IN THE SUPREME COURT OF FLORIDA

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CASE NO. 96,127

MARSHALL L. GORE

Appellant

-V-

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

TNITIAL BRIEF OF APPELLANT

MARSHALL LEE GORE

William M. Norris, Esq.
WILLIAM M. NORRIS, P.A.
Fla. Bar No. 309990
3225 Aviation Avenue, Suite 300
Coconut Grove, Florida 33 133
Telephone: (305) 860-0988
Fax: (305) 285-0699

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STATUTES

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STATEMENT OF THE CASE

I. Course of proceedings:

Appellant Marshall Lee Gore was indicted on March 2 1, 1990, for the March 12, 1988 first degree murder and armed robbery of Robyn Novick (Rl-1-3). He was tried, convicted, and on June 30, 1995, he was sentenced to death.

On direct appeal, the Supreme Court, in an opinion issued on October 1, 1998, reversed and remanded for a new trial. *Gore v. Florida,* 719 So.2d 1197 (Fla. 1998).

A jury was selected on January 26, 27, 28, 1999 for Mr. Gore's retrial, which returned a verdict of guilty on February 12, 1999 (RI-15; R2-389-390). Appellant discharged guilt phase counsel and conducted the charge conference and summation pro se. A twelve to zero recommendation for a death sentence was returned on March 16, 1999, after a two day sentencing hearing which appellant also conducted pro se after discharging penalty phase counsel (R2-408). The Court held a Spencer hearing on March 29, 1999 (R29-1-32), and issued a written sentencing order and imposed a sentence of death in April 19, 1999 (R2-459-478; R3-483-485).

This appeal follows imposition of that sentence (R3-530).

STATEMENT OF THE FACTS

I. The State's case in the Guilt phase:

During the guilt phase of the trial, the State presented circumstantial evidence of appellant's crimes against Robyn Novick and, under the Williams Rule, presented evidence of appellant's extrinsic offenses against Susan Roark and Tina Corolis. Of the 34 witnesses the State called, 16 related to the crimes against Robyn Novick and 18 related to extrinsic crimes against Susan Roark and Tina Corolis. No witness had direct evidence that Marshall Lee Gore committed the crimes for which he was on trial.

At trial, the evidence of charged and uncharged crimes often overlapped, but for clarity, it is separated here. The facts of this case are difficult to master because the State, lacking direct evidence that Marshall Gore murdered Robyn Novick, called numerous witnesses to present voluminous evidence that Gore had murdered Susan Roark and had attempted to murder Tina Color-is.

A. ROBYN NOVICK:

A Metro-Dade Police Department officer assisting an Agricultural Patrol unit searching for a juvenile in the Redlands area of Dade County on March 16, 1988, saw a blue tarpaulin on the ground (TR 1052, 1057). He approached the tarpaulin,

lifted the edge and saw the leg of a white person he assumed to be a woman because the toenails were painted (TR 1059). A homicide squad responded to the scene, an overgrown field used for dumping trash, near Southwest 244 Street and 214 Place, at about 2:00 P.M. (TR 1359). The naked body of a female, later identified as Robyn Novick, was found (TR 1359, 1365). She had a silver belt around her neck and lace cloth around her left ankle (TR 1360, 1361). There was nothing of evidentiary value tying appellant Marshall Lee Gore to the crime scene (TR 1375).

A forensic pathologist from the Dade County Medical Examiner's office went to the scene and inspected the body (TR 1070). Dental records later established the victim's identity as Robyn Novick (TR 1077). The pathologist's observations and autopsy established that a stab wound to the center of the chest penetrated the body 3 and 3/4 inches, penetrating the heart and lung, a fatal wound (TR 1090). The silver belt around her neck was constricted tight enough to fracture a ring of cartilage in her windpipe, tight enough to cause death by strangulation (TR 1092). The victim's right thumbnail was broken, but there was no other evidence about her hands of a struggle (TR 1096-97). The pathologist believed the condition of the body when he first inspected it to be consistent with death between 9:30 P.M. on March 11 and 1:30 A.M. on March 12, 1988, but that death could have occurred

earlier or later (TR 1083, 1098).

A preschool teacher who was a regular weekend patron of The Redland Tavern, which she described as a "redneck bar," was there with her husband on Friday, March 11, 1988 (TR 1113). At about 9 to 9:30 P.M., she saw a girl in her twenties come in, nicely dressed in a "black outfit" with a silver belt (TR 1115). The girl stayed about half an hour and left driving a yellow Corvette, with the "shadow of a man" visible in the passenger seat (TR 1117-18). Tony Roberson, a regular at The Redlands Tavern who worked sometimes as night-time manager, saw an unfamiliar man at the pool tables at about 8:30 P.M. on Friday, March 11 (TR 12 19). Later "a real good-looking girl" wearing a black dress arrived, spoke to the man and they left together in a yellow Corvette (TR 1220-21). Roberson identified Gore from a photo array as the man and Novick from a group photograph as the girl (TR 1222-23).

Rosa Latsinger, who lived at 21420 SW 240 Street in the Redlands, where Marshall Gore was staying at the time, saw a Corvette parked on the street in front of her house at about 10:00 or 11:00 P.M. on Friday, March 11 (TR 1248, 1258). FBI Special Agent Carl Lower-y testified that Robyn Novick's body was found "within a few hundred feet" from this house (TR 1322).

Jessie Casanova, who also lived at the SW 240 Street residence, saw Gore in

the house at about 2:00 A.M., and saw a Corvette parked on the street (TR 1286). Later, Gore returned to the house having been injured in an automobile crash (TR 1287). She asked him for the key to the Corvette, to add to her key collection (TR 1290). Detective Mike Decora later confirmed that the key he obtained from Jessie fit the Corvette which belonged to Robyn Novick (TR 1373).

David Restrepo was awakened at about 3:00 A.M. on March 12, 1988, by Marshall Gore, known to him as "Tony" (TR 113 1). Gore was driving a yellow Corvette, which he said his girlfriend loaned to him (TR 1132). Restrepo noticed the vanity tag "Robyn N," and Gore instructed him to call him Robyn (TR 1135-36). Together, they drove to a "strip bar," where Gore went in while Restrepo waited in the car (TR 1133). Mark Joi, a friend of Gore's from his teens in Cutler Ridge, worked as a bouncer at "The Organ Grinder," a dancing girl bar on 87th Avenue near U.S. 1 (TR 1327-28). He saw Gore in the early morning hours of March 12, 1988, driving a yellow Corvette with the tag "Robyn N" (TR 1330-31). There was someone else in the car who did not get out (TR 1331).

Gore and Restrepo continued up U.S. 1 until Gore lost control and the vehicle flipped over (TR 1140). They attempted to drive away, but two tires were blown out and the vehicle was inoperable (TR 1142).

Detective James R. Avery of the Coral Gables Police Department was on

duty in a marked unit when he heard the noise of a crash (TR 1336). He responded and saw a yellow Corvette with the tag "Robyn N" that had been flipped over (TR 1339). He found a gold cigarette case with the initials RGN, various credit cards and a Florida driver's license in the name of Robyn G. Novick (TR 1344). On March 16, Officer R. G. Robkin received word from the Broward County Sheriff that the car was stolen, so he went to the towing company lot to "process" the yellow Corvette (TR 1350-5 1). He found a power of attorney in the name of Marshall L. Gore giving his father control of his property (TR 1354, 1919).

Restrepo testified that when the police car approached the accident scene, Gore said "run," that the car was stolen (TR 1143). Gore and Restrepo ran in separate directions, but met at a nearby convenience store and called a cab. They returned to the accident scene, but police were present so they went to Restrepo's home (TR 1145). Once there, they awoke Juan Ton-es, Restrepo's cousin, who drove them back to the vicinity of the accident where Gore retrieved a brown bag containing his clothing (TR 1149, 1176).

The following night, between 11 P.M. and midnight on March 13, 1988, Appellant visited Frank McGee, a fiiend from his teenage years in Cutler Ridge, at his home in Coconut Grove. Gore asked to spend the night, stating that the police were looking for him (TR 1394, 1397-98). McGee refused (TR 1399). He recalled

that Gore had a large bruise on his back and that Gore said he had been in an accident driving a yellow Corvette (TR 1400). Gore called a taxi and left (TR 1402).

B. SUSAN ROARK:

Susan Roark brought Marshall Gore with her on January 30, 1988, to visit Michelle Hammon and Hammon's boyfriend at their trailer in Cleveland, Tennessee (TR 1407). Roark and Gore left in the early morning hours of Sunday, January 31 (TR 1412). Roark was expected to return to her grandmother's house and attend church that day, but did not (TR 1412).

Whether Roark was ever seen alive again is uncertain. Stephanie Refner, a friend of Roark and defense witness, saw Roark driving her black Mustang on 25th Street in Cleveland, Tennessee two weeks after her "disappearance." She saw Roark make a U-turn, pulling into a Texaco gas station, and saw her get out of her car in a well-lighted area (TR 2367, 2371, 2392). Harold Roark, Susan's father, said that he had looked for his daughter and not found her, but he did see a woman who looked like Susan drive a black Mustang and pulled into a gas station in this area (TR 2410).

Gore was seen in Tampa, Florida on January 3 1, 1988, by Susan Brown, a friend from Miami attending college in Tampa (TR 16 12-13). Gore was driving a

black Mustang (TR 1614). Brown pawned jewelry for Gore, including a ring with the initials "S.M.R." later identified as belonging to Susan Roark (TR 1615, 1617).

On February 2, 1988, Gore was given a speeding ticket in Punta Gorda, Florida while driving Susan Roark's black Mustang (Ex 35, TR 1559).

Marshall Gore went to the Potampkin South Mitsubishi automobile dealership in Miami on February 4, 1988 and spoke to Rosa Latsinger about trading in a black Mustang (TR 1230, 1232-33). Since he did not have a title to the car, no trade was made (TR 1236). However, Latsinger knew Gore's sisters and was a good friend of Brown, so she offered Gore a place to stay. This was a house in the Redlands at 21420 S.W. 240 Street (TR 1240).

On February 14, 1988, Gore crashed and abandoned the Mustang on Coral Way in Miami (TR 1481).

On April 2, 1988 Susan Marie Roark's body was located in a remote, heavily-wooded area north of Gainesville off of Interstate 75 in Columbia County, Florida by deputy sheriffs looking for the remains of a missing person (TR 1660-61). She was found lying face up and naked, except for a boot lace wrapped around her wrist (TR 1446).

Dr. William Maples, a forensic anthropologist, received the largely skeletal remains of Susan Roark on April 7 and determined that she had been stabbed one or

more times in the chest (TR 1443, 1449). Also, he determined that she suffered an injury to her neck, called "pithing" caused by a sharp knife, severing her spinal cord as is done in a slaughter house (TR 1452).

Hair that had been found clenched in Roark's hand was identified as human hair, but did not match that of Marshall Gore (TR 2448).

C. TINA COROLIS:

The central witness against Marshall Gore regarding his crimes against Tina Corolis was Tina Corolis herself.

On March 14, 1988, around 9:00 p.m., Gore called her to ask for a ride to pick up a car (TR 1568). She picked up Gore at a restaurant near her house, returned to her home with Gore to make a telephone call and then drove up and down Biscayne Boulevard looking for the car Gore was to pick up (TR 1570). After about one hour, Gore directed Corolis to drive into a rock pit near Aventura Road where he relieved himself and returned to the car with a knife (TR 1572). He told her to get under the dash board on the passenger side and drove off (TR 1573).

Later, Gore dragged her out of the car, raped her in a grove of trees, and hit her head with a rock, choking her until she was unconscious. When she regained consciousness, Gore and her car were gone (TR 1575). Gore was arrested

in Kentucky with Tina Corolis' car.

II. The defense case in the Guilt phase:

The defense called two witnesses regarding the State's evidence of extrinsic offenses: a friend of Susan Roark who had seen her alive after Gore left Tennessee and a hair examiner who concluded that the hair in Susan Roark's hand was not that of Marshall Gore.

Beyond that, the defense called only two witnesses: Ana Fernandez, who had been only 15 years old at the time of the offense and whose memory, like the memory of so many of the State's witnesses, had suffered considerable erosion over the years, and appellant himself. Fernandez testified that she had worked for Gore to "answer phones, and keep names and scheduling and stuff like that" for Gore's escort service company called "The Exchange" (TR 22 12).

Marshall Gore confirmed that this was a business in which he had engaged; that Robyn Novick and Tina Coloris had worked for him and were working on an escort assignment when he last saw them on March 11, 1988 (TR 1881). Gore also attempted to explain that a third woman, Paulette Johnson, was also engaged in the escort business with Novick and Corolis (TR 1 890) and had been murdered in the same manner as Novick while Gore was in prison (TR 2037). Gore was held in

contempt for this attempt (TR 2059).

SUMMARY OF THE ARGUMENT

I. Prosecutorial misconduct that is intended to "goad" the defense into a motion for mistrial bars retrial on double jeopardy grounds. Here such misconduct was not corrected until appellate reversal of appellant's conviction, but the same prohibition on retrial should apply.

II. The State introduced Appellant's extrinsic crime of statutory rape of a thirteen-year-old girl in the guilt phase of the trial. This was a repeat of the exact error that lead to reversal of the prior conviction and requires reversal again notwithstanding the prosecutor's use of the emphamism "intimacy" for the word "sex."

III. During the penalty phase of the trial, the State repeated precisely the error that lead to a reversal of appellant's first conviction; that is improper interrogation about appellant's alleged violent collateral crimes against Maria Dominguez. The sentence should again be overturned for the repeat and embellishment of that misconduct by adding the names of five more women.

IV. The State presented no direct evidence that Marshall Gore murdered Robyn Novick or that he committed armed robbery in the taking of her car. In a circumstantial evidence case, the State failed to present evidence that is inconsistent with any reasonable hypothesis of innocence. Since the State failed to meet this burden regarding the defense that Novick had an escort assignment, the defendant's motion for judgment of acquittal should have been granted,

V. The circumstantial evidence of premeditation is insufficient to support a first degree murder conviction,

VI. The grounds described by the trial judge in the sentencing order to support the "cold, calculated and premeditated" aggravator are conjectural. The record lacks proof beyond a reasonable doubt that the factors required to apply this statutory aggravator were present.

VII. The trial court erred in excluding evidence of the murder of Paulette Johnson, evidence which supported Appellant's hypothesis of innocence.

VIII. Appellant's decision to proceed pro se in summation and in the penalty phase was not free and voluntary because it was done to avoid incompetent counsel and the trial court erred in allowing self-representation in the phase of a capital case under *Faretta v. California* and Article 1, Section 16 of the Florida Constitution.

IX. On the record before this Court, penalty phase counsel's failure to secure any expert mental health testimony or fact witnesses other than appellant himself in mitigation constitutes ineffective assistance of counsel and precludes any meaninful proportionality review.

ARGUMENT

I. Prosecutorial misconduct that is intended to "goad" the defense into a motion for mistrial bars retrial on double jeopardy grounds. Here such misconduct was not corrected until appellate reversal of appellant's conviction, but the same prohibition on retrial should apply.

This Court reversed appellant's conviction and sentence of death in *State v.* Gore, 7 19 So.2d 1197, 1199 (Fla. 1998), "based on the cumulative effect of the prosecutor's improper cross-examination of Gore and improper closing argument." In a pretrial ruling the State had been precluded "from introducing evidence concerning Gore's kidnapping and abandonment of Corolis's son." This Court was concerned with the State's "blatant disregard of the trial court's specific pretrial ruling." This court wrote: "Undoubtedly, this questioning of Gore was highly prejudicial in that it involved Gore's reprehensible action of leaving a two-year-old child naked in a burned and abandoned house in thirty-degree weather." *Id.* Also, the State raised other collateral crimes. On three occasions during cross-

examination of Gore "the prosecutor questioned Gore as to whether he had sex with a thirteen-year-old girl." Also, the State asked about Maria Dominguez, attempting to introduce uncharged criminal conduct into the trial. "Like the questioning concerning the collateral crime of sex with a thirteen-year-old girl, this questioning could only demonstrate Gore's bad character or propensity to commit crime, and thus was improper." 719 So.2d at 1200.

The Supreme Court of the United States in *Oregon v. Kennedy, 456* U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), observed that the double jeopardy bar to retrial would apply after mistrial had been declared on the defendant's motion if the prosecution had intended to goad the defense into making such a motion. A defendant should enjoy the same constitutional protection where his efforts to secure a mistrial in the trial court were unsuccessful but appellate review set aside a conviction achieved through prosecutorial overreaching.

In *Ruiz v. State, 743* So.2d 1, 10 n. 11 (Fla. 1999), this Court, after remanding for a new trial, observed: "Double jeopardy principles do not bar a new trial in the present case." Similarly, *in Keen v. State,* 504 So.2d 396,402 n. 5 (Fla.1987), the Court said: "'We find no double jeopardy problem with a retrial of Keen arising from the prosecutorial misconduct here." Keen explained that "the misconduct sub judice was engaged in by the prosecutor in the heat of trial in order to win his case, and

was not done intentionally in order to afford the state 'a more favorable opportunity to convict the defendant."' *Id.*, citing *Oregon v. Kennedy, 456* U.S. at 674, 102 S.Ct. at 2088. *See also Fugitt v. Lemacks,* 833 F.2d 251,252 (11th Cir.1987) (rejecting double jeopardy claim because "the prosecutor in this case did not have the intention which is necessary to trigger a double jeopardy claim.").

In the initial trial of this case, the prosecutorial overreaching to secure a conviction emerged after the development of Mr. Gore's defense, corroborated in part by the witness Ana Fernandez, that he managed an escort service that employed Robyn Novick and that clients might be responsible for her death. This defense was further corroborated by appellant's testimony about Paulette Johnson, who was also a member of Gore's escort service and under subpoena to be a defense witness when she was murdered in the same manner that Robyn Novick had been murdered. As is discussed in a section of this brief below, the purely circumstantial nature of the State's case required that this defense be countered for the State to obtain a conviction.

The prosecutor in the first trial has not declared that it was his intention to "goad" the defense into a motion for a mistrial, but the prosecution team in the second trial definitely remembered Ana Fernandez, remembered her eleventh hour appearance and remembered the difficulty the State had in taking her deposition. In

colloquy with the judge, defense counsel said: "We bent over backwards and brought her in and she was deposed." The State responded: "At the end. The night before she testified. The State had already rested." (R1, 74 Transcript of January 15, 1999 hearing before Judge Leesfield).

Similarly, the prosecution team in the second trial aggressively stamped out appellant's testimony about Paulette Johnson. Being forewarned about this testimony, the State did not have to goad Mr. Gore into a motion for a mistrial. Instead, it moved pretrial for an order in limine excluding the testimony.

Whether the State's conduct in the first trial was motivated by an intent to goad the defense into moving for a mistrial because of Ana Fernandez or because of Paulette Johnson or whether it was motivated by a desire to obtain a conviction of Gore at any cost, and try him again if the cost was too great, is a distinction with little difference. The State acted as if it desired to get a conviction of Gore or get a second chance to do so. This conduct does not comply with the double jeopardy clause and retrial should be barred.

II. The State introduced Appellant's extrinsic crime of statutory rape of a thirteen-year-old girl in the guilt phase of the trial. This was a repeat of the exact error that lead to reversal of the prior conviction and requires reversal again notwithstanding the prosecutor's use of the emphamism "intimacy" for the word "sex."

During direct examination of Jessie Casanova, who was 13 years old in 1988, the prosecutor asked "How would you characterize your relationship with the defendant back in 1988 when he lived at your house?" The prosecutor followed up with: "Was it an intimate relationship?" (TR. 1278). This sparked a Williams Rule objection by the defense and a sidebar. During the sidebar, the following exchange took place (TR. 1279):

> STATE: I'm not going any further.
> THE COURT: Statutory rape.
> STATE: I didn't say she this six. (sic)
> THE COURT: Intimate. Sex.
> STATE: It does not mean they had intercourse. That's the only thing against the law.
> DEFENSE: I strenuously object.
> STATE: Although they did have intercourse, she asked me not to say that. She chose the word intimate when I pretried her. She asked that I leave it at that.

Thus, notwithstanding the fact that this Court reversed Mr. Gore's prior conviction in part because the State raised the extrinsic crime of statutory rape of this 13-year-old girl, the State worked out a euphemism with the girl and raised the issue again. The defense moved for a mistrial, which was denied (Tr. 1280). The Court instructed the jury to disregard the answer (Tr. 1282).

In light of the volume of evidence the State presented regarding extrinsic crimes, the danger that the jury would convict Marshall Gore simply because the

State has proven that he is a bad person or has propensity to commit crime is too great to be cured by a simple instruction to the jury to disregard the clear import of the State's interrogation.

Reversal of the conviction is required.

III. During the penalty phase of the trial, the State repeated precisely the error that lead to a reversal of appellant's first conviction; that is improper interrogation about appellant's alleged violent collateral crimes against Maria Dominguez. The sentence should again be overturned for the repeat and embellishment of that misconduct by adding the names of five more women.

In its per curium opinion reversing appellant's prior conviction and sentence of death in this case, the *Court* wrote, *Gore v. State,* 719 So.2d at 1200:

> In addition, during Gore's cross-examination the prosecutor asked questions about another female, Maria Dominguez. While the State argues that the questions asked concerning Dominguez were themselves innocuous, the State makes no pretense of explaining why the questions were asked in the first place. These questions could only serve to suggest to the jury Gore's involvement in yet another collateral crime against a female victim, close in time to the crime charged. This aspect of the State's cross-examination irnpermissibly placed before the jury presumptively prejudicial collateral crime evidence without an appropriate predicate for its admissibility having been established. Like the questioning concerning the collateral crime of sex with a thirteen-year-old girl, this questioning could only demonstrate Gore's bad character or propensity to commit crime, and was thus improper.

Clearly, the name "Maria Dominguez" should have been seared into the prosecutor's mind with the admonition to tread cautiously.

However, the prosecutor abandoned caution in her desire for a death sentence. In cross-examination of Mr. Gore during the penalty phase, the State asked: "Would Maria Dominguez who saw you on Valentine's Day 1988, say that you were not a violent person?"(TR 3 144). The State then asked about Teresa Warren on December 3, 1987. Gore objected: "She is bringing names out of a hat here and this is absolutely improper," but the objection was overruled (TR 3 145). The State went on to ask about Brenda Shaltenburg on October 30, 1987, Lisa Ingram on February 20, 1988, Arlene Lucien in January 1988, Dora Graclo on January 20, 1988 and Jackie Shabo (TR 3146-47).

There are rules of evidence that apply even in the penalty phase. The State is not free to sling mud madly in the hopes that enough will stick to obtain a vote for death. The trial judge did ultimately, *sua sponte* after overruling defense objections, exclude the State's desired evidence detailing Gore's alleged violence in the Maria Dominguez matter, and asked the uncounseled Mr. Gore if he wanted an instruction to the jury to disregard state questions about other women (TR 3 191, 3201). The Court then gave Mr. Gore a Hobson's choice; he would have to forego the argument that there was no evidence if she excluded the evidence (TR 3204). The problem is

that the damage had already been done. A rational juror would conclude that these were all women who were the victims of Appellant's violence. Mr. Gore was correct when he said: "I think you are putting me in an unfair position" (TR 3205). As this Court said about the State's play in the first trial: "this questioning could only demonstrate Gore's bad character or propensity to commit crime, and was thus improper." 719 So.2d at 1200.

IV. The State presented no direct evidence that Marshall Gore murdered Robyn Novick or that he committed armed robbery in the taking of her car. In a circumstantial evidence case, the State failed to present evidence that is inconsistent with any reasonable hypothesis of innocence. Since the State failed to meet this burden regarding the defense that Novick had an escort assignment, the defendant's motion for judgment of acquittal should have been granted.

In this appeal, Marshall Gore seeks review of the sufficiency of the State's evidence to support his convictions for murder and armed robbery, the sufficiency of that evidence to support the element of premeditation necessary for first degree murder and whether there was proof beyond a reasonable doubt to support the finding of a "cold, calculated and premeditated' statutory aggravator in the penalty

phase. Each of these issues are substantially interrelated.

The statement of the facts in this case are set forth above separating the evidence adduced by the State about Robyn Novick's murder, the basis for the charges in this case, from the evidence that relates to the murder of Susan Roark and the assault on Tina Corolis. This separation makes it clear that there is no direct evidence that Marshall Gore killed Robyn Novick. The circumstantial evidence of Gore's guilt of the charged crimes is insufficient to establish guilt beyond a reasonable doubt. That mandatory hurdle is cleared only if *the Williams* Rule evidence is taken to establish Gore's predisposition to kill young women for their cars.

Marshall Gore testified at trial and freely admitted most of the facts presented by the State about the events of March 11 and 12, 1988. He met with Robyn Novick at the Redlands Tavern and left with her, later partying and driving to Coconut Grove with a friend in Novick's car. He said that Robyn Novick left him after the Redlands Tavern to go on an escort assignment with three men. He never saw her again.

Predicating Marshall Lee Gore's conviction on the circumstantial evidence presented by the State is troublesome for several reasons:

*First is that if Gore killed Robyn Novick and stole her car, he could only have done so during the short window of time on March 11 between his 9:30 P.M. departure from the Redlands Tavern and his 10:00 or 11:00 P.M. arrival with Robyn Novick's Corvette at his residence. The medical examiner testified that the condition of the body was consistent with death occurring between 9:30 P.M. on March 11 and 1:30 A.M. on March 12, 1988 (TR 1083). The greater portion of this window of death is consistent with Mr. Gore's hypothesis of innocence; the men of Robyn Novick's escort assignment would have had from 10:00 or 11:00 P.M. to 1:30 A.M. or later. The medical examiner acknowledged that the period of possible death could be later (TR 1098), which increased the opportunity of others to have killed her'.

*Second is the fact that Robyn Novick's body was found stripped naked and her clothes were never found. The sentencing judge took this as evidence of cool and calm planning on Mr. Gore's part, leaving Ms. Novick's body naked to speed up the decomposition process and increase the likelihood of his

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[1] Of course, the passage of time severely tampered Gore's ability to gather evidence for his defense. Seven years passed between Novick'd death in 1988 and Gore's first trial in 1995. Eleven years had passed by his retrial in 1999.

Electronic information gathering collets data about us all, but it is not long retained. For example, Gore was unable to get telephone records of Robyn Novick's cellular phone to corroborate his testimony. If the State obtained them while the records still existed, they were not shared with the defense.

getaway (R3-466). This is a leap of faith; it may be true but it is an unlikely explanation. If Gore were the killer and that were his purpose, why didn't he just bury the body, or, more simply take it a stone's throw to the west and drop it in an Everglades canal with alligators? Besides, what did he do with her clothes? A simpler explanation, consistent with Gore's hypothesis of innocence, is that Robyn Novick was already naked after hours of "escort" service for three men, and her body was simply dumped by them when they were done with her in a location that would tend to incriminate Gore.

*Third, and most troubling about the fundamental validity of the fact-finding process in this case, is the white fluid found by the medical examiner in Robyn Novick's vagina, This fluid was never tested for DNA indicators by the medical examiner's office, but it may have been tested by the Crime Laboratory (TR. 1101). The decision would have been made by the lead detective (TR. 1106). There is nothing in the record to indicate whether this test was ever done, so the decision about whether Mr. Gore goes free or not must be made with no knowledge of what this fluid was or who it came from. The results of DNA testing on this fluid could have been powerful evidence supporting Mr. Gore's hypothesis of innocence, but we will never know because the State seems to have lost its sample of the fluid.

*Fourth, the state tried to hold its case against Gore together with the

theory that there was a *modus operandi* displayed in the murder of Susan Roark and the attempted murder of Tina Corolis and that the repetition of this *modus operandi* occurred in the murder of Robyn Novick. The basic problem with the theory is that there is a limited number of repetitive patterns in brutal murders of young women. Marshall Gore tried to prove at trial that one of his defense witnesses, Paulette Johnson, was murdered with the identical *modus operandi* while he was in prison. Mr. Gore not only did not get to present this proof to the jury, he was held in contempt for his efforts to place the facts in evidence.

It should be noted that the prosecutor tried to deal in summation with the issue of the untested and now lost white fluid from the victim's vagina, but her argument to the jury was misleading. The prosecutor's argument might be an additional reason why the adequacy of the factual basis for the verdict should be questioned. The prosecutor said (TR 2485-86):

> There was no physical evidence connecting any individual to this crime. Yet, Robyn Novick was murdered, folks. There is no doubt about that,
>
> .... let's talk about the substance, the creamy white substance in her vagina that the defense mentioned.
>
> Do you think if that evidence matched somebody else, that matched Marshall Lee Gore, wouldn't the State want to bring that forward if that matched Marshall Lee Gore, don't you think? (SIC) Wouldn't the defense want to bring forward that some of this evidence matched another individual?

This issue should have been the cornerstone of the defense summation, Why was it that it had to be the defense that mentioned this creamy white substance? Why didn't the State mention it? Since the State didn't have any direct evidence of who the murderer was, why didn't the State run tests on it? What happened to it so that we can't run tests on it now? The State wants to speculate during its summation on whether the State would want to come forward with the evidence if the tests showed it was Gore and whether the defense would want to come forward if it was someone else, lets ask what would have happened if the tests did show it was someone else, but people responsible for the testing thought Gore should die? Wouldn't the test results disappear? Wouldn't the creamy white substance disappear so that it could not be retested? Didn't the creamy white substance in fact disappear ?

Not a single one of these questions was asked by the defense in summation, and no mention of the issue was made at all because Marshall Gore was handling that task *pro* se. As was expected by everyone in the courtroom, he self-immolated[2]

State v. Lane, 559 So.2d 187, 189 (Fla. 1989), presented the standard upon which a trial court may grant a judgment of acquittal in a circumstantial evidence case:

> . . .if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under *the* law." *[Lynch v. State,* 293 So.2d [44] at 45 [(Fla. 1974)]. The state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla.R.Crim.P.3.380.
>
> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *Spinkellink v. State, 3* 13 So.2d 666,670 (Fla.1975), *cert. denied, 428* U.S. 911, 96 S.Ct. 3227, 49

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[2] When Marshall Gore announced ready to begin his summation, the prosecutor said: "I don't know where Tony [trial counsel] went. *** I hate for him to miss this." (TR 2532). Perhaps all that Mr. Gore did during summation was pour gasoline over himself. The judge lit the match by banishing ***sua sponte*** stand-by counsel from counsel table, where he had been helping Mr. Gore, to the audience section of the courtroom, from where no help was possible.

During closing argument by the State, the trial judge interrupted and called the parties to a side-bar conference where she admonished trial counsel for talking to the defendant at counsel table and handing him papers (Tr. 2479). Instead of commending counsel for his assistance of the defendant, the judge banished counsel to "sit in the back," "he'll ask if he has questions" (Id.). Later, when the question of whether the defendant had waived sequestration, counsel's only way of communicating with his client came to light.

Counsel, in order to communicate with Mr. Gore, was reduced to writing a note on a piece of paper, crumpling it up and throwing it to Mr. Gore.

> L.Ed.2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See *Toole v. State, 472* So.2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Here, that threshold burden of offering evidence that is inconsistent with the defense hypothesis of innocence was not met by the State. "In order to convict on circumstantial evidence, the State has the burden of presenting evidence that not only is consistent with guilt, but that is inconsistent with any reasonable hypothesis of innocence." *Norton v. State,* 709 So.2d 87, 91 (Fla. 1997). The State not only had absolutely no direct evidence of guilt, its circumstantial evidence was not inconsistent with Gore's defense that Robyn Novick went off on an escort assignment, The line of cases from *Davis v. State,* 90 So.2d 629, 631 (Fla.1956), recognizes as well established the proposition that in circumstantial evidence cases, the evidence must not only be consistent with guilt, but "it must also be inconsistent with any reasonable hypothesis of innocence."

The State showed its ability and resourcefulness in finding evidence to respond to the defendant's challenges to the proof of extrinsic offenses. For example, the State called Harold Roark to challenge Stephanie Refner's testimony

that she had seen her friend Susan Roark drive her black Mustang into the Rocky Point Texaco station one night two weeks after her reported disappearance. Roark reported seeing a woman who looked like his daughter on the 5th or 6th or on the 12th or 13th of February, 1988, with no recollection of which day, what time or which gas station (TR 2462-63). However, the State could not rebut the defendant's explanation of innocence, even when it had available to it at the time of its investigation such resources as Robyn Novick's mobile telephone tolls for the night of her death. Who did she call? Who called her? We do not know and these records were no longer available for defense investigation by the time Mr. Gore was brought on for trial.

Counsel for Marshal Gore timely moved for a judgment of acquittal at the close of the State's case (TR 1734), and renewed the motion at the close of all of the evidence (TR 2464). This Court has held that "a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." *Gordon v. State, 704* So.2d 107, (Fla. 1997). The court erred in denying this motion. The conviction should be overturned.

V. **The circumstantial evidence of premeditation is insufficient to support a first degree murder conviction.**

The failure of the State's proof is fully discussed in the section above, discussing the State's failure to prove a sufficient circumstantial case of murder, and in the section below, discussing the unreasonable inferences drawn by the sentencing judge to justify the "cold, calculated and premeditated" statutory aggravator. Those arguments and citations of authority are incorporated here.

In this section, appellate argues that even if the circumstantial evidence submitted by the State is sufficient to support his conviction for murder, a second round of inferences is required to support a finding of premeditation and that this second round of inference lacks support in the record to justify a first degree murder conviction.

In two cases arising from a homicide in a drive-by shooting, *Cummings v. State,* 715 So.2d 944 (Fla. 1998), and *Fisher v. State,* 715 So.2d 950 (Fla. 1998), this court reversed death sentences based in part on the "heightened premeditation" of ccp, and remanded with instructions to enter judgment for second degree murder. In both cases, this court wrote (715 So.2d at 949 and at 952):

> Premeditation is more than a mere intent to kill; it is a fully formed purpose to kill. *Wilson v. State,* 493 So.2d 1019 (Fla. 1986). Premeditation may be proved by circumstantial evidence. *Hoefert v. State,* 617 So.2d 1046 (Fla. 1993). However, premeditation sought to be proved by circumstantial evidence must be inconsistent with every other reasonable inference. *Cochran v. State,* 547 So.2d 928 (Fla.1989). If the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by

premeditated design, a verdict of first-degree murder cannot be sustained. *Coolen v. State, 696* So.2d 738 (Fla.1997).

As highlighting the particular failure of the State to prove premeditation, Mr. Gore submits *Thompson v. State,* 647 So.2d 824, 826 (Fla.1994). On review, a "ccp" aggravator was found to be unsupported. A witness saw the defendant converse with the victim, the witness turned away, heard a "pop," looked up and saw the defendant standing over the victim. "No one saw the actual shooting." In the absence of evidence as to what happened during the brief time that the witness looked away, ccp could not be established. "A number of scenarios inconsistent with heightened premeditation are possible. The record simply does not show what happened in the brief time span when the witness looked away."

The record here shows far less, The first degree murder conviction should be overturned.

VI. The grounds described by the trial judge in the sentencing order to support the "cold, calculated and premeditated" aggravator are conjectural. The record lacks proof beyond a reasonable doubt that the factors required to apply this statutory aggravator were present.

According to *Hardy v. State, 7* 16 So.2d 761, 765-66 (Fla. 1998), to prove the statutory aggravating factor that the murder was cold, calculated and premeditated,

the State must prove beyond a reasonable doubt four elements:

> The State must prove beyond a reasonable doubt that: (1) the murder was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant had a careful plan or prearranged design to commit the murder before the fatal incident (calculated); and (3) the defendant exhibited heightened premeditation (premeditated); and (4) the defendant had no pretense of moral or legal justification.

"/T/he CCP aggravating circumstance is usually, but not exclusively, applied to 'those murders which are characterized as execution or contract murders or witness-elimination murders. '" *Mahn v. State,* 714 S0.2d 391,398 (Fla.1998), quoting *Herring v. State,* 446 So.2d 1049, 1057 (Fla. 1984). This is not an appropriate case for the CCP aggravator.

In her sentencing order (R3-465-69), the trial judge devotes four single-spaced pages to marshalling the facts supporting the CCP aggravator of Florida Statutes Section 921.141 (S)(i). She looked for similarities among the Novick, Roark and Corolis cases and drew the conclusion from the fact that similarities did exist that Gore's conduct was cold, calculated and premeditated. This conclusion cannot survive review.

The sentencing judge concluded:

*"/T/he defendant targeted young, attractive women who drove new sporty automobiles."

*"Had he just wanted a car, he could have stolen one, Instead, he decided to kill."

*"We know, from the evidence surrounding the murder of Robyn Novick, that he intended to kill her when he went out with her that night and we know this based upon his actions in the Susan Roark case and the Tina Corolis case."

The sentencing judge is a skilled communicator, but she has picked through the evidence like a shopper picking through a bin of bruised tomatoes, looking for fmds that are ripe and firm. The court notes that Gore had no automobile and no place to stay, but he never had his own car or home; he never murdered for lodging and he was able to find transportation by borrowing it. The court notes that Gore was armed with a knife, but this is a guess based on the fact that Robyn Novick was stabbed. No knife was found, and no one saw Gore with a knife. The court notes that Robyn Novick had no defensive wounds, indicating a well-thought-out plan, but the medical examiner testified that she had a torn fingernail, which was indicative of a struggle (Tr. 1096, 1100). The court notes that Gore took his victim to a remote area he was familiar with, as part of a plan to avoid police determination of the cause of death and the identity of the perpetrator. Had this been defendant's plan, he could have taken her to the Everglades, nearby to the west, where canals and

wildlife would have erased all signs of the crime.

Most abused in the court's analysis is *the* concept of *modus operandi.* The concept is followed or abandoned as suits an author, not an analyst. The court says "They went almost immediately, stopping first to get gas, to the area in the Redlands. . . ." This conflicts with the "m.o." If he was in fact the murderer, Gore drove Susan Roark from Tennessee all the way to the Gainesville area of Florida before dumping her. If in fact he attempted murder, Gore drove Tina Corolis to Aventura in far north-east Dade County and then to the Redlands in the far south-west of the county before dumping her. The court says "The defendant's actual attack of Ms. Novick, however, took place outside of the vehicle so the Defendant obviously forced or dragged Ms. Novick out of her car at knife-point as he did Tina Corolis and almost certainly did Susan Roark, We can reasonably conclude this since Ms. Novick was stabbed in the chest and no blood was found in her car." This is in harmony with the "m.o.," but conflicts with the testimony. There was no blood in Ms. Novick's car because there was little or no external bleeding due to the nature of her wound. The medical examiner testified that puncture of her sternum sealed the blood in her chest cavity (Tr. 1106).

Finally, the sentencing judge tells us that Marshall Lee Gore "looked her in the eye" as he "strangled the last bit of life out of' Robyn Novick. This is the

narrative of fiction, not fact.

The Eleventh Circuit Court of Appeals in *United States v. Lopez-Ramirez, 68* F.3d 438,440 (11 th Cir. 1995), teaches Where the government's case is circumstantial, as it is here, 'reasonable inferences, and not mere speculation, must support the jury's verdict.'" (Quoting *United States v. Perez-Tosta, 36* F.3d 1552, 1557 (1 lth Cir. 1994).) The sentencing court's order shows that the only support for the cool, calm and premeditated aggravator, and in turn the finding of premeditation and of guilt itself is speculation.

The finding of this aggravator should be reversed.

VII. The trial court erred in excluding evidence of the murder of Paulette Johnson, evidence which supported Appellant's hypothesis of innocence.

Marshall Gore contended that Robyn Novick's death and the assault on Tina Corolis was the actions of others and the result of their employment in the escort service business. At the prior trial of this case, Gore testified that a third woman, Paulette Johnson, was also involved with Novick and Corolis in the escort business and had been murdered in the same manner by unknown persons after Gore was incarcerated.

On January 19, 1999, the State filed a Motion for Order In Limine, seeking to

exclude evidence of the death of Paulette Johnson, labeled by the State as "an attempt to show some *sort* of *reverse Williams* Rule" (R1: 45-46). Indeed, Gore did attempt to introduce such evidence. The relevance sprang from the same *modus operandi* rationale that underlay the State's evidence of the Susan Roark and the Tina Corolis cases. Clearly, if Johnson, Novick and Corolis were engaged in the same enterprise, and were killed or assaulted in the same way, then the fact that Gore could not have been responsible for the Johnson murder bears on the question of whether he committed the Novick murder.

Appellant believes that the trial court erred in admitting the great volume of extrinsic evidence presented by the State and that he was prejudiced by this error. Essentially, Mr. Gore was put on trial for two murders and an attempted murder simultaneously.

However, the Court's evidentiary ruling is difficult to reach on direct appeal because of procedural complexities in this case, The ruling was made before the first trial, but violated by the State. This Court reversed for the violation, but did not reach the correctness of the underlying evident&y ruling. Counsel for Appellant did not revisit the issue before retrial, but the basis for his motion for judgment of acquittal after the conclusion of the State's case was that the proceeding had been overwhelmed by the volume of William's Rule evidence.

In any event, Mr. Gore was caught in a cross-tide, the State was permitted to retry in great detail the Susan Roark murder and the Tina Color-is attempted murder, but Mr. Gore was forbidden to discuss the death of Paulette Johnson.

As this Court held in *Rivera v. State,* 561 So.2d 536, 539 (Fla. 1990), "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt. it is error to deny its admission." *Accord, Vannier v. State, 714* So.2d 470, 471-72 (Fla. *4th* DCA 1998); *Persaud v. State,* 25 Fla.L.Weekly D519, 521 (Mar, 10, 2000).

In light of the record as a whole in this case, this error cannot be dismissed as harmless. Appellant's conviction should be reversed.

VIII. Appellant's decision to proceed pro se in summation and in the penalty phase was not free and voluntary because it was done to avoid incompetent counsel and the trial court erred in allowing self-representation in the phase of a capital case under *Faretta v. California* and Article 1, Section 16 of the Florida Constitution.

For the closing argument of the guilt phase and for the entire penalty phase of his trial, appellant Marshall Lee Gore opted to dispense with the services of his court appointed counsel and, with leave of court, represent himself. Appellant seeks review of the trial court's rulings on the grounds, first, that the requirement of

Faretta v. California, 422 U.S. 806 (1975), 95 S.Ct. 2525, 45 L.Ed.2d 562, that the decision to waive the right to counsel be voluntary and intelligent, does not apply to this case because appellant's choice was between incompetent counsel and no counsel at all and, second, that the rationale of ***Faretta*** does not apply in the highly technical environment of the penalty phase of a death case any more than it does in appellate litigation.

A. Appellant did not "voluntarily and intelligently" reject the State's efforts to "force a lawyer upon him" and assert his "constitutional right to conduct his own defense" because his only option to self-representation was representation by incompetent counsel.

Appellant Marshall Lee Gore appeals from a conviction and a sentence of death imposed after reversal and remand of a conviction and sentence of death in the

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same case. ***Gore v. State,*** 7 19 So.2d 1197 (Fla. 1998). Both guilt phase and penalty phase counsel who represented him in the first proceeding also represented him in the retrial.

When trial counsel rested the defense at retrial without calling witnesses requested by the defendant and without recalling the defendant to conclude what Gore believed to be essential testimony, Mr. Gore elected to terminate the

representation of appointed counsel and to proceed to speak for himself in closing argument.

When penalty phase counsel declared ready to proceed with no expert mental health witnesses and no other witnesses in mitigation except the defendant himself, Mr. Gore elected to terminate the representation of appointed penalty counsel and to speak for himself.

Mr. Gore told the court why he was proceeding in this manner (Tr. 2760-61):

> I want this Court to understand that, yes, I understand that [there will be no delay in the proceeding]. However, that Mr. Pena advised me when I got into this courtroom he was not calling any witnesses at all. He was not going to put on any kind of defense, except me. He was going to put me back up on the stand again. That was going to be the whole thing.
>
> So in light of that and in light of the fact that I was told that Ana Fernandez and Jessie Casanova and other people were going to be witnesses here and now, all of a sudden, they are doing it to me again. They done it to me at the first part of this trial and told me all these witnesses are going to come here and they will be here and I get down to the last minute * * * last minute, seventh hour they are not witnesses, they don't show up, they are not going to be here.

When the Court asked Mr. Gore is he wished to represent himself, he replied (Tr. 2763-64):

> I have to. I have no other choice. It is a choice between bad counsel and myself.
> * * *
> Oh, I understand this [that there will be no delay in the proceedings]. But if we are not going to have any witnesses, there is

> no penalty phase for me anyway with Mr. Pena. So I am going to go with the theory I have in my mind and that is going to be it.
>
> If I cannot have any witnesses because counsel won't call any, then, you know, that's just as bad as me representing myself, so there is no difference in my representing myself or me representing myself. The only difference is he abandoned me as the end of the last trial, was not here for the closing argument, was not here for the last day of trial. The jury saw this and was obviously prejudiced by it, obviously prejudiced me by it.

Mr. Pena confirmed to the court that he would not have called any witnesses at the penalty phase, regardless of what Mr. Gore's wishes might be (TR 2773).

Courts have recognized that the choice between self-representation and poor counsel may not be a voluntary waiver of the right to counsel, The Court in *Crandell v. **Bunnell,*** 25 F.3d 754, 755 (9th Cir.1994) stated:

> the defendant claimed his decision to proceed pro se was coerced because he faced an unconstitutional alternative: an appointed lawyer who was incompetent. In ruling on that claim, we implicitly accept the premise that, had Robinson shown that his counsel was incompetent, his decision to go pro se would have been involuntary.

In this case, the choice between representation by counsel and proceeding pro se was used by the court as a bludgeon to force appellant to abandon pretrial issues. Appellant appeared pro se at a hearing on January 19, 1999 (RI-1 73), seeking to have heard prior to trial a number of matters that his appointed counsel would not raise. Ultimately, appointed counsel agreed to present most of Gore's issues, but

refused to re-litigate the Williams Rule issue on the ground that the prior result was relatively advantageous to appellant. As is noted later in this brief, the volume of William's Rule evidence became so overwhelming that counsel based his motion for judgment of acquittal on this issue, an issue which he had refused to raise prior to trial.

At this pretrial conference, the Court told Gore that if he persisted with the issues which counsel refused to raise, he would have to proceed pro se as to all issues; "We don't do this half-and-half' (Rl-229). After she won this consession from appellant (R1-230), the Court presented Gore with the option of waiving his speedy trial rights to have appointed counsel raise the pretrial issues he had agreed to raise, or proceeding pro se and still having the continuance charged to him (R1-254). Gore objected that counsel had the full 90 days "window" from the time of the mandate, but had done nothing to prepare for trial *(id).* Against this backdrop, Mr. Gore's decision to proceed pro se cannot be considered a voluntary waiver of a constitutional right.

Mr. Gore is not the hearty yeoman farmer of colonial myth that drives *Faretta,* eschewing Counsel imposed on him by the State and, in a demand for individual autonomy, exercising his right to represent himself. Rather, Mr. Gore is a man facing the possibility of death alone, without the zealous or competent

representation of counsel.

B. The Court's decision to allow Appellant to replace court appointed counsel, particularly in the penalty phase, was judicial aiding and abetting of a suicide and cannot be excused as an exercise of appellant's constitutional rights.

The recent decision *in Martinez v. Court of Appeal of California,* __ U.S. __, 120 S.Ct. 684, L.Ed.2d (2000), shows that there are limits to the rule of *Faretta v. California.* The opinions of concurring Justices, which attempt to reaffirm *Faretta,* call into question its application in a death case.

Prior to *Martinez, this Court in Hill v. State, 656* So.2d 127 1 (Fla. 1995), refused a death litigant's motion to proceed pro se, fashioning a remedy in which the defendant was permitted to file pro se a supplemental brief, but counsel was "directed to proceed to prosecute the appeal in a genuinely adversarial manner." The Supreme *Court* observed in *Martinez: "No* one . . . attempts to argue that as a rule *pro* se representation is wise, desirable or efficient, * * * Our experience has taught us that ' a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney."' *Id.* (citations and footnotes omitted). But death is different. This court does not review only the wisdom of Mr. Gore's defense. This court also reviews the proportionality

of the imposition of the death sentence. The proportionality review of this court cannot be denied by incompetence of appointed counsel, error of the court in permitting pro se representation, or the manifest inability of the defendant to manage the powerful engine of a death case.

Justice Stevens said *in Martinez:* " In *the* words of *the Faretta* majority, appellate proceeding are simply not a case of 'hal[ing] a person into its criminal courts."' Nor is a person sentenced to death in the electric chair simply "hale[d]" into criminal court.

Appellant's contention on this appeal that different rules should apply to the dismissal of counsel in a death case is reinforced by the concurring opinions in *Martinez.* Justice Breyer wrote, *Id. :*

> I note that judges closer to the firing line have sometimes expressed dismay about the practical consequences of that holding. See e.g., *United States v. Farhad,* 190 F.3d 1097, 1107 (CA9 1999) (concurring opinion) (right of self-representation "frequently, though, not always, conflicts squarely and inherently with the right to a fair trial"). I have found no empirical research, however, that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution's basic guarantee of fairness. And without some strong factual basis for believing that *Faretta's* holding has proved counterproductive in practice, we are not in a position to reconsider the constitutional assumptions that underlie that case.

Justice Stevens no doubt is correct about the constraints that bind his court in overruling precedent. However, this Court is not limited by empirical research. To

the contrary, it must correct disproportional application of the death penalty whatever its cause.

There is an important distinction as to when and how the Constitutional waiver of the right to counsel is made. Justice Scalia in his concurring opinion suggests that the consequences of self-representation at trial is no different than the waiver of counsel at a custodial interrogation or a confession. He writes, Id.

> Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people. As Justice Frankfurter eloquently put it for the Court in *Adams v. United States ex re. McCann,* 3 17 U.S. 269 (1942), to require the acceptance of counsel "is to imprison a man in his privileges and call it the Constitution." *Id.,* at 280.

The difference, of course, is that the defendant is far from the court when he self-inflicts a wound with his decision to confess His decision to represent himself is a wound made with the supervision and approval of the court. If that wound is fatal and the death sentence is imposed, the noble words of Justice Scalia quoted above do not restore proportionality to the State's act of executing him.

In short, justice is no better served by having pro se litigants control penalty phase litigation than it is by having pre se litigants control appellate review of the death sentence.

Faretta v. California may remain as establishing the requirements of the Sixth

Amendment to the United States Constitution, but Florida has defined the right of its citizens to counsel. Article 1, Section 16 of the Florida Constitution provides: "In all criminal prosections, the accused shall *** have the right *** to be heard in person, by counsel, or both." Under the principal or primacy announced in *Traylor v. State,* 596 So.2d 957, 962-63 (Fla. 1992), this Court may look to article 1, section 16 as an independent foundation for determining whether and/or what basis a defendant might discard the expert assistance of counsel during the penalty phase of a capital case. Notwithstanding *Faretta,* the result in this case cannot be squared with the guaranties of the Florida Constitution.

IX. On the record before this Court, penalty phase counsel's failure to secure any expert mental health testimony or fact witnesses other than appellant himself in mitigation constitutes ineffective assistance of counsel and precludes any meaninful proportionality review.

> "/T/he basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. . . . /I/n a case involving the death penalty, it is the very foundation of justice,"

Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla.1985).

In the penalty phase of this case, that essential foundation of zealous advocacy fell to dust. In this section of his brief, Mr. Gore seeks to have his

sentence of death set aside and the case remanded for a new sentencing hearing, as it was in *Hildwin* v. *Dugger*, **654** So.2d 107, 110 (Fla.1995), because he was "prejudiced by the ineffective assistance of trial counsel at the penalty phase with respect to the presentation of mitigating evidence."

The Eleventh Circuit Court of Appeals has set the standard for review of ineffective assistance of counsel claims as a mixed question of law and fact. Fact found by the District Court is accepted. "We apply our own judgment, however, as to whether the conduct in question constitutes ineffective assistance of counsel . . . warranting relief." ***Buenoano v. Singletary, 74*** F.3d 1078, 1083 (11th Cir.1996).

Most of the facts pertinent to this point on appeal were developed during a status conference on March 9, 1999, 25 days after the February 12, 1999 verdict and six days, with three working days available, before the March 15, 1999 penalty phase was to begin,

Dr. Merry Haber, the only psychiatric witness listed by the defense, had not been able to interview the defendant and the Court wished to insure that there would be no delay.

During this hearing, Mr. Gore said that he had problems with having his family members testify. Guillermo Pena, his penalty phase counsel, then struck Mr. Gore's sister "Michelle" from the witness list. Gore corrected that his sister's

name was Mindy (Tr. 2722).

When it was discovered that Dr. Merry Haber would be unable to evaluate Gore before the penalty phase hearing was scheduled to begin, Pena struck her also (Tr. 2740). The following exchange took place (Tr. 2741):

THE COURT:	Okay, Is that what Mr. Gore wishes?
MR. PENA:	Mr. Gore, is that what you wish? (Discussion off the record)
THE DEFENDANT:	This is my life, I'm not going to - - -
MR. PENA:	He wants us to appoint somebody else.
THE DEFENDANT:	I said this will probably delay it. WE can't help it. We got to get another one. We got to get another one.
MR. GENOVA:	What do you mean "we"?
MR. PENA:	You 'Honor, I will strike Dr. Haber. I'm not going to request another one.

After a long discussion of Mr. Gore's history of psychological evaluations, the court continued the case until the next day to give the defendant an opportunity to arrange for Dr. Barry Crown, who had already evaluated the defendant, to see him again.

On March 10, 1999, after having had a night to sleep on what he had done to his obligation to zealously represent Mr. Gore, counsel for Mr. Gore filed a memorandum with the Court which utterly abandoned the client. This memorandum is not in the record, but its content was discussed in the record. When the case was called, Mr. Pena started to discuss "a short memorandum that I did yesterday"

regarding his conversation with a psychologist (TR 2754). His client asked for a copy of it and Mr. Pena responded. "I consider it attorney work product privilege, which I don't think he is necessarily entitled to" (TR 2755). When Mr. Gore responded, "That is an interesting issue," the Court admonished him to "speak through your lawyer" *(Id).* Unfortunately, the record suggests that Mr. Pena was not representing Mr. Gore at this point; the memorandum he gave to the court told of a conversation Mr. Pena had with a Capital Collateral Representative attorney the day before about Mr. Gore's refusal to speak with a neuropsychologist employed by CCR while Mr. Gore was housed at Starke (TR 2757-58). While the sentencing court and Mr. Pena had the benefit of this memorandum, this Court does because it was never filed with the clerk and is not in the record.

Further, Mr. Pena sided with the Court and abandoned his client, saying that Mr. Gore was "playing games" (TR 2741-2742). It is not clear how Mr. Pena reconciled his belief that his client was playing games with his client's history of successful interaction with four or six doctors who evaluated him for his competency hearing (TR 2744'2748).

Mr. Pena did some quixotic things during trial. Before the second day of testimony began, Mr. Pena observed a juror see Mr. Gore being brought down the hall in handcuffs (TR 1212). The Court asked: "So what is it that you are requesting

at this time?" Mr. Pena responded: "We're not requesting a mistrial." For what purpose did Mr. Pena raise the issue? At the end of the preceding day, Mr. Pena reported to the court on the record (TR 1164); "Although I hold the attorney-client privilege very high. as Mr. Restrepo was testifying, he [the defendant] leaned over and told me that, "This guy is going to die,." * * * "The defendant tells me 'This guy is going to die when this trial is over,' and I thought I should just disclose to the State and to the Court." What Mr. Pena achieved or intended to achieve, if any thing, with these disclosures is unclear.

When his penalty phase counsel told the court that he was prepared to begin the penalty phase without mental health witnesses, or any other witnesses save the defendant, Mr. Pena moved from quixotic into a zone no capital defense counsel could occupy. Mr. Gore expressed his desire to represent himself (TR 2760). The Court allowed this, with the admonition that the case was going forward on Monday morning as scheduled (*Id*).

The result was a twelve to zero vote for death and a sentence of death.

Evidence of penalty phase counsel's ineffectiveness is found in what he did after the penalty phase hearing, after he was reinstated as counsel.

He attended a Spencer Hearing on March 29, 1999. The transcript of this hearing consists of 32 pages, of which 29 pages reflect the colloquy between the

court and Marshall Gore about the issues he raised in his pro se motion for a new trial. His lawyer's first words appear on the next to last page of the transcript, responding to the Court's inquiry about whether the defense has additional evidence. Counsel says, "No, Your Honor" (R29-29).

Mr. Gore's penalty phase counsel filed a "Sentencing Memorandum" on April 5, 1999 that talks of what was "physical evidence" and what was "circumstantial evidence" and what role each played in this case (R2-455). Clearly, counsel has confused "direct" evidence with "physical" evidence. Counsel wrote: "The State presented a largely circumstantial case, with only some property that belonged to Robyn Novick being found in Mr. Gore's possession;" and " However, none of the physical evidence introduced was directly tied to Mr. Gore." (R2-455). As a consequence of this confusion, counsel's memorandum offers little aid to the court and no succor to his client. In light of the fact that this is a retrial, the second time this counsel has worked through the sentencing issues in this case, his confusion on so fundamental a level is troublesome.

This Court has noted that "we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." *Rose v.*

State, 675 So.2d 567, 573 (Fla.1996), citing *Hildwin v, Dugger, 654* So.2d at 1109; *Santos v. State,* 629 So.2d 838, 840 (Fla.1994).

Failure to seek out mental health witnesses competent to develop such mitigation evidence and present it during the penalty phase of the capital trial can constitute ineffective assistance of counsel. "Claims of ineffective assistance of counsel during the penalty phase of a capital case are subject to the two-prong analysis laid out by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d *674* (1984)." *Lambrix v. Singletary, 72* F.3d 1500, 1504 (11 th Cir. 1996). The standard is succinct; the defendant must demonstrate that but for counsel's errors he would have probably received a life sentence. *Hidlwin v. Dugger,* 654 *So.2d at* 109. Such a demonstration is made if "counsel's errors deprived [defendant] of reliable penalty phase proceeding." *Id.* at 110 (emphasis added).

Here, it cannot fairly be said that counsel's failure develop psychological mitigators resulted in a reliable penalty phase.

This aspect of death penalty jurisprudence, that is the significance in proportionality review of psychological mitigators, as developed by this Court, are

echoed in the Federal Eleventh Circuit Court of Appeals *in habeaus corpus* litigation. That Court has recognized the potential weight of psychiatric mitigators in *Baxter v. Thomas,* 45 F.3d 1501, 1515 (11th Cir.1995):

> Psychiatric mitigating evidence "has the potential to totally change the evidentiary picture." *Middleton v. Dugger, 849* F.2d. [491] at 495 [(1988)]. We have held petitioners to be prejudiced in other cases where defense counsel was deficient in failing to investigate and present psychiatric mitigating evidence. See *Stephens v. Kemp, 846* F.2d 642,653 (1 lth Cir.) ("prejudice is clear" where attorney failed to present evidence that defendant spent time in mental hospital), *cert. denied, 488* US. 872, 109 S.Ct. 189, 102 L.Ed.2d 158 (1988); *Blanco [v. Singletary], 943* F.2d [1477] at 1503; *Middleton, 849* F.2d at 495; *Armstrong v. Dugger, 833* F.2d 1430, 1432-34 (1 lth Cir. 1987) (defendant prejudiced by counsel's failure to uncover mitigating evidence showing that defendant was "mentally retarded and had organic brain damage. ")

Baxter applied the two prong test of *Strickland v. Washington in the same* manner as has this *Court, Baxter v. Thomas, 45* F.3d at 1523-13, quoting *Bolender v. Singletary,* 16 F.3d 1547, 1556-57 (11th Cir.1994):

> In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel, [the defendant] must show both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the error, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different.

Rose v. State, 675 So.2d at 573, had a record of "substantial mitigation" that

required "a resentencing proceeding where such evidence may be properly presented," and collected similar opinions from this Court:

> *Phillips v. State,* 607 So.2d 778, 783 (Fla.1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"), *cert. denied,* 509 U.S. 908, 113 S.Ct. 3005, 125 L.Ed.2d 697 (1993); *Mitchelle v. State,* 595 So.2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and non-statutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); *State v. Lara,* 581 So.2d 1288, 1289 (Fla. 199 l)(prejudice established by evidenced of statutory mitigating factors and abusive childhood).

Appellant acting pro se simply lacked the ability, the time and the resources necessary to develop a basis of mitigation. This case should be remanded for a new sentencing hearing where such evidence may be gathered and properly presented.

CONCLUSION

Appellant Marshall Lee Gore respectfully requests that his conviction be reversed and the case be dismissed on double jeopardy grounds.

In the alternative, Mr. Gore requests that his conviction and sentence be vacated and the case be remanded for further proceedings.

Respectfully submitted,

LAW OFFICES OF
WILLIAM M. NORRIS, P.A.
3225 Aviation Avenue, Suite 300
Coconut Grove, Florida 33 133-474 1
TELEPHONE: (305) 860-0988
FAX: (305) 285-0699

BY: ______________________

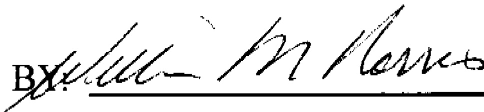
WILLIAM M. NORRIS
Florida Bar No. 309990

CERTIFICATEOFSERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been mailed this 3 day of May, 2000 to Ms. Fariba N. Komeily, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33101.

Respectfully submitted,

LAW OFFICES OF
WILLIAM M. NORRIS, P.A.
3225 Aviation Avenue, Suite 300
Coconut Grove, Florida 33 133-474 1
TELEPHONE: (305) 860-0988
FAX: **(305) 285-0699**

BY: 

WILLIAM M. NORRIS
Florida Bar No. 309990