IN THE SUPREME COURT OF FLORIDA

MARSHALL LEE GORE,

Appellant,

v. CASE NO. 75,955

STATE OF FLORIDA,

Appellee.

_____/

# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

The Appellant, Marshall Lee Gore, relies on his Initial Brief to reply to the arguments presented in the State's Answer Brief, except for the following additions concerning Issues I, III and VII.

## ARGUMENT

### ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

The State contends that Gore never asserted his right to deal with the police only through counsel. State's brief at page 15. This position is premised upon the claim that Gore's assertion of his Sixth Amendment right to counsel, and his

acceptance of counsel, on the unrelated federal charges did not constitute an assertion of his right to counsel during any subsequent police interrogation on other charges. However, Gore's acceptance of counsel after his arrest indicates his desire to deal with law enforcement only through an attorney. Decisions from the United States Supreme Court support the conclusion that Gore's assertion of his Sixth Amendment right to counsel was sufficient to invoke his Fifth Amendment right to counsel for any subsequent interrogation on unrelated charges. See, Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) (confession obtained after defendant had requested counsel at arraignment, but before consulting with counsel, held inadmissible as a violation of the Sixth Amendment); Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) (defendant's assertion of right to counsel during interrogation on one offense was sufficient to constitute an assertion of counsel during an interrogation on a second unrelated offense which defendant had not initiated); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

The Seventh Circuit Court of Appeals in United States ex rel Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987), held that an individual who invokes his right to counsel at an arraignment is also invoking his Fifth Amendment right for any subsequent interrogation on unrelated offenses while he is still in custody. Edwards, Roberson, and Jackson support the Seventh Circuit's position. Moreover, the precise issue is

currently pending in the United States Supreme Court in McNeil v. Wisconsin, Case No. 90-5319 (case argued February 26, 1991). Although the Wisconsin court declined to follow the rationale of Espinoza, the prior decisions from the United States Supreme Court support the Espinoza opinion. Furthermore, the Supreme Court in Butler v. McKellar, 494 U.S. __, 110 S.Ct. __, 108 L.Ed.2d 347 (1990) implicitly approved the Espinoza decision. 108 L.Ed.2d at 354. The court denied relief to the defendant in Butler on the grounds that he was not entitled to retroactive application of Roberson. However, the court acknowledged that Roberson supported the Seventh Circuit's opinion in Espinoza.

This Court has also considered the Espinoza opinion in Kight v. State, 512 So.2d 922 (Fla. 1987), but did not have to decide whether to adopt the Espinoza holding. Kight initiated the conversation leading to the statement admitted at trial, and this Court found that no violation of Edwards occurred. The Kight decision, however, was issued prior to the United Supreme Court decision in Minnick v. Mississippi, 498 U.S. __, 111 S.Ct. __, 112 L.Ed.2d 489 (1990), which held that a defendant who asserts his Fifth Amendment rights under Edward cannot subsequently waive his right to counsel without the actual presence of his attorney. Consequently, this court may have decided Kight differently had the Minnick rule been announced earlier.

The State also argues that the admission of Gore's statement was harmless error. His statements included his denial of

knowledge of Susan Roark, her black Mustang automobile, of Tina Corrolis or her red Toyota. (R-2217-2219) Although these statements on their face were exculpatory, the state used them as inferences of guilt. See, Sec. 90.803(18)(a), Fla. Stat.; Jackson v. State, 537 So.2d 269, 272 (Fla. 1988); Smith v. State, 424 So.2d 726, 737 (Fla. 1983). The prosecutor argued that Gore lied when he denied knowledge of these facts in order to avoid his prosecution and thereby showed his consciousness of guilt. (R-2433-2434) Brown v. State, 391 So.2d 729 (Fla. 3d DCA 1980). Evidence that Gore committed the homicide was circumstantial. Susan Roark left her friends' party with Gore voluntarily. Gore was later found with her jewelry and automobile. However, evidence concerning the details surrounding Susan Roark's death were scant. Therefore, Gore's statement's denying knowledge of Roark and her automobile became critical evidence in furthering that Gore was conscious of his own participation in the offense. While there was substantial evidence placing Gore in Susan Roark's presence before her disappearance, and placing him in her automobile and with her jewelry after her disappearance, the state had little evidence inferring his actual participation in the homicide. As a result, the statements he made to detective Simmons were crucial to the prosecution.

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

The state contends that Holton v. State, 16 FLW 136 (Fla. Jan. 19, 1991) controls the question presented here and requires a decision adverse to Gore. This position is without merit. Holton is distinguishable.

In Holton, the defense asked for a continuance until a key witness could be located to testify. The witness failed to appear on the first day of trial, but defense counsel waited until three days into the trial to request relief from the trial court. The court suggested that the parties agree to a summary of the witness' deposition for presentation to the jury. The state and the defense agreed and prepared such a statement. This court held that under the circumstances, the trial court did not err in denying the motion for continuance.

In contrast, defense counsel in the present case moved to continue the trial to secure the presence of a witness well in advance of the trial date. Furthermore, the deposition to perpetuate testimony was the court's imposed alternative to a continuance; defense counsel never agreed. Further compounding the error is the fact that the trial judge refused to allow Gore to be present at the deposition to perpetuate testimony.

Holton never involved such a question. Holton is simply not applicable.

ISSUE VII

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN IMPROPERLY FINDING AND WEIGHING THREE AGGRAVATING CIRCUMSTANCES 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 State relies on two cases to support its position that the trial judge correctly found the homicide to be committed in a cold, calculated, and premeditated manner. First, the state claims that the murder was committed to facilitate the robbery of Susan Roark and therefore similar to Jones v. State, 569 So.2d 1234 (Fla. 1990). However, there was no evidence suggesting that the murder was committed for the purpose of taking Roark's jewelry and automobile. While Gore was found in possession of these items, there is no evidence suggesting that the homicide was committed for the purpose of taking the property. In Jones, there was evidence of a discussion about killing the victims for the purpose of obtaining the motor vehicle. 569 So.2d at 1238. No such evidence exists in the instant case.

Another case upon which the state relies, Robinson v. State, 16 FLW 107 (Fla. Jan. 15, 1991), is also distinguishable. Again, the evidence in Robinson is different from this

case. Testimony indicated that after the sexual assault on the victim, the defendant expressed concern about her ability to identify him and the defendant shot her twice in the presence of the co-perpetrator. The state had direct evidence of a plan to kill for the specific purpose of eliminating the witness. No such evidence exists in Gore's case.

Drake v. State, 441 So.2d 1079 (Fla. 1983), and Mann v. State, 420 So.2d 578 (Fla. 1982), are on point. As in this case, both of those cases involved homicides where no details existed about the nature of the killing. (See discussion initial brief at pages 54-55).

## CONCLUSION

For the reasons presented in the Initial Brief, and this Reply Brief, Marshall Gore asks this Court to reverse his judgments and sentences.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Ms. Carolyn M. Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Marshall Lee Gore, #8825558, Cell #603, c/o Dade County Jail, 1321 N.W. 13th Street, Miami, Florida, 33125, on this 1st day of May, 1991.

W. C. McLAIN