IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

MARSHALL LEE GORE

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defendant's motion for judgment of acquittal should have been granted.

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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 penalty phase of a capital case under *Faretta v. California* and Article 1, Section 16 of the Florida Constitution.

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.

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.

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 precluded any meaningful proportionality review.

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REPLY ARGUMENT

The States' answer brief contains an extensive presentation of the facts of the case, but appellant believes that the answer often fails to address the issues he raised in his initial brief. To increase the chances that this reply brief will facilitate the court's decisional process, Gore reviews the State's brief in the sequence of the issues he raised, but he groups those arguments, so that some common threads in this appeal can be identified.

GROUP A: The State intentionally repeated at retrial precisely the errors that lead to reversal of appellant's first conviction.

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.

A death case is not a game at which a prosecutor can practice oneupsmanship with the assurance that if he gets a conviction, at whatever cost, the worst that can happen is that he has to try the case again. *Oregon v. Kennedy*, 456 U.S. 667 (1982), stands for the proposition that a double jeopardy bar to retrial can apply after mistrial if the prosecution intended to goad the defense into making the motion for mistrial. The question to be answered in deciding whether such a bar should be applied is whether the prosecutor intended to provoke the motion for a mistrial. Appellant is well

aware that the clear majority rule is that appellate reversal on grounds other than sufficiency of the evidence does not implicate the double jeopardy clause. However, the facts of a given case may require application of the double jeopardy doctrine upon appellate reversal.

The State correctly notes that all of the cases cited by appellant in his initial brief ruled that, on the facts of each case, double jeopardy did not attach upon appellate reversal. The point is that each court recognizes that the principles of double jeopardy could apply.

Here, the State simply has not responded to the appellant's initial argument that the State did not embark on its parade of error until after the defendant had presented a cogent theory of the defense for which the prosecution was not prepared. What the prosecutor did in response to this unexpected turn of events was seek to guarantee a conviction, at whatever cost. Mr. Gore argues that as a consequence the State should not be permitted to try him again.

The State has not suggested why this court should not apply this level of sanction for the State's conduct.

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 a reversal of the prior conviction and requires reversal again notwithstanding the prosecutor's calculated use of the euphemism "intimacy" for the word "sex."

The State gives terse treatment to this issue. They do not address the fact that the state repeated the questioning that caused the prior reversal of Mr. Gore's conviction. They do not address the admission by the second prosecutor that her questioning was intentional, casting the issue with a euphemism ["intimate relationship" for "statutory rape"] based on the acceptability of the euphemism to the witness rather than compliance with the ruling of this court.

Instead, the State downplays the significance of the matter and argues that it was cured by the court's instruction to disregard.

The Federal Eleventh Circuit observed in *United States v. Crutchfield*, 26 F.3d 1098, 1103 (1 lth Cir. 1994): "When improper inquiries and innuendos permeate a trial to such a degree as occurred in this case, we do not believe that instructions from the bench are sufficient to offset the certain prejudicial effect suffered by the accused." Here, the Supreme Court of Florida reversed a murder conviction and death sentence because the prosecutor asked improper questions. The prosecutor sat with the witness, worked out a euphemism suitable to the witness, and asked the questions again on retrial. Now the State tries to trivialize the matter.

This should not be allowed.

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.

The State casts this issue as impeachment of appellant's claim that he was a non-violent person. This court had written in reversing Mr. Gore's prior conviction on precisely this ground that "this questioning could only demonstrate Gore's bad character or propensity to commit crime and thus improper." *Gore v. State*, 7 19 So.2d 1197, 1200 (Fla. 1998).

The State argues that the issue was not preserved, but Gore raised a timely objection below (Tr. 3145). The State then argues that Gore did not object until the second woman was named and that he did not object on the *Williams* rule ground for which this court reversed his prior conviction. What the State is telling us here is that Mr. Gore, conducting the capital penalty phase *pro* se, is not only obliged to remember the reason for the reversal, but also is obliged to reiterate the grounds for that reversal when the State repeats its error. The State believes it is free to disregard that reversal with impunity.

Mr. Gore believes this is not the law.

GROUP B: The evidence was insufficient to sustain the verdict of guilt or the sentence of death.

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. The law requires in a circumstantial evidence case, that the state 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.

The State responds to appellant's argument that it failed to present evidence that is inconsistent with his hypothesis of innocence by reciting what the evidence proved. One problem with this recitation is that it begins with a factual error of significance. While Defendant claimed that he regularly met Ms. Novick at the Redlands Tavern, Curtis Roberson, who frequented the bar, testified that they had never seen them there. (T. 1823-25, 218-19)"

Gore did not claim that he regularly met Ms. Novick at the Redlands Tavern. He did claim that he met Ms. Novick at the Redlands Tavern that particular night (Tr. 1824-25), a fact which was corroborated. He said: "We usually always met on a Friday night if I had work for her" (Tr. 1825). No follow-up questions were asked, either on direct or cross-examination as to where he "usually always" met with Ms. Novick. The State draws an unsupported inference from the fact that Gore met Novick there that night to reach the conclusion that he always met her at that bar. This unsupported leap of logic characterized the entire prosecution.

The State also is facile with its use of where Ms. Novick's yellow

Corvette was seen. They tell us: "Ms. Novick's car was seen parked in the area where her body was found" and "Defendant was seen with the car in this location" (Brief, p. 63). Both references, however, described witnesses telling of having seen the car parked in front of Mr. Gore's residence.

Mr. Gore's trial counsel moved for judgment of acquittal at the close of the State's case (Tr. 1734), and renewed his motion at the close of all of the evidence (Tr. 2464). His motions, like the State's case, were dominated by the flood of *Williams* rule evidence used by the State to secure its conviction. However, despite the flood of evidence about other violent crimes, the evidence is legally insufficient to sustain Mr. Gore's conviction of murdering Ms. Novick.

It is worth note that the State now uses the fact that trial counsel for Gore referred to the flood of *Williams* rule evidence as overwhelming the trial as his ground for judgment of acquittal as the basis for their claim that Mr. Gore did not preserve his appellate challenge to the sufficiency of the evidence. Clearly, that is exactly what Gore's argument was all about. There was so much evidence about extrinsic bad acts that focus was lost on the question of whether the State had proven the crimes charged.

The State had no direct evidence that Marshall Gore killed Robyn Novick. It presented a lot of circumstantial evidence, but that evidence did

not rebut Gore's hypothesis of innocence, that he met Ms. Novick at the Redlands Tavern prior to sending her on an escort assignment from which she did not return. "/A/ judgment of acquittal is appropriate if the State fails to present evidence from which the jury can excluded every reasonable hypothesis except that of guilt." *Gordon v. State,* 704 So.2d 107 (Fla.1997).

On Mr. Gore's question about the State's failure to test the fluid found in the victim's body, the State files a report as a supplement to the record. Whether this has anything to do with the fluid discussed during trial is unclear. What is clear is that the report presented by the State on appeal had absolutely no part in the trial. The State simply cannot shore up the inadequacy of its proof at trial with supplements to the record on appeal.

The conviction should be reversed for insufficiency of the evidence.

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

Appellant's opening brief discussed several cases considering the "cold calculated and premeditated" aggravator in connection with his discussion of the sufficiency of the evidence that Gore had the required premeditation necessary for a first degree murder conviction. These cases were not presented, as the State suggests, because Gore is confused about the difference between the aggravator and first-degree premeditation. Rather, the

"CCP" cases focus on the questions raised by Gore's appeal and are instructive.

Premeditation is the gravamen of first-degree murder. Premeditation was not proved here. Mr. Gore's 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.

The State answers Mr. Gore's argument that the evidence does not support application of the "ccp" aggravator with the claim that "the trial court applied the correct law and its factual findings are supported by the record" (Brief, p. 77). This is half right. The law is correctly stated. Its application is wrong. Critical factual fmdings are pure speculation.

Appellant's initial brief highlighted instances in which the sentencing judge engaged in emotional narrative and speculation: the State responds with five and one half pages of single spaced repetition of the court's order in its entirety (Brief, pp 77-83). Generally, the State does not respond to the deficiencies in this order pointed out by appellant.

The State does claim that the court's conclusion that the Defendant had a knife is supported by the record. This support is found in Tina Coralis' statement that Gore had a knife when he attacked her (Brief, p. 84, Tr. 1572).

Of course, the fact that Gore had a knife when he was with Coralis does not establish that he had a knife when Novick was killed. Further, Coralis said that Gore's knife "'wasn't a large knife." The weapon that made a three and one half inch deep puncture wound in Robyn Novick's chest would have had to have been a large knife. Whose knife this might have been is a matter of sheer speculation, with no support at all in the record.

The State does not respond to the rest of the examples of speculation and literary license in the court's sentencing order. On the record before the court, this aggravator should be stricken and the case remanded for resentencing.

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

The State urges that this argument was not preserved because Mr. Gore argues that the excluded evidence would have supported his theory of innocence. "Defendant now contends that this evidence was admissible as similar crimes evidence to show that someone other than Defendant committed the crimes. However, as this was not the ground on which Defendant sought to elicit the evidence below, this issue is not preserved" (Brief, p. 87).

The record suggests that the Court recognized the inference that Mr.

Gore was suggesting: "I have reviewed the motion in limine and, for the record, it is the State's motion to preclude the defendant or the defense in any way referring to the fact that Pauline Johnson was found dead after the defendant was placed in custody, or after the defendant was in custody" (Tr. 324). The point is that if Mr. Gore was in prison when Pauline Johnson was murdered, he could not have been the one responsible. Some one else had to have been responsible.

The State's suggestion that the evidence is inadmissible under *State v. Savino,* 567 So.2d 892 (Fla. 1990), misapplies that case. In *Savino,* the defendant attempted to blame his wife for the murder he was charged with based on a prior bad act she had committed. The court ruled that the prior bad act was dissimilar. Here, Mr. Gore is not attempting to place the blame on a particular person. He simply wanted the jury to know that another person associated in the escort business had been murdered in the same way as Ms. Novick, and that he was not responsible because he was in jail at the time.

Mr. Gore suggests that this excluded testimony was relevant and its exclusion was error.

GROUP C: Appellant was denied his constitutional right to the effective assistance of counsel.

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 penalty phase of a capital case under ***Faretta v. California*** and Article 1, Section 16 of the Florida Constitution

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.

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.

In his initial brief, Mr. Gore addressed the two subparts of this argument separately. In reply, Mr. Gore merges the issues because the State's brief raises issues that are more coherently answered this way.

Does *Faretta v. California*, 422 U.S. 806 (1975), either require or forgive what happened in this case?

The State repeats its chant about Mr. Gore's failure to raise below the issue of the applicability of *Faretta's* view of the world to the question of the right of a defendant in a death case to proceed *pro* se. This time the State may be right. Once the court decided that Mr. Gore possessed a threshold level of competence, no one, not the prosecutor, not the court, not defense counsel, and certainly not the defendant, seems to have given a moments consideration to the question of whether Mr. Gore should control the

powerful engine he was given when he was permitted to proceed *pro* se in a death case.

The State calls Mr. Gore's contention that the Florida Constitution might provide a ground for limiting the application of *Faretta* to death cases "entirely specious" (Brief, p. 93). Perhaps not. There is nothing in *Faretta* that prohibits the yeoman farmer of colonial myth from representing himself on appeal, but this *Court* in *Hill v. State,* 656 So.2d 1271, 272 (Fla. 1995), denied such a right:

> The transcript of the hearing clearly supports Judge Sanders' findings with respect to Hill's competency and knowing and voluntary waiver of assistance of counsel. However, this is the direct appeal of a capital case. The Court is concerned that it cannot properly carry out its statutory responsibility to review Hill's conviction and sentence of death without the skilled adversarial assistance of a lawyer acting on Hill's behalf, particularly as it concerns the sufficiency of the evidence to convict and the proportionality of the death sentence.

The United States Supreme Court later agreed with this *Court* in *Martinez v. Court of Appeal of California,* U.S. __, 120 S.Ct. 684, __ L.Ed.2d __ *(2000).*

Martinez was not a capital murder case.

Mr. Gore asks this Court to consider whether the factors that controlled *Hill,* that is the grave responsibilities of the Courts in a death case and the

great complexity of such a case, it served by permitting the *Faretta* rationale to permit a defendant like Mr. Gore to represent himself.

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 precluded any meaningful proportionality review.

The state raises the argument that ineffective assistance of counsel claims are not favored on direct appeal. The State ignores the ample record, supported by extensive quotation by appellant in his initial brief, that shows clearly, ineffective assistance. Instead, the State tells us: "As counsel made strategic decisions regarding what evidence to present, he cannot be deemed ineffective. *Haliburton v. State,* 691 So.2d 466, 471 (Fla. 1997)" (Brief, p. 90).

This court should not forget that Mr. Gore's lawyer chose to do nothing at all to present a case for mitigation. The State wants this decision to be viewed as a strategic decision. This is the lawyer who told the court that a jury had seen his client in shackles, but hurried to state he did not want a mistrial (Tr. 12 12). Was this strategic thinking? This is the lawyer who, professing his commitment to the attorney client relationship, told the court that his client muttered threats against a witness (Tr. 1164) Was this strategic thinking? This is the lawyer who filed a memorandum with the court about his conversation with a psychologist, but refused to let his client see the

memorandum on the ground that he considered it attorney work product privilege (Tr. 2754-55). Was this strategic thinking? This is the lawyer who, on this particular question, declined to call the defendant's sister, but got her name wrong (Tr. 2722). This is the lawyer who engaged in the following exchange when the trial judge asked penalty counsel, after he struck the psychiatric expert from the witness list, is this was the defendant's wish (Tr. *2741):*

> THE DEFENDANT: This is my life. I'm not going to . . .
>
> [PENALTY COUNSEL]: 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.
>
> [TRIAL COUNSEL]: What do you mean "we"?
>
> [PENALTY COUNSEL]: Your Honor, I will strike Dr. Haber. I'm not going to request another one.

Trial counsel may simply have engaged in inappropriate humor, making reference to an old joke about Tonto and the Lone Ranger. Penalty counsel simply abandoned his client.

This abandonment leaves this Court with no adequate basis fulfill its statutory obligation to decide whether the sentence of death imposed on

Marshall Lee G-ore is proportional.

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,

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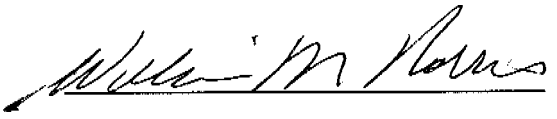
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been mailed this 30th day of October, 2000 to Ms. Sandra S. Jaggard, Office of the Attorney General, Rivergate Plaza, Suite 950,444 Brickell Avenue, Miami, Florida 33 101.



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