childhood environment. (R 3076)

Gore filed a motion for new trial on April 11, 1990, which the court denied on the following day. (R 3085-3087, 3127) He timely filed his notice of appeal to this court on April 26, 1990. (R 3131)

Facts - The Prosecution's Case

Marshall Gore met Nathan Caywood in Cleveland, Tennessee. (R 1172-1174) Caywood knew Gore by the name Tony. (R 1172) The two men decided to travel to Florida together, and Caywood suggested that Gore meet him at the Rocky Top Market in Cleveland at 11:30 p.m. (R 1176-1179) Caywood asked Jamie Stafford to show Gore the location of the market. (R 1178) Stafford accompanied Gore to the Rocky Top Market between 10:00 and 10:30 p.m. (R 1253-1254). Rather than waiting for Caywood, Gore began a conversation with a young woman who drove to the market in a black Mustang automobile. (R 1257-1259) Stafford recognized the woman as Susan Roark (R 1258, 1263-1264). Stafford said that Gore told him he was leaving. Gore then entered Susan Roark's car and they drove away. (R 1259-1260)

Gore accompanied Roark to a party at the home of a friend of Roark's, Michelle Trammell's. (R 1304-1306) Trammell said that Roark had planned to spend the night at her home after the party (R 1304). Roark and Gore arrived at Trammell's home around 10:00 on the night of January 30, 1988 (R 1304). Roark introduced Gore simply by the name Tony (R 1308). Others present at the party included Rick Hammond, Trammell's boyfriend (R 1362). Brian Swafford and Randall Scott Clark were

also present (R 1381, 1396-1397). All those present, besides Gore, were long-time friends of Roark's. Each of those present at the party testified that they observed no unusual behavior on the part of Gore (R 1319, 1372-1373, 1393, 1412). Between 11:30 and 12:00, Roark left to drive Gore home. She intended to return to Trammell's home to spend the night (R 1304). Roark had also asked Trammell to accompany her when taking Gore home (R 1311), however, Trammell fell asleep and did not go with Roark. (R 1314) Roark did not ask any of her other friends who were present to accompany her. (R 1317-1318, 1368-1369, 1393, 1413-1414) She freely left with Gore alone. (R 1393, 1414)

Susan Roark never returned to her friend's home. (R 1316) Trammell assumed that Roark must have gone home rather than coming back to spend the night. (R 1321). Later the following day, however, Susan's grandmother called Trammell inquiring about Roark. (R 1321-1322) Roark's grandmother had expected her home by 7:00 am Sunday morning (R 1334). Her grandmother reported her missing (R 1334). Efforts were made to find her without success (R 1323).

On April 2, 1988, the skeletonized remains of Roark's body were discovered in Columbia county. (R 949, 957, 965, 972) Four members of the Sheriff's auxiliary were conducting a search on horseback for a missing man. (R 948, 956, 964, 970) The body was in a wooded area which had been used for unauthorized dumping of household garbage and refuse. (R 949, 957) The body was laying near some old tires. (R 977) Several items of evidence

were found near the body. Two earrings were located underneath the victims head. (R 978-979) A pink and blue shirt was found a short distance from the body as well as a pair of woman's underwear. (R 978-979, 988-989, 1065-1066) A hair piece was also found (R 978) and, in the victim's hands, a single strand of hair was present. (R 986) A shoe string was tied around the victim's left wrist. (R 1005-1006, 1040). The pair of woman's underwear appeared to have been cut, and a panty shield was found in two pieces. (R 1040, 1067) Some beer bottles, white socks and a Marlboro cigarette pack were also collected. (R 1072-1075) There were no fingerprints found at the scene. (R 1046). Serology testing on the shirt indicated the presence of blood. (R 1082) However, the preliminary tests were not conclusive and the test sometimes has false positive readings for items such as bleach and rust (R 1085-1091). There was also insufficient quantities to determine if it was human blood or animal blood (R 1091-1092).

A skeletal remains were examined by a pathologist, Dr. Bonifacio Floro and by forensic anthropologist, Dr. William Maples. (R 1093, 1136) The remains had a small amount of tissue attached to the bone and a portion of the skin. All the internal organs were decomposed. (R 1140) The leathery skin still covered the chest, abdomen, and the front left side of the victim. A small oval hole, two to three inches in diameter, was in the skin in the region of the right breast. (R 1141) A string was attached around the left wrist. There was a mark on the left wrist indicating that at one time the string

was rather tight. (R 1141) The skin was not broken in that area, however, a bruise mark was apparent. (R 1141) Floro found no evidence of broken bones, or evidence of other wounds. (R 1141) He concluded the cause of death was homicide. (R 1142-1143). This conclusion was based on the fact that a young woman was found deceased in a rural area, without clothes, and had no history of chronic or acute illnesses. (R 1142-1144) Floro concluded the manner could have been strangulation, a slashing injury to the neck, or a stabbing which would have left no marks. (R 1145) The neck area was completely missing. (R 1146) Floro stated that he expected the neck and the neck to be intact. (R 1147) His conclusion was that there must have been some injury to the neck which provided a favorable environment for insects to begin the deterioration process. (R 1146) He believe some type of open wound occurred in the neck area. (R 1146) Floro stated that the absence of cartilages and small bones in the neck area could have been attributed to animal activity. (R 1154) He could also not rule out the possibility that death occurred as a result of an drug overdose, since there was insufficient tissues for toxicology studies. (R 1157-1159) Floro removed the skull from the remains for the purposes of preparing a dental chart. (R 1147, 1160) He used a scalpel and said that it is possible that he accidentally made a nick in the bone at the base of the skull which the anthropologist later discovered. (R 1160) Floro concluded that the body was placed in its location either at the time of death, or within two hours of death (R 1150). Based on the degree of

decomposition, he concluded that death occurred six to seven weeks prior to the discovery of the body. (R 1152-1154) Floro disagreed with Maples' conclusion that death could have occurred only two weeks prior to the body. (R 1152-1153) The remains were identified as Susan Roark's based on an examination of her dental charts. (R 1148- 1149, 1131-1135)

Maples testified about three findings on the remains. (R 1093-1098). He said the circular hole in the skin in the area of the right breast could have been caused by the breast being cut away or maggots devouring the tissue in that area. (R 1099) He said of the hundreds of cases he had examined, only two have had the breast area missing. (R 1100) According to Maples there may have been an injury to the breast area that produced an attractive environment for maggot activity to devour the tissue. (R 1099, 1124) Based on the edges of the skin, he felt that the greater probability was that maggots had removed the breast. (R 1124-1126) Maples also found a nick in the bone at the based of the skull. (R 1101-1110) He believe the nick was produced by a knife. (R 1101) Moreover, the wound was produced by stabbing action. (R 1103) The orientation of the wound indicated that the blade had come from the rear of the person, since a knife went under the back of the skull above the first vertebrae. (R 1106) This could have severed the spinal column causing immediate death. (R 1106) Based on brownish debris in the wound to the bone, Maples concluded that the wound occurred somewhere around the time of death. (R 1107-1108) However, Maples said the wound to the bone could have occurred when the

medical examiner used a scalpel to remove the skull from the spinal column. (R 1108) The medical examiner also washed the brain case, which could have left brown staining in the wound. (R 1109-1110) Maples concluded that the body was placed at the scene before rigor mortis began, which would have been within twelve hours of death (R 1113-1114). Because of the decomposition and the mummification of the skin, Maples concluded the body had probably been at the scene about two to six months prior to discovery. (R 1112, 1115-1117) The body could have been present at the scene for as little as two weeks, or for as much as six months. (R 1115-1117)

In January, 1988, Gore visited a former girl friend, Susan Brown, in Tampa. (R 1417-1421) He drove a black Mustang and told Brown that his mother had given him the car. (R 1422) Gore needed money for a hotel and asked Brown to assist him in pawning some jewelry, since he did not have a driver's license. (R 1425-1426) Gore and Brown went to a pawn shop where Gore offered three or four rings. (R 1427) The pawn shop owner refused one ring, a class ring with the initials S.M.R. (R 1427) Gore said that the ring had belonged to a former girl friend. (R 1428) Brown then accompanied Gore to a hotel where he rented a room. (R 1429) The following day, Gore asked Brown to assist him in pawning more jewelry. (R 1430) This time a necklace, which Gore said had belonged to a former girlfriend. (R 1430-1432) They pawned the necklace for $70. (R 1432). They continued to another pawn shop where Gore pawned additional jewelry, two or three rings. (R 1433-1435) Brown was

unable to identify the rings which had been obtained from the pawn shops, as the rings Gore pawned. (R 1451) Two rings and transaction records were obtained from the Pawn & Gun Exchange in Tampa. (R 1478-1490) A flat herringbone chain necklace and transaction records were obtained from another pawn shop up in Tampa, the A & A pawn shop. (R 1494-1514) The owner of the shop was able to identify the herringbone chain because of its unusual length. (R 1501) A ring was also obtained from the Royal Golden Gun pawn shop in Tampa. (R 1504-1506)

Susan Brown introduced Gore to Rosa Lastinger in Miami. (R 1658) Lastinger worked for a car dealership selling cars. (R 1659) In February, 1988, Gore called Lastinger to talk to her about trading a black Mustang. (R 1660) He was unable to make the trade, however, because he not have the registration or title to the car. (R 1660) Gore told Lastinger that his father had the title, and since they were on bad terms, he could not obtain it. (R 1660-1661) Gore using the name Tony at the time, but he filled out paper work in the name of Marshall Anthony Gore. (R 1659-1663). He made arrangements to stay with Lastinger for a few days at her home but stayed six to eight weeks. (R 1663) During this time, he drove the black Mustang. (R 1663-1664). Lastinger described one incident when she was riding with Gore in the automobile and he was stopped for speeding. (R 1665-1666) She said when he saw a police car coming he suddenly got a paranoid reaction and started driving over a 100 miles-per-hour. (R 1665) When she told him to slow down, Gore said, "You don't understand, they're going to get

me, going to get me." (R 1666). After he was stopped, Gore handed Lastinger his pocket knife, saying he was about to be arrested. (R 1666-1667) The officer merely gave him a ticket. (R 1667) Gore's response was that Karen, his ex-wife, had apparently not reported the Mustang stolen. (R 1667) Later, on February 14 1988, Gore was involved in an automobile accident with the black Mustang and called Lastinger to pick him up. (R 1668-1669, 1729-1733). The police seized the Mustang after Gore left the scene (R 1577-1589). The automobile was the same one that Gore had had glass repaired in a few days earlier. (R 1607-1611) The car was titled in the name Harold Roark (R 1541).

Crime scene investigators processed the Mustang and obtained several items of evidence. A yellow chain with a teddy-bear charm was hanging on the rear view mirror. (R 1524) Two pairs of earrings were attached to driver's sunviser. (R 1526) A brown pillow was in the car. (R 1528) Also, a pair of brown shorts with suspected blood stains were recovered. (R 1533) The driver's side seat-belt also had a red stain which was suspected blood. (R 1535) A psychology textbook with the name Susan Roark written inside was in the automobile. (R 1537) Also, a florist card addressed to Susan. (R 1539) The jewelry and pillows found in the car were later identified as being similar to items Susan Roark owned. (R 1306-1307) The traffic ticket bearing the name of Marshall L. Gore was also found inside the car. (R 1541) The pair of shorts tested positive on a presumptive test for the presence of blood, but no other

typing could be performed. (R 1603-1604) The seat-belt buckle also tested positive for the presence of blood. (R 1604-1605) The presumptive tests were not conclusive. (R 1606) Latent fingerprints were obtained from the inside driver's window of the automobile. (R 1545-1546) One proved to match Gore's right index-finger. (R 1629)

Marisol Coto and her daughter, Jessie Casanova, testified about some music tapes Gore gave to Jessie which had come from the black Mustang (R 1692-1695, 1701-1704). Gore also gave a set of the Mustang keys to Jessie because she collected and played with keys. (R 1705) He also asked Jessie to burn the tapes, but she did not. (R 1707-1715) The tapes and the keys were turned over to FBI agents. (R 1716-1728) Agent Keating verified that the keys matched the black Mustang. (R 1725-1728)

While in Miami in February of 1988, Gore met Lisa Ingram at a party, at a lake (R 2024-2025). Gore, his friend David, and Ingram left the party to take David home, since he was ill. (R 2026-2027) Ingram testified that Gore drove a dark colored compact car. (R 2027) After leaving David, Ingram noticed a purse in Gore's automobile. (R 2028-2029) Over defense objections, Ingram was allowed to testify that Gore allegedly said that the purse belonged to a girl that he had killed last night. (R 2029) The court allowed the statement in as an admission against interest over relevancy objections. (R 2029, 2018-2024) Ingram testified that she heard this statement on the night of February 19th or the morning of February 20th. (R 2030) Therefore, his reference to "last night" would have been

to February 18th or 19th. (R 2030) On redirect, the state was allowed to illicit, over objection, that Ingram was upset when she was interviewed by the police. (R 2035)

The trial court allowed the state to introduce evidence of a collateral crime in an effort to prove Gore was the perpetrator. (R 1811-1862, 2053) Tina Corolis testified about a sexual assault Gore allegedly committed upon her in March of 1988, in Hollywood, Florida. (R 2053-2118) Corolis said she met Gore in September or October of 1987, and they dated about five times between October and March of 1988. (R 2054) On March 14, 1988, Gore telephoned her asking her for a ride since his car was broken down. (R 2054) She picked him up, and they drove around attempting to find his automobile. (R 2055) At one point, he asked her to pull over so he could use the rest room. (R 2055) He returned to the car with a knife and took over the driving of the car. (R 2055) He drove them to an area which was somewhat wooded and where garbage had been dumped. (R 2056) Gore threatened to cut the seat-belts from her car and tie her up, but did not do so. (R 2056-2057) Corolis also had her son in the automobile. (R 2057) Gore placed the knife at her stomach and told her to take her clothes off, and then sexually assaulted her. (R 2057) After the assault, she tried to convince him to take her and her son home. (R 2058) Instead, he dragged her out of the car, punched her face against a rock, and strangled her. (R 2058) She lost consciousness. (R 2058) When she regained consciousness, Gore, her car and her son were gone. (R 2058-2059) In addition to the blow to her head, she

suffered stab wounds across her neck, arms, legs, and buttocks. (R 2059) Her jewelry was also taken. (R 2060) She later recovered her red Toyota automobile and her jewelry. (R 2060-2062)

The state presented two statements Gore allegedly made after his arrest. FBI agents, L. D. McGuinty and Larry Faust, arrested Gore in Tennessee. (R 2170-2206) They did not question him at that time, but Gore allegedly said that the two agents would be famous for making the arrest. (R 2076, 2205) Later, in Florida, a Miami detective interviewed Gore. (R 2210-2220) When asked if he had ever driven a 1986 black Mustang with a Tennessee license tag, Gore said he did not recall having ever driven such a car. (R 2217) Gore also denied knowing anyone by the name of Susan Roark. (R 2217) When asked if he knew Tina Corolis, Gore denied knowing her. (R 2218) Gore also denied ever having driven the 1987 red Toyota Corrolla. (R 2219)

Facts - The Defense's Case

The defense presented four witnesses who testified about the collection of various hair samples from the scene and comparison standards from Gore and the victim. (R 2289-2318) A pair of underwear and a pair of socks found at the scene had Negro hairs present; no Caucasian hairs were found. (R 2303-2304) Hairs from a shirt found at the scene were Caucasian hairs, but none were similar to Gore's. (R 2306-2307) The only other hair found at the scene was from the victim's hand

and they did not match Gore's hair. No hairs matching Gore's were present on any of the items recovered from the scene. (R 2307-2309)

Gore's sister, Michelle Gore, testified about some jewelry she and her sister owned which was missing. She had several necklaces, rings, and gold chains which had disappeared over the years. (R 2352-2353) She looked at exhibit #33, a herring-bone chain necklace, and said that it could have been hers because she had one identical to it. (R 2353-2354) She also identified exhibit #32, a diamond ring, as like the one she lost. (R 2355) She looked at another ring, exhibit #34, and identified it as similar to the ring her sister owned. (R 2356-2357)

Stephanie Refner testimony was presented by a video-taped deposition. (R 2358, 3005-3036) Refner knew Susan Roark, and she testified that the last she saw Roark was on 25th Street as Susan was driving her automobile. (R 3006-3012) Roark turned into a Texaco gasoline station. (R 3012) This was on a Saturday night, a week after January 31st. (R 3015-3017) On February 14th, Refner read the newspaper article reporting that Roark was missing. (R 3013-3014) She was in shock because she knew she had seen Roark after January 31st, which was the date the article reported Roark missing. (R 3014-3015) Refner called detective Chastain to report that she had seen Roark. (R 3016-3017) She reported to Dewey Chastain, on February 15, 1988, that she had seen Roark in the black Mustang on 25th Street on February 6th. (R 3034-3036, 2362-2366)

The state presented two witnesses in rebuttal. (R 2377, 2385) Randall Giles said that he saw Susan Roark in either late February or January at the Texaco station on 25th Street in Cleveland, Tennessee. (R 2378-2379) She said she was going to a party off Eades Bluff. (R 2379) The following day, Giles heard that Roark was missing. (R 2379) Giles assisted in the search for Roark and was looking for black Mustangs around town. (R 2379-2380) Harold Roark, Susan's father, learned of his daughter's disappearance on January 31, 1989. (R 2385) He and some of his friends started searching for her. (R 2386) They looked for her automobile every Friday and Saturday night until they were notified that her car had been found wrecked. (R 2387)

Pretrial Motions

A. Motion to Suppress Statements.

Before trial, Gore moved to suppress statements he allegedly made to law enforcement officers after his arrest. (R 1787-1811, 1862-1984) FBI Agents L.B. McGuinty and Larry Faust, arrested Gore in Paducah, Kentucky on a federal parole violation. (R 1863-1864, 1878) The agents were aware of the pending state charges and investigations. (R 1886) During the interview with McGuinty and Faust, Gore initially signed a waiver of rights form, but later asserted his rights under Miranda. (R 1866-1869, 1872, 1879, 1886-1887) When the agents asked specifics about how Gore arrived in Kentucky, Gore said he did not want to answer anymore questions. (R 1869, 1872,

1880-1881) He did not ask for a lawyer at that time. (R 1869, 1872, 1880-1881) The agents stopped questioning. (R 1880-1881) They transported Gore to a federal facility in Kentucky. Federal public defenders represented him in those proceedings and advised him not to talk to law enforcement on the other charges. (R 1889, 1916) Gore was released from federal custody and transferred to the custody of the Metro Dade Police Department. (R 1889-1890)

Detective David Simmons arrested Gore on state charges in relation to the assault on Tina Marie Corolis on March 24, 1988. (R 1888-1891) He interviewed Gore the same day, after transporting him to an interview room at police headquarters. (R 1889) Simmons advised Gore of his constitutional rights. (R 1893) Gore refused to initial the rights advisement form. (R 1896-1898) Gore said he had been advised by his federal public defender not to cooperate with law enforcement. (R 1898, 1916-1917) However, according to Simmons, Gore said he declined to follow their advice and wanted to speak to the detective. (R 1898) The detective asked if he wanted to speak to someone in the Miami Public Defender's Office (R 1899). Gore declined. (R 1899) Gore testified that he requested an attorney to be present throughout the interview with Detective Simmons (R 1950-1955).

Simmons began the interview around 3:15 p.m. (R 1892), and terminated it at 10:15 p.m. (R 1909) He was aware that Gore had asserted his Miranda rights with the federal authorities and had been advise by counsel not to talk to law enforcement.

(R 1911-1915) He was also made aware about 9:05 p.m. that an attorney from the Public Defender's Office in Miami was attempting to contact Gore. (R 1908) Simmons advised Gore of that fact at 9: 25 p.m., and according to Simmons, Gore declined to see the attorney. (R 1907- 1908) Judy Alves of the Miami Public Defender's Office attempted to see Gore at the Dade County Jail during the afternoon of March 24, 1988. (R 1791-1794) She obtained a court order from Judge Pearson and returned to the jail at 5:00. (R 1793-1794) She was told that Gore was not present. (R 1794) She received this information from the shift commander. (R 1794) Alves then proceeded to the police headquarters homicide division. (R 1795) She advised that she had a court order to see Gore. (R 1796) She was told that Gore was present and that the detectives would get back with her. (R 1796) After waiting for a period of time, Alves returned to Judge Pearson for an emergency hearing. (R 1796-1797) This occurred about 7:00 p.m. (R 1797) Following the hearing, Alves returned to police headquarters in an attempt to see Gore; this was after 9:00 p.m. She was never permitted access to him. (R 1800-1802) Simmons ultimately secured the statement. (R 2215-2220) The trial court denied the motion to suppress and allowed the statement into evidence. (R 1974, 2216-2220)

B. Deposition to Perpetuate Testimony.

Gore moved to continue the trial in order to secure the live testimony of a defense witness, Stephanie Refner. (R

2868-2870, 214-216) Refner lived in Cleveland, Tennessee and was unable to travel due to her pregnancy which was at the 8 1/2 month stage. (R 2868-2870, 214-216) Gore asked that his trial be continued in anticipation that Refner could travel after the birth of her child. (R 2868-2870) The state objected to a continuance, but agreed as an alternative that Refner's deposition to perpetuate testimony could be taken. (R 214-216) Over Gore's objection, the trial judge denied the continuance and ordered that Refner's deposition to perpetuate testimony be taken. (R 2871) Gore filed a request to be present at the taking of the deposition (R 143-145), however, the court denied the request on the grounds that this was a defense deposition rather than a state deposition. (R 143-145) The deposition was taken without Gore's presence and used in the trial. (R 3005-3036) Before trial, Gore again renewed his motion for continuance and objection to the use of a video-taped deposition. (R 214-216)

Penalty Phase and Sentencing

The state and defense presented additional evidence at the penalty phase of the trial. (R 2589-2687) The state presented a certified copy of the information and judgement and sentence for the Tina Corolis case, in which Gore was adjudged guilty of burglary, kidnapping, attempted first-degree murder, sexual battery, and robbery. (R 2589-2594) Gore presented testimony from his mother and uncle about his childhood experiences and a psychiatrist (R 2595-2687).

Brenda Gore, Marshall's mother, described Marshall's childhood experiences and family life. (R 2595-2627) She married Gore's father when she was seventeen years old, and the marriage lasted 26 years. (R 2597-2598) However, the marriage was marred by many lengthy separations. (R 2600-2602) Jimmy Gore also beat his wife regularly in the presence of the children. (R 2602) Brenda Gore suffered a ruptured eardrum, black eyes and bruises, although she never suffered a broken bone. (R 2603) He treated Marshall and his brother Michael in a similar fashion. (R 2612-2615) Jimmy Gore beat his sons with his fists. (R 2613) According to Brenda Gore, Marshall's father treated him and his brother like they were dogs. (R 2614-2615) These beatings began when Marshall was seven years old. (R 2615) Marshall suffered a cut on his leg one time, and bruises where he had been hit and kicked. (R 2615-2616) Jimmy Gore had his sons working in the construction business for him when they were ten years old. (R 2616) He worked them as if they were grown men, and then he would take their money. (R 2617) Jimmy Gore also brought marijuana into the house and gave it to his sons. (R 2618) Jimmy Gore was also involved in thefts and other criminal behavior, including a shoot-out over a stolen car. (R 2603-2606) There were times when Jimmy Gore simply disappeared for periods of time. (R 2619) He also did things to change his appearance from time to time. (R 2601) During Jimmy Gore's disappearances, the family had difficulty surviving financially. (R 2619) Brenda Gore would rent out part of the house for the income. (R 2619) Jimmy Gore also used

aliases (R 2609-2610), and the children were aware that he did so. (R 2610) Brenda Gore said that Marshall never had good self-esteem because of the way he was treated by his father. (R 2620-2621) She recalls an instance when Marshall was seventeen or eighteen years old, when he wanted to be called by another name. (R 2621-2622) He also talked as if he was dead and possessed. (R 2622) Once Marshall attempted suicide. (R 2622-2623) His father had beaten him up and torn the bedroom door off, telling him that he had no right to privacy, and didn't deserve any privacy. (R 2623) That night, Brenda Gore heard her son talk to his friends, telling them good-bye and that he would never see them again. (R 2623) Marshall had taken a bottle of Valium and had to be rushed to the hospital. (R 2623-2624) The situation in the household had gotten to the point where Brenda was afraid to go to sleep. (R 2624) There was a lot of fighting between the father and the sons, and Marshall and his brother Michael were fighting with each other. (R 2625) At one time, Michael stabbed Marshall. (R 2625) Brenda Gore finally obtained a divorce after trying for three years in fear. (R 2625)

Rex Gore, Marshall's uncle, also testified. (R 2628) He described the family relationship between Brenda and Jimmy Gore very shaky, marred by constant fighting. (R 2632) He said that his brother constantly abused, physically and mentally, his wife and children. (R 2633) Rex Gore said his brother would frequently be gone for days at a time. (R 2635) He said on occasions he had seen his brother come in from work and throw

all the food off the dinner table (R 2636), and dump the waste-paper basket on top of the table. (R 2636) Jimmy Gore was involved in criminal activity and bragged to his brother about that activity. (R 2637) It was not unusual for law enforcement to be looking for his brother for various reasons.(R 2637-2638) His brother talked about being involved with the Mafia and people getting killed. (R 2638) These discussions occurred in the presence of his family. (R 2638-2639) He laughed about the criminal activity like it was funny, and did not try to keep it a secret from his children. (R 2639-2640) Rex Gore said that his brother's sons were terrified of him by the time they were seven or eight years old. (R 2641-2642) The children became street-smart by the time they were six or seven. (R 2642) They would become angry and talk about fighting or getting a gun and killing someone, and Jimmy Gore would just laugh about it. (R 2643) Rex Gore said that Jimmy Gore's father also abused him as well as the other children in the family. (R 2648-2650) However, he believed that Jimmy Gore was abused to a greater degree because of his appearance, having red hair and freckles. (R 2649-2650)

A psychiatrist, Umesh Mhatre, testified for the defense. (R 2651) Mhatre concluded that there was a causal relationship between Marshall Gore's abuse and neglect as a child, and his behavior as an adult. (R 2659-2660) He suffers from a anti-social personality disorder. (R 2660-2661) Mhatre felt that Gore's problems directly related to his childhood, and his identification with his father image. (R 2661) A child at six

or seven years old begins to model his father, and wants to be like his father, and takes up those characteristics. (R 2662-2663) At about age fifteen, Marshall Gore began to use disassociated periods as a coping mechanism in trying to come to terms with himself. (R 2663). Mhatre concluded that Marshall was probably feeling some guilt during this time and wanted to be someone else. This the reason he might have said that Marshall is now dead. (R 2663) His abuse as a child was a critical factor in his current anti-social behavior as an adult. (R 2664) On cross-examination, the prosecutor was allowed to ask the psychiatrist if Gore new the difference between right and wrong. (R 2666-2667) Defense objected on the grounds that insanity was not an issue during the penalty phase, however, the judge overruled the objection. (R 2667-2669)

SUMMARY OF THE ARGUMENT

1. The trial court should have granted Gore's motion to suppress statements he allegedly made after his arrest. Gore asserted his right to remain silent with FBI agents who arrested him on federal parole violation charges after they attempted to question him on other matters. Gore was represented by the federal public defender on these charges, and his lawyer also advised Gore not to cooperate with law enforcement on the state charges. He gave this advice prior to Gore's being transferred to state custody. However, Metro Dade Police Officer David Simmons proceeded to interview and interrogate Gore even though he was aware of Gore's previous assertion of his rights and consultation with counsel. The statements Gore gave to Simmons were obtained in violation of Gore's rights under the Fifth Amendment.

2. The State presented improper evidence of collateral crimes. Lisa Ingram testified to a statement Gore allegedly made about having killed someone. Tina Corolis testified about an assault Gore perpetrated on her which the State asserted as similar fact evidence tending to prove Gore committed the homicide of Susan Roark. Neither witness's testimony was relevant, and the trial court erred in denying Gore's request to exclude the evidence.

3. Gore moved to continue his trial in order to secure the live testimony of a defense witness, Stephanie Refner. Refner lived in Cleveland, Tennessee, and was unable to travel due to her pregnancy. Gore asked for the continuance in anticipation

that Refner could travel after the birth of her child. The State objected to a continuance, but suggested, as an alternative, that Refner's deposition to perpetuate testimony could be taken Over Gore's objection, the trial judge denied the continuance and ordered Refner's deposition. Gore filed a request to be present at the taking of the deposition however, the court denied the request on the grounds that this was a defense deposition rather than a state deposition. The deposition was taken without Gore's presence and used in the trial. The trial court abused its discretion in denying a continuance and in denying Gore his Sixth Amendment right to be present at the deposition.

4. The offense of kidnapping requires that the victim forcibly or by threat be confined, abducted or imprisoned against his will to facilitate the commission of a felony. Gore moved for a judgment of acquittal on the grounds that the State failed to prove any confinement or abduction against the will of the victim. State witnesses testified that Susan Roark was voluntarily with Gore at the party and voluntarily drove him away. There was no evidence of force or threat. There was no evidence of confinement or abduction. Gore's motion for judgment of acquittal should have been granted.

5. Defense counsel invoked the rule of witness sequestration before testimony began. At the prosecutor's request, the victim's stepmother, Carolyn Roark, was excused from the rule even though she was a material witness. The State's request and the judge's decision to excuse her from the rule was based

solely on Article I Section 16 (b) Florida Constitution and Section 960.001(5) Florida Statutes which allows a homicide victim's relative to be present at any critical stage of the proceedings, if the person's presence does not violate any rights guaranteed to the defendant. The court abused its discretion and misapplied these constitutional and statutory provisions. Gore's right to due process and a fair trial have been violated.

6. Dr. Umesh Mhatre testified for the defense during penalty phase. He described the psychological damage Gore suffered as the result of his chaotic family life and poor parenting. The testimony was presented solely in support of nonstatutory mitigating circumstances. Gore did not assert the existence of the statutory mitigating circumstances dealing with impaired capacity or extreme mental or emotional disturbance. On cross-examination, the prosecutor was permitted to ask about Gore's sanity at the time of the offense over defense relevancy objections. The cross-examination was improper and mislead the jury since sanity was not an issue at penalty phase. proceeded as follows:

7. In sentencing Gore to death, the trial court relied on three improper aggravating circumstances. First, the homicide was not proven to have been committed in a cold, calculated and premeditated manner since the circumstantial evidence provided no details about how the murder occurred. Second, the convictions used to support the aggravating circumstance of a previous conviction for a violent felony are pending on appeal.

Finally, since the evidence was insufficient to support the conviction for kidnapping, the court improperly used that conviction in aggravation to find that the homicide occurred during a kidnapping. The sentencing process was tainted, and Gore's death sentence was unconstitutionally imposed.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING GORE'S MOTION TO SUPPRESS STATEMENTS SINCE THE STATEMENTS WERE OBTAINED IN VIOLATION OF GORE'S RIGHT TO COUNSEL.

Gore moved to suppress statements he allegedly made to law enforcement officers after his arrest. (R 1787-1811, 1862-1984) FBI Agents L.B. McGuinty and Larry Faust, arrested Gore in Paducah, Kentucky on a federal parole violation. (R 1863-1864, 1878) The agents were aware of the pending state charges and investigations. During the interview with McGuinty and Faust, Gore initially signed a waiver of rights form, but later asserted his rights under Miranda. (R 1866-1869, 1872, 1879, 1886-1887) When the agents asked specifics about how Gore arrived in Kentucky, Gore said he did not want to answer anymore questions. (R 1869, 1872, 1880-1881) He did not ask for a lawyer at that time. (R 1869, 1872, 1880-1881) The agents stopped questioning. (R 1880-1881) They transported Gore to a federal facility in Kentucky. Federal public defenders represented him in those proceedings and advised him not to talk to law enforcement on the other charges. (R1879-1898, 1916) Gore was released from federal custody and transferred to the custody of the Metro Dade Police Department. (R 1890)

Detective David Simmons arrested Gore on state charges in relation to the assault on Tina Marie Corolis on March 24, 1988. (R 1888-1891) He interviewed Gore the same day, after transporting him to an interview room at police headquarters.

(R 1889) Simmons advised Gore of his constitutional rights. (R 1893) Gore refused to initial the rights advisement form. (R 1896-1898) Gore said he had been advised by his federal public defender not to cooperate with law enforcement. (R 1898, 1916-1917) However, according to Simmons, Gore said he declined to follow their advice and wanted to speak to the detective. (R 1898) The detective asked if he wanted to speak to someone in the Miami Public Defender's Office (R 1899). Gore declined. (R 1899) Gore testified that he requested an attorney to be present throughout the interview with Detective Simmons. (R 1950-1955)

Simmons began the interview around 3:15 p.m. (R 1892), and terminated it at 10:15 p.m. (R 1909) He was aware that Gore had asserted his Miranda rights with the federal authorities and had been advised by counsel not to talk to law enforcement. (R 1911-1915) He was also made aware about 9:05 p.m. that an attorney from the Public Defender's Office in Miami was attempting to contact Gore. (R 1908) Simmons advised Gore of that fact at 9: 25 p.m., and according to Simmons, Gore declined to see the attorney. (R 1907- 1908) Judy Alves of the Miami Public Defender's Office attempted to see Gore at the Dade County Jail during the afternoon of March 24, 1988. (R 1791-1794) She obtained a court order from Judge Pearson and returned to the jail at 5:00. (R 1793-1794) She was told that Gore was not present. (R 1794) She received this information from the shift commander. (R 1794) Alves then proceeded to the police headquarters homicide division. (R 1795) She

advised that she had a court order to see Gore. (R 1796) She was told that Gore was present and that the detectives would get back with her. (R 1796) After waiting for a period of time, Alves returned to Judge Pearson for an emergency hearing. (R 1796-1797) This occurred about 7:00 p.m. (R 1797) Following the hearing, Alves returned to police headquarters in an attempt to see Gore; this was after 9:00 p.m. She was never permitted access to him. (R 1800-1802) Simmons ultimately secured the statement which was admitted at trial. (R 2215-2220)

The Fifth Amendment protects a criminal defendant from further police interrogation once he has asserted his right to remain silent or requested counsel. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966); Kyser v. State, 533 So.2d 285 (Fla. 1988); Long v. State, 517 So.2d 664 (Fla. 1987); Smith v. State, 492 So.2d 1063 (Fla. 1986). In Edwards, the Supreme Court clarified Miranda and established a bright-line rule that once a defendant requests counsel there can be no further police-initiated interrogation until counsel is made available to the defendant. The purpose for the Edwards rule was to prevent repeated attempts by law enforcement to secure a waiver of constitutional rights. Recently, the Supreme Court further clarified Miranda and Edwards in Minnick v. Mississippi, ___ U.S. ___, 4 FLW Fed. S973 (Case No. 89-6332, 1990). The Mississippi court had interpreted Edwards to mean that once the defendant has

consulted with counsel, the police are then free to initiate further questioning. Rejecting this interpretation, Supreme Court held that there can be no further interrogation of the accused without counsel's actual presence:

> What ever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.
>
> We consider our ruling to be an appropriate and necessary application of the Edwards rule. A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged. The case before us well illustrates the pressures, and abuses, that may be concomitants of custody. Petitioner testified that though he resisted, he was required to submit to both the FBI and Denhem interviews. In the latter instance, the compulsion to submit to interrogation followed petitioner's unequivocal request during the FBI interview that questioning cease until counsel was present. The case illustrated also that consultation is not always effective in instructing the suspect of his rights. One plausible interpretation of the record is that petitioner thought he could keep his admissions out of evidence by refusing to sign a formal waiver of rights. If the authorities had complied with Minnick's request to have counsel present during interrogation, the attorney could have corrected Minnick's misunderstanding, or indeed counseled him that he need not make a statement at all. We decline to remove the protection from police-initiated questioning based on isolated consultations with counsel who is absent when the interrogation resumes.

Minnick, 4 FLW Fed. at S975.

Gore's statement was obtained in violation of his Fifth Amendment right to remain silent and to have counsel present during any police interrogation. Miranda requires that all questioning cease once a suspect asserts his right to remain silent or requests a lawyer. 384 U.S. at 473-474; Smith v. State, 492 So.2d 1063, 1066. Gore asserted his right not to speak to law enforcement officers during the first interview conducted after his arrest by the FBI agents. No officer should have attempted to interview him again after that assertion. Ibid. Although Gore did not specifically request counsel at that time, he did later, as evidenced by his consultation with the federal public defenders. The fact that the federal authorities arrested Gore and conducted the initial interview primarily concerning the federal charges, the request to deal with law enforcement through counsel carried over to the State's investigation. Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Detective Simmons was aware of Gore's assertion of his rights and subsequent consultation with counsel, if not before he took Gore to the interview room, at least at the beginning of the interview. (R 1898, 1916-1917) Gore refused to sign the written waiver Simmons offered to him. Moreover, Simmons was aware that a lawyer had a court order and was seeking access to Gore at least by 9:05 p.m. 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.

Gore's statement was obtained in violation of his rights under the Fifth Amendment. The trial court should have granted the motion to suppress. This Court must now reverse Gore's convictions for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF COLLATERAL CRIMES.

The prosecution presented collateral crimes evidence through the testimony of Lisa Ingram and Tina Corolis. (R 2024-2035, 2053-2118) Ingram testified to a statement Gore allegedly made about having killed someone. (R 2029) Corolis testified about an assault Gore perpetrated on her which the State asserted as similar fact evidence tending to prove Gore committed the homicide of Susan Roark. (R 2053-2118) Neither witness's testimony was relevant, and the trial court erred in denying Gore's request to exclude the evidence. (R 1757-1786, 1811-1862, 2018, 2049) See, e.g., Peek v. State, 488 So.2d 52 (Fla. 1986); Jackson v. State, 451 So.2d 458 (Fla. 1984); Drake v. State, 400 So.2d 1217 (Fla. 1981). Gore was deprived of his right to due process and a fair trial. Amends. V, VI, XIV U.S. Const.

A. Testimony of Lisa Ingram

On the night of February 19, 1988, Lisa Ingram was riding in a car with Gore. (R 2027) She noticed a light-colored, clutch purse in the car. (R 2028-2029) Ingram testified that Gore said, "[the purse] belonged to a girl that he had killed last night." (R 2029) She understood Gore to be referring to an occurrence on February 18, 1988, although he gave no further information. (R 2030) The State argued that this evidence was admissible because the comment could have referred to the Susan

Roark homicide which allegedly occurred on January 31, 1988. (R 1782, 2758-2759) However, as defense counsel argued, there could have been another murder which occurred on February 18, 1988, and the statement should be considered at face value. (R 1781-1786) In fact, Gore was a suspect in a number of sexual battery cases and another murder in the Miami area. (R 1784) The statement was not an admission against interest regarding the Roark homicide since the date was not consistent and nothing linked the purse Ingram saw to Roark. (R 1781-1784) As evidence of a collateral crime, the statement proved nothing more than Gore's criminal propensity.

This Court's decision in Jackson v. State, 451 So.2d 458 (Fla. 1984) is on point. In that case, the State presented a witness who testified that the defendant pointed a gun at him and bragged that he had been a "thoroughbred killer" when in Detroit. Ibid, at 460. Reversing for a new trial, this Court conclude the testimony was irrelevant:

> The testimony showed Jackson may have committed an assault on [the witness], but that crime was irrelevant to the case sub judice. Likewise, the "thoroughbred killer" statement may have suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice. The testimony is precisely the kind forbidden by the Williams rule and section 90.404(2).

Ibid, at 461. The alleged comments about which Ingram testified was no more relevant here than the "thoroughbred killer" comment was in Jackson. The statement either referred to an unrelated killing or was a boast with no basis in fact. Either

way, the statement was of no relevance other than to prove Gore's criminal propensities.

B. Testimony of Tina Corolis

Tina Corolis testified about a sexual assault Gore allegedly committed upon her in March of 1988, in Hollywood, Florida. (R 2053-2118) She met Gore in September or October of 1987, and they dated about five times between October and March of 1988. (R 2054) On March 14, 1988, Gore telephoned her asking her for a ride since his car was broken down. (R 2054) She picked him up and they drove around attempting to find his automobile. (R 2055) At one point, he asked her to pull over so he could use the restroom. (R 2055) He returned to the car with a knife and took over the driving of the car. (R 2055) He drove them to an area which was somewhat wooded and where garbage had been dumped. (R 2056) Gore threatened to cut the seat-belts from her car and tie her up, but did not do so. (R 2056-2057) Corolis also had her son in the automobile. (R 2057) Gore placed the knife at her stomach and told her to take her clothes off, and then sexually assaulted her. (R 2057) After the assault, she tried to convince him to take her and her son home. (R 2058) He dragged her out of the car, punched her face against a rock, and strangled her. (R 2058) She lost consciousness. (R 2058) When she regained consciousness, Gore was gone, her car and her son were also missing. (R 2058-2059) In addition to the blow to her head, she suffered stab wounds across her neck, arms, legs, and buttocks. (R 2059) Her

jewelry was also taken. (R 2060) She later recovered her red Toyota automobile and her jewelry. (R 2060-2062)

The State asserted that the assault on Corolis was sufficiently similar to the Roark homicide and unique enough to qualify as evidence of identification. See, Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). While the prosecution identified a number of similarities, there were significant differences. Moreover, the similarities did not have an unusual quality about them sufficient to identify Gore as the perpetrator. As this Court said in Drake,

> A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

Ibid. at 1219.

Dissimilarities exist between the cases, and the claimed similarities were not unusual. The prosecutor used a chart to compare the similarities, and a review of that chart shows that the primary similarities had nothing unique which pointed only to Gore as the perpetrator. (R 2944) Both victims had dark hair and, coincidentally, both had the middle name "Marie." (R 2944) Gore had no automobile when he came in contact with the women, and he later used their cars as his own. (R 2944) The women's jewelry was taken and pawned. (R 2944) Although the State claimed a sexual motive for the attack in both cases, there was no evidence of a sexual assault on Roark. (R 2944)

The claim was also made that a knife was used and wounds inflicted to the neck of the victims. (R 2944) However, only speculation based upon the medical evidence that Roark possibly suffered a wound to the neck supports this factor. (R 1101-1110) Both victims were left in a remote, wooded area near a trash pile. (R 949, 2056) Perhaps most importantly, Roark was killed and Corolis was not. See, Drake, at 1219.

The facts present in Drake are comparable, and as in Drake, this Court should find the collateral crimes evidence improperly admitted. Drake was tried for the homicide of a woman whose decomposed, nude body was found dumped in a remote wooded area. Her hands had been bound behind her back. The State, as did the prosecutor in this case, presented collateral crimes evidence of prior assaults Drake committed on women during which he tied their hands behind their backs. Concluding that these similarities did not have a sufficiently unique quality, this Court held that the evidence was improperly admitted.

> The only similarity between the two incidents introduced at trial and Reeder's murder is the tying of the hands behind the victims' backs and that both had left the bar with the defendant. There are many dissimilarities, not the least of which is that the collateral incident involved only sexual assaults while the instant case involved murder with little, if any, evidence of sexual abuse. Even assuming some similarity, the similar facts offered would still fail the unusual branch of the test. Binding of the hands occurs in many crimes involving many different criminal defendants. This binding is not sufficiently unusual to point to the defendant in

> this case, and it is, therefore, irrelevant to prove identity.

Drake, 400 So2d at 1219. In this case, the similarities between the collateral crime and the murder are that Gore knew the victims, used their cars and stole their jewelry after the assault. Like the binding of the victim's hands in Drake, taking a victim's car and jewelry is not an unusual circumstance. Furthermore, as in Drake, the collateral crime here was also a sexual assault without a homicide, while the Roark homicide had little evidence of sexual abuse.

The trial judge should not have admitted the collateral crimes evidence in this case. Gore has been deprived of his right to due process and a fair trial. Amends. V, VI, XIV U.S. Const. He asks this Court to reverse his convictions and order a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING GORE A 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.

Gore moved to continue the trial in order to secure the live testimony of a defense witness, Stephanie Refner. Refner lived in Cleveland, Tennessee, and was unable to travel due to her pregnancy (R 214-216, 2868-2870). Gore asked that his trial be continued in anticipation that Refner could travel after the birth of her child (R 214-216, 2868-2870). The State objected to a continuance, but suggested, as an alternative, that Refner's deposition to perpetuate testimony could be taken Over Gore's objection, the trial judge denied the continuance and ordered Refner's deposition. (R 2871). Gore filed a request to be present at the taking of the deposition (R 143-145), however, the court denied the request on the grounds that this was a defense deposition rather than a state deposition (R 143-145). The deposition was taken without Gore's presence and used in the trial. (R 3005-3036) Before trial, Gore again renewed his motion for continuance and objection to the use of a video-taped deposition. (R 214-216) The trial court abused its discretion in denying a continuance and in denying Gore his Sixth Amendment right to be present at the deposition ordered in lieu of the live testimony.

Since the deposition became a part of the trial, Gore had a constitutional right to be present. See, Amends. V, VI, XIV

U.S. Const.; Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Snyder v. Massachusetts, 291 U.S. 218, 54 S.Ct. 330, 78 L.Ed. 674 (1934); Francis v. State, 413 So.2d 1175 (Fla. 1982); Chapman v. State, 302 So.2d 136 (Fla. 2d DCA 1974). The right to be present at trial is grounded in part in the the Sixth Amendment Confrontation Clause. Ibid. However, the right is broader in scope than merely being present to confront adverse witnesses. This Court in Francis recognized that a defendant "... has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." 413 So.2d at 1177. Florida Rule of Criminal Procedure 3.180 gives a defendant the right to be present at various pretrial, trial and post-trial stages even when no testimony is to be received. Encompassed in the right to be present is the right to consult with counsel about matters pertinent to the trial and the examination of witnesses. See, Chapman, 302 So.2d at 138-139.

Consequently, Gore had the right to be present at the deposition to perpetuate testimony even though the deposition was of a defense witness. In Chapman, the Second District Court addressed the question of a defendant's involuntary absence from a deposition to perpetuate the testimony of a State's witness. However, the rationale is equally applicable to the deposition of a defense witness. The court wrote,

> The use of a deposition, taken in the involuntary absence of a defendant, as evidence against him violates the defendant's right to be personally present during his trial and his Sixth Amendment right to con-

> front witnesses. The presence of defendant's counsel, considering the unreasonably short notice he was given of the deposition taking, is insufficient to cure the error. As Mr. Justice Cardozo noted in Snyder v. Massachusetts, 291 U.S. 97, at 114, 54 S.Ct. 330, at 335, 78 L.Ed. 674, "A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel ... and cross-examine his accusers." (citations omitted). Due to the nature of th error, we can only speculate as to what would have happened had defendant been actually present and been given the opportunity to advise with his counsel.

302 So.2d at 138-139. Gore likewise had the right to be present at the deposition to perpetuate the testimony of a defense witness. The deposition was part of the trial and Gore had the right to consult with his lawyer as if the testimony was being presented in open court.

A misreading of Florida Rule of Criminal Procedure 3.190(j) which provides guidelines for taking depositions to perpetuate testimony probably lead the trial judge to err. Subsection (3) of that rule sets out the notice to the defendant and transportation requirements when the State takes a deposition.[1] The prosecutor and the trial court fastened upon

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[1]Fla.R.Crim.P. 3.190(j)(3) reads as follows:

> (3) If the deposition is taken on the application of the State, the defendant and his attorney shall be given reasonable notice of the time and place set for the deposition. The officer having custody of the defendant shall be notified of the time

(Footnote Continued)

the language in that section and improperly interpreted it to mean that when the defense takes a deposition, the defendant need not be transported. (R 143-145) This erroneous interpretation was also precipitated by the court's belief that the defendant's presence was only essential to confront adverse witnesses. (R 143-145) The trial judge's mistake deprived Gore of a critical constitutional right. Gore urges this Court to reverse his conviction for a new trial.

(Footnote Continued)

> and place and shall produce the defendant at the examination and keep him in the presence of the witness during the examination. A defendant not in custody may be present at the examination, but his failure to appear after notice and tender of expenses shall constitute a waiver of the right to be present. The State shall pay to the defendant's attorney and to a defendant not in custody the expenses of travel and subsistence for attendance at the examination. The State shall make available to the defendant for his examination and use at the deposition any statement of the witness being deposed that is in the possession of the State and that the State would be required to make available to the defendant if the witness were testifying at trial.

ISSUE IV

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

The offense of kidnapping requires that the victim forcibly or by threat be confined, abducted or imprisoned against his will to facilitate the commission of a felony. Sec. 787.01 Fla. Stat. Gore moved for a judgment of acquittal on the grounds that the State failed to prove any confinement or abduction against the will of the victim. (R 2226-2235) State witnesses testified that Susan Roark was voluntarily with Gore at the party and voluntarily drove him away. There was no evidence of force or threat. There was no evidence of confinement or abduction. (R 1259-1260, 1304-1306, 1319, 1372-1373, 1393, 1412-1414) The fact that Roark was later found murdered does not establish that a forceful confinement or abduction, beyond that inherent in the commission of the homicide, preceded the murder. See, Faison v. State, 426 So.2d 963 (Fla. 1983); Hrindich v. State, 427 So.2d 212 (Fla. 5th DCA 1983), rev. dism., 431 So.2d 989 (Fla. 1983). Gore's motion for judgment of acquittal should have been granted.

In Hrindich, the Fifth District Court was faced with facts similar to those existing here. The question was whether there had been sufficient confinement against the will of the sexual battery victim to uphold that element of the false imprisonment count. The victim had voluntarily accompanied the defendant in

his automobile prior to the sexual assault. Reversing the false imprisonment conviction, the district court wrote:

> The victim in the case before us voluntarily accompanied appellant in his automobile. Until the attempted sexual battery commenced, the victim had made no attempt to leave and was not restrained. While she was confined in the front seat of the car during the course of the event, all confinement was incidental to the attempted sexual battery. See, Simpkins v. State, 395 So.2d 625 (Fla. 1st DCA 1981); Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980).

Hrindich, 427 So.2d at 213. Susan Roark likewise voluntarily accompanied Marshal Gore. There was no evidence of confinement. While confinement incidental to the homicide might be inferred, that is insufficient to support the separate offense of kidnapping.

Gore's motion for judgment of acquittal should have been granted. He asks this Court to reverse his conviction on that count with directions that he be discharged.

ISSUE V

THE TRIAL COURT ERRED IN EXCUSING THE VICTIM'S STEPMOTHER FROM THE RULE OF WITNESS SEQUESTRATION SOLELY BECAUSE SHE WAS A RELATIVE OF THE VICTIM.

Defense counsel invoked the rule of witness sequestration before testimony began. (R 928) At the prosecutor's request, the victim's stepmother, Carolyn Roark, was excused from the rule even though she was a material witness. (R 928-930, 2154-2160) The State's request and the judge's decision to excuse her from the rule was based solely on Article I Section 16 (b) Florida Constitution and Section 960.001(5) Florida Statutes which allows a homicide victim's relative to be present at any critical stage of the proceedings, if the person's presence does not violate any rights guaranteed to the defendant. The court abused its discretion and misapplied these constitutional and statutory provisions. Gore's right to due process and a fair trial have been violated, and he asks this Court to reverse his convictions. Amends. V, VI, XIV U.S. Const.; Art. I, Sec. 16 (a) Fla. Const.

The rule of witness sequestration serves a valuable purpose in insuring a defendant's right to due process and a fair trial. As this Court stated in Spencer v. State, 133 So.2d 729, 731 (Fla. 1961),

> The obvious reason for the rule is to avoid the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand.

Ibid. Although a trial judge has the discretion to exclude a witness from the rule, such a decision cannot be made absent a

hearing to determine the need for the exception and whether any prejudice would accrue to the opposing party. Randolph v. State, 463 So.2d 186 (Fla. 1984); Thomas v. State, 372 So.2d 997 (Fla. 4th DCA 1979). In Randolph, this Court, quoting Thomas with approval, said,

> Subsequent to the trial in the case sub sub judice, the decision in Thomas v. State, 372 So.2d 997 (Fla. 4th DCA 1979), was rendered, and the court held that a detective should not have been allowed in the courtroom, but that the presence of the detective in the courtroom did not lead to an improper conviction. In its opinion the court said:
>
> > While it may be helpful, even necessary in some complex cases, to have a police witness to remain in the courtroom during trial and thus be excluded from the witness rule we deem it proper to advise the trial court to make a finding no real prejudice would result from this procedure if the accused objects after invoking the rule. A hearing to determine if the police witness' presence is necessary and indispensable and non-prejudicial would be the way to accomplish a proper finding.
>
> 372 So.2d at 999.
>
> In our opinion a trial court should not, as a matter of course, permit a witness to remain in the courtroom during the trial when he or she is not on the stand, unless it is shown that it is necessary for the witness to assist counsel in trial and that no prejudice will result to the accused. A hearing to determine these matters should be conducted if the rule excluding and sequestering witnesses has been invoked.

Randolph, 463 So.2d at 191-192. The trial judge in the instan case conducted no hearing as Randolph requires. Furthermore, the court never considered the need for the witness's presence in the courtroom. Instead, the court deferred completely to

the constitutional provision which permits a homicide victim's relative to be present at critical stages of the proceedings.

Article I Section 16 (b) Florida Constitution reads as follows:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

The court's decision to apply this section in such a way as to allow the victim's right to be present to supersede the defendant's right to secure a fair trial, via use of the rule of witness sequestration, directly contradicts the express wording of this provision. A victim's relative has the right to be present only "to the extent [the right does] not interfere with the constitutional rights of the accused." Once the homicide victim's relative becomes a witness, the right to be present must defer to the defendant's right to exclude witnesses from the courtroom. Any other interpretation would allow an automatic exception to the rule of witness sequestration for relatives of homicide victims. While the victim's relative has the right to be present at trial, a defendant's right to a fair trial must take priority.

The decision to exclude the victim's stepmother from the rule violated Gore's right to due process and a fair trial. Gore urges this Court to reverse his conviction for a new trial.

ISSUE VI

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

Dr. Umesh Mhatre testified for the defense during penalty phase. (R 2651) He described the psychological damage Gore suffered as the result of his chaotic family life and poor parenting. (R 2651-2665) The testimony was presented solely in support of nonstatutory mitigating circumstances. (R 2701, 2707-2714, 2717-2718) Gore did not assert the existence of the statutory mitigating circumstances dealing with impaired capacity or extreme mental or emotional disturbance. (R 2707-2714, 2717-2718) Secs. 921.141(6)(b)&(f) Fla. Stat. On cross-examination, the prosecutor was permitted to ask about Gore's sanity at the time of the offense over defense relevancy objections. (R 2666-2668) The exchange proceeded as follows:

> Q. Dr. Mhatre, Marshall Lee Gore knows the difference between right and wrong, doesn't he?
>
> A. Yes sir.
>
> Q. At the time that he killed Susan Marie Roark he knew the difference between right and wrong, didn't he?
>
> [DEFENSE COUNSEL]: I object to that, Mr. Dekle has not (inaudible) of the jury's finding, that is not a proper question.
> Also I object on the ground, we're not offering this testimony as evidence of his sanity, I feel that it a improper (inaudible).
>
> * * * *

THE COURT: Why can't you solve it by telling him, that the jury found him guilty of the offense at the time --.

[THE PROSECUTOR]: Okay, I can handle it.

[DEFENSE COUNSEL]: Judge, I object to this discourse between Mr. Dekle and this witnesses[sic], I think sanity is not an issue in this case and we have not defended on the issue of insanity and to try to straw man it and say, there's no way that he is insane is to confuse the jury and it's improper.

[THE PROSECUTOR]: Well, you know, we have talked about the shootouts with the police that occurred before Marshall Gore got born over my objection, I --

[THE COURT]: I'm gonna allow it.

(R 2666-2667) The prosecutor continued to belabor the inquiry on the issue of Gore's sanity, prompting another defense objection which was again overruled:

Q. On January the 31st, 1988 Marshall Lee Gore knew the difference between right and wrong, didn't he?

A. Does that day have a significance?

Q. That's the day Susan Marie Roark died.

A. I really have not exactly specified, when I talked to him, put it into a day, he has not shown me anything in my examination that there have been times when he may not have known, I can go on a specific day.

Q. You have no indication, that he didn't know the difference between right and wrong, is there?

A. On that particular day, I have not specifically examined him.

Q. He is capable of understanding the nature and quality of his acts, is he not?

A. He should be.

Q. He is capable of conforming hid conduct to the requirements of law, isn't he?

[DEFENSE COUNSEL]: Judge, I'm going to renew my objection, I object to that line of questioning, it is confusing, this defense has not offered the defense of insanity in this case, all that goes to the issue of insanity, which is a non-issue in this case.

THE COURT: Same ruling.

Q. He is capable of conforming his conduct to the requirements of the law, isn't he?

A. He should be able to.

(R 2667-2668)

The prosecutor's inquiry was irrelevant and improper for two reasons. First, a capital defendant's sanity is not a relevant issue for penalty phase. Legal insanity is not the test employed for the statutory mitigating circumstances. Fersuson v. State, 417 So.2d 631 (Fla. 1982). Consequently, any suggestion that the legal standard for insanity is a consideration at sentencing is improper and likely to confuse the jury. Second, in the instant case, Gore never asserted the statutory mental mitigating circumstances. The psychiatrist's testimony was submitted solely to explain the impact of Gore's troubled family life on his mental condition. Therefore, there was no "legal test" to be met before consideration of the testimony. Gore's expert never claimed that Gore's capacity was impaired or that he suffered from an extreme mental or emotional disturbance. The prosecutor's questioning was precisely as defense counsel characterized it -- a straw man

created to obscure the jury's focus from the real issues. (R 2666)

ISSUE VII

THE TRIAL COURT ERRED IN IMPROPERLY FINDING AND WEIGHING THREE AGGRAVATING CIRCUMSTANCE THEREBY RENDERING GORE'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A.

The Trial Court Improperly Found That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner.

The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See,e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d. 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed -- one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be "...a careful plan or pre-arranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987). Moreover, this prearranged plan cannot be inferred from a lack of evidence. LLoyd v. State, 524 So.2d 396, 403 (Fla. 1988); Gorham v. State, 454 So.2d 556 (Fla. 1984); Drake v. State, 441 So.2d 1079 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983); Mann v. State, 420 So.2d 578 (Fla. 1982). The circumstantial evidence in this case provided no details about the actual

killing. As a result, the trial court made improper inferences from this lack of evidence to find the premeditation aggravating factor.

In finding the premeditation factor, the trial judge stated:

> 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 that 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 responses 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 and obtaining her car.
>
> The evidence further established 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 punishment for his murder of SUSAN MARIE ROARK.
>
> Further evidence of the heightened premeditation that is required for this aggravated circumstance is the almost identical act, perpetrated against Tina Marie Corolis, under almost identical circumstances, using an almost identical method of operation.

Initially, the court's finding contains several irrelevant facts. First, assuming for argument the State proved a kidnapping (see Issue IV, supra.), a kidnapping provides no evidence tending to prove details surrounding the actual killing. Second, consideration of the fact that the body was found unclothed in a remote area near a pile of trash does not establish any circumstances surrounding the killing and constitutes a nonstatutory aggravating factor. See, Drake v. State, 441 So.2d at 1082-1083. Third, assuming for argument, the court properly concluded that the kidnapping and robbery was premeditated in a planned and calculated fashion, this does not prove the homicide was as well. See, Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1984). Fourth, Gore's use of an alias or alleged flight is likewise irrelevant, as are other facts occurring after the killing, such as disposal of the body. See, Drake, 441 So.2d 1079. Finally, the court's reliance on the collateral crime as supporting the circumstance is misplaced. Not only was the collateral crimes evidence irrelevant and inadmissible (see Issue II, supra.), but a telling difference renders the

parallel useless to support this aggravating circumstance -- the victim was not killed in that case.

When distilled to the relevant facts, this circumstantial case fails to establish the premeditation aggravating factor. At best, the State proved: (1) that Gore was the last person seen with the victim; (2) the victim's body was later discovered in a remote area; and (3) Gore was in possession of the victim's car and property. The manner of death was never established beyond being some form of homicide. Some evidence suggested there may have been a wound to the neck and breast areas of the body. No other details exist. A lack of evidence cannot provide prove beyond a reasonable doubt of the existence of this aggravating circumstance. See, e.g., Lloyd, 524 So.2d 526; Gorham, 454 So.2d 556.

Drake v. State is on point. The facts in Drake are strikingly similar to the facts in the instant case. Drake was seen leaving a bar with the victim. Six weeks later, her partially nude, decomposed body was discovered in some woods. Her hands were tied behind her back and she had suffered eight stab wounds to the chest and abdomen. There were no other details about how the homicide occurred. The jury convicted Drake on the basis of circumstantial evidence. This Court ruled that the evidence was insufficient to uphold the finding of the premeditation aggravating circumstance. 441 So.2d at 1082-1083.

Mann v. State, another circumstantial evidence case, is on point. The ten-year-old victim in Mann was abducted while

riding her bicycle to school. Her body was found the next day. She died from a blow to the head and had suffered several cuts and a stab wound. No other details about the killing were available. Mann was convicted on circumstantial evidence. This Court held the evidence was insufficient to support the premeditation aggravating circumstance. 420 So.2d at 581.

The trial court should not have found and considered the premeditation aggravating factor in sentencing. Like Drake and Mann there is no evidence in this case detailing the circumstances of the homicide. The premeditation aggravating circumstance was not proven. Gore's death sentence has been imposed in an unconstitutional manner in violation of the Eighth and Fourteenth Amendments. He asks this Court to reverse his death sentence.

B.
The Trial Court Erred In Using As An Aggravating Circumstance Previous Convictions Which Are Pending Decision On Appeal And Not Final.

On March 16, 1989, Gore was convicted for attempted murder, kidnapping, sexual battery and armed burglary in the case involving Tina Corolis. The trial court used these convictions to find the aggravating circumstance of a previous conviction for a violent felony. (R 3073) The case is presently pending decision in the Third District Court of Appeal (case no. 89-990), and the convictions are not final. Although reliance on these convictions to find the aggravating circumstance was proper at the time of sentencing, Gore's death sentence will be

improperly imposed, requiring a remand for resentencing if the convictions are reversed. Long v. State, 529 So.2d 286 (Fla. 1988); Oats v. State, 446 So.2d 90 (Fla. 1984).

C.
The Trial Judge Should Not Have Found As An Aggravating Circumstance That The Homicide Was Committed During A Kidnapping Since The Evidence Was Insufficient To Prove A Kidnapping Occurred.

The State failed to prove a kidnapping occurred and Gore's motion for judgment of acquittal should have been granted. This question has been addressed in Issue IV, supra., and Gore incorporates by reference that discussion in support of this issue. Since the kidnapping count was not proved, the trial judge should not have found that the homicide occurred during a kidnapping. (R 3073) That aggravating circumstance was improperly considered in the sentencing process. See, Atkins v. State, 452 So.2d 529, 532 (Fla. 1984).

CONCLUSION

For the reasons and authorities presented in Issues I through V, Marshall Gore asks this Court to reverse his convictions and remand his case for a new trial. Alternatively, Gore asks this Court, for the reasons presented in Issues VI and VII, to reduce his death sentence to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Marshall Lee Gore, #401256, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 19 day of December, 1990.

W. C. McLAIN