IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,249

MARSHALL LEE GORE,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The appellant was the defendant and the appellee the prosecution, State of Florida, in the lower court, The parties will be referred to as they stood in the trial court, The record on appeal will be referred to by the letter "R". The trial transcripts will be referred to by the letter "T". All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE

Marshall Gore was indicated on one count of First Degree Murder and one Count of Armed Robbery, in violation of F.S. 782.04(1) and 812.13, respectively (R. 103).

Ex Parte Order to Appoint Defense Expert was filed May 3, 1990 (R. 20-21).

Order Appointing Defense Expert was filed May 9, 1991 (R. 29-30).

Notice of Intent to Rely on Evidence of Other Crimes, Wrongs, or Acts was filed October 30, 1991 (R. 44).

Motion to Compel and Amended Motion to Compel were filed November 13 and 21, 1991, respectively (R. 45-48).

Notice of Intent to Rely on Evidence of Other Crimes, Wrongs, or Acts was filed February 24, 1992 (R. 59).

Defendant's Motion to Preclude the State of Florida From Seeking the Death Penalty or Alternative Relief Based on the State's Failure to Provide Adequate Resources was filed November 3, 1992 (R. 83-85).

Notice of Interlocutory Appeal was filed May 5, 1995 (R. 169).

Requested Jury Instructions Regarding Circumstantial Evidence was filed May 10, 1995 (R. 234).

Judgment of Guilty as charged was filed May 11, 1995 (R. 238-239).

Defendant's Sentencing Memorandum was filed June 19, 1995 (R. 325-328).

Sentence as to Count I of the Indictment was filed June 30, 1995 sentencing Marshall Gore to the death Penalty (R.332-340).

Three Sentencing Memorandums were filed; one on June 30, 1995, and two on July 3, 1995 (R. 332-340, 342-352, 353-356).

Notice of Appeal was filed July 26, 1995 (R. 357-358).

This appeal fallows.

STATEMENT OF THE FACTS

At Marshall Gore's trial, the following testimony, and facts ware presented:

Marshall Gore was offered a plea wherein the State offered him one life term to be served concurrently with the first of five life terms arising from the 1988 case with credit for the seven years served by Mr. Gore with the State's closing out all remaining cases against him (T. 215).

The plea offer was relayed to Gore who rejected same (T. 216).

During voir dire, when questioning prospective Juror Demery, the State gave specific examples of what would constitute first degree murder and asked the jury panel if "anyone disagreed with it" (T. 287-289).

Gore informed the court that he disagreed with the jury Strikes that his counsel had been making thusfar (T. 363).

The prosecution moved to back strike Juror Torres and Gore's counsel Objected to the strike arguing that the State was striking Juror Torres on the basis of race (T. 371). The court granted the State's motion to strike Juror Torres (T. 371).

Gore's counsel requested that the jury panel be sequestered which motion was denied (T. 375).

Gore's counsel moved for a continuance based on the fact that Gore had not received any of his legal materials and as a result would be unable to assist counsel in the preparation of cross-examination of the witnesses (T. 384). The court denied the motion (T. 384).

At that point, Gore informed the court that there was a conflict; however, the court ignored Gore's statement (T. 385).

Officer Norman Shipes, Metro-Dade Police Department, testified for the State that on March 16, 1988, while driving through the area of S.W. 244th Street and S.W. 214th Avenue, Dade County, he saw a blue tarpaulin laying just off the edge of the road IT. 396-399). The witness stopped his car by the blue tarp, and lifted a corner of it at which time he saw what appeared to be the leg of a deceased white female (T. 400).

Dr. Roger Mittleman, Associate Medical Examiner fur Dade County, testified that on March 16, 1988, he responded to the scene out on S.W. 244th Street and S.W. 214th Place (T. 407). The victim's body was found underneath the blue tarp (T. 407). A belt was wrapped around the victim's neck (T. 410). The victim was nude (T. 412); there was a stab wound in the center of her chest, and another smaller stab wound next to the first one (T. 413). Through dental records, the victim was identified as Robyn Novick (T. 417-418). The victim was strangled to death (T. 421).

Linda Williams testified on behalf of the State that she and her husband went to the Redlands Tavern on the evening of March 11, 1988 (T. 438). On that evening, she saw a white female very nicely dressed who entered the tavern wearing a black outfit with a wide belt (T. 439). The witness noticed that the female was out of place in that bar and that the female was nat the type of customer the witness had usually seen in that bar (T. 438-439). After the female left the bar, the witness and her husband left also and saw the female get into a yellow Corvette eantainina a white male sitting On the passenger's *side* of the car (T. 441). The witness did not see the female or the male in the bar again after that evening (T. 441).

In a photo lineup, the witness identified a man who resembled the man she saw in the Corvette that night (T. 444). The witness had had a couple of drinks on the evening in question so that she was unable to positively identify Gore as the man she saw March 16, 1988 (T. 447).

David Restrepo testified for the State that in March, 1988, he lived in Kendall, Florida (T. 452). At the time, the witness knew Marshall Gore as Tony Gore (T. 243). He identified the defendant as the man he knew as Tony Gore (T. 452).

on the morning of March 12, 1988, Gore came to the witness' house in the early morning hours; Gore was drivina a yellow Corvette (T. 454). Prior to this date, the witness had only seen Gore drive a black Mustang (T. 453). The car's license plate said,

"Robin" on it (T. 455). Gore told the witness that Gore's girlfriend hnd lent him the car (T. 458).

Gore drove the witness to a strip club (T. 457). The witness waited for Gore in the car (T. 458). After that, while driving elsewhere, Gore told the witness that he wanted to change his name to Robyn (T. 458). The two men then went to a Food Spat (T. 459). *After* leaving the Food Spot, Gore lost control of the car; the car flipped over several *times* and the witness was thrown out of the car (T. 459). The men noticed that two of the car's tires where flat, and Gore parked the car (T. 462). While exiting the car, Gore grabbed a brown paper bag. At that point, he told the witness that the car was stolen (T. 462).

As the men were running away from the car, Gore told the witness that he thought he m&y have left some jewelry in the car (T. 465).

At this point, the prosecutor and defense counsel discussed with the court at sidebar the fact that a witness walked out of the courtroom and made a comment to Gore "nice smile" (T. 480). The court decided that the jury had not heard this comment,.

Jessie Casanova testified *for* the State that she lived at 21420 S.W. 140th Street, South Dade (T. 485). In February, 1988, a person began living with her, her mother and her mother's friend, Rosa (T. 484). The witness identified the person who lived with her family as Marshall Gore known to her then as Marty (T. 485). Gore asked her to refer to him as Tony whenever they were outside of the house (T. 485).

During the month of February, 1988, Gore drove a black Mustang (T. 487). On March 11th, 1988, when Gore left the house, he left in a taxi (T. 489). Later, during the early morning hours of March 12, 1988, Gore tapped on the witness' window and retrieved a black bag which he took with him (T. 491). Gore was driving a light-colored Corvette (T. 491).

When Gore returned to the house later that same date, March 12, 1988, he arrived in a taxi (T. 492). The witness asked about the Corvette and Gore told that he was helping a female friend out and that he had had an accident with the car (T. 493).

Luis Toledo, Metro-Dade Police Department, Crime Scene Bureau, identified the photos he had taken at the crime Scene (T. 497).

Mark C. Joy testified that he worked during the months of February and March, 1988 at the Organ Grinder Bar (T. 499). In the early hours of March 12, 1988, the witness saw Gore drive up in a yellow car bearing the license plate with the name "Robyn" (T. 501). Someone else was in the car: however, the witness could not identify whether it was a male or female (T. 501).

Defense counsel informed the court that he was having a conflict with Gore because Gore wanted defense counsel to ask additional questions to open the door to other lines of questioning (T. 594).

James Avery, former City of Coral Gables Police Department, testified for the State that on the morning of March 12, 1988, --while on patrol, he heard a cur crash (T. 5131. When he investigated, he found a yellow corvette, with two blown-out tires,

and license tag bearing the name, "Robyn" (T. 515). Inside the car, the witness found credit cards, and a driver's license in the name of Robyn G. Novick and a gold cigarette case with initials RGN (T. 517).

Robert Rnbkin, former City of Coral Gables Police Department, testified that on March 12, 1988, he examined a yellow Corvette bearing license plate "Robyn" (T. 524). Inside the car, the witness found a piece of paper titled Vower of Attorney" signed in two places by Marshall Lee Gore (T. *527).*

Frank McKee testified for the State that In March, 1988, he knew Marshall. Lee Gore (T. 531). The witness saw Gore on March 13, *1988* when Gore came by the witness' house between the hours of 11:00 P.M. and Midnight (T. 531-532). *Gore* told the witness that the police were looking for him and the witness told Gore that he could not stay at the witness' house (T. 532).

Gore told the witness that he had been driving a Corvette, but that he (Gore) had had an accident with the car and that he (Gore) had wrecked it (T. 533). Gore told the witness that his friend, Dave, may have broken his collar bone (T. 533). Gore left the witness' house in a taxi (T. 533).

Mike Decora, Metro Dade Police Detective, Homicide Division, testified that in 1988, Jessie Casanova gave him a key (T. 545). The key was a GM key that fit the ignition, the hatchback, and the doors of the yellow Corvette (T. 547).

Linda Williams identified the woman she saw at the bar On March 13, 1988 and was not able to positively identify the man she saw: as a result of a photo lineup, Linda Williams told the witness that the photo of the man resembled the man who met and left the bar with the nicely-dressed woman she had seen that night (T. 554).

Michelle T. Hammon testified that in 1988 she was living in Cleveland, Tennessee (T. 559). The witness knew Susan Marie Roarke who drove a black Mustang (T. 561). On January 30, 1988, Susan Marie Roarke arrived at the witness' house *in* her black Mustang with a male named Tony (T. 561-562). The witness identified Gore as the man she met that night introduced to her as Tony (T. 562). Susan Marie Roarke and Tony left the witness' together (T. 563). The witness never saw Ms, Roarke again (T. 563).

Defense counsel made a continuing objection to all testimony regarding previous crimes (T. $66).

Detective Kenneth Michael Griffin, City of Miami Police Department. on March 14th, 1988, the witness investigated a car accident that occurred on Coral Way, Miami, involving a black Mustang which belonged to someone living in Tennessee (T. 568). The person driving the black Mustang did not remain on the scene (T. 568). Investigation of the owner of the car *revealed* that the car was registered to Susan Roarke (T. 569). Defense counsel moved to strike the previous witness's testimony; the court denied the motion (T. 571).

Dr. William Maples, forensic anthropologist from the University of Florida, testified that in 1988, he examined remains from Columbia County, Florida, which were brought to him for investigation (T. 575-576). The witness received the Medical Examiners Report, dental records and some investigative reports which the witness examine and from which he identified the remains as those belonging to person once known as Sudan Marie Roarke (T. 579). The left side of the front of the torso was missing and the area around the right breast was missing (T, 582). The witness stated that it appeared that one or more wounds on the left aide of the chest occurred, and that there was a defect on the lower aspect of the skull just to the right of the midline caused by the tip of a sharp implement (T. 583). From the evidence he received, the witness concluded that the victim died as the result of a knife wound inflicted the base of the skull which cut the spinal card (T. 586).

At the beginning of the next trial day, Gore complained to the court that ha was missing an entire box of depositions (T. 604).

Capita 1 Nei l Nydham, Columbia county Sheriff's Office, testified that an April 2nd, 1980, he was in charge of the investigation regarding the human remains found in a heavily wooded area (T. 606). The body found in this heavily wooded area was that of Susan Roarke (T. 610, 613). A grayish band had been tied around

the left arm IT. 610). The witness determined that the black Mustang belonging to Susan Raarke had been ticketed in Florida (T. 614).

On cross-examination, it was established that the witness found no evidence to indicate that Gore had been in Columbia County, Florida, nor that the hair found clenched in Susan Roarke's fist belonged to Gore, nor that the fingerprints found on a pack of Marlboro cigarettes belonged to Gore (T. 616-637). No evidence was found linking Gore to the *crime* scene (T. 618).

Tina Colaris testified that she lived in Florida in March, 1988 (T. 624). Prior to March, 1988 the witness had met a man called Tony who she identified as Gore (T. 624-625). On the evening of March 14, 1988 Gore contacted the witness and told her that his Corvette had broken down and that he needed a lift to pick up another car from a friend (T. 626).

When the witness picked up Gore, he was carrying a tote baq with him (T. 626). she took Gore to the Aventura area off Biscayne Boulevard (T. 628). The witness stopped at a gas station in order for Gore to make a telephone call (T. 629). Gore directed the witness to drive him to an unpopulated construction site *in* the Aventura area IT. 630). Gore exited the car to urinate while the witness waited and when he returned, Gore put a knife to the witness' stomach and told her to get into the passenger's seat (T. 6311. Gore drove the car keepinq the witness with her head down so that she could not see where they were going (T. 632).

When Gore stopped the car, he told the witness to take off her pants: later the witness was told to take off her shirt (T. 633, 634). The witness was forced ta have sex with Gore (T. 634). Later, Gore pulled the witness out of the car, hit her with a brick and choked her until she became unconsciaua (T. 635). When she regained consciousness, the witness saw that her car was gone (T. 635).

[4] The witness was not able to remember being stabbed (T. 643). She had stab wounds in the neck and other stab wounds inflicted to the right of her right shoulder (T. 644).

On cross-examination, it was established that the witness could not conclusively say who stabbed her (T. 652). She was unable to identify the crime scene on her own (T. 653). After she regained consciousness, the witness discovered that her jewelry was gone (T. 654). Later, a detective showed her her jewelry (T. 661).

Detective Louis Pasaro, Metro-Dade Police Department, testified that he investigated the Tina Calaris case (T. 664). He stated that Tina Colaris was found within a few blocks of the area where Robyn Novick's body was found (T. 667). He stated that the keys received from Jessie Casanova were the keys that fit Susan Roarke's Mustang (T. 673).

The witness showed a photo lineup to Tina Colaris; she signed and dated the picture of the man who had attacked her (T. 677). The jewelry belonging to Tina Colariswas found in a pawn shop an

Bird Road (T. 681). The seller identification showed that Marshall Gore pawned the jewelry (T. 683). Gore's prints were not on the jewelry (T. 688).

Sergeant David Simmons, Metro-Dade Police Department, testified that on March 24, 1988, Gore was brought to the police station (T. 712).

Defense moved for mistrial (T. 714).

The witness testified that he read Gore his Miranda rights (T. 719). The witness stated that Gore refused to sign any documents (T. 720, 721, 722).

Gore told the witness that he did know Susan Raarke (T. 729). Gore denied knowing and did not remember Tina Colaris or her Son, Jimmy (T. 733). Gore denied going to the Cashmar Pawn Shop (T. 730).

Gore denied ever having been in any Corvette or any color (T. 738). Gore never confess to the crime (T. 772).

The prosecution rested its case,

Ana Fernandez White testified for the defense that she knew Marshall Gore because she went to school with Gore's sisters (T. 802). The witness worked for Gore; she kept track of messages and the "girls" (T. 806). part of her job was to tell Gore in what hotels and rooms these girls were (T, 807).

The witness met Tina Colaris several times and babysat for her twice (T. 807, 808). The witness went to Gore's father's ranch with Tina where Gore took some *pictures* of Tina (T. 809). The witness had a business card of Gore's business called "The

Exchange" which had the names of 25-30 girls on the back (T. 809). Tina Colaris was one of the names that appeared on the back of the business card (T. 809). Gore took sexually-oriented photos of Tina Colaris (T. 810). she met Robyn Novick who also went by the name "Gail" ten to 15 times (T. 811).

The witness testified that she went to a party on Valentines Day in 1989 with Gore, Susan Roarke and Pauline Johnson: they worked for Gore (T. 812). When they left the party, Gore was driving; shortly thereafter, the group was involved in a car accident (T. 815). Gore told the witness to get out of the car and leave before the police arrived (T. 815). The witness was told that the car belonged to Susan Roarke (T. 815). After the accident, the group went to someone's house and they picked up a black Mustang and dropped the witness off at home (T. 816).

When the witness babysat for Tina Colaris, Tina called her baby by different names; the one that the witness remembered was Jimmy IT. 817). According to the witness, Robyn Novick drove two different cars; one was a business-type car, and the other was a yellow Corvette (T. 818).

Around the time of the Calle Ocho Festival in 1988, the witnesssaw Gore, Tina Colaris, Robyn Novick together at the Organ Grinder strip club (T. 819). In 1988, Tina Colaris came to the witness' house with a police officer and took some pictures that were there (T. 724).

Tina Colaris told the witness that she used the pictures to get money from Channel Four News; they had given her the best offer (T. 826).

The witness testified that it was common for the girls that worked for Gore to change their appearance (T. 828).

The trial court excluded the photo of a ring appearing to match the ring that was taken from Ms. Colaris; nor would the court admit Gore's business card as well as were two Affidavits Of Ana Fernandez (T. 833, 834, 835).

Robyn Novick and Marshall Gore exchanged czars on one occasion that the witness could recall (T. 844).

Gore informed the court that he wanted to represent himself (T. 907). The trial court held that Gore was not competent to represent himself (T. 912).

Gore informed the court that he felt that he was being forced to testify on his behalf even though he did not want to testify (T. 913). After the trial court inquired into Gore's giving testimony, Gore testified on his own behalf (T. 919).

Marshall Gore testified on his behalf (T. 920). He stated that he met Robyn Navick in 1981 and became good friends with her (T. 921, 923). He stated that Robyn Navick worked for a finance company and as a result, she drove a lot of cars (T. 927).

Gore met Ana Fernandez in 1981 or 1982; An8 was friends with Gore's sisters (T. 926). Ana worked for the witness (Gore) transcribing records (T. 926). At the time Gore met Ana Fernandez,

he wasworkingas an escort mediator (T. 929). Gore had been a prostitute since he was 14 years old (T. 930). Ana Fernandez kept track of the clients and which girls went with which clients (T. 932). Tina Colaris work for Gore's business as a "fantasy girl" (T. 933). As part of the service Gore provided, he rented motel rooms for the purpose of sex (T. 935). Tina Colaris nnd the other girls would change their appearance often (T. 937). Gore identified his rinq which he made at Eglund Prison (T. 939, 940). Gore stated that the ring which Tina Colaris claimed was hers was too large for her (T. 942). He received the ring when Ana sent it to his wife in California (T. 942).

The police removed items that would have aided Gore in his defense from his cousin's house in Kentucky (T. 948). The items were Gore's wallet, his telephone book, photos, a copy swinger maqazine he published, Tina's photo in the magazine (T. 949, 950). The photo of Tina Colaris was taken by Gore at his family's ranch (T. 953). Additionally, Gore had nude photos of Tina Colaris in his prison cell. which were taken by the police (T. 957). Gore also had lingerieand swim suit photos of Robyn Novick (T. 958).

Gore knew Susan Roarke (T. 959). Around Valentine's Day, lP88, Susan Roarke was in the car when Gore had a car accident (T. 961). Gore was driving a black Mustang when he got into an accident on Coral Way, Miami (T. 962). He knew Susan Roarke from the eiqhth grade (T. 964).

Gore drove Roarke's Mustang from Tennessee to Miami (T. 976). Susan Roarke and Nathan drove in another Mustang which was car #2 (T. 976). He drove Susan's car with the stolen tags to Miami (T. 976). They had a plan wherein Susan would report the car stolen when she returned to Tennessee; he saw Susan in Miami around the beginning of February, 1988 (T. 977). Susan had possession of the Mustang which had been stolen with all of her papers and the plates to put on the car (T. 976). The stolen Mustang was picked up by the police (T. 977). The car that actually belonged to Susan Roarke was the one Gore was driving which was involved in the accident on Coral Way; Susan Roarke was in that car when the accident occurred (T. 978).

The last time Gore saw Susan Roarke was around February 29th, 1988 (T. 979). Paulette Johnson went by the name of Paulette Johnson, and she and Susan Roarke drove the stolen Mustang even after Gore was arrested to his knowledge (T. 979).

Susan and Pauline stayed at the same house with McKee (T. 982).

Gore had an accident in Robyn Novick's car (T. 983). David Restrepo was in the car when Gore had the accident in the Corvette (T. 984). Restrepo and Juan Torres had been male escorts (T. 984). Gore believes that Restrepo was listed on the back of Gore's business card which was not allowed into evidence (T. 986).

On the night about which Linda Williams testified, Gore was at the Redlands Tavern: he saw Robyn Novick at the bar (T. 988). He

saw Mark Jov at the Organ Grinder; he went to the organ Grinder twice that night (T. 994).

Gore did not kill Robyn (T. 999). Robyn, Tina and Pauline left the Organ Grinder with three men in a white Mercedes (T. 10002. He spoke to Rabyn on the telephone the next marninq and told her that her car had been wrecked and he told her to report it BE having been stolen (T. 1001).

At closing, the prosecution informed ths jury that if they decided that Gore had lied to them, then he would be guilty of first degree. murder (T. 1170).

The prosecution questioned the defendant as to whether or not he was bored (T. 1175). Again, prosecution looked at the defendant and commented that perhaps the defendant wanted to testify now (T. 1182). The prosecution commented on the fact that Gore did not want to answer the prosecution's questions (T, 1186).

The prosecution stated to the jury when referring to Gore that the me thinq that the court could never make the prosecution say was, ".. that's a human being++ (T. 1228). Prosecution further commented on the fact that Gore did not subject himself to cross-examination (T. 1228). Prosecution told the jury that it was as simple as not believing Gore, which meant he was guilty, and if they did believe Gore, then he was not guilty (T. 1236). He then stated, "Don't let a scam artist scam us".

Jury instructions on felony murder were given by the court (T. 1240). Gore requested that the evidence he had tried to admit, but

which had been excluded be marked (T. 1256). Gore was advised that the court clerk kept all items not admitted into evidence (T. 1258).

At the penalty phase of Gore's trial, the following testimony, arguments and facts were elicited:

Gore requested an instruction to the jury regarding his age at the time Robyn Novick was murdered which request was denied (T. 1280).

Albert Fuentes, president of All Investigations, Inc., a private investigation firm, testified that he was retained to assist defense counsel in the mitigation phase of the trial (T. 1288). The witness testified that he was greatly hindered in his investigation by Gore's lack of cooperation (T. 1289).

Gore moved to have Anthony Cenova removed as his counsel because he claimed that Genova had not conducted any investigation into mitigating factors in Gore's case (T. 1290). The trial court denied Care's *motion (T. 1301).*

Gore requested that he be appointed another psychiatrist for his evaluation because Gore felt that this doctor was incompetent (T. 1306).

A composite of the Indictment, Judgment and Sentence was introduced into evidence regarding the State's prosecution against Gore in the death of Susan Marie Roarke (T. 1308).

Detective Parr, Metro-Dade Homicide Detective, testified that he was involved in the search for Tina Colaris' son (T. 1311) and that during that search, *he* found the body of Robyn Novick (T.

1311.1. The witness further stated that on that same day, Tina Colaris' son was found in Georgia in a closet in an abandoned shack (T. 1313). The child had been stuffed into the cabinet with two cinder blocks keeping the door closed (T. 1315). On that date, the temperature was 30 degrees and the boy was found wearing only a T-shirt (T. 1316).

Gore took the stand on his own behalf (T. 1324). He testified that Colaris' son was his son (T. 1328). He further testified that he left the child at the abandoned house to keep the child out of danger (T. 1329).

Gore also testified that the ring he removed from his finger during the trial was a ring he had made while he was in Eglund Federal Prison (T. 1335). The defendant testified that he was diagnosed with Attention Deficit Disorder (T. 1337), and that he had also been diagnosed with neurological problems (T. 1337). He has had daily migraine headaches all of his life due to spinal injury which caused oranic brain damage (T. 1339). The injury aggravates the ADD and makes him lose his ability to concentrate and sleep(T. 1339, 1343). Gore testified he had been in 37 auto accidents (T 1339). He has suffered several head injuries and had trouble staying on a subject (T. 1343).

Jessie Casanova testified that she was with Gore at the Calle Ocho festival in 1988 (T. 1357).

At close of the penalty phase, the prosecution instructed the jury that "it's not just a murder, it's not just Robyn Novick IT. 1370).

The jury found Gore guilty of murder in the first degree and the majority recommended that Gore receive the death penalty (T. 1386).

This appeal follows.

POINTS ON APPEAL

3

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF COLLATERAL CRIMES WHERE THE SIMILAR FACT EVIDENCE WAS NOT STRIKINGLY SIMILAR AND SHARED NO UNIQUE CHARACTERISTICS, WHERE THIS EVIDENCE BECAME THE FEATURED THEME OF THE STATE'S PROSECUTION AND WHERE THE PROBATIVE VALUE! OF THIS EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT?

II

WHETHER THE EVIDENCE WAS SUFFICIENT, BEYOND A REASONABLE DOUBT, TO CONVICT THE DEFENDANT OF FIRST DEGREE MURDER?

III

WHETHER THE EVIDENCE WAS SUFFICIENT, BEYOND A REASONABLE DOUBT, TO CONVICT THE DEFENDANT QF ROBBERY?

IV

WHETHER THE CONDUCT OF THE PROSECUTION IN THE INSTANT CASE WAS SUCH AS TO DEPRIVE APPELLANT OF A FAIR TRIAL?

V

WHETHER THE TRIAL COURT ERRED BY INTRODUCING INTO EVIDENCE GRUESOME PREJVDICZAL AND UNNECESSARY COLLATERAL CRIMES PHOTOS?

VI

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VII

WHETHER THE APPELLANT MUST BE RESENTENCED DUE TO THE INVALIDITY OF THE AGGRAVATING FACTORS OF MURDER DURING A ROBBERY OR FOR PECUNIARY GAIN?

VIII

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH AFTER REFUSING **A** PLEA OFFER AND **EXERCISING** HIS **RIGHT TO** A TRIAL BY JURY?

a

SUMMARY OF THE ARGUMENT

The trial court erred by allowing the admission of collateral crimes evidence not uniquely similar to the instant offense, which improperly became a feature of the trial and whose prejudice vastly outweighed whatever probative value it may have had.

The evidence was insufficient to prove identity, premeditation or the underlying felony of robbery so as to sustain convictions for either First Degree Murder or Robbery.

The improper conduct and comments of the prosecution deprived appellant of a fair trial.

Prejudicial and gruesome collateral crimes photos were improperly admitted.

Defense evidence pertinent to the theory of defense was improperly excluded.

The appellant was improperly sentenced to Death as two Aggravating Factors were not sufficiently proven.

The trial court erred in sentencing appellant to Death because he turned down a plea offer of Lifr Imprisonment immediately before trial.

ARGUMENT

I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF COLLATERAL CRIMES WHERE THE SIMILAR FACT EVIDENCE WAS NOT STRIKINGLY SIMILAR AND SHARED NO UNIQUE CHARACTERISTICS, WHERE THIS EVIDENCE BECAME THE FEATURED THEME OF THE STATE'S PROSECUTION AND WHERE THE PROBATIVE VALUE OF THIS EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT

On March 10th, 1995, the parties argued the admissibility of collateral crimes/w Rule evidence (SR 1-23).

The prosecution argued that testimony as to the murder of Susan Roarke, for which Gore had been convicted and the attempted murder of Tins Colaris, for which Gore had been convicted should be allowed as Williams Rule evidence to prove identity.

The prosecution argued that Susan and Tina were white women, small stature (SR, 4). Prosecution also argued that Gore was seen driving Roarke's car after her disappearance (SR. 5), that

Roarke suffered trauma to her neck (SR. 6), that Tina was choked and stabbed (SR. 7), that Tina's car was taken (SR. 8) and was found with Gore driving it, that Robyn and Tina were both stabbed and Robyn was asphyxiated around the neck (SR. 17).

The defense argued that Tina *and* Robyn had different professions than Susan (SR. 10), that Susan was last seen going to meet a date (SR. 11), that Robyn was going with "Antonio" to participate in a cocaine transaction (SR. 11), that Susan Roarke's jewelry was pawned (SR. 12), that there was no evidence of Rabyn or Susan being raped while Tina had been raped (SR. 12), that Tina was the only victim with evidence as to Gore having a knife (SR. 14), that "She is the only case where her son is kidnapped" (SR. 14).

The trial court ruled:

> *THE COURT:* The court is satisfied that the evidence presented by the proffer of the State is similar enough in nature that it meets the test for admission in the trial of State of **Florida v. Marshall Lee Gore.**
>
> The dissimilarities that I see is at least one of the victim was raped, The second confirmation to the argument that all of the other items are similar satisfies me that the evidence *is* not *being* sought to be introduced to show propensity to commit a crime. They show motive and intent or identity of this particular victim. Without a cataloguing by the state attorney all of the issues concerning the pawning of the victim's property, the driving of the victim's car to a certain

point, stating me that the car was lent to him, the use of the name Tony or Antonio, which is Tony, and the particular similarities of the physical description, weight and height particulars of the victim, lead me to believe that the similar fact evidence is sufficient under the law to be admitted Into the trial and any discrepancy is not sufficient to say this is not the same victim, would be overly prejudicial by its introduction,

MR. GENOVA: In light of the Court's ruling, without waiving his right to appeal this issue at a latter time, I hope that the Court's ruling that the similarities in respect to Tina's case are the facts that she was stabbed and choked and saying that the car was lent to him. She is the only one that was raped. She is the only one whose son was left for dead in Georgia,

If we could keep that situation, the fact that she was stabbed and choked and suffered trauma to her neck, that her property was found, that her car was taken and that it was represented by the Defendant that it had been loaned to him by a friend, if we could leave that rule intact, keep out the fact that she was raped and the fact that her child was taken has nothing to do with Robyn Novick's case- -

MR. ROSENBERG: The first one is similar in nature. All three victims, every one of them is found nude, Tina, although she survived, ran through the woods naked. Robin is nude. Susan was found naked. Tina is raped and found to have had oral sex. I cannot tell whether or not thnt took place. The facts do indicate something similar in nature in that the attempt along with the property involved was the same with Robyn.

THE COURT: What about the baby, was he still alive?

MR. ROSENBERG: I don't have a problem with that concerning motive and intent of the Defendant.

THE COURT: Barring some other items that you choose to litigate by way of motion in limine, the Court is going to allow the State to present evidence, it Can, of rape involving Tina as part of the similar fact evidence. However, it excludes any reference to the fact that the defendant travels after the taking of the child and left here. That clearly could be prejudicial and outweighs any probative value.

(SR. 19-21)

The appellant first submits that thr evidence as to the crimes involving Susan Roarke and Tina Colaris was not so strikingly similar to the instant incident with such unique characteristics as to allow for their admission.

In Drake v. State, 400 So.2d 1217 (Fla. 1981), this Court, as to the admissibility of Williams Rule evidence, stated:

> Williams v State holds that evidence of similar facts is admissible for any purpose if relevant to any material issue, other than propensity or bad character, even though such evidence points to the commission of another crime. The material issue to be resolved by the similar facts evidence in the present case is identity, which the State sought to prove by showing Drake's mode of operation.
>
> The mode of operating theory of proving identity is baaed on both the similarity of and the unusual nature of the factorial situations being compared. 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 paint to the defendant.
>
> (p. 1219)

In Heuring v. State, 513 So.2d 122 (Flu. 1987), this Court set the relevancy standard as follows:

> "Similar fact evidence that the defendant committed a collateral offense is inherently prejudicial.

Introduction Of such evidence creates the risk that the conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof that he committed the charged offense. (citations omitted) Such evidence is, therefore, inadmissible if solely relevant to bad character or propensity to commit the crime. (citations omitted) To minimize the risk of wrongful conviction, the similar fact evidence must meet a stricc standard of relevance, The charged and collateral offenses must be not only strikingly similar, but they *must* also share some unique characteristics which sets them apart from other offenses."

There was no evidence that Robyn Novick was raped. There was no evidence appellant met her for a date or asked her for a ride. Robyn Novick did not have a son allegedly taken by appellant,

The appellant submits that there were no such unique characteristics in the Roarke and Colaris cases as would render them admissible in the Novick prosecution. Appellant especially submits that the dissimilarities of the instant case, when compared to that of Tina Colaris, require a finding that they (Colaris and Novick) were not so uniquely similar as to allow a "re-prosecution" of the Colaris case.

Officer Shipes, (T. 396), Dr. Mittleman (T. 403), Linda Williams (T. 436), David Restrepo (T. 452), Jessie Casanova (T. 482), Luis Toledo (T. 495), Mark Joy (T. 499), James Avery (T. __

511), Robert Robkin (T. 523), Frank McKee (T. 530), Mike Decora (T. 536-558), testified as to the Robyn Novick homicide, There was 162 pages of witness testimony as to the death of Robyn Novick.

Michelle Hammon (T. 558), Ken Griffin (T. 566), Dr. William Maples IT. 572), Captain Neil Nydlam (T. 605) testified as to the Susan Roarke's murder.

Tina Colaris (T. 624), Detective Louis Pasaro (T. 664-710) testified AS to the crimes against Tina Colaris.

The testimony as to the Roarke and Colaris crimes constituted 152 pages of transcript. Almost as much evidence was introduced concerning the collateral crimes as the crime charged!

During its cross-examination of the defendant (T. 1142-1162), the prosecutor questioned Mr. Gore almost exclusively as to the collateral crimes (Raarke and Colaris) cases.

During its closing argument, (T. 1168-1188; 1227-1237), the prosecution referred repeatedly to the collateral crimes cases.

The defendant submits that the trial court reversibly erred in permitting the prosecution to make the collateral offenses, rather than the Robyn Navick prosecution, the feature of the trial.

In the case of Long v. State, 22 Fla.L.Weekly S345 (Fla. 1997), this Court has recently stated, in reversing that defendant's conviction for excessive collateral Crime evidence:

> Section 90.403, Florida Statutes (1995), stated in pertinent, part:
>
> Relevant evidence is inadmissible if its probative valueis aubstantiallp outweighed by the danger of unfair

prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

In State v. McClain, 525 So.2d 420, 422 (Fla. 1988), we explained the balancing test a trial court must perform under section 90.403 in determining whether relevant evidence also is admissible against a defendant at trial. We stated:

> This Statute compels the trial court to weigh the danger of unfair prejudice against the probative value In applying the balancing test, the trial court necessarily exercises its discretion. Indeed, the same item of evidence may be admissible in one case and not in another, depending upon the relation of that item to the other evidence. E. Cleary, McCormick on Evidence, § 185 (3d ed. 1984).

Professor Ehrhardt *explains* the application of the statute as follows:

> Although Section 90.403 is mandatory in its exclusion of this evidence, a large measure of discretion rests in the trial judge to determine whether the probative value of the evidence is substantially outweighed by any of the enumerated reasons. The court must weigh the proffered evidence against the other facts in the record and balance it against the strength of the reason for exclusion.
>
> In excluding certain relevant evidence, Section 90.403 recognizes Florida law. Certainly, most evidence that is

admitted will be prejudicial to the party against whom it is offered. Section 90.403 does not bar this evidence; it is directed at evidence which inflames the jury or appeals improperly to the *jury's* emotions. Only when that unfair prejudice substantially outweighs the probative value of the evidence is the evidence excluded.

...In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis: the chain of inference necessary to establish the material fact: and the effectiveness of a limiting instruction.

1 C. Ehrhardt, Florida Evidence § 403.1 at 100-03 (2d ed. 19841 (footnotes omitted)

The proper application of this balancing test was central to our later decision in Henry v. State, 574 So.2d 73 (Fla. 1991), where we reversed the defendant's conviction for the first-degree murder of his wife and remanded the case for a new trial because of the erroneous admission of excessive testimony concerning the defendant!? murder of his wife's son. Although recognizing that the evidence wasrelevant to the case as being part of a prolonged criminal episode, we explained that it nevertheless was inadmissible:

Some reference to the boy's killing may have been necessary to place the events in context, to describe

adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness, However, it was totally unnecessary to admit *the* abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiners photograph of the body. Even if the state had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed probative value. § 90.407, Fla Stat. (1985). Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the *jury* against Henry.

Id. at 75, See also Long v. State, 610 So.2d 1276, 1280-12?? (Fla.1992) (although evidence concerned with defendant's arrest in collateral crime was admissible to establish identity and connect him to victim of charged of fenses, details of collateral crime were not admissible). Even when evidence of a collateral crime are properly admissible in a case, we have cautioned that "the prosecution should not go too far in introducing evidence of other crimes. The state should not be allowed to go so far as to make the collateral crime a feature instead of an incident.

(S. 345)

In Bush v. State, 22 Fla.L.Weekly D809 (Fla. 1st DCA 1997), the Court reversed that defendant's conviction due to excessive collateral crimes evidence stating!

Unfair prejudice results where the state makes a collateral offense a feature, instead of an incident, of a trial, State v. Richardson, 621 So.2d 752 (Fla. 5th DCA 1993). The state's presentation of evidence of collateral offenses must not transcend the bounds of relevancy to the offense being tried. Id. A similar offense becomes a feature instead of an incident of the trial or the charged offenses where it can be said that the similar fact evidence has so overwhelmed the evidence of the charged crime as to be considered an impermissible attack on the defendant's character or propensity to commit crimes. Snowden v. State, 537 So.2d 1303 (Fla. 3d DCA), rev. denied, 547 So.2d 1210 (Flu, 1989). The admission of excessive evidence of other crimes to the extent that it becomes a feature of the trial has been recognized as fundamental error. See, Travers v. State, 578So.2d 793 (Fla. 1st DCA), rev, denied, 584 So.2d 1000 (Fla. 1991). As we stated in Travers, the danger is that evidence that the defendant committed a similar crime will frequently prompt a more ready belief by the jury that the defendant might have committed the charged offense thereby predisposing the mind of the juror to

believe the defendant guilty, Travers at 797, citing Nickels v State, 90 Fla. 659, 685, 106 So.479, 488 (1925).

(D. 810)

The appellant submits that in the instant case, the collateral crimes evidence became a feature rather than an incident of this trial. Appellant's convictions must be Reversed. see, also, State v. Lee, 531 So.2d 133 (Fla. 1988).

The appellant would also submit that the prejudice he suffered from the admission of this collateral crimes evidence vastly outweighed what probative value it may have had. This was particularly true as to the Tina Colaris incident which involved a rape and kidnap of a child not present in either the Susan Roarke or Robyn Novick cases. This prejudice was compounded by the prosecution's elicitation of evidence as to the taking of Tina Colaris's child (T. 1143-1144) which was contrary to the court's explicit pretrial ruling that the state's evidence "excludes any reference to the fact that the defendant travels after the taking of the child and left there. That clearly would be prejudicial and outweighs any probative value" (SR. 21). The prejudice suffered due to the "feature presentation" of Tina Colaris evidence would also include the submittedly prejudicial photos of MS. Colaris, in a hospital recovering from her injuries (R. 203-208). The appellant'? convictions must be Reversed. See, Sexton v. State, 22

Fla.L.Weekly S469 (Fla. 1997); Turtle v. State, 600 So.2d 1214 (Fla. 1st DCA 7992): State v. Zenobia, 614 So.2d 1139 (Fla. 4th DCA 199?)

II

THE EVIDENCE WAS INSUFFICIENT, BEYOND A REASONABLE DOUBT, TO CONVICT THE DEFENDANT OF FIRST DEGREE MURDER

The indictment (R. 1) charging the defendnnt charged that he killed Robyn Novick "from a premeditated design" "and/or while engaged in the perpetration of, or in an attempt to perpetrate a robbery".

The defendant initially submits that the evidence was insufficient, beyond a reasonable doubt, to prove his identity as the person or one af the persons responsible for Ms. Novick's death.

There were no eyewitnesses to Ms. Novick's death, No witness or evidence placed the defendant with Ms. Navick wither immediately before or immediately after her death. The medical examiner did not testify as to a time of death,

The defendant did not confess to Ms. Novick's murder (T. 772).

The sole witness to testify as to whom was with Ms. Novick on the night before the defendant was in possession of her automobile was Linda Williams. Ms. Williams, who had been drinking (T. 447) saw Ms. Novick at a tavern getting into her car which contained a male passenger. She testified that the "features weren't that

clear" (T. 446). She was unable to make a positive identification of the man whom she saw with Ms. Novick (T. 444, 446-7).

Thus, no state evidence place Marshall Gore with Ms. Novick immediately prior to her death, at the time of her death, or immediately after her death. Indeed, the state presented no evidence as to when Ms. Novick died. Linda Williams testified that she saw Ms. Novick with an unidentified man on the night of March 11, 1988. Officer Snipes discovered Ms. Novick's body on March 16, 1988, five days later. The medical examiner, Dr. Mittleman, examined her body on March 16, 1988 (T. 406). Dr. Mittleman did not testify as to when, in the five intervening days between March 11 and March 16 that Ms. Novick died. There were no witnesses, eyewitnesses to testify that Marshall Core was with Ms. Novick when she died. There was no physical evidence to prove that Marshall Gore was with Ms. Novick when she died.

The appellant submits that there was no direct evidence to prove that he was the cause of Ms. Novick's death.

That being so, the state's case against Mr. Gore rests entirely upon circumstantial evidence.

In Steward v. State, 30 So.2d 489 (Fla. 1947), this Court considered a murder case in which the proof "wholly fails to identify the appellant as the guilty agent" (p. 489 of opinion). This court stated:

> If the facts and proof are equally consistent with some other rational conclusion than that of guilt, Or if the evidence leaves it indifferent which of several

hypotheses is true, or merely establishes some finit probability in favor of one hypothesis rather than another such evidence cannot amount to proof, however great the probability may be.

[3] In Armstrong v. State, 107 Fla. 494, 145 Sa. 212, 213, this Court held:

"This court is committed to the doctrine that a vet-dirt of quilt of felony should not be upheld when based on guesswork or suspicion, and that, where the evidence, considered as a whole entirely fails to disclose any substantial proof of material facts necessary to be alleged and proved, a judgment Of conviction will be reversed."

The Illinois court in the case of People v. Holtz, 294 211, 143, 128 N.E. 741, held:

"Mere proof that defendants had an opportunity to commit. the homicide, without proof excluding an opportunity by anyone else to commit it, it not sufficient."

(p. 490-491)

In State v. Roby, 246 So.2d 570 (Fla. 1971), this Court found that the state failed to prove that that defendant's action(s)was the cause of the homicide stating:

This places a finding that Roby's action directly caused the homicide in the realm of speculation and suspicion which, however strong, is never sufficient to

mullify a reasonable doubt and support a criminal conviction. The burden of proof of connection the death to Roby's pistol was not met.

(p. 570).

In Jaramillo V. State, 417 So.2d 257 (Fla. 1982), this Court reversed that defendant's murder conviction as it stated!

"where the only proof of quilt is circumstantial, no matter how strongly the evidence may suggest quilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence" (p. 257 of opinion).

In Scott V. State, 581 So.2d 887 (Flu. 1991), this Court addressed a similar case built also entirely upon circumstantial evidence. In Reversing that defendant's conviction, this Court stated:

"[3] As we have said before, circumstantial evidence "must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused and no one else committed the offense charged." Hall v. State, 90 Fla. 719, 720, 107 SO. 246, 247 (1925). Since the state's case against Scott was based entirely upon circumstantial evidence, such evidence must be hot only consistent with Scott's guilt but also inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629 (Fla. 1956). See, also Cox; Duest v. State, 462 So.2d 466 (Fla. 1905); McArthur v. State, 351

So.2d 972 (Fla.1977). That test has not been met in this case. This Court is unable to correct the problems resulting from the manner in which three different law enforcement administrations conducted the investigation of this murder. We find that the circumstantial evidence presented by the prosecution could only create a suspicion that Scott committed this murder. Suspicions cannot be a basis for a criminal conviction. Our law requires proof beyond a reasonable doubt and a fair trial for a dsfendant.

(p. 893)

In Long v. State, 689 So.2d 1055 (Fla. 1997), this Court again addressed a circumstantial evidence murder case, In Long, the prosecution also introduced Williams Rule evidence, In Reversinq Long's conviction, this Court stated:

Long argues that the evidence in this case is insufficient to sustain the conviction for first-degree murder. Based on the evidence presented, the law requires us to agree, The State bears the responsibility of proving a defendant's guilt beyond and to the exclusion of a reasonable doubt. Cox v. State, 555 So.2d 352 (Fla. 1989): Davis v. state, 90 So.2d 629 (Fla. 1956). Tn order for the State to move premeditated first-degree murder throuqh circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Bedford v. State, 589 So.2d 245 (Fla. 1991), cert. denied, 503 U.S. 1009 (1992); Wilson v. State, 493 So.2d1019 (Fla. 1986); McArthur v. State, 351 So.2d 972

(Fla. 1977). The question of whether the evidence is inconsistent with any other reasonable inference is a question of fact for the jury. Bedford, 589 So.2d at 25; Holton v State, 573 So.2d 284 (Fla.1990), cert. denied, 500 U.S. 960 (1991). Nevertheless, a jury's verdict an this issue must be reversed on appeal if the verdict is not supported by competent, substantial evidence. Evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not sufficient to support a conviction. Cox; Scott v. State 581 So.2d 887 (Fla. 1991); Williams v. State, 143 So.2d 484 (Fla. 1962).

In this case, the state introduced evidence that Long abducted and then released McVey; that a search of Long's car after he was apprehended for the McVey abduction revealed two hairs consistent with that of the victim; that a carpet fiber from the scene of the crime matched the carpet in Long's cart and that Long made vaque statements to the effect that he had killed "others". While the hair and fiber evidence in conjunction with the other evidence in this case certainly raises a very strong suspicion that Long killed the victim, we find that it is insufficient to establish beyond a reasonable doubt thnt he did so. First, no one saw Lonq with the victim, and no statements were introduced in which Long stated that he killed the victim in this case. Further, as explained below, the critical evidence linking Long to the murder in this case, the two strands of hair and the carpet fiber, is not competent to support the conviction.

Hair comparisons cannot constitute a basis for positive personal identification because hairs from two different people may have precisely the same characteristics. Scott v. State, 581 So.2d 887 (Fla. 1991); Cox; Horstman v. State, 530 So.2d 368 (Fla. 2d DCA), review denied, 539 So.2d 476 (Fla. 1988); Jackson v. State, 511 So.2d 1047 (Fla. 2d DCA 1987). Moreover, even where evidence does produce a positive identification, such as fingerprints, the State must still introduce some other evidence to link a defendant to a crime. See, e.g., Jaramillo v. State, 417 So.2d 257 (Fla. 1982) (where only evidence connecting defendant to crime was fact that defendant's fingerprints were left at scene, evidence insufficient to convict). Here, the other evidence connecting Long to this murder was a carpet fiber; yet the State introduced no evidence to indicate that the carpet fiber could have come only from Long's car or that carpet was placed in only a few cars.

The facts of this case axe similar to those presented to us in cox. In that case, the evidence reflected that hair and blood consistent with the defendant's were found in the victim's car. Also found in a car was a boot print that appeared to have been made by a military boot and the defendant was in the military. The defendant did not know the victim and no one testified that they had been seen together. While we noted that the evidence created a suspicion that cox had murdered the victim it did not prove beyond a reasonable doubt that he had done so. This was especially true given that hair analysis and comparison is not an absolutely

a

certain and reliable method of identification, Just as we Were compelled to find the evidence insufficient in Cox, so, too, must we do here.

(p. 1057-1058)

Marshall Gore submits that the state has failed to link him to this crime. He submits that while the evidence may have created a suspicion that he murdered Robyn Novick, it did not prove beyond a reasonable doubt that he had done so. See, also, Wilkes v. State, 541 So.2d 664 (Fla. 1989); Smolka v. State, 662 So.2d 1255 (Fla. 5th DCA 1995).

Aside from a lack of proof as to identity, appellant submits that the prosecution failed to prove First Degree Murder by either Premeditation or Felony Murder,

In considering the sufficiency of evidence to prove premeditation the Court in Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990) stated:

> Premeditation is more than A mere intent to kill: it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.
>
> (p. 967)

and,

> Premeditation may be proven by circumstantial evidence. Cochran v. State, 547 So.2d 928 (Fla. 1989). Whether the evidence fails to exclude a reasonable hypothesis of innocence is generally a jury question. If there is substantial, competent evidence to support it, the jury verdict will not be reversed. Id at 930. However, Cochran also says, "Where ths element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference."
>
> (p. 967)

In Smith, the Court noted that that state was unable to prove what occurred immediately prior to the homicide, The Court found that there was no evidence of the presence or absence of provocation and very little evidence of previous difficulties between the appellant and the victim+ The court reversed that defendant's conviction for first degree murder finding that that killing, was not "inconsistent with a killing which may have occurred in the heat of passion or without premeditation. Because the evidence is not inconsistent with every reasonable hypothesis of innocence, we must vacate the judgment for first degree murder and instruct the court to enter a judgment for second degree murder" (p. 968 of opinion).

In Kirkland v. State, 684 So.2d 732 (Fla.1996), this Court reversed a First Degree Murder conviction finding insufficient evidence to prove premeditation. In So doing, this Court stated:

> The State's case was based upon circumstantial evidence Kirkland moved for A judgment of acquittal at the conclusion of the State's case. The trial court denied. Kirkland's motion. We have stated that such a motion should be granted unless the State can "present evidence front which the jury can exclude every reasonable hypothesis except that *of* guilt". State v. Law, 559 So.2d 187, 188 (Fla. 1989). We find that the circumstantial evidence *in* this case "is not inconsistent with any reasonable exculpatory hypothesis as to the existence of premeditation". Hall v. State, 403 So.2d 1319, 1321 (Fla. 1981). Indeed, a review of the record forces us to conclude, as a matter of law, that the State failed to prove premeditation to the exclusion of all other reasonable conclusions. Where the State's *proof* fails to exclude a reasonable hypotheses [sic] that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Hoefert v. State, 617 So.2d 1046, 1048 (Fla. 1993),
>
> Premeditation is defined as follows:
>
> Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist

for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.

Asay v. State, 580 So.2d 610, 612 (Fla. 1991). The state asserted that the following evidence suggested premeditation. The victim suffered a severe neck wound that caused her to bleed to death, or sanguinate, or suffocate. The wound was caused by many slashes. In addition to the major neck wound, the victim suffered other injuries that appeared to be the result of blunt trauma. There was evidence indicating that both a knife and a walking cane were used in the attack, Further, the State pointed to evidence indicating that friction existed between Kirkland and the victim insofar as Kirkland was sexually tempted by the victim.

We find, however, that the State's evidence was insufficient in light of the strong evidence militating against a finding of premeditation. First and foremost, there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time *prior* to the actual homicide. Second, there were no witnesses to the events immediately preceding the homicide. Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide. Indeed, the victim's mother testified that Kirkland owned a knife the entire

> time she was associated with him, Fourth, the State presented scant, if sny, evidence to indicate that Kirkland committed the homicide according to a Preconceived plan. Finally, while nat controlling, we note that it is unrefuted that Kirkland had an IQ that measured in the sixties.
>
> (p. 734-735)

In the instant case, there was no suggestion that Marshall Gore "exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide." There was "no evidence suggesting that" Marshall Gore" made special arrangements to obtain a murder weapon in advance of the homicide". The "State presented scant, if any, evidence to indicate that" Marshall Gore "committed the homicide according to a preconceived plan."

As was defendant Kirkland, Marshall Gore's conviction, if identity is considered proven, must be reduced to Second Degree Murder.

Likewise, in Hoefert v. State, 617 So.2d 1046 (Fla. 1993), this Court Reversed that defendant's First Degree Murder conviction stating:

> Premeditation is the essential element which distinguishes first-degree murder from second-degree murder. Wilson v. State, 493 So.2d 1019 (Fla. 1986). Premeditation may be proven by circumstantial evidence. Sireci v. State, 899 So.2d 964 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982),

overruled on other grounds by Pope v. State, 441 So.ed 1073 (Fla. 1983). However, "[w]where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference." Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). where the State's proof fails to exclude a reasonable hypotheses that the homicide occurred other than by m-meditated design, a verdict of first degree murder cannot be sustained. Hall v. State, 403 So.2d 1319 (Fla. 1981).

"'Evidence fram which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.'" Holton v. State, 573 So.2d 284 289 (Fla. 1990), cert. denied, U.S. 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991) (quoting Larry v. State, 104 So.2d 352, 354(Fla. 1958)).

In this case, the State was unable to prove the manner in which the homicide was committed and the nature and manner of arty wounds inflicted. The medical examiner only established ths cause of death as "probably asphyxiation" based upon "the lack of finding something [else]." There was *no* medical evidence of physical

trauma to Hunt's neck, no evidence of sexual activity, and no evidence of genital injuries.

Even taking the evidence presented in the light most favorable to the State, as Cochran requires, the State merely established the following: Hunt accompanied Hoefert to his apartment and was found dead in that apartment several days later: the cause of Hunt's death was asphyxiation; Hoefert had strangled several other women while either raping or assaulting them: and Hoefert attempted to conceal his crime by failing to report Hunt's death to the authorities, by digging a large hole in his yard where he planned to bury Hunt's body, and by fleeing to Texas.

Although we find that the circumstantial evidence in this case is consistent with an unlawful killing, we do not find sufficient evidence to prove premeditation. Therefore, the conviction for first-degree murder is reversed and the death sentence vacated.

(p. 1048-1049)

In this case there was no evidence as to what occurred between the parties at the time of Ms. Novick's death. There was no evidence of any previous difficulties between Marshall Gore and Ms. Novick.

As in Hoefert, supra appellant's conviction, if identity is proven, must be Reduced to Second Degree Murder.

The state's theory of felony murder was based upon Ms. Novick's death "in the perpetration of, or in an attempt to perpetrate a robbery."

The appellant would rely upon the argument and authorities cited in his argument as to the insufficiency of the evidence to prove robbery in support of his contention that this necessary underlying felony was not proven, beyond a reasonable daubt, so as to support a conviction for Felony Murder.

The appellant first submits that identification was not prove, beyond a reasonable doubt, that he was the person who killed Robyn Novick. His conviction for murder must be Reversed.

If it. is considered that identity has been sufficiently proven, it is submitted that the evidence presented was insufficient to prove, beyond a reasonable doubt, either premeditated or felony murder and that this conviction must be Reduced to Second Degree Murder.

III

THE EVIDENCE WAS INSUFFICIENT, BEYOND A REASONABLE DOUBT, TO CONVICT THE DEFENDANT OF ROBBERY

The indictment charged that the defendant did take by "force, violence, assault or putting in fear" "Jewelry and/or credit cards and/or keys and/or and automobile" "from the person or custody of Robyn Novick" "with the intent to permanently deprive Robyn Novick" "and in the course of committing said Robbery, carried a deadly weapon, to wit: a knife and/or similar sharp object" (R. 2).

There were neither any eyewitnesses/witnesses to this offense nor Rid the defendant confess to Armed Robbery, The defendant wad not proven or seen to have been with Ms. Novick at the time of her death (when the robbery allegedly occurred). The state presented no evidence, sufficient beyond a reasonable doubt, to prove that Ms. Novick's jewelry, credit cards, keys or automobile were taken from her by force, violence, assault or putting in fear. The state did not disprove that Ms. Novick may have given or loaned her property to the defendant. The state did not disprove that Ms. Novick's property was taken from her after her death, as an afterthought, by the defendant or other person or persons unknown, when it could not legally be taken by "force, violence, assault, or putting in fear". The state did not prove that, at the time Ms.

Novick either gave up, lost or was divested of her property that the person who obtained that property carried a "knife and/or similar sharp object".

The defendant never confessed to the crime (T. 772).

The sole witness as to who was with Ms. Novick on the night before a state witness testified that the defendant had possession of Ms. Novick's Corvette was Linda Williams. She saw Ms. Novick leave a tavern with a man in a yellow Corvette. She had been drinking that evening (T. 447). She could not make a positive identification of the man whom she saw with Ms. Novick (T. 446-7, T. 444). She testified as that, "The features weren't that clear" (T. 446).

In view of the lack of evidence either that the defendant was the person who took Ms. Novick's property, or that this property was taken before her death, rather than as an afterthought, that the property was taken by force, fear, or violence, or that the taker, at the time of ths taking, possessed a weapon, the defendant submits that the charged offense of Armed Robbery was not proven beyond and to the exclusion of a reasonable doubt and, therefore, the defendant's conviction and sentence for Armed Robbery must be Reversed. See, Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986); Gomez v. State, 496 So.2d 982 (Fla. 3d DCA 1986); McConnehead v. State, 515 So.2d 1046 (Fla. 4th DCA 1987); Butts v. State, 620 So.2d 107 (Fla. 2d DCA 1993); Allen v. State, 690 So.2d 1332 (Fla. 2d DCA 1997).

IV

THE CONDUCT OF THE PROSECUTION IN THE INSTANT CASE WAS SUCH AS TO DEPRIVE APPELLANT OF A FAIR TRIAL

The appellant has argued the insufficiency of the evidence to support his convictions for First Degree Murder and Robbery in other portions of this brief, The evidence to support his convictions was, submittedly scant, circumstantial and underwhelming.

Having only a circumstantial evidence case, the prosecution, submittedly, sought to achieve a conviction by resorting to improper and impermissible comments and conduct. It is submitted that this conduct separately, but certainly cumulatively, served to deprive Marshall Gore of a Fair Trial and requires Reversal.

In Adams v. State, 192 So.2d 762 (Fla.1966), this Court held "that attorneys for the State should refrain from inflammatory and abusive argument, since they are officers clothed with quasi-judicial powers."

In Cumbie v. State, 378 So.2d 1 (Fla. 1st DCA 1978), the Court, in reversing the conviction, stated "prosecutors should represent the State with candor and fairness, even though the crime prosecuted is a heinous one and the desire to get a guilty verdict

is great. It is for the jury to decide the case, without emotion, and solely on the evidence presented to it" (p. 3 of opinion).

In the case of Glassman v. State, 377 So.2d 208 (Fla. 3d DCA 1979), the Court considered the propriety of prosecution conduct and, in reversing that defendant's conviction, stated:

> We are also disturbed with the unprofessional language employed by the prosecuting attorney in this case. "It is undoubtedly improper in the prosecution of persons charged with crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and engage in vituperative characterizations of them." Johnson v. State, 88 Fla. 461, 102 So. 549, 550 (1924). "There is no reason under any circumstances at any time for a prosecuting officer to be rude to a person on trial. It is a mark of incompetence to do so . . ." Daugherty v. State, 154 Fla. 308, 17 So.2d 290, 291 (1944). "The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament." Stewart v. State, 51 So.2d 494, 495 (Fla. 1951). "[T]rials should be conducted coolly and fairly, without the indulgence in abusive or inflammatory statements made in the presence of the jury by the prosecuting officer." Goddard v. State, 143 Fla. 28, 196 So. 596, 602 (1940) ... In our view, the prosecuting attorney violated each of these well established injunctions under Florida law

which lends further weight to our conclusion that reversible error occurred in this case.

(p. 211)

It is submitted that the prosecutor in the instant case violated all these admonishments and, in allowing his own animosity towards appellant overpower his professional judgment, committed reversible error.

The trial court, in its pretrial ruling, as to collateral evidence of the Tina Colaris case, excluded "any reference to the fact that the defendant travels after the taking of the child and left here. That clearly would be prejudicial and out weighs any probative value" (SR. 21).

Contrary to this ruling, the Prosecution during its cross-examination of appellant inquired!

Q: By the way, would you tell the Ladies and Gentlemen of the Jury why on the 16th day of March of 1998, after leaving Tina on the side of the road, you left two-year-old who you say is your son, Jimmy, locked in an abandoned house in Georgia, naked in 30 degree weather?

(T. 1143-44)

The defense objection was overruled (T. 1144).

The Tina Colaris incident was a collateral offenses. The state's presentation of the collateral offense could not transcend the bounds of relevancy set by the trial court. See, State v. Richardson, 621 So.2d 752 (Fla. 5th DCA 1993). The prosecution's disregard of the trial judge's pretrial ruling, especially in a

case without averwhelming evidence, constitutes reversible error. See, Halsell v. State, 672 So.2d 869 (Fla. 3d DCA 1996).

During its crass-examination, the prosecution asked:

Q: You wouldn't want to have sex with 13-year-old girls?

(T. 1153)

and,

Q: It seems to me that being an LD would sort of be consistent with you having sex with 13-year-old girls.

(T. 1153)

The defense objected (T. 1153).

and,

Q: Let's talk about Jessica Casanova, 13 year-old-girl you live? in a house with. You had sex with her right?

(T. 1154).

The defense objection was overruled (T. 1154).

Appellant submits that whether or not he had sex with a 13 year-old-girl was immaterial as to *whether* he killed Robyn Novick. See, Wilt v. State, 410 So.2d 924 (Fla. 3d DCA 1982). There was no evidence to show that appellant committed the collateral offense of sex with 13 year-old-girls. See, Thomas v. State, 59 So.2d 517 (Fla. 1952); Cole v. State, 356 So.2d 1307 (Fla. 2d DCA 1978). This reference to a collateral crime charged violated the fundamental rights of appellant to a fair trial before an impartial

jury. See, Harmon v. State, 394 So.2d 121 (Fla. 1st DCA 1980): Marris State, 447 So.2d 1020 (Fla. 3d DCA 1984).

The Record reflects that during its crass-examination, the prosecution:

Teased the appellant about the name he used (T. 1142, 1143).

Did not give nppellant an opportunity to finish his answer (T. 1143, 1144).

Improperly commented on the work appellant did:

So you're also a dancer? Were you a cook? How about a bottle washer?

A: I have been a cook.

Q: Candle maker? No? Nothing like that?

(T. 1146)

Improperly commented on the appellant's credibility*

Mr. Gore, you can use whatever you want. You've made up every other story.

(T. 1149)

Improperly made racist remarks:

Q: Oh, Gore is a Jewish name? what did you have for Passover, a bunch of Matzo this year?

(T. 1157)

Again, referred to other unrelated cases, cases that were not noticed as Williams rule evidence!

Q: Now, You know a girl by the full name of Maria Dominquez that you met at the Pizza Hut prior to the 13th of February, 1988?

(T. 1158)

Defense objection was overruled (T. 1158).

The prosecution continued:

Q: Did you hear, see Maria Dominguez just prior to the accident you had in the Mustang on February of 1988?

A: I said I'm not going to make any statements whatsoever to you in relation to any other criminal cases, okay.

Q: You don't want to talk about any other cases?

A: I have a right not to answer that an I take it --

(T. 1158-9)

The defense. objection was overruled (T. 1159).

Improperly commented to the jury concerning his personal animosity towards appellant:

Q: Because I don't like people who kill women. How's that? You want to know why? Because I don't like people preying on women.

(T. 1159)

and,

Q: I didn't kill three women you did. You see, Mr. Gore. you killed women. That's why you're on the stand,

(T. 1162)

and,

Q: Well, you know what, you're right, I am, because somebody who does what you do deserves to die.

(T. 1162)

Improperly and caustically commented on appellant's character:

Q: I didn't realize how good a guy you were. You were concerned &bout their insurance rates, Is that your testimony?

During closing argument, the prosecutor commented:

a) If you believe he did not tell you the truth, that he made up a story, that's it, he's guilty of First Degree Murder --

(T. 1170)

Defense objection was overruled (T.1170)

and,

It's simple and it comes down to this in simplicity: If you believe his story, he's not guilty. If you believe he's lying to you, he's guilty. It's that simple.

(T. 1236)

Defense objection was overruled (T. 1236).

Prosecution comments such as these inviting a jury to convict a defendant because he lied have consistently been held to be error. See, Bass v. State, 547 So.2d 680 (Fla. 1st DCA 1989);

Clewis v. State, 605 So.2d 974 (Fla. 3d DCA 1992): Pacifico v. State, 642 So 2d 1178 (Fla. 1st DCA 1994); Northard v. State, 675 So.2d 652 (Fla. 4th DCA 1996).

b) Improperly commented on appellant's demeanor:

Am I boring you, Mr. Core.

(T. 1175)

and,

Now -- I'm sorry. Maybe he wants to testify now, Judge. I'm not sure.

The Court: What happened?

Mr. Rosenberg: He sort of wants to answer "that's right" to what I'm saying.

The defendant: No, I don't.

(T. 1182)

It has been held to be reversible error for a prosecutor to address the defendant's demeanor off the witness stand. See, Baldez v, State, 679 So.2d 825 (Fla. 4th DCA 1996); Pope v. Wainwright, 496 So.2d 798 (Fla.1986).

c) Improperly disregarding the court's pretrial ruling and commented:

And when you took her car, why did you take her Son? Well, he was really my son and I was saving him and that's why I left him locked up in a kitchen cabinet, because T was helping him

(T. 1230)

Defense objection was overruled (T. 1230).

d) Improperly expressed a personal opinion and vilified appellant.

You know, Ladies and Gentlemen, there's a lot Of rules and procedures that I have to follow in court, and there's a lot of things I can say or can't say, but there's one thing the Judge can't ever make me say and that is he can never make me say that's a human being.

(T. 1228)

It is improper for a prosecutor to refer to the accused in derogatory terms, in such manner as to place the character of the accused in issue. See, Lewis v. State, 377 So.2d 640 (Fla. 1979); Pacifico v. state, supra.

Repeated improper remarks and conduct of a prosecutor can constitute reversible error in the absence of objection, See, Paft State, 112 So.2d 380 (Fla. 1959); Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984): Fuller v. State, 540 So.2d 182 (Fla. 5th DCA 1989).

Tn cannot be said that these remarks did not prejudice appellant. As they did, and as the wholly circumstantial evidence against him was nat overwhelming, his conviction must be Reversed. See, Coleman v. State, 420 So.2d 354 (Fla.5th DCA 1982); Rahmings v.State, 425 So.2d 1217 (Fla.2d DCA 1983).

V

THE TRIAL COURT ERRED BY INTRODUCING INTO EVIDENCE GRUESOME PREJUDICIAL AND UNNECESSARY COLLATERAL CRIMES PHOTOS

Over objection (T. 641), photos showing Tina Colaris after the attack on her (R. 203) were introduced into evidence.

These photographs had nothing to do with the Robyn Novick homicide. They were unnecessary as Ms. Colaris described her injuries. Their only effect was to improperly and unfairly prejudice the jury against appellant. Any probative value they may have had was vastly outweighed by the prejudice their admission visited upon appellant. The admission of these unnecessary and gruesome collateral crimes photographs constituted reversible error. See, Henry v. State, 574 So.2d 73 (Fla. 1991); Duncan v. State, 619 So.2d 279 (Fla, 1993); Steverson v. State, 22 Fla.L.Weekly S345 (Fla. 1997); Czubak v. State, 570 So.2d 925 (Fla. 1990).

VI

THE TRIAL COURT ERRED BY FAILING TO ADMIT EVIDENCE THE DEFENDANT SOUGHT TO ADMIT WHERE A DEFENDANT SHOULD BE ENTITLED TO INTRODUCE RELEVANT EVIDENCE WHICH WILL TEND TO SUPPORT HIS DEFENSE

In the instant case, the trial court erred by failing to admit evidence which the defendant sought to introduce to support his defense.

In the instant case, Gore attempted to intraduce a photograph of Tina Colaris which would have been identified by a witness for the defense, hna Fernnndez (T. 800). The court refused to admit the photograph although it was proffered to the court that the witness would testify as to when and where the photograph had been taken (T. 801). Ana Fernandez testified that she knew Tina Calaris and that the witness watched Gore take sexually-oriented pictures of Tina Colaris whose name appeared on the back of Gore's business cards for "The Exchange" (T. 807, 809, 810).

Ana Fernandez's testimony was in direct contradiction to the testimony given by Tina Colaris wherein Colaris testified that she became acquainted with Gore when she met him at a club where she

worked. Introduction of the photograph of Colaris would have supported Gore's position.

The witness testified that she kept track of the "girls" that worked for Gore (T. 807). she also testified that she had met Robyn Novick, Pauline Johnson and Susan Roarke (T. 811, 814). The witness also testified that in 1988 Tina Colaris arrived at the witness' home wfth a police officer. The police officer removed pictures of Colaris from Fernandez's home (T. 825). Further testimony by the witness established that the "girls" that worked forGore in his escort service often changed their appearances (T. 828).

Ana Fernandez's affidavit regarding a ring claimed to be owned by Tina Colaris was excluded (T. 835). The photo of Tina Colaris and the business card wherein Tina Colaris' name appeared on the back were excluded (T. 833, 834, 835, 836). All of this evidence would have supported Gore's position. Ana Fernandez's testimony regarding where and when she saw Gore take a picture of Tina Colaris was excluded (T. 893). This would have corroborated Gore's position that he employed Tina Colaris. Where the evidence tends even indirectly to establish reasonable doubt regarding defendant9 quilt, it is error to deny it admissibility. See, Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1992); Estano v. State, 595 So.2d 973 (Fla. 3d DCA 1992).

At Gore's trial, the court excluded evidence that would have corroborated defendant's position with regard to William rule evidence. It has been held that where Williams rule testimony is

considered sufficiently relevant to be admitted into evidence that competent evidence tending to disprove Williams rule testimony is equally important. See, Holley v. State, 328 So.28 224 (Fla. 2d DCA 1978).

In the instant case, the evidence excluded wad highly pertinent to Gore's theory of defense. The trial court abused its discretion by excluding evidence which would have tended to create a reasonable doubt and that would have tended to corroborate Gore's defense. See, Fields v. State, 608 So.2d 899 (Fla. 1st DCA 1992).

In the case at bar, Ana Fernandez's testimony regarding what Tina Colaris told her when Fernandez saw Colaris at the Broward Mall was excluded. This statement made out of court was essential and probative to the defense's theory. King v. state, 684 So.2d 1388 (Fla. 1st DCA 1996).

The trial court's exclusion of Ann Fernandez's affidavit regarding the ring claimed to belong to Tina Colaris was not harmless error. The statement supporting defense's position that the ring belong to Gore and that he had made it for himself while incarcerated at Eglund w&s substantially important to Gore's position that: the ring did not belong to Tina Colaris and that he (Gore) could not have robbed Colaris of the ring in Gore's possession. See, Zerquera v. State, 549 So.2d 189 (Fla. 1989).

The trial court failed to make sufficient inquiry into the surrounding circumstances regarding witnesses sought to be put on the stand by the defense. The state's objection that the names had not been included on the witness list was sustained pursuant to

Fla.Crim.R.P. 3.220. Yet, again, these witnesses' testimony would have tended to create a reasonable doubt and would have corroborated the defense's position. The trial court had the obligation to determine whether or not the Gore's noncompliance of the criminal rules would have resulted in harm to his position. See, Coffey v. State, 421 So.2d 49 (Fla. 4th DCA 1982).

A defendant facing a serious criminal charge should *be able to* produce evidence essential to his defense. See, Wilson v. State, 230 So.2d 426 (Fla. 3d DCA 1969); Roberts v. State, 370 So.2d 800 (Fla. 2nd DCA 1979).

By excluding evidence that would have tended to support Gore's case and by failing to inquire regarding the surrounding circumstances of why defense violated the rules of criminal procedure by failing to supply the names of certain witnesses On the witness list delivered to the prosecution, the trial court abused is discretion where it denied the defense an opportunity to support its case. The trial court's exclusion of evidence and testimony is reversible error. The defendant's case must be remanded for the appropriate proceedings regarding this error.

VII

THE APPELLANT MUST BE RESENTENCED DUE TO THE INVALIDITY OF THE AGGRAVATING FACTORS OF MURDER DURING A ROBBERY OR FOR PECUNIARY GAIN

The trial court submitted jury instructions to the jury as to aggravating factors. In sentencing appallnnt to Death, the Court found the twn aggravating factors of Murder during a Robbery and for murder fcr pecuniary gain (R. 334).

As argued in his argument as to the sufficiency of evidence to support the robbery conviction, appellant submits that these two alleged aggravating factors were not proven to exist. He submits, therefore, that he must be Resentenced before a jury which is not instructed as to these alleged aggravators and by a judge who doss not take these alleged aggravators into consideration when imposing his sentence.

VIII

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH AFTER REFUSING A PLEA OFFER AND EXERCISING HIS RIGHT TO A TRIAL BY JURY

Prior to trial, the defendant was offered a plea of "One life concurrent with the first of five lifes given out in the '88 case with credit for the seven years to class out all remaining cases, which I believe number 10".

(T. 215).

The trial court made sure that the defendant knew of the offer (T. 215).

The defendant decided to exercise his Right to a Trial by Jury. He was subsequently convicted and sentenced to Death.

Only defendant's trial came between the plea offer of "Life" and the Death Sentence mated out.

The defendant submits that he was improperly sentenced to Death because he exercised his constitutional right to have his quilt or innocence determined by a jury of his peers.

In Weatherington v. State, 262 So.28 725 (Fla. 3d DCA 1972) the Court considered the issue and stated:

The substance of this point appears to be that the appellant received a heavy sentence because he dared to

ask for a jury trial. Of course, if this were the case, the sentence would be unconstitutional. (p. 725).

In Fraley v. State, 426 So.2d 983 (Fla. 3d DCA 1983), this Court stated:

> The law is clear that any judicially imposed penalty which needlessly discourages assertion of the fifth amendment right not to plead guilty and deters the exercise of the sixth amendment right to demand a jury trial. is patently unconstitutional. (p. 985).

In Stephney v. State, 564 So.2d 1246 (Fla. 3d DCA 1990), "the court *offered* Stephney a sentence of three and one-half years for a plea of guilty. The guidelines recommended range for the offense was five and nne-half to seven years." The defendant was convicted at trial and sentenced "to nine years in prison, the highest permissible sentence based on his guidelines scoresheet." In reversing the defendant's sentence the court stated:

> The only conclusion which can be drawn is that the longer sentence was entered due to the defendant's failure to accept the plea bargain offered by the trial judge. (p. 1248). and,

> We think the proper remedy in this case is to remand with directions that the trial judge enter sentence within the recommended guidelines range of five and one-half to seven years. (p. 1248).

In Gillmand v. State, 373 So.2d 955 (Fla. 2d DCA 1979), the Second District Court of appeals considered the issue and states:

> The law is clear that any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional. (Citation omitted). An accused cannot be punished by a more severe sentence because he unsuccessfully exercised his constitutional right to stand trial rather than plead guilty (Citation omitted). (p. 9.38).

See, also, McEachern v. State, 388 So.2d 244 (Fla. 5th DCA 1980).

In the case of Cavallaro v. State, 647 So.2d 1006 (Fla.3d DCA 1994) this Court found that a party's decision to go to trial rather than accept a plea bargain is not punishable by the imposition of a harsher sentence because to do so would impinge on the constitutional right to trial by jury. This Caurt remanded for a new sentencing proceeding before a different judge.

The defendant submits that in the instant case he was punished for exercising his right to a jury trial (7 years straight/5 years habitual vs, 8-11 years, guidelines vs. 30 years habitual sentence) . Pursuant to the above authorities, he submits that the must be Resentenced.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the appellant Respectfully submits, that his Convictions must be Reversed, Sentences vacated and this Cause Remanded for appropriate proceedings,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foreqoinq was furnished by mail to the Office of the Attorney General at 111 Brickell Avenue, Suite 950, Miami, Florida 33131, on this 29 day of September, 1997.

submitted,

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