IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1458
Lower Tribunal Case No.: 83-361-CF

DAVID A. GORE,
Petitioner/Appellant

vs.

STATE OF FLORIDA,
Respondent/Appellee
_____/

INITIAL BRIEF OF APPELLANT

ANDREW A. GRAHAM, ESQUIRE
GRAHAM, MOLETTEIRE & TORPY
10 Suntree Place
Melbourne, FL 32940
Phone: (321) 253-3405
Fax: (321) 242-6121
Bar No.: 0218871

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUES

CONSTITUTIONS

RULES OF COURT

OTHER AUTHORITIES

INTRODUCTION

References to the record of the penalty phase retrial are preceded by the letter "R." References to the record of the post conviction proceedings are proceeded by the letters "CP."

STATEMENT OF THE CASE

On October 5, 1998, the Supreme Court of the United States denied Mr. Gore a certiorari review of this Court's decision upholding imposition of the death penalty. *See, Gore v. Florida,* 525 U.S. 892 (1998); *and Gore v. State,* 706 So.2d 1328 Fla. 1997). After this denial, counsel for collateral proceedings was appointed on March 11, 1999. CP 1, 2. Gore's Motion for Post Conviction Relief was then filed on September 30, 1999. CP 93-189. An Amended Motion for Post Conviction Relief was filed on January 8, 2002, following the production of large numbers of public records. CP 248-313. In his Amended Motion for Post Conviction Relief, Gore raised the following issues:

1. Improper and incomplete instruction to the jury regarding Gore's future parole eligibility, including a violation of *Giglio v. United States*, 405 U.S. 150 (1972), due to false testimony given by Robert Stone, the former state prosecutor.

2. Ex parte communications between the trial court and the prosecutor.

3. Ineffective assistance of counsel, including:

    a) The decision and effect of calling Mr. Stone as a defense witness at the penalty phase retrial without conducting any discovery regarding his testimony;

    b) Failure to propose an expanded jury instruction on the cold, calculated and premeditated aggravator;

c) Failure to discover and expose financial bias of the state's mental health expert;

d) Failure to investigate and present mitigation evidence of Gore's toxic chemical exposure; and

e) Failure to investigate and present evidence of the abusive relationship between Gore and his mother. (This allegation was withdrawn prior to the evidentiary hearing.)

4. Violations of *Giglio, supra*, and *Nadue v. Illinois*, 360 U.S. 264 (1959), by the prosecution for knowing failure to correct the false testimony of Mr. Stone regarding Gore's future parole eligibility.

5. A jury impermissibly tainted by biased jurors.

6. Failure by the trial court to instruct the jury that Gore would serve 50 years prior to being considered for parole.

7. Unconstitutionality of the death penalty as applied because it is unreliable and arbitrary.

CP 248-313.

Thereafter, the trial court permitted Gore further to amend his Rule 3.850 Amended Motion for Post Conviction Relief to raise the argument that, on the basis of *Ring v. Arizona*, 536 U.S. 584 (2002), the Florida sentencing scheme deprived Gore of his Sixth Amendment right to a jury determination of aggravating factors. CP 584-634. This Amendment to the Amended Motion was filed on November 19, 2002. CP 681-684.

In its order after the *Huff* hearing, the lower court denied Claims 1, 2, 3(b), 4, 5, 6, and 7, and agreed to an evidentiary hearing on Gore's remaining claims. CP 695-745. These claims included issues regarding the following matters:

a) the testimony of Robert Stone,

b) financial bias on the part of the State's mental health expert,

c) mitigation evidence of toxic chemical exposure, and

d) failure of defense counsel to call a witness who could properly explain Gore's future parole eligibility.

Following an evidentiary hearing on July 21, 2003, on these issues, CP 768-958, the trial court denied all of Gore's remaining claims on June 14, 2004. This appeal was timely filed. CP 991-998.

References to the record of the penalty phase retrial are preceded by the letter "R." References to the record of the post conviction proceedings are proceeded by the letters "CP."

STATEMENT OF FACTS

The underlying facts of the crime in this case were set forth in detail in two prior opinions of this Court. *See, Gore v. State*, 475 So.2d 1205 (Fla. 1985); *and Gore v. State*, 706 So.2d 1328 (Fla. 1997). Therein, this Court summarized the facts which resulted in Gore's sentence of death for the murder of Lynn Elliot, two life sentences for the kidnappings of Regan Martin and Lynn Elliot, and three life sentences for sexual battery of the two victims.

Gore and his cousin Freddy Waterfield kidnapped the two teenage girls on July 26, 1983. Both victims were raped and terrorized; Lynn Elliot was murdered by Gore while trying to escape her captor. After a 1984 jury trial, Gore was sentenced to death for the murder. In addition, two concurrent life sentences were imposed for the kidnappings to be served consecutively to the death sentence, and three concurrent life sentences were imposed for sexual battery to be served consecutively to both the death sentence and the two other life sentences. *See, Gore v. State*, 706 So.2d 1328 (Fla. 1997). This Court affirmed these sentences in 1985. *See, Gore v. State*, 475 So.2d 1205 (Fla. 1985).

In 1989, the United States District Court for the Middle District of Florida reversed Gore's death sentence, in accordance with *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Lockett v. Ohio*, 438 U.S. 589 (1978), for failure to permit Gore to

present non-statutory mitigating circumstances. That court remanded to the trial court for a sentencing retrial. *See, Gore v. Dugger*, 763 F. Supp. 1110 (M.D. Fla. 1989). The Eleventh Circuit Court of Appeals affirmed this decision. *See, Dugger v. Gore*, 933 F.2d 904 (11th Cir. 1991).

The sentencing retrial occurred in November 1992, again resulting in a death sentence for the 1983 murder of Lynn Elliot. This Court affirmed in 1997. *See, Gore v. State*, 706 So.2d 1328 (Fla. 1997). Following denial of certiorari by the Supreme Court of the United States, counsel was appointed for this collateral proceeding on March 11, 1999. Motions to vacate Gore's death sentence culminated in an evidentiary hearing on July 21, 2003, during which seven witnesses testified and evidence was introduced as follows.

Robert G. Udell, Esq., testified that he was appointed by the trial court to represent Mr. Gore at his sentencing retrial, and that this may have been his first penalty phase in a capital case. CP 776. He further testified that Attorney Jerome "Jay" Nickerson, volunteer co-counsel through this proceeding, "took the lead," and that Mr. Udell actually considered himself to be "second chair." CP 780, 801. At the conclusion of the sentencing retrial, Mr. Udell was compensated for his efforts by the trial court but Mr. Nickerson was not. CP 781.

At the evidentiary hearing, Mr. Udell agreed with collateral counsel that Mr. Gore's school records and medical records should have been introduced for the jury to consider at the penalty phase retrial. CP 785. Mr. Udell also stated that he never understood why the original prosecutor in the 1984 murder trial, Robert Stone, Esq., was called as a defense witness at the penalty phase retrial, CP 788-789, or why this witness was never deposed or interviewed by defense counsel prior to testifying. CP 793. Mr. Udell acknowledged that Mr. Stone was not friendly to Mr. Gore, CP 792-793, but stated that the entire issue was "way above my head." CP 798. When questioned, Mr. Udell had no idea why defense counsel failed to move to strike Juror Tobin for cause, given the obvious bias he exhibited during voir dire. CP 801. He stated: "I was sitting second chair, Jay [Nickerson] picked this jury." CP 801. Mr. Udell further testified that undiscovered evidence regarding the state's mental health expert's bill, and how often this expert testified for the prosecution, was ". . . clearly evidence of bias." CP 805.

Mr. Stone, the former prosecutor who had previously been called as a defense witness at the penalty phase retrial, also testified. He stated that after being subpoenaed by defense counsel, he met with the prosecutor to discuss his testimony, including Gore's future parole eligibility, but had no contact of any kind with the defense prior to testifying at the sentencing retrial. CP 825, 826, 827. Mr.

Stone admitted that in 1992, at the penalty phase retrial, he had no knowledge of the Parole Commission's guidelines, regulations or procedures with regard to parole eligibility, and still had no knowledge of that information. CP 829, 830.

Thelma Gore, Mr. Gore's mother, testified regarding mitigation evidence that had not been presented during his penalty sentencing retrial. Her testimony included Gore's many childhood illnesses, poor academic performance, and his long-term exposure to toxic chemicals used on the citrus groves in Indian River County during the 1950s, 1960s and 1970s. CP 830-854. She also testified regarding the family's consumption of fish and wildlife from the groves and irrigation canals near their home. CP 836-837.

Dorothy Stokes, Gore's aunt, also testified regarding his constant exposure to toxic agricultural chemicals throughout childhood. She testified that five of Mr. Gore's male cousins who grew up or worked in close proximity to the industrial citrus groves had died from cancer, and others had been made very ill by agricultural chemicals. CP 855-862.

Dr. Herbert Nigg, a professor with the University of Florida and an entomologist versed in toxicology and biochemistry, testified as to the agricultural chemicals commonly used in the citrus industry during the 1960s and 1970s. His testimony included a comparison of those chemicals with the more environmentally benign ones currently in use. CP 866-867. Dr. Joseph Napp, a

professor emeritus with the Ecology Department at the University of Florida, also testified. CP 922. During his twenty-five (25) year career with the University of Florida, his duties included evaluation of pesticides for the Florida citrus industry. CP 922. These experts testified that chemicals commonly used on citrus groves in Indian River County during the time period in question included lead arsenate; chlorinated hydrocarbons (DDT); organo phosphate insecticides; DDE; DDD; Aldrin; Dieldrin; Heptachlor; Ethion; Chlordane; Calthane; parathion; Malathion; and Dursban. CP 867-870, 922-927. All of these chemical compounds are now banned from use except Malathion and Dursban. CP 927. Dr. Napp further testified that chlorinated hydrocarbons, which are in the same class as DDT, and lead arsenate were persistent in the environment. CP 927, 928.

The last witness was David Chestnut, Esq., a Board Certified civil trial lawyer who had been practicing for twenty-two (22) years in the Nineteenth Circuit. He testified that it was professional malpractice to fail to expose the state's mental health expert's bias to the jury by failing to elicit testimony concerning his compensation and the particulars of his employment. CP 941.

SUMMARY OF ARGUMENT

I

THE PROSECUTION KNOWINGLY ELICITED FALSE TESTIMONY REGARDING THE POSSIBILITY OF FUTURE PAROLE AND THEN FAILED TO CORRECT SUCH TESTIMONY IN VIOLATION OF *GIGLIO v. UNITED STATES*, 405 U.S. 150 (1972), *AND NADUE v. ILLINOIS*, 360 U.S. 264 (1959).

Defendant argues that the testimony elicited by the prosecution that defendant could be released on parole "at any time" is a *Giglio v. U.S.*, 405 U.S. 150 (1972), and *Nadue v. Illinois*, 360 U.S. 264 (1959), violation by eliciting knowingly false testimony and refusing to correct it when the evidence was material and clearly affected the finder of fact as indicated by the jury's questions herein.

II

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT THE DEFENDANT WOULD BE REQUIRED TO SERVE 50 YEARS BEFORE HE WAS ELIGIBLE FOR PAROLE CONSIDERATION.

The trial court should have truthfully instructed the jury that if Gore were to receive a life sentence in this case he would not be eligible for parole consideration for 50 years from the date of his arrest.

III and IV

EX PARTE COMMUNICATIONS BETWEEN PROSECUTOR AND TRIAL JUDGE WERE IMPROPER AND REQUIRE A NEW SENTENCING TRIAL.

THE LOWER COURT ERRED IN ITS DENIAL OF GORE'S MOTION TO DISQUALIFY THE TRIAL JUDGE BECAUSE HE WAS A MATERIAL WITNESS TO THE EX PARTE COMMUNICATIONS.

Defendant argues that the prosecutor and judge below engaged in ex parte communications which compromised the trial court's duty to independently weigh aggravators and mitigating factors, and that the court should have granted defendant's motion to disqualify himself from the collateral proceedings because he was a material witness to the ex parte communications.

V

INEFFECTIVE ASSISTANCE OF COUNSEL RENDERED THE RESULT OF THE PENALTY RETRIAL BELOW "UNRELIABLE" WITHIN THE MEANING OF *STRICKLAND v. WASHINGTON*, 466 U.S. 668 (1984).

Ineffective assistance of counsel resulted from the following errors:

a the decision to call as a defense witness the former state attorney who prosecuted this defendant, and counsel's failure to make any effort to determine what his testimony would be;

b failure to discover and expose to the jury financial bias and exorbitant fees charges by the state's mental health expert;

c failure on the part of Gore's court appointed defense counsel Udell to make any substantive decisions, and his total deference to volunteer defense co-counsel Nickerson;

d failure to discover and present readily available witnesses who would testify to other mitigating circumstances including defendant's poor school performance, childhood medical records and possible neurologic disorders caused by long term exposure to toxic chemicals used in citrus agriculture;

e failure to move the court to strike Juror Tobin for cause;

f failure to propose an expanded jury instruction on the cold, calculating and premeditated aggravator.

VI

GORE'S TWENTY THREE YEARS ON DEATH ROW WITHOUT RESOLUTION OF HIS CASE, DESPITE DILIGENT PURSUIT OF HIS RIGHTS, IS CRUEL AND UNUSUAL PUNISHMENT WHICH REQUIRES HIS DEATH SENTENCE TO BE REDUCED TO LIFE

VII

THE EIGHTH AMENDMENT REQUIRES INVALIDATION OF THE DEATH PENALTY BECAUSE, AS APPLIED, IT REMAINS AS ARBITRARY AND CAPRICIOUS AS THE DEATH PENALTY STATUTES STRICKEN *FURMAN v. GEORGIA*, 408 U.S. 238 (1972)

Defendant argues that the experience in Florida since reinstatement of the death penalty has not reduced its arbitrary application. Therefore, it unconstitutionally violates the Eighth and Fourteenth Amendments to the United States Constitution.

POINT I

THE PROSECUTION KNOWINGLY ELICITED FALSE TESTIMONY REGARDING THE POSSIBILITY OF FUTURE PAROLE AND THEN FAILED TO CORRECT SUCH TESTIMONY IN VIOLATION OF *GIGLIO v. UNITED STATES*, 405 U.S. 150 (1972), *AND NADUE v. ILLINOIS*, 360 U.S. 264 (1959).

This Court has stated that "[u]nder *Giglio*, once a defendant has established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show that the false evidence was not material." *Guzman v. State*, 868 So.2d 498, 507 (Fla. 2003). The *Guzman* Court further found that:

> ... the proper question under *Giglio* is whether there is any reasonable likelihood that the false testimony could have affected the court's judgment as the factfinder in this case. If there is any reasonable likelihood that the false testimony could have affected the judgment, a new trial is required. The State bears the burden of proving that the presentation of the false testimony was harmless beyond a reasonable doubt.

Id. at 507-508.

Prior to his re-sentencing proceeding, Gore's counsel moved the trial court to tell the jury that the sentencing alternatives were either a death sentence or a life sentence without the possibility of parole. R 4946-4956. He contended that jurors are more likely to recommend death when they believe there is a possibility of the

defendant's eventual release. Defense counsel argued that the Eighth Amendment requires "truth in sentencing," and that Gore's jury needed to understand the sentencing alternatives. R 4948. Defense counsel further argued that Gore, in effect, was facing a life sentence without possibility of parole because he could not live long enough to serve out all of his consecutive sentences, reiterating that "we're relying on the Eighth Amendment in truth in sentencing." R 4952. In response, the state told the trial judge:

> The fact of the matter is, that after serving twenty-five calendar years under the statute as it is today, this man would be eligible for parole under this crime.
> * * * * * * * *
> But as far as this case is concerned, under the law as it is today, he is eligible for parole after twenty-five years; that is the law. And they are not being honest with you when they tell you that under the statute or under this crime, he can not be eligible for parole.

R 4954, 4956.

The trial court, persuaded by the prosecutor's argument, denied the defendant's motion in limine. R 4955.

When the defense presented to jurors the alternative of a life sentence without mentioning parole eligibility, R 971, the state objected: "Judge, I will object and ask you to require the Defense attorney to say life without possibility of parole after 25 years which is the lawful sentence." R 972. In response, the

defense argued that it was neither appropriate nor accurate to instruct the jury about the possibility of parole within 25 years. R 972. The trial court ruled:

> I'll sustain the objection consistent with the Court's the sentence is the first degree murder of Florida that you first live in prison without possibility of parole for 25 years. That's what we're here, sentence for first degree not murder not even that may have been. I'll sustain the objection.

R 973.

[While there may well be flaws in the trial transcript, it is clear that the trial court sustained the state's objection.]

The state later re-emphasized this point to the jury:

> MR. COLTON [prosecutor]: The point is do y'all understand that unlike what Mr. Udell [defense counsel] was saying that he would receive life, that the sentence is not life. The sentence is life without eligibility for parole until 25 years, do you understand that?
>
> THE PANEL: Yes.

R 1665.

At the time of the underlying murder and Gore's original prosecution in 1983, the State Attorney who actively participated in the prosecution of both Gore and his co-defendant, Freddy Waterfield, was Robert Stone, Esq. By the time of the penalty retrial in November 1992, he was in private practice. (CP 823, 824).

Without ever having deposed or even interviewed him, defense counsel called Mr. Stone to testify with regard to sentencing standards at the penalty retrial. In contrast, the state prosecutor had met with Mr. Stone prior to his taking the stand in order to discuss several issues, including Gore's possibilities for parole on sentences imposed for the other crimes in this case. CP 825, 826. During cross examination, in response to a prosecution question about Defendant's potential parole on the life sentences for kidnapping and sexual battery, Mr. Stone testified as follows:

> Q. Let's break that down, Mr. Stone. Basically, are you saying that of the life sentence it adds up to basically one life sentence followed by another life sentence?
>
> A. That's correct.
>
> Q. Two live [sic] sentences?
>
> A. Two life sentences.
>
> Q. And he is subject to parole; is that correct?
>
> A. Yes.
>
> Q. When could he receive parole?
>
> A. I guess any time.
>
> Q. Who is that up to?
>
> A. Probation and Parole Commission

Q. All right. People in Tallahassee?

A. Seven member board in Tallahassee.

R 3203.

At the charge conference, Gore again unsuccessfully moved that the trial court not instruct the jury on parole eligibility in 25 years, arguing that, given his other life sentences, a life sentence here was tantamount to life without parole. R 3273-3278, 4409. Defense counsel further moved that the state not be allowed to argue parole eligibility after 25 years to the jury, noting:

> MR. NICKERSON: Yes, Judge. At – at the beginning of this proceeding we indicated to the Court that the reality here is that with Mr. Gore's other sentences in the other cases, that a life sentence here in consideration with those other sentences, in consideration with the other offenses for which he was convicted in this case that a life – that a life verdict here would mean true life. Simply because when you run all of the sentences together, when you consider Mr. Gore's chronological age, he is not going to walk out of any penal institution in the State of Florida. And this instruction addresses that. And that's why it states life imprisonment.
>
> THE COURT: The State, Mr. Barreira or Mr. Morgan?
>
> MR. BARREIRA: Yes, Your Honor, I'll handle it. The law is that it's, the two options are life with a minimum mandatory 25 years and death. Those are the two legal options. If he wants to argue to the jury as a practical matter life here is going to mean life, that's – he's free to do that. But the law is that the other option is life with a minimum mandatory of 25.

> MR. NICKERSON: I would ask that the State of Florida, as we asked in the beginning of these proceedings, be precluded from making the argument that Mr. Gore could be paroled after 25 years, or the first opportunity for consideration of parole would be years, for the reasons that we've previously stated.
>
> One, because that would be a nonfactual argument, because he has other life sentences which are out there which must be served; and two, I believe it's encumbent upon the State of Florida to not make misleading arguments. And if they're allowed to stand up in this case and say that he could be released within 25 years, that that is a false argument and the government must do justice.
>
> That is the first – that is the first rule for a Prosecutor. And I believe that it would – that in argument otherwise, that if you do not give him death, that he will get out within 25 years is an improper argument.

R 3273-3275.

The trial court denied defense counsel's request. R 3278.

Near the beginning of the state's argument to the jury, the prosecutor repeated that the choice the jury had to make was between a death sentence and one of life without the possibility of parole for 25 years. R 3530. During final argument, the prosecutor again addressed the jury on this subject:

> You know, based on what the Defense lawyer said in his questioning of this jury panel the first couple of days and what he said in his opening statement, the Defense will no doubt try and play on your sympathy. <u>They'll tell you that if you give him life without parole without the possibility of parole for 25 years that he'll never get out of prison. I submit that that's what he's going to stand</u>

> here and tell you. That he'll never get out of prison. That there's been enough tragedy already and that another death won't bring back Lynn Elliott and won't solve anything.
> Ladies and gentlemen, David Allen Gore has no right to stand here through his lawyer and ask for that. He has no right - [emphasis supplied]

[Defense counsel objects and approaches the bench] (The following occurred during the bench conference.)

> MR. NICKERSON: The case law is quite clear that in fact I can stand in front of that jury in mitigation, and say it engenders mercy and sympathy, that I can ask for something less than life. That's an improper argument. It's improper. It's an improper comment on legitimate Defense tactics. It's an improper comment on the law and I object on the Eighth Amendment.
>
> MR. COLTON: I never said under the law he has. - I'm talking about under the facts and circumstances of this case he has no right to ask this jury for sympathy.
>
> THE COURT: It's proper argument. I'll overrule the objection.

R 3581-3583.

Pursuant to Section 947.11, Florida Statutes, the Department of Legal Affairs is legal advisor to the Florida Parole Commission. The Parole Commission by its very nature is an agency of the state. Therefore, the state cannot claim ignorance of the true possibilities regarding Gore's parole eligibility; indeed, parole eligibility was at all times entirely in the hands of the state. *See*, *Giglio v.*

United States, 405 U.S. 150 (1972) (rejecting claim that trial prosecutor was unaware of impeachment evidence, where evidence was available to other prosecutors); *Antone v. State*, 355 So.2d 777 (Fla. 1978) (information known to State Department of Law Enforcement attributable to prosecution even where trial prosecutor did not know of it). The state prosecutors in this case were in constant communication with the Department of Legal Affairs throughout Gore's re-sentencing trial. R 916. An attorney from that Department actually represented the state at the charge conference when parole eligibility was discussed. R 3273.

At the time of the murder which resulted in Gore's arrest, the only possible sentences for first degree murder in Florida were death, or life imprisonment without the possibility for parole for 25 years. Section 775.082(1), Florida Statutes (1983). Due to previously imposed sentences, Gore could not be paroled for the murder at bar for at least 50 years from the date of his arrest. Gore was arrested for this murder on July 26, 1983. At that time, he was on parole for armed trespass, having served approximately eighteen months of a five year sentence. R 1846-50. Following his arrest, Gore pleaded guilty to five other first degree murders and received five life sentences without the possibility of parole for 25 years, to run concurrently with each such other case but consecutively to the sentence imposed in this case. R 5657-5661 (recitation of plea agreement), 5619-5621(imposition of sentence). In this case, Gore additionally received a death sentence, followed by

two concurrent life sentences for kidnapping, followed by three concurrent life sentences for sexual battery. R 3200-3202. In sum, his sentences were as follows: the remainder of his sentence for armed trespass, followed by the death sentence, followed by two concurrent life sentences, followed by three concurrent life sentences, followed by five consecutive life sentences for first degree murder (each with a 25 year mandatory minimum).

Under Parole Regulation 23-21.006(3)(b), Gore would not be eligible for a parole interview until eighteen months prior to the expiration of the minimum mandatory [here, 50 year] term. *See also, Weller v. State*, 547 So.2d 997 (Fla. 1st DCA 1989) (no right to proposed parole release date when defendant had various concurrent sentences, one of which carried 15-year mandatory term).

As this Court noted in *Lowry v. Parole & Probation Commission*, 473 So.2d 1248 (Fla. 1985), the Parole Commission has adopted Attorney General Opinion 85-11. Under A.G.O. 85-11, the Commission cannot parole an inmate on a consecutive sentence which he has not yet begun to serve. Since Gore's consecutive life sentences for kidnapping and sexual battery were consecutive to his death sentence, he had never begun to serve them. Therefore, the Commission could not parole him for those offenses.

Although the state was at all times privy to this information, the prosecutor vehemently objected to, and the trial court barred, Gore's argument to the jury that he effectively faced life imprisonment based on these prior sentences. From the very commencement of the penalty retrial proceeding through jury deliberations, the state fought every attempt by the defense to present the jury with an accurate picture of how much time Gore would serve if given a life sentence in this case. It was clearly a feature of the state's case to mislead the jury on this point. Jurors were left with the false impression that the state might release Gore in the year 2008, or even earlier given Mr. Stone's testimony ("any time"), unless he were sentenced to death. As a result, Gore's Eighth and Fourteenth Amendment rights were violated. The initial violation occurred when his jurors were presented with a false picture of his prospects for parole eligibility, and the second occurred when Gore was judicially barred from giving them an accurate depiction of his true situation.

In *Mordenti v. State*, 894 So.2d 161 (Fla. 2004), this Court set forth the three-pronged test necessary to challenge a death sentence based upon *Giglio*:

> To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false and (3) the statement was material. *See Guzman,* 868 So.2d at 505, *Ventura v. State*, 794 So.2d 553, 562 (Fla. 2001), *Rose v. State*, 774 So.2d 629, 635 (Fla. 2001).

Mordenti, supra, at 175.

Based on Mr. Stone's testimony, the jury received a false picture that Gore could be released on parole either at "any time" or 25 years from his date of arrest [and thus within 15 years of the subject re-sentencing]. During deliberations, the jury submitted three written inquiries two of which were directly related to this testimony, clearly indicating its influence on their decision regarding an advisory sentencing recommendation. The second jury question was: "Is the 10 years served go towards the 25 years?" R 3621, 5604. Their third question was: "The standing two life sentences, when and if a parole can occur?" R 3629, 5604.

Prior to responding to the jurors' questions, the trial court entertained argument from counsel. As to the second inquiry, the state argued that Gore received credit "... for all the time that he's been in jail from July 26, 1983." R 3622. The prosecutor, by way of clarification, added:

> This isn't like a case where they're deciding guilt or innocence where the penalty has no part in what they're doing, this is the penalty they want to know before they vote for life without parole for 25 years or death, they want to know is he going to get credit for the time he's already served and they have a right to know that.

R 3623. The trial court asked defense counsel if Gore was entitled to "credit against any sentence that is imposed for the time that he has served commencing

on July 26, 1983." Gore's counsel replied: "As a fact, don't [sic] know that it is true, but it would be disingenuous for me to say that's not true." R 3625. Defense counsel further stated:

> It may be a correct statement of the law, but that's not sufficient to give it. The better argument is that it unduly emphasizes this issue before the Jury by specifically instructing them on that. And therefore, we would ask you just to answer it by saying that you can't answer the question, they have to rely upon the instructions previously given.

R 3627.

The state countered: "This is not covered by the instructions and it is a matter of the law." R 3628-3629. Overruling the defense objection, the trial court instructed the jury as follows: "The defendant recieves [sic] credit for all the time he has served since his incarceration since July 26, 1983." R 3629, 5604.

In response to the jury's third question, the trial court proposed instructing the jury to rely on its memory. The state replied:

> I don't think that is a legal issue anyhow. I know there was some comment that it was. I don't think it is. It's really a discretionary matter. There has been evidence on it. We'd ask the Court to instruct as you just indicated, that they should rely on their own recollection of the evidence.

R 3630.

The state incorrectly contended that the defense had presented the testimony that Gore could be paroled at any time on those offenses. Defense counsel stated that he "... was not sure that the evidence they were given on this issue is a correct statement of the law." R 3630. When defense counsel expressed doubt regarding the accuracy of Stone's testimony, the prosecutor stated: "If we checked, I think we probably find that they can release him now if they wanted to on those sentences, conditional release and everything else." The trial court responded: "I honestly don't know the answer. But my point is Mr. Stone testified on this subject, and whether Mr. Stone correctly stated the law or not, I don't know. But it's in evidence." R 3632. With this, the trial court overruled Gore's objection, and told jurors to rely on their recollection. R 3633, 5604.

There is no question that the false picture presented by the state affected the jury's sentencing decision. The trial judge not only failed to clear up this false impression, but was unconcerned whether or not the jury was relying on a false understanding of the law. In addition to his previously noted comments above, the trial court stated: "I recall testimony on this from Mr. Stone. I'm not commenting one way or the other whether it's a correct statement of the law or what the law is. I'm going to answer the question by telling them they should rely on their own recollection of the evidence." R 3632-3633.

In *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946), the Court defined a trial judge's duty to respond to jury questions during deliberations: "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Given this directive, the trial judge's statement clearly violated Gore's Fourteenth Amendment due process rights.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Court found a violation of due process to exist when the state

> ... raised the specter of petitioner's future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in this view, would not pose a future danger to society.
>
> The logic and effectiveness of petitioner's argument naturally depended on the fact that he was legally ineligible for parole and thus would remain in prison if afforded a life sentence. Petitioner's efforts to focus the jury's attention on the question whether, in prison, he would be a future danger were futile, as he repeatedly was denied any opportunity to inform the jury that he never would be released on parole. The jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested.

Id. at 165-166 (opinion of Blackmun, J., joined by three justices). Justice Blackmun further stated that the state denied Simmons due process because his

jury may reasonably have believed that he could be released on parole if not executed, and because the trial court refused to let the jury know that the defendant was ineligible for parole. *Id*. at 163-164.

Justice O'Connor, joined by two justices concurring in judgment with the majority, wrote that the decision whether to inform the jury of the possibility of early release is generally left to the states. However, she further wrote that when the state seeks to show future dangerousness, the Due Process Clause affords the defendant the right to bring his parole ineligibility to the jury's attention. *Id*. at 176-178. Justice Ginsburg agreed in a separate concurrence. *Id*. at 174. In reaching these opinions, Justices Blackmun, Ginsburg and O'Connor all relied on *Crane v. Kentucky*, 476 U.S. 683 (1986), for the proposition that a defendant has the due process right to meet the state's case against him. *Simmons*, *supra*, at 165.

In the case at bar, Gore was denied his right to meet and refute the state's claim that he could be released at "any time" unless sentenced to death. Although this Court wrote that "defense counsel was free to argue that as a practical matter Gore would spend his life in prison," *Gore v. State*, 706 So.2d 1328, 1333 (Fla. 1997), the record shows just the opposite. At the pretrial hearing, Gore's counsel requested that the trial judge not tell his jury that he was parole eligible in 25 years, but this request was denied. R 4955. Then, at the beginning of voir dire, both the

lower court (R 419) and the state (R 461) informed the venire of Gore's parole eligibility in 25 years. When defense counsel subsequently told prospective jurors that the alternative to a death sentence was a life sentence without mentioning future parole eligibility, the lower court sustained a prosecutorial objection and granted the state's request that the court ". . . require the Defense attorney to say life without possibility of parole after 25 years which is the lawful sentence." R 971-972. The state then elicited the panel's agreement that "unlike what [defense counsel] was saying that he would receive life, . . . the sentence is not life. The sentence is life without eligibility for parole until 25 years, . . ." R 1665.

The trial court also denied Gore's requests that it not instruct the jury regarding parole eligibility in 25 years, and that the state not be allowed to argue this point to the jury. R 3273, 4409. As a result, the state was permitted to represent to the jury that it had to choose between a death sentence or a life sentence with parole eligibility in 25 years. R 3530.

The defense position that Gore would spend his life in prison was met by a successful prosecutorial objection, and therefore that argument was never permitted to be presented to his jury. Accordingly, this is not a case in which the defense ever had an opportunity to rebut the state's misrepresentations concerning parole eligibility. Hence, Gore's death sentence clearly violates the Fourteenth Amendment.

In *Jones v. State*, 569 So.2d 1234 (Fla. 1990), involving two convictions for first degree murder, this Court held that the trial court improperly barred the defendant from arguing that he could receive two consecutive life sentences with 25 year mandatory minimum terms before parole eligibility: "Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders." *Id*. at 1239-1240.

The fact that a defendant is not eligible for parole for 50 years is a mitigating circumstance which can support a life sentence. In *Turner v. State*, 645 So.2d 444 (Fla. 1994), this Court reversed a death sentence, noting that there was ample mitigation, including the fact that "the alternative to the death penalty was two life sentences, which the jury knew would have required Turner to serve a minimum of fifty years in prison before he could be considered for parole." *Id*. at 448. Based upon these decisions, there is no doubt that Gore was improperly denied a fully informed jury with regard to the issue of his future parole eligibility.

> In any capital case a defendant has wide latitude to raise as a mitigating factor any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

In a series of opinions, this Court has steadfastly rejected the concept that lengthy prison time is a mitigating circumstance to be considered by a jury. *See, Franqui v. State*, 699 So.2d 1312 (Fla. 1997); *Marquand v. State*, 641 So.2d 54 (Fla. 1994); *Nixon v. State*, 572 So.2d 54 (Fla. 1990); *and Booker v. State*, 773 So.2d 1079 (Fla. 2000). *Contra*, *Jones v. State*, 569 So.2d 1234 (Fla. 1990). This continued rejection contradicts and violates the decision of the Supreme Court of the United States in *Shafer v. South Carolina*, 532 U.S. 36, 38 (2001), which determined that lengthy prison time is in fact a mitigating circumstance to be considered by the jury:

> Most plainly contradicting the state's contention, the jury's written request for further instructions on the question left no doubt about the jury's failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means...

Justice Ginsburg noted with approval Chief Justice Finney's reasoning in the South Carolina Supreme Court dissent, *id.* at 47 n. 6, where he stated:

> ...[D]ue process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected. Here, the jury's inquiry prompted a misleading response which suggested parole was a possibility. In my opinion, due process mandates reversal....
>
> Further, if the decision whether to inform juries which inquire about parole eligibility is simply one of policy, as

> the majority suggests... then why not adopt a policy which gives the jurors the simple truth....

State v. Shafer, 531 S.E.2d 524, 534 (S.C. 2000).

On direct appeal, Gore argued that his jurors had a false view of his parole eligibility in violation of the Eighth and Fourteenth Amendments. In response, this Court wrote:

> Gore's second argument is that the trial court - through multiple errors - permitted the State to mislead the jury as to his eligibility for parole. Specifically, Gore asserts that in light of his numerous other life sentences, he could not have been considered for parole for at least fifty years if given a life sentence. According to Gore, the jury was misled into believing that Gore was subject to parole either immediately on some of these offenses or at most within fifteen years. As part of this argument, Gore contends that it was error to deny his request to omit possibility of parole twenty-five years from the life sentence instruction. We disagree. The jury was correctly instructed that a life sentence for the murder of Lynn Elliott included eligibility for parole after twenty-five years. Section 775.082(1), Fla. Stat. (1983). [6] It would have been error for the trial court to instruct the jury otherwise.
>
> Also in connection with this argument, Gore posits that the trial court erred in its responses to two questions issued by the jury during deliberations. The first question asked whether, if given a life sentence, Gore would receive credit for the ten years he had already served, to which the court instructed the jury that he would. However, even defense counsel conceded this

[6] The statute was subsequently amended in 1994 to eliminate eligibility for parole for those convicted of first-degree murder. Ch. 94-229, S 1, at 1577, Laws of Fla.

> point at trial. The jury's second question asked if and when parole could occur on these other life sentences. The court instructed the jury to rely on their recollection of the evidence that had been presented. This was not error. The record shows that in its cross-examination of former prosecutor Robert Stone[7] the State elicited testimony that none of Gore's life sentences contained a minimum mandatory sentence.[8] Defense counsel did not object to the line of questioning; thus any objection was waived. We also note that defense counsel was free to argue that as a practical matter Gore would spend his life in prison.
>
> Because Gore points out that error can occur even where there is no actual misstatement of the law, we also note this case is distinguishable from *Hitchcock v. State*, 673 So.2d 859, 863 (Fla. 1996). In *Hitchcock*, the State argued in a re-sentencing proceeding that the defendant would be eligible for parole after twenty-five years if given a life sentence. We held this argument to be improper and unfairly prejudicial because the re-sentencing occurred so close in time to the expiration of the twenty-five year period. In contrast, the State in the present case did not make any such argument, nor was Gore close to meeting the expiration of the twenty-five year minimum mandatory.

Gore, supra, at 1332-1333.

However, even this Court failed to dispute that the prosecution's contention that Gore "could be released at any time" - the only "evidence" before the jury -

[7] Stone was one of the prosecutors in Gore's first trial and in Waterfield's trial.

[8] Gore claims he presented Stone's testimony to illustrate that if Gore was given a life sentence for the murder of Lynn Elliott, he would not be eligible for parole for 50 years. On cross-examination, Stone testified that Gore's five life sentences boiled down to the equivalent of two consecutive life sentences, and that none of his sentences contain any minimum mandatory sentence.

was fundamentally wrong evidence which clearly affected the jury. More egregious is the fact that this false testimony, known by the state to be false, not only went uncorrected but was actually procured by the prosecution. In *Nadue v. Illinois*, 360 U.S. 264 (1959), the Court said, "[T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id*. at 269. The Sixth Amendment right to a jury trial is a fundamental right to which every citizen faced with the possibility of incarceration is entitled. *See, Duncan v. Louisiana*, 391 U.S. 147 (1968). Embodied within this right is the guarantee of a properly instructed, fair and impartial jury. In order to guarantee this right, sentencing juries must be properly instructed on the law and informed with evidence in order to "... maintain a link between contemporary community values and the penal system." *See, Gregg v. Georgia*, 428 U.S. 153, 181 (1976). *See also, Witherspoon v. Illinois*, 391 U.S. 510 (1968).

In rejecting the concept of informing a jury regarding the length of time a defendant would likely serve, this Court has stated:

> These other sentences are not relevant mitigation on the issue of whether appellant will actually remain in prison for the length of those sentences. The length of actual prison time is affected by many factors other than the length of the sentence imposed by the sentencing court. The introduction of this evidence would open the door to conjecture and speculation as to how much time a prisoner serves of a sentence and distract jurors from the

> relevant issue of what is the appropriate sentence for the murder conviction.

Booker v. State, 773 So.2d 1079, 1088 (Fla. 2000).

The jury in the instant case asked the trial court to explain the length of time that Gore would serve on his life sentences. The lower court's response, "to rely on the evidence," introduced precisely the error denounced by the *Booker* Court: the door was opened to conjecture and speculation by the jury based upon the prosecution's false testimony of Gore's release at "any time." This series of events clearly violated the Eighth and Fourteenth Amendments and the rule of law propounded by the Court in *Shafer*, *supra.* As this Court stated in *Guzman v. State*, 868 So.2d 498 (Fla. 2003):

> Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Justice Blackman observed in *Bagley* that the test 'may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.' 473 U.S. at 679-680, 105 S.Ct. 3375.

Id. at 506.

On this basis alone, the death penalty imposed on Gore cannot stand and a new sentencing trial is required. *See, Giglio v. United States*, 405 U.S. 150 (1972); and *Guzman, supra*.

Furthermore, Defendant Gore contends that, by operation of the express provisions of Article I, Section 17, of the Florida Constitution, all decisions of the Supreme Court of the United States which interpret the cruel and unusual punishment clause of the Eighth Amendment apply retroactively in Florida. Article I, Section 17, states in pertinent part as follows:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the Untied States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United State Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. <u>This section shall apply retroactively.</u> [Emphasis supplied.]

POINT II

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT THE DEFENDANT WOULD BE REQUIRED TO SERVE 50 YEARS BEFORE HE WAS ELIGIBLE FOR PAROLE CONSIDERATION.

In the case at bar, Gore was denied his right to meet and refute the state's claim that he could be released at "any time" unless sentenced to death. Although this Court wrote that "defense counsel was free to argue that as a practical matter Gore would spend his life in prison," *Gore v. State*, 706 So.2d 1328, 1333 (Fla. 1997), the record shows just the opposite.

Prior to Gore's re-sentencing proceeding, defense counsel moved the trial court to tell the jury that the sentencing alternatives were either a death sentence or a life sentence without the possibility of parole. R 4946-4956. Defense counsel argued that the Eighth Amendment requires "truth in sentencing," and that Gore's jury needed to understand the sentencing alternatives. R 4948. Defense counsel further argued that Gore, in effect, was facing a life sentence without possibility of parole because he could not live long enough to serve out all of his consecutive sentences, reiterating that "we're relying on the Eighth Amendment in truth in sentencing." R 4952. In response, the state told the trial judge:

> The fact of the matter is, that after serving twenty-five calendar years under the statute as it is today, this man would be eligible for parole under this crime.
> * * * * * * * *
> But as far as this case is concerned, under the law as it is today, he is eligible for parole after twenty-five years; that is the law. And they are not being honest with you when they tell you that under the statute or under this crime, he can not be eligible for parole.

R 4954, 4956.

The trial court, persuaded by the prosecutor's argument, denied the defendant's motion in limine. R 4955.

The trial court later denied Gore's requests that it not instruct the jury regarding parole eligibility in 25 years, and that the state not be allowed to argue this point to the jury. R 3273, 4409. As a result, the state was permitted to represent to the jury that it had to choose between a death sentence or a life sentence with parole eligibility in 25 years. R 3530.

Under Parole Regulation 23-21.006(3)(b), Gore would not be eligible for a parole interview until eighteen months prior to the expiration of the minimum mandatory [here, 50 year] term. *See also, Weller v. State*, 547 So.2d 997 (Fla. 1st DCA 1989) (no right to proposed parole release date when defendant had various concurrent sentences, one of which carried 15-year mandatory term).

The fact that a defendant is not eligible for parole for 50 years is a mitigating circumstance which can support a life sentence. In *Turner v. State*, 645 So.2d 444 (Fla. 1994), this Court reversed a death sentence, noting that there was ample mitigation, including the fact that "the alternative to the death penalty was two life sentences, which the jury knew would have required Turner to serve a minimum of fifty years in prison before he could be considered for parole." *Id*. at 448.

> In any capital case a defendant has wide latitude to raise as a mitigating factor any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

The trial court then refused to give Gore's proposed jury instruction 31, which listed 16 factors (including future parole ineligibility) for consideration in mitigation. R 4444. The trial court should have modified that instruction to clearly explain to the jury that Gore could not be considered for parole for 50 years. When the state argued that the "catch-all" standard instruction covered this matter, defense counsel replied: "... Judge, when we just give the standard jury instruction or any other circumstance of the defendant's background, that does not give the meaningful effect that's required by the Eighth Amendment, and that's why we're asking for this specific, and that's why we're going to ask for specifics with respect to 30 [sic]." R 3315-3316 (apparently as a result of a typographic

error, the transcript sometimes refers to proposed instruction 31 as "30"). The judge denied this request. R 3360-3362.

Instead, over defense objection, R 3410-3411, the trial court instructed the jury pursuant to the standard instruction:

> ... Among the mitigating circumstances you may consider if established by the evidence are: [recitation of two statutory circumstances]
> Third any other aspect of the Defendant's character or record and any other circumstance of the offense.

R 3614.

That instruction is simply inadequate given the facts of this case.

The Supreme Court noted that, although the trial court found no statutory mitigation, it "... found the following nonstatutory mitigating circumstances: (1) Gore's exemplary conduct while in prison, his past conduct as a model prisoner, his capacity to be one in the future, and his ability to live in prison without being a threat or danger to others; (2) Gore's impoverished childhood; (3) Gore's exemplary conduct during the re-sentencing proceeding; (4) Gore's depression at the time of the offense; and (5) Gore's love for his children and his separation from them." *Gore v. State*, 706 So. 2d 1328, 1331-1332.

Gore contended to the trial court and to this Court on appeal that jurors did not consider this mitigating evidence, because they did not receive proper instruction from the trial court. This failure on the part of the trial court

specifically to instruct the jury as to the mitigating factor of 50 years without possibility of parole rendered Gore's advisory jury constitutionally unreliable. As a result of this error on the part of the trial court, Gore's Eighth and Fourteenth Amendment rights were violated when he was judicially barred from giving his jury an accurate depiction of his true likelihood of parole situation. Accordingly, a new sentencing trial is required.

POINT III

EX PARTE COMMUNICATIONS BETWEEN PROSECUTOR AND TRIAL JUDGE WERE IMPROPER AND REQUIRE A NEW SENTENCING TRIAL.

The penalty phase retrial in this case began on Monday, November 9, 1992. On Saturday, November 21, 1992, the jury returned an advisory verdict in favor of death. Prior to Friday, December 4, 1992, in an ex parte communication, the trial court requested that the prosecuting assistant state attorney prepare findings of fact and conclusions of law that comported with the Supreme Court's requirements in death cases. On Friday, December 4, 1992, the prosecutor furnished a lengthy letter to the court, detailing extensive findings on aggravating and mitigating circumstances. R 4547- 4556. A "cc" notation at the bottom of this letter indicated that a copy was sent to one of the two defense counsel. Gore's attorney, Robert Udell, in his affidavit attached to the Amended Motion for Post-Conviction Relief (CP 248-313), denied any knowledge or receipt of such a letter. As a result, no defense sentencing memorandum or proposed order was ever submitted. Had Gore's counsel received a copy of this letter, he also could have furnished the trial judge with a memorandum of proposed findings relative to aggravators and mitigators.

Four days later on Tuesday, December 8, 1992, at the sentencing hearing imposing the death penalty, the trial court entered its findings on aggravating and mitigating circumstances, lifting verbatim or nearly verbatim great portions of the prosecutor's ex parte letter and including them in the sentencing order imposing death. These documents were also attached to Gore's Amended Motion for Post-Conviction Relief. R 4563-4577, CP 248-313. This action by the trial court violated the rule in *Rose v. State*, 601 So.2d 1181 (Fla. 1992), and *Smith v. State*, 708 So.2d 253 (Fla. 1992), as well as *Canon 3A(4), Florida Code of Judicial Conduct*.

The Supreme Court has repeatedly stressed:

> ... a trial judge's weighing of statutory aggravating factors and statutory and non-statutory mitigating circumstances is the essential ingredient in the constitutionality of our death penalty statute.

Porter v. State, 723 So.2d 191, 196 (Fla. 1998). This Court requires detailed written orders setting forth the trial judge's weighing analysis utilized to support imposition of a death sentence. *See, Walker v. State*, 707 So.2d 300 (Fla. 1997); *and Campbell v. State*, 571 So.2d 415 (Fla. 1990).

Here the ex parte proposed findings from the prosecutor are in many respects identical to the findings of the trial judge. As a result, this Court cannot distinguish whether these findings are those of the trial judge or those of the

prosecutor. Thus, in this case, this Court did not discharge its constitutionally mandated proportionality review function in death cases, because the authorship of "the detailed written order" is in dispute. Imposition of Gore's death sentence under these circumstances is arbitrary and cannot withstand constitutional scrutiny.

The perception of "the cold neutrality of an impartial judge", *State ex rel. Davis v. Parks*, 194 So.2d 613, 615 (Fla. 1939), is of particular constitutional moment when imposing a death sentence:

> ... so far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for ... procedural fairness.... I do not concede that whatever process is 'due' an offender faced with a fine or prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, or is it negligible, being literally that between life and death.

Reid v. Covert, 354 U.S. 1 (1957) (Harlan J., concurring).

In *Arbelaez v. Butterworth*, 738 So.2d 326, 331 (Fla. 1999), Justice Anstead stated in his concurring opinion, "Our adversarial system of justice depends almost entirely upon the procedural fairness and integrity of the process."

In *Rose, supra*, 601 So.2d 1181 (Fla. 1992), a death case, the prosecutor furnished the trial judge with a draft order denying the defendant's Rule 3.850 Motion. However, defense counsel was not given notice of receipt of the order by the court, a chance to review it, or an opportunity to object to its contents. The

Court, condemning the ex parte communications of judges who call upon only one party and direct that party to prepare a proposed order for the judge's signature, stated:

> The judiciary ... has come to realize that such a practice is fraught with danger and gives the appearance of impropriety.

Rose, supra, at 1183. *See also, Steven Lubet, Ex Parte Communications: An issue in Judicial Conduct*, 74 Judicature 96, 96-101 (1990), and *Canon 3A(4), Florida Code of Judicial Conduct*.

In *Smith, supra*, Frank Smith, a defendant sentenced to death, also filed a Rule 3.850 Motion. At a hearing, the presiding judge testified that he had asked the prosecutor, on an ex parte basis, to prepare an order denying relief and had engaged in additional ex parte conversations about one of the findings in the proposed order.

This Court reversed, stating: "[A] judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation." *Smith, supra*, at 255. [Footnote omitted.] The *Smith* Court also noted:

> We reject the State's argument that Smith's due process rights were not violated by the ex parte communications because he had ample opportunity to object to the substance of the proposed Order.

Smith, supra, at 225. Therefore, an ex parte communication in a death case that deals with any subject other than strictly administrative matters is a serious due process violation requiring, as in this instance, a new sentencing trial.

An additional ex parte communication occurred in this case on February 17, 1992, when the prosecutor filed a document entitled *Ex Parte Motion to Appoint Counsel, Transport the Defendant and Set Case for Pre-Sentencing and Sentencing Hearing*. R 4004-4008. As a result of this ex parte motion, Judge Wild, Judge Vaughn's predecessor in this case, entered several orders including: an Order Appointing Public Defender, R 4008; an Order Setting Hearing Date March 2, 1992, R 4009; and an Order to Transport Defendant, R 4010.

Arguably, the Order to Transport Defendant is administrative in nature. However, the other orders regarding appointment of counsel and setting a time for a pretrial hearing are clearly not "strictly administrative." "Thus, if all parties are not involved in setting the case, it will be assumed that there was an ex parte communication with the judge in order to obtain the time." *See, Rose v. State*, 601 So.2d 1181, 1184 (Fla. 1992) (Justice Harding, concurring). Both of these orders involved important stages of the proceeding, and Gore should have been allowed to participate. Had Gore been present at the hearing to appoint counsel, the fact that this appointed public defender had previously represented Freddy Waterfield, Mr. Gore's co-defendant, could have been discovered immediately. This actual

conflict of interest which caused counsel to withdraw, may have been avoided. In addition, the participation of both sides in setting a pretrial hearing was extremely important. The ex parte setting of the pretrial conference, to occur a few days after the ex parte order, heightened the potential for an unfair penalty trial (a proceeding which ultimately lasted two weeks). More to the point, such practice is destructive to the appearance of impartiality. "We are not here concerned with whether an ex parte communication *actually* prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question." *Rose, supra,* at 1184. *See also, Smith v. State,* 708 So.2d 253 (Fla. 1998).

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

Rose, supra, at 1183.

An example of the destruction of the appearance of impartiality in this case can be seen in Exhibit 4 to Gore's Amended Motion for Post-Conviction Relief. CP 248-313. In this document taken from the state's file, both a secretary and a prosecutor refer, in writing, to the trial judge as "Dan." Such informality and familiarity between the state attorney's office and the trial court destroys the concept of cold impartiality.

All capital litigation is particularly unique, complex and difficult. Ex parte communications between judge and prosecutor undermine the perception of rigorous fairness demanded in these cases. In the case at bar, Mr. Gore's due process rights were clearly violated by such a practice. In order fully to explore the nature and pervasiveness of these ex parte communications, Gore needed to depose Judge Vaughn; the former prosecutor David Morgan, now Judge Morgan; as well as the defense attorneys, Mr. Udell and Mr. Nickerson. *See*, *Davis v. State*, 624 So.2d 282 (Fla. 3rd DCA 1993), *and Smith v. State*, 708 So.2d 253 (Fla. 1998). Therefore, this Court should vacate Gore's death sentence and order another sentencing retrial in this case.

POINT IV

THE LOWER COURT ERRED IN ITS DENIAL OF GORE'S MOTION TO DISQUALIFY THE TRIAL JUDGE BECAUSE HE WAS A MATERIAL WITNESS TO THE EX PARTE COMMUNICATIONS.

Gore, in the preparation and drafting of his Motion for Post Conviction Relief, incorporated an argument alleging that an ex parte communication had occurred between the trial judge and the prosecutor. CP 95-100. Pursuant to Rule 2.160(d)(2), Fla. R. Jud. Admin., Gore immediately filed a motion to disqualify the judge appointed to the collateral proceedings, on the basis that he was the same judge who presided over the sentencing retrial and engaged in the improper ex parte communications. CP 95-100. Part of the relief sought in this motion was further discovery on the issue. CP 100. Gore requested that he be allowed to depose the presiding Circuit Judge below, the Honorable Dan L. Vaughn, and the penalty phase retrial prosecutor, now-County Court Judge, the Honorable David Morgan. CP 100.

On October 14, 1999, Judge Vaughn denied Gore's motion for disqualification, without a hearing and without requiring a responsive pleading from the state. CP 191. The lower court then denied Gore's ex parte argument without an evidentiary hearing or any discovery and, in so doing, made factual findings that the claim was meritless. CP 698-699. In other words, Judge Vaughn

first prevented the taking of his own deposition by denying the motion to disqualify himself, and then made findings of fact that Gore's ex parte claim was without merit. This was error.

Rule 2.160(d)(2), Fla. R. Jud. Admin., provides in pertinent part:

> A motion to disqualify shall show:
> ... that the judge is a material witness for or against one of the parties to the cause.

The lower court denied Gore's motion for disqualification due to legal insufficiency, although the motion clearly referenced the ex parte argument made in the Rule 3.850 motion and further stated: "... Judge Vaughn is a material witness and will testify directly upon the issue of ex parte communications." CP 91. Judge Vaughn's recitations denying the ex parte argument in his *Huff* order are the equivalent of his testimony untested by confrontation or cross examination:

> ... The Court listened to the argument of both parties at the penalty phase retrial.... It is apparent that the Court independently weighed the aggravating and mitigating circumstances to determine what penalty should be imposed. Therefore, this claim is without merit.

CP 699.

These statements have never been tested by examination of counsel, nor can they be without discovery or the opportunity to determine the facts. The trial court also specifically found that the ex parte allegations were admittedly conclusory, as they

must be until some discovery occurs. CP 698. Nevertheless, often conclusory allegations are important. As Justice Harding stated:

> ... [I]f all parties are not involved in setting the case, it will be assumed that there was an ex parte communication with the judge in order to obtain the time.

Rose v. State, 601 So.2d 1181, 1184 (Fla. 1992), Harding concurring.

Further, attached to Gore's Rule 3.850 motion is the affidavit of Robert Udell, Esq., the defense attorney at the resentencing trial, in which he stated under oath:

> ... I was not informed that I could present the trial judge with proposed findings of fact and conclusions of law appropriate in this case. CP 152.
>
> ... I was unaware that the Court had requested such findings from the prosecution and I have no recollection of ever receiving the State's proposed findings dated December 4, 1992. CP 153.

No proposed findings of fact or a sentencing memorandum from the defense are in the record.

In this case, Gore's basis for his motion to disqualify was that Judge Vaughn was a material witness. There were no allegations of judicial bias. The material witness provision of Rule 2.160(d)(2), *supra*, requires a statement of the manner in which the judge's testimony may be relevant. Obviously, when exploring the issue of an ex parte communication, all parties to the communication are material

witnesses with regard to relevant information. Judge Vaughn's findings in the *Huff* order denying Gore's ex parte communication argument without a hearing are, from an evidentiary point of view, equivalent to material testimony. Therefore, the trial court judge should have recused himself from the collateral proceeding, and thereafter discovery and an evidentiary hearing should have been held on this issue.

POINT V

INEFFECTIVE ASSISTANCE OF COUNSEL RENDERED THE RESULT OF THE PENALTY RETRIAL BELOW "UNRELIABLE" WITHIN THE MEANING OF *STRICKLAND v. WASHINGTON*, 466 U.S. 668 (1984).

In order for the Defendant to prevail and obtain new trial on sentencing, he must show that his counsel's acts or omissions "... fall outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 688, 687-688 (1984). In a penalty phase context, Defendant Gore must establish that counsel's conduct was deficient and that his defense was prejudiced as a result. In *Gaskin v. State*, 737 So.2d 509 (Fla. 1999), this Court specifically addressed the penalty phase:

> Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *Robinson*, 707 So.2d at 695.

Gaskin, supra, at 516 n. 14.

As set out in detail below, Defendant Gore clearly established that he was prejudiced due to his counsel's deficient performance.

A

THE DECISION TO CALL AS A DEFENSE WITNESS THE FORMER STATE ATTORNEY WHO PROSECUTED THIS DEFENDANT, AND COUNSEL'S FAILURE TO MAKE ANY EFFORT TO DETERMINE WHAT HIS TESTIMONY WOULD BE, WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

The decision to call Robert Stone as a witness for the defense was made before the start of the trial on November 9, 1992. CP 825. Robert Stone was the former state attorney who had personally handled the prosecution of Defendant Gore in 1984. This decision was apparently made in an attempt to inform the jury of the following facts: that Gore's co-defendant, Waterfield, had been convicted of manslaughter on the same facts in a separate prosecution; that Waterfield had received a sentence other than death; that the state had offered Gore a plea bargain for life in prison; and that Gore would never actually be released from prison due to his consecutive life sentences.

Prior to subpoenaing Mr. Stone, both Mr. Udell and Mr. Nickerson, Gore's defense counsel, were aware that Stone believed the reason that Gore's co-defendant was not convicted of first degree murder was because Gore welched on his plea agreement and refused to testify against Waterfield at trial. CP 827. Both defense attorneys were well aware that Mr. Stone held a grudge against Gore. CP 791. Mr. Stone later testified that he had no inkling why the defense had called

him to testify in this case. CP 827. On the same subject, Mr. Udell later testified that the decision to call Stone was " . . . [s]urprising then and it's probably unusual now." CP 792.

Gore's penalty retrial prosecutor met with Stone after he learned that Stone had been subpoenaed by the defense. CP 826. The two of them agreed that the prosecutor would question Stone on cross examination about when Gore could be released on the life sentences for kidnapping and rape. CP 826. In contrast, Gore's defense counsel did no investigation and made no inquiry of Stone, by discovery deposition or even a simple witness interview, to determine what his testimony would be. Defense counsel simply and blindly called Gore's former prosecutor as a witness. CP 825, 827. As a result of this flawed decision, complete absence of basic preparation and subsequent failure to make any objections during Stone's cross examination, defense counsel opened the door which permitted the prosecution impermissibly to play upon the jurors' fear that Gore would be released to rape and kill again if he were only given a life sentence.

This Court has repeatedly stated that "[t]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002), *and cases cited therein*.

The constitutional concern in these matters is whether the investigation supporting counsel's decision was itself reasonable. This decision must be measured for reasonableness "under prevailing professional norms which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. State*, 539 U.S. 510, 522-523 (2003). In *Strickland*, *supra*, the Court said:

> Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary.

Id. at 691.

It is a violation of professional norms to call as a witness at the penalty phase retrial in a death case the state attorney who originally prosecuted the defendant, without conducting any prior investigation as to his potential testimony. There is no question that this significant breach on the part of Gore's defense counsel amounted to ineffective assistance of counsel.

At the commencement of jury selection, the trial court instructed potential jurors that they were to render "an advisory sentence as to whether the Defendant should receive the death penalty or life imprisonment without the possibility for parole for 25 years." R 419. The state prefaced its voir dire questioning with a lecture during which it told the venire that there were only two possible sentences

for Gore: "One is life without consideration for parole for at least 25 years, and the other is death in the electric chair.... So it will be up to this jury to make a recommendation to the Judge as to whether or not this Defendant should be sentenced to life without possibility of parole for 25 five [sic] years or death."

R 461.

Juror responses during voir dire reflected a material misunderstanding of their choices: that their recommendation was to be either a death sentence or a sentence of 25 years. When the state asked Juror Maynard if the fact that Gore was guilty would affect her recommendation that he "be sentenced to life without parole for 25 years or death," she replied:

> MS. MAYNARD: Since, he's guilty and sentence is what they are, I don't think I have any problem.
>
> MR. COLTON: Thank you.
>
> MS. MAYNARD: Since he's serving 25 years anyway.
>
> MR. COLTON: Okay. Thank you.

R 853-854.

Similarly, Juror Agostini thought the sentencing choice was between "going to the electric chair or to 25 years in prison." R 782.

After three days of voir dire, Juror Kramer was informed by her husband that Gore's trial involved a sexual battery. She then disclosed to the trial court that

she had been raped at knifepoint by a criminal who had been released after serving only six years of a 20 year sentence. R 1164. Obviously, given these facts, the issue of parole eligibility would be of considerable importance to Juror Kramer.

The dissent in *Gore, supra,* at 1340, noted that Juror Kramer, in particular, was plainly (albeit understandably) prejudiced based on her own experience as a victim. Justice Shaw, in his dissenting opinion with Justice Anstead concurring, found that Juror Kramer should have been excused from the case for several reasons:

> (1) she violated the court's order by discussing the case with her husband; (2) her responses regarding her ability to be impartial were equivocal; and (3) it is clear that from the record that Ms. K. was ... bothered by the fact that her assailant who received a twenty-year sentence only served six. Once he was released, he apparently raped again; 'they let him out and he did it again.' A juror with these concerns should not be sitting on a case where she is called upon to determine whether the defendant, a convicted rapist, should be sentenced to life without parole for twenty-five years or death.

Id. at 1340.

In addition, three other jurors were biased against mitigation. Juror Arcomone said her decision would be based upon what the person did, and that she would not consider mitigating factors based upon her long-standing view in favor of the death penalty. R 1249-52. Juror Donithan thought the death penalty should be used more often, and it "could be touch and go" whether or not he could

recommend a life sentence. R 761. He would follow the law "as well as I could." R 762. However, without hearing any aggravating evidence, he would vote for death. R 1261. Juror Tobin felt that an impoverished background should not be considered as mitigation. R 1033.

In review of the voir dire of those jurors whom Gore's counsel sought to excuse for cause, the majority opinion of this Court stated: "Although they expressed certain biases and prejudices, each of them also stated that they could set aside their personal views and follow the law in light of the evidence presented. [Citations omitted.]" *Gore, supra,* at 1332. Justice Shaw, in his dissent, chronicled a significant number of cases in which convictions were set aside due to the trial court's failure to strike equivocal jurors for cause:

> In the following instances, potential jurors gave equivocal verbal answers regarding their ability to be impartial, and it was held to be error for a trial judge to refuse to strike them for cause: 'I would like to try,' *Gill v. State*, 683 So.2d 158, 160 n.1 (Fla. 3rd DCA 1996); 'I hope that I can,' *Williams v. State*, 638 So.2d 976, 978 (Fla. 4th DCA 1994); 'I think I can,' *Jones v. State*, 660 So.2d 291, 292 (Fla. 2d DCA 1995); 'I could do it,' *Prince v. State*, 538 So.2d 486, 489 (Fla. 3rd DCA 1989); 'I believe so,' *Cogging v. State*, 667 So.2d 926, 927 n.2 (Fla. 3rd DCA 1996); "and I would try," *Auriemme v. State* , 501 So.2d 41, 42 (Fla. 5th DCA 1986).

Gore, supra, at 1338 n.12, *Shaw in dissent.*

The test for impartiality was succinctly stated in *Hill v. State*, 477 So.2d 553 (Fla. 1985):

> When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause. *See, Thomas v. State*, 403 So.2d 371 (Fla.1981).

Hill, supra, at 556. *See also, Williams v. State*, 638 So.2d 976 (Fla. 4th DCA 1994). In its earliest cases, this Court expressed the view that "... jurors should if possible be not only impartial, but beyond even the suspicion of partiality," *O'Connor v. State*, 9 Fla. 215, 222 (1860), and that "[i]f there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused." *Johnson v. Reynolds,* 97 Fla. 591, 121 So. 793, 796 (1929).

With the exception of Juror Tobin, Gore's counsel challenged all of these equivocal jurors for cause. When his challenges were denied by the trial court, he requested additional peremptory challenges, all of which were denied except one, which was used to strike another objectionable juror. *Gore, supra,* at 1332 n. 4; 1340 n. 14. However, in light of the testimony elicited by the prosecutor from Mr. Stone, Gore was left with a biased jury uniquely susceptible to the state's arguments regarding Gore's future dangerousness and parole eligibility.

On direct examination during the penalty retrial, Mr. Stone testified that Gore's two life sentences for kidnapping were to be served concurrently, and the three life sentences for sexual battery were to run consecutively to the other two life sentences. R 3200-3202. Without objection from defense counsel, Robert Stone, the former prosecutor in Gore's original trial, testified during cross-examination by the state as follows:

> Q. Let's break that down, Mr. Stone. Basically you are saying that of the life sentence it adds up to basically one life sentence followed by another life sentence?
>
> A. That's correct.
>
> Q. Two live [sic] sentences?
>
> A. Two life sentences.
>
> Q. And he is subject to parole; is that correct?
>
> A. Yes.
>
> Q. When could he receive parole?
>
> A. I guess any time.
>
> Q. Who is that up to?
>
> A. Probation and Parole Commission.
>
> Q. All right. People in Tallahassee?

A. Seven member board in Tallahassee.

R 3203.

Gore's counsel failed to object to this factually and legally incorrect testimony, and at no time thereafter did the prosecutor correct Mr. Stone's false testimony. This Court noted in its opinion that the failure on the part of defense counsel to lodge an objection resulted in a waiver of this issue on appeal. *Gore, supra*, at 1333. Quite disturbingly, on Page 3 of the lower court's Order on Evidentiary FRCrP 3.850 Hearing (the order on review here), the trial court stated that, "Even if Gore's counsel had objected it would have been overruled by the trial court." CP 985-990. The clear result of this chain of events is that the trial lawyer's failure to object, thereby creating the waiver, is, itself, ineffective assistance of counsel.

This error was further compounded by the fact that Mr. Stone's inaccurate and false testimony that Gore could be released at "any time" was the <u>only</u> testimony presented to the jury with regard to parole eligibility. Mr. Stone later testified at the evidentiary hearing below that he did not know what the rules, regulations or guidelines of the Parole Commission were, either at the time of the original trial or at the time of the penalty phase retrial. CP 829, 830. However, defense counsel failed to call any witness who, with knowledge and authority, could correctly testify as to Gore's actual parole eligibility in this case. R 1335.

Had Gore's counsel called a qualified witness from the Parole Commission, the defense could have established that Gore was ineligible for parole consideration until he served 50 years, and he would not even have been granted a parole interview until eighteen months before expiration of those 50 years. Sections 947.16(2)(g) and (3), Florida Statutes. *See also,* Parole Regulation 23-21.006.

Thus, Robert Stone's false testimony, which was never objected to or rebutted by Gore's counsel, unduly prejudiced a jury already susceptible to the prosecutor's argument with regard to Gore's future dangerousness. Gore's jury was further swayed by the state attorney's improper final argument during which he stated:

> You know, based on what the Defense lawyer said in his questioning of this jury panel the first couple of days and what he said in his opening statement, the Defense will no doubt try and play on your sympathy. They'll tell you that if you give him life without parole without the possibility of parole for 25 years that he'll never get out of prison. I submit that that's what he's going to stand here and tell you. That he'll never get out of prison. That there's been enough tragedy already and that another death won't bring back Lynn Elliott and won't solve anything.
>
> Ladies and gentlemen, David Allen Gore has no right to stand here through his lawyer and ask for that. He has no right - [Emphasis supplied.]

Although defense counsel objected, the trial court overruled the objection and deemed this to be "proper argument." R 3583.

During deliberations, it became apparent that Mr. Stone's testimony had considerable impact on the entire jury, as their questions to the trial court demonstrated:

Question Number Two asked:

> Is the 10 years served go towards the 25 years? R 5604.

The trial court answered this question as follows:

> Question Number 2. The Defendant recieves [sic] credit for all the time he has served since his incarceration since July 26, 1983. R 5604.

Question Number Three asked:

> The standing two (2) life sentences when and if parole can occur? R 5604.

The trial court answered this question as follows:

> Question Number 3. The jury should rely on their own recollection of the evidence. R 5604.

In his argument to the trial judge concerning the proper response to be given to the jury in response to Question Number Two, defense counsel objecting to the court's proposed instruction on the basis that it inaccurately, and therefore unfairly, over-emphasized Gore's parole eligibility, thus favoring death as a sentencing recommendation. However, the argument by defense as to the proper instruction to be given in response to Question Number Three clearly revealed the ineffectiveness of Defendant's counsel:

MR. UDELL: Judge, the problem with the instruction as given is that I'm not sure that the evidence they were given on this issue is a correct statement of the law.

THE COURT: Well, it was in evidence, whether it's right or wrong, it's evidence and we can't change that.

MR. MORGAN: It was elicited by Defense lawyer.

MR. UDELL: Had somebody said on this stand he's not eligible - he's not eligible for time served, had that been the evidence and we're in that position, and No. 2 came up, I think the State would say, Judge, tell them to rely on the evidence, they heard the law.

MR. MORGAN: Object at this point.

MR. UDELL: I realize that, but now you're telling them to rely on what Mr. Stone tells us the law is.

THE COURT: He testified as a witness.

MR. UDELL: I realize that but that's not the law. It may not be the law.

MR. MORGAN: Judge, they elicited that testimony themselves.

MR. NICKERSON: Judge, it's the law that he's eligible on both lifes immediately right now or because they're running consecutive that he becomes - he's eligible on the first one right now, but he would have to make parole on that one before - that the only.

> MR. MORGAN: If we checked, I think we probably find that they can release him now if they wanted to on those sentences, conditional release and everything else.
>
> THE COURT: I honestly don't know the answer. But my point is Mr. Stone testified on this subject, and whether Mr. Stone correctly stated the law or not, I don't know. But it's evidence.
>
> MR. UDELL: Judge, the understatement from the defense we registered our objections to that ruling and ask you to rule. [sic]
>
> THE COURT: Any other comment?
>
> MR. COLTON: Judge, there was testimony on this issue elicited by the Defense through a witness called by the Defense and the Jury should rely on what they heard during the testimony. The can accept it or reject it.
>
> THE COURT: I recall testimony on this from Mr. Stone. I'm not commenting one way or the other whether it's a correct statement of the law or what the law is. But there was testimony. I'm going to answer the question by telling them they should rely on their own recollections of the evidence.

R 3630-3633.

This Court, in the direct appeal of the reimposition of the death sentence, explicitly recognized defense counsel's error:

> The original purpose in calling Robert Stone was to verify that Gore's co-Defendant Waterfield was only convicted of manslaughter not first degree murder, thereby permitting defense counsel to assert

> disproportionality at opening statement. *Gore supra*. Also in connection with this argument, Gore posits that the trial court erred in its responses to two questions issued by the jury deliberations. The first question asked whether, if given a life sentence, Gore would receive credit for the ten years he had already served, to which the court instructed the jury that he would. However, even defense counsel conceded this point at trial.
>
> The jury's second question asked if and when parole could occur on these other life sentences. The court instructed the jury to rely on their recollection of the evidence that had been presented. This was not error. The records shows that in its cross-examination of the former prosecutor Robert Stone, the State elicited testimony that none of Gore's life sentences contained a minimum mandatory sentence. Defense counsel did not object to the line of questioning; thus any objection was waived. [Emphasis supplied.]

Gore, *supra*, at 1333 (footnotes omitted).

In summary, the following action and inaction, of defense counsel amounted to ineffective assistance of counsel within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984):

(1) the decision to call Gore's original prosecutor without any preparation for or knowledge of his anticipated testimony;

(2) the failure to object to false testimony elicited by the state from this witness during cross examination; and

(3) the failure to call any witness to rebut Stone's testimony and to inform the jury of Gore's ineligibility of parole for a minimum of 50 years.

This series of *Strickland*[9] violations produced a *Giglio*[10] violation by the state, when it knowingly presented false testimony material to the outcome of defendant's penalty phase retrial and failed to correct it. As this Court stated in *Guzman v. State*, 868 So.2d 498 (Fla. 2003):

> Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Justice Blackman observed in *Bagley* that the test 'may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.' 473 U.S. at 679-680, 105 S.Ct. 3375.

Guzman, supra.

The events outlined above were sufficient to "undermine the confidence in the outcome" of Gore's penalty phase re-trial. It cannot be said, based upon this record, that there was no reasonable likelihood that such false testimony could not

[9] *Strickland v. Washington*, 466 U.S. 688 (1984).

[10] *Giglio v. United States*, 405 U.S. 150 (1972).

have affected the deliberations and decision of Gore's prejudiced jury. Therefore, the death penalty imposed in this case was the product of "a breakdown in the adversary process that renders the result unreliable." *Strickland, supra*, at 687.

B

FAILURE TO DISCOVER AND EXPOSE TO THE JURY FINANCIAL BIAS AND EXORBITANT FEES CHARGES BY THE STATE'S MENTAL HEALTH EXPERT WAS INEFFECTIVE ASSISTANCE OF COUNSEL

At the evidentiary hearing below, Attorney David Chestnut testified that Mr. Nickerson's cross examination of Dr. McKinley Cheshire, the state's mental health expert, fell below the standard of care when defense counsel failed to inquire into the financial bias of Dr. Cheshire (CP 941) and how frequently this expert testified for the prosecution as opposed to the defense. CP 944. Mr. Chesnut stated: "I think it's not only basic, it's very basic." CP 944. On cross examination by the prosecution, Mr. Chestnut made it clear that these same rules apply in both criminal and civil cases. CP 948. This was true regardless of the fact that Gore's penalty phase retrial occurred prior to this Court's definition of the applicable standard of care in *Elkins v. Syken*, 672 So.2d 517 (Fla. 1996). CP 943. At the time this testimony was given, Mr. Chestnut, whose office is located in the Nineteenth Circuit, had been a Board Certified civil trial lawyer for more than ten

of the 22 years he had been practicing law. A significant portion of his practice involved legal malpractice claims. CP 938-939.

While competing experts in civil trials is no novelty, the imposition of the death penalty is a much weightier matter. Finding the "killer" expert may be zealous advocacy, but failure on the part of opposing counsel to expose how much that expert was paid to the jury is ineffective assistance of counsel that can lead to erroneous findings rendering the result unconstitutional.

Dr. McKinley Cheshire, M.D. was the mental health professional hired by the state. His employment began October 26, 1992, and ended November 1, 1992. The motion for payment of his fees appears in the record. R 4709. However, his bill setting forth his hours does not appear in the record even though the motion recited that it was attached. The bill sought payment in the amount of $27,476.25. The State Attorney's file contained the bill itself which was attached to Gore's Rule 3.850 motion as Exhibit 5. CP 184. Dr. Cheshire gave a deposition, examined Gore one time, and then testified in court at the sentencing trial. His actual bill for these services was $33,375 reduced 15% by him to $27,476.25. CP 184. The trial judge entered an order March 9, 1993, requiring the Board of County Commissioners of Indian River County to pay Dr. Cheshire's bill. R 4724-4725. Apparently, the Assistant State Attorney was so alarmed by Dr. Cheshire's

bill that he drafted a memorandum to the State Attorney in order to justify its payment. CP 186-188.

Gore's counsel hired two mental health experts to testify on his behalf. Michael Maher, M.D., was deposed, examined Gore, and testified at the penalty phase retrial. R 4728-4729. Dr. Maher's bill was $6,776.50. Dr. Peter M. Maculuso who reviewed records and testified at trial submitted a bill for $4,808.45. R 4732-4733. The trial court approved payment to these two defense experts pursuant to stipulation by the attorneys on April 5, 1993. R 4736-4737.

In order for the jury to evaluate Dr. Cheshire's bias and credibility, Gore's jury was entitled to know that his fee was disproportionately exorbitant in comparison with those of the defense mental health experts. Defense counsel made no effort either at Dr. Cheshire's deposition or during cross examination at trial to elicit testimony regarding the particulars of his bill. Nor did defense counsel ask any questions of Dr. Cheshire to determine whether or not he regularly testified as an expert for the state, or how much money he had been paid for prosecution-related services in the relatively recent past. *See, Elkins v. Syken*, 672 So.2d 517 (Fla. 1996), *and Orkin v. Knollwood*, 710 So.2d 697 (Fla. 5th DCA 1997). At the evidentiary hearing, Mr. Udell testified that he knew Dr. Cheshire "very well" (CP 802) and that his reputation was "pro-prosecution." CP 802, 803.

Such basic, routine information can be very useful in demonstrating bias on the part of a witness. Use of expert opinion testimony to influence jury decisions is not a novel concept. Failure to reveal critical evidence concerning the bias and credibility of a competing expert's opinions when the very life of the defendant is at stake was ineffective assistance of counsel. In this case, if Gore's jury had determined that Dr. Cheshire's evidence was unreliable based upon financial bias, they could have rejected his entire testimony and found several mitigating factors including mental instability, intoxication, and domination of another.

Mr. Udell, one of the defense attorneys, testified at the evidentiary hearing below that evidence of Dr. Cheshire's bill and that he was often employed by the prosecution could be . . . "clearly evidence of bias." CP 805. Yet he had "no idea" why Mr. Nickerson never explored this avenue. CP 806.

Had Gore's counsel effectively questioned Dr. Cheshire, a proportionality review may have required the imposition of life imprisonment rather than a death sentence. Therefore, this failure on the part of Gore's counsel may have resulted in his death sentence due to a breakdown in the adversarial process which renders the result unreliable. *Strickland, supra*, at 687.

C

FAILURE ON THE PART OF GORE'S COURT APPOINTED DEFENSE COUNSEL UDELL TO MAKE ANY SUBSTANTIVE DECISIONS, AND HIS TOTAL DEFERENCE TO VOLUNTEER DEFENSE CO-COUNSEL NICKERSON, RESULTED IN INEFFECTIVE ASSISTANCE OF COUNSEL

In recognition of Gore's Sixth Amendment right to counsel, the circuit court appointed Robert G. Udell, Esq., to represent and defend Gore. Mr. Udell acted as Gore's defense counsel for the penalty retrial phase, at the conclusion of which he was compensated by the State of Florida. As a member of The Florida Bar, Mr. Udell had an ethical obligation and professional responsibility to competently represent Gore pursuant to his oath of admission and Rule 4-1.1, Rules Regulating The Florida Bar, which provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation.

The obligation to provide competent legal representation rises to its highest level in capital cases:

> The propriety of the death penalty is in every case an issue requiring the closest scrutiny.... However, the 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. Every attorney in

> Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice.

Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). *See also, Strickland v. Washington*, 466 U.S. 688 (1984).

Mr. Udell's repeated failures to fulfill his professional duties to Gore, as noted throughout Point V of this brief, resulted in ineffective assistance of counsel within the meaning of *Wilson, supra,* and *Strickland, supra.* His breaches of professional conduct are particularly egregious in light of the fact that Mr. Udell's client was sentenced to death as a result.

Mr. Udell represented Mr. Gore at his penalty retrial, with the assistance of "volunteer" co-counsel Jerome "Jay" Nickerson, Jr., Esq. Mr. Udell admitted that, prior to his appointment, he had no knowledge of Mr. Nickerson either personally or by reputation, but testified that it had been his understanding at the time that "... he [Nickerson] had been doing capital litigation for many many years extensively." CP 779. Mr. Udell was surprised to learn that at the time of the penalty retrial Mr. Nickerson had been an attorney and member of The Florida Bar for less than three years. CP 779. Mr. Udell was also unaware that Mr. Nickerson was defending a Bar grievance during the preparation and conduct of Gore's penalty retrial.

Mr. Udell could not remember exactly how it was that Mr. Nickerson had become involved in the case, but testified that he had "... volunteered to assist, and then basically took the lead, clearly took the lead." "He took the lead on this case and I was co-counsel." CP 779,780. Mr. Udell went on to explain what that meant:

> Well, I mean, any given case some lawyers got to make up their minds as to what are we going to present in mitigation, what mitigation do we have, what witnesses are we going to call to present it, and, likewise, how are we going to rebut the aggravating evidence. Someone's got to make th decisions on how we're going to do that, Jay took the lead.
> * * * * * * * *
> ... Jay made all the final decisions and this was his mitigation.

CP 782, 792.

Mr. Udell described his own involvement in the defense of Mr. Gore as "sitting second chair":

> I deferred to his [Nickerson's] expertise throughout the trial, including jury selection.
> * * * * * * * *
> – I don't remember quite honestly having said a word to this jury,.... I didn't do opening, I didn't do closing, and I don't remember how much cross-examination I did.

CP 801, 794.

It was also Mr. Nickerson who spent the bulk of the time with Gore and his family (CP 785), argued the defense positions at the pretrial conference, at bench

conferences and during the majority of the charge conference (R 3273-3392), and made and argued objections during the trial.

At the Rule 3.850 evidentiary hearing, Mr. Udell testified that he deferred to Mr. Nickerson throughout the entire penalty retrial. CP 780, 782, 796. Mr. Udell was an experienced criminal attorney at the time of the penalty phase retrial. Nonetheless, by way of explanation, Mr. Udell testified that he was uncertain as to whether or not he had ever participated in a capital penalty phase prior to Mr. Gore's case; it "may have been" his first. CP 776. Mr. Udell further testified that it was Mr. Nickerson who made the decision to subpoena State Attorney Stone to testify for Gore. CP 789. Mr. Udell said that he did not understand why or where "Jay [Nickerson] was headed" (CP 781), and that the decision to call Stone was " . . . [s]urprising then and it's probably unusual now" (CP 792):

> We discussed - I mean, we did discuss it, was [sic] allowed to give my input. If I had terrible objections I'm sure I voiced them and they were heard, but Jay made all the final decisions and this was his mitigation. CP 792.

When asked to explain why no one ever deposed Mr. Stone or even talked to him prior to his testimony, Mr. Udell replied:

> Again, you're going to have to ask Mr. Nickerson. It was his issue, he was the one who's presenting it, arguing it, understood it. And I assume he made a decision not to do it for some reason.

CP 796.

At the end of the penalty retrial phase of the case, both Mr. Udell and Mr. Nickerson sought to be paid for their efforts. The trial court granted Mr. Udell's application for fees and denied that of Mr. Nickerson. R 4698-4699. Following this denial, Mr. Udell shared his fee with Mr. Nickerson. CP 781. The total fee approved by the court for the two week trial, an interlocutory certiorari petition to the Fourth District Court of Appeal, and all required preparation and discovery was $25,956.72.

At the evidentiary hearing below, Gore introduced into evidence this Court's order of discipline of Mr. Nickerson in Case Number 84-093 and the Report of Referee. CP 953. The Referee had found Mr. Nickerson guilty of all violations charged by The Florida Bar which included: "conduct that is unlawful or contrary to honesty of justice; . . . conduct involving dishonesty, fraud, deceit or misrepresentation and conduct that is prejudiced to the administration of justice." The Report of Referee further reveals that the conduct complained of occurred in response to the grant of a domestic violence injunction against Mr. Nickerson on April 28, 1992. The penalty retrial in the instance case occurred in November 1992.

Unfortunately, no one was ever able to ask Mr. Nickerson himself what his strategy had been during the penalty retrial phase. Mr. Nickerson is no longer a

member of The Florida Bar and could not be located for service of a defense witness subpoena to testify at the evidentiary hearing below.

Mr. Udell's total deference to Mr. Nickerson amounted to a serious breach of professional responsibility and complete abrogation of his duty, resulting in a death sentence being imposed on his client Gore due to ineffective assistance of counsel within the meaning of *Wilson, supra,* and *Strickland, supra.*

D

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO DISCOVER AND PRESENT READILY AVAILABLE WITNESSES WHO WOULD TESTIFY TO ADDITIONAL MITIGATING EVIDENCE

In *Strickland v. Washington,* 466 U.S. 668 (1989), the Court found that:

> In the sentencing phase of a capital case, '[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.' *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). For that reason, we have repeatedly insisted that 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor.' *Eddings v. Oklahoma*, 455 U.S., at 112, 102 S.Ct., at 875. In fact, as Justice O'CONNOR has noted, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the 'interests of justice' may impose on reviewing courts 'a duty to remand [the] case for resentencing.' *Id*., at 117,

> n., and 119, 102 S.Ct., at 877, n., and 878 (O'CONNOR, J., concurring).
>
> Of course, '[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing.' Comment, 83 Colum.L.Rev. 1544, 1549 (1983).

Strickland, supra, at 705-706.

The following is a summary of additional mitigation evidence which could have been, but was not, presented at Gore's penalty retrial in 1992.

Prior to his arrest and incarceration Gore had lived in or near citrus groves, and had worked in and around citrus groves, his entire life. Gore's mother Thelma testified that he had worked continuously "in citrus" from the time he was fourteen (14) years old until his arrest. CP 831- 835.

Mrs. Gore testified that "it was an everyday thing" to catch and eat the fish and frogs from the irrigation canals in the groves, and that these canals were also the family's "swim hole." CP 836. Mrs. Gore also testified that the family's water supply came from a shallow well in or near the citrus groves. CP 846-847. Due to poverty, Gore ate a diet consisting of contaminated fish, frogs, and vegetables from gardens that were also contaminated with grove chemicals.

In 1998, Gore's father, a life long agriculture worker, died from bladder cancer after many years of exposure to this toxic environment. CP 837. Dorothy

Stokes, Gore's aunt, testified that five of Mr. Gore's male cousins, all in the agriculture business, had died due to agriculture chemicals, and others had been so ill that "... they had to have their blood changed." CP 857- 860.

In addition to long term toxic chemical exposure, Gore experienced dangerously high fevers in his childhood. Gore's mother testified that when he was seventeen months old, Gore was attacked by a colony of ants. CP 838. The severity of the bites resulted in a fever of 105 degrees that lasted for two days, causing Gore to suffer seizures and delusions. CP 838. Following this incident, he continued to experience hallucinations periodically. At the age of seven, Gore contracted acute bronchitis and was admitted to Indian River Memorial Hospital with another 105 degree fever. CP 838. He was not discharged until his fever broke three days later. Gore's mother stated that she thought he "had a lot of headaches" in addition to chronic respiratory problems. CP 841.

Persistent high fever is known to cause brain damage. In Gore's case, his school report cards reflect the effects these fevers may have had on him. Teachers' comments indicate that he was "very immature" with a "poor attention span." Gore was also described as "a real baby" who was "emotionally immature." His grades included Ds and Fs until he dropped out of school in the eleventh grade. Gore's mother testified that school testing showed his I.Q. to be between 88 and

93. CP 844-845. During the evidentiary hearing below, these records were filed with the lower court and marked as Exhibit 2. CP 952.

Two entomologists, Dr. Nigg and Dr. Napp, testified regarding the chemicals commonly used in the citrus industry. According to their testimony the following lists of now banned pesticides were commonly used in Indian River County during the 1960s and 1970s:

a. DDT
b. organo phosphates
c. organo chlorine compounds
d. lead arsenate
e. chlorinated hydrocarbons
f. Calthane
g. chlorobenzene
h. endrine
I. Dieldrin
j. Chlordane
k. Aldrin
l. ethion
m. Dursban
n. DDD
o. Heptachlor

CP 867-871, 923-928.

At the end of the evidentiary hearing, an Environmental Protection Agency (EPA) report was entered into evidence as Exhibits 10 and 11. CP 954. This report states that exposure to the above-listed chemicals can cause neurological damage and deficits.

None of this mitigating evidence was ever discovered or presented by defense counsel in the 1992 penalty retrial, although it was readily available. Gore's mother Thelma and his aunt Dorothy Stokes both testified that they were not asked about any of these issues by either Mr. Nickerson or Mr. Udell, his defense attorneys. CP 848, 849, 862. These mitigation facts may have resulted in a different sentence recommendation. Failure on the part of Gore's attorneys to investigate, develop and present such mitigation evidence at his penalty retrial was ineffective assistance of counsel. *See*, *Harvey v. Dugger*, 656 So.2d 1253 (Fla. 1995); *and State v. Sireci*, 502 So.2d 1221 (Fla. 1987).

E

DEFENSE COUNSEL'S FAILURE TO MOVE TO STRIKE JUROR TOBIN FOR CAUSE RESULTED IN INEFFECTIVE ASSISTANCE OF COUNSEL

As noted above, defense counsel failed to challenge Juror Tobin for cause, despite his knowledge that significant evidence of an impoverished childhood would be presented, when Juror Tobin stated during voir dire that an impoverished background should not be considered in mitigation. R 1033. This failure to challenge a juror for cause is another specific act of ineffective assistance of counsel which is properly raised by Gore in his motion for post-conviction relief filed pursuant to Rule 3.850, Fla. R. Crim. Pro.

Such failure to permit or present non-statutory mitigating circumstances necessitated the retrial in the first instance, because evidence of a defendant's impoverished background should be presented and considered in mitigation. This Court on direct appeal, following the retrial and re-sentencing of Gore to death, specifically held that defense counsel's failure to object to Juror Tobin for cause acted as a procedural bar to argument of the matter on appeal. *Gore v. State*, 706 So.2d 1328, 1332 n. 3 (Fla. 1997). As a result of this ineffective assistance of counsel within the meaning of *Strickland, supra*, Gore's only remaining remedy was to raise this issue in his motion to vacate and set aside his sentence. *See, Gaskin v. State*, 737 So.2d 509 (Fla. 1999).

F

FAILURE ON THE PART OF DEFENSE COUNSEL TO PROPOSE AN EXPANDED JURY INSTRUCTION ON THE COLD, CALCULATING AND PREMEDITATED AGGRAVATOR WAS INEFFECTIVE ASSISTANCE OF COUNSEL

During the charge conference, the prosecution requested an expanded version of the cold, calculated and premeditated (CCP) aggravator standard jury instruction. *See, Gore v. State*, 706 So.2d 1328, 1334 (Fla. 1997). The state, in seeking this expanded CCP instruction, understood that the standard instruction would likely be found defective because the Supreme Court of the United States had invalidated Florida's standard jury instruction for the heinous, atrocious and

cruel (HAC) aggravator in *Espinosa v. Florida*, 505 U.S. 1070 (1992). Thereafter, this Court was required to consider whether the standard jury instruction for the cold, calculated and premeditated (CCP) aggravator was likewise defective. *See*, *Jackson v. State*, 648 So.2d 85 (Fla. 1994).

In response to this request by the prosecution, the trial court issued the following expanded CCP instruction to Gore's jury:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The kind of crime intended to be cold, calculated and premeditated is one that follows a careful plan or pre-arranged design.

Gore, *supra*, at 1334 n. 10.

Defense counsel objected to this instruction but failed to submit an alternative proposed jury instruction that would pass constitutional muster. *See*, *Gore*, *supra*, at 1334.

On review, this Court specifically found that this expanded CCP instruction proposed by the prosecution and submitted to the jury was deficient, but held that the error was harmless. *Gore, supra*, at 1334.

In *Jackson,* this Court approved the following CCP instruction:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated and premeditated, and there was not pretense of moral or legal justification. 'Cold' means the murder was the product of calm and cool reflection. 'Calculated' means the defendant had a careful plan of prearranged design to commit the murder. 'Premeditated' means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A 'pretense of moral or legal justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Id. at 89-90.

The various "additional" elements added to the CCP standard jury instruction by the *Jackson* Court existed prior to Gore's penalty phase retrial, and should have been included in the instruction submitted by the trial court to Gore's jury. In *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990), this Court said that the CCP aggravator applied to "murders more cold blooded, more ruthless, and more plotting than the ordinary reprehensible crime of pre-meditated murder." In addition, the CCP aggravator requires a "heightened premeditation," *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), as well as "calm and cool reflection." *See*,

Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992).

Given the "biases and prejudices" of Gore's jury (*Gore*, *supra*, at 1332), it is entirely conceivable that the clearly unconstitutional CCP instruction submitted to them "rendered the result unreliable" or substantially impaired... "confidence in the outcome of the proceedings." *See*, *Strickland*, *supra*, at 695.

> In *Stringer v. Black*, 503 U.S. 222, 232, 112 Section 1130, 1137, 117 L.Ed.2d 367 (1992), the Supreme Court addressed the role of the reviewing court when the sentencing body is told to weigh an invalid factor in its decision. [A] reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or re-weighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.
>
> ... a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is "unlikely to disregard a theory flawed in law." See also, *Griffin v. United States*, 502 US 46, 59, 112 S.Ct. 466, 474, 116 L.Ed.2d 371 (1991) ("When jurors have been left the option of relying upon a legality inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.")

Jackson, supra, at 40.

However, the *Jackson* Court also stated that failure to make specific objections at

trial acts as a procedural bar to review. *Jackson, supra*, at 90.

Thus, Gore's counsel not only should have objected to the clearly unconstitutional expanded CCP instruction proposed by the prosecution, but should also have submitted a proposed jury instruction that incorporated the judicial gloss of these earlier decisions. Failure to do so allowed the jury to be misled by the state and was ineffective assistance of counsel.

The cumulative result of the foregoing instances as detailed above was ineffective assistance of counsel. As a consequence, imposition of the death penalty in this case did not result from a "fair fight." Justice Anstead concurring in *Arbelaez v. Butterworth* 738 So.2d 326 (Fla. 1999) stated:

> ... This Court and the United States Supreme Court have held that the integrity of the process is of unique and special concern in cases where the State seeks to take the life of the defendant.

Arbelaez, supra, at 331.

POINT VI

GORE'S TWENTY TWO YEARS ON DEATH ROW WITHOUT RESOLUTION OF HIS CASE, DESPITE DILIGENT PURSUIT OF HIS RIGHTS, IS CRUEL AND UNUSUAL PUNISHMENT WHICH REQUIRES HIS DEATH SENTENCE TO BE REDUCED TO LIFE

Gore's death sentence should be reduced to life pursuant to the Eighth and Fourteenth Amendments. *See also, Hitchcock v. State*, 673 So.2d 859 (Fla. 1996); Art. IV, Florida Const. In that case, this Court rejected the defendant's argument that the Eighteen years he had served on death row was cruel and unusual punishment, in violation of his Eighth Amendment rights. However, this Court did direct that the continued proceedings be expedited. In the case at bar, Gore has served 22 years on death row. Although this Court found that 18 years did not rise to the level of cruel and unusual punishment, some period of time must do so. Gore therefore contends that his time served in excess of 20 years is a violation of his Eighth and Fourteenth Amendment rights, which entitles him to a reduced sentence of life in prison.

POINT VII

THE EIGHTH AMENDMENT REQUIRES INVALIDATION OF THE DEATH PENALTY BECAUSE, AS APPLIED, IT REMAINS AS ARBITRARY AND CAPRICIOUS AS THE DEATH PENALTY STATUTES WHICH WERE STRICKEN IN *FURMAN v. GEORGIA*, 408 U.S. 238 (1972)

The concept that "death is different" in a jurisprudential due process sense began with the Scottsboro boys case, *Powell v. Alabama,* 287 U.S. 45 (1932), when counsel was first required for all defendants facing the death penalty. Justice Sutherland, writing for the Court, noted that such a defendant "requires the guiding hand of counsel at every step of the proceedings against him." *Powell, supra,* at 69.

This idea has firmly taken root in modern jurisprudence. When the Court struck down the death penalty for the mentally retarded in *Atkins v. Virginia,* 536 U.S. 304 (2002), Justice Scalia in dissent recognized the "death is different jurisprudence." *See also, California v. Ramos,* 463 U.S. 992, 998-999 (1983). Virtually every retreat from the death penalty since *Furman*, including *Roper v. Simmons*, ___ U.S. ___, 125 S. Ct. 1183 (2005), striking down the death penalty for juveniles, and even *Lockett v. Ohio*, 438 U.S. 589 (1978), requiring the jury to hear all mitigating evidence, is in part based upon the idea that "death is different" due to its finality:

> This especial concern [for reliability in capital proceedings] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable or penalties; that death is different.

Ford v. Wainwright, 477 U.S. 399, 411 (1986). *See also, Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Furman v. Georgia*, 408 U.S. 238, 289 (1972) Brennan concurring; and *Ring v. Arizona*, 536 U.S. 584, 606 (2002).

Capital cases require more strict standards of review and additional review in both state and the federal courts to "get it right." Nevertheless, over 120 individuals have been released from death row in this country since *Furman* due to "actual innocence."

Few can doubt that arbitrariness infects the system. Post-*Furman* death penalty litigation has been driven by an effort to remove the arbitrariness rightly condemned by all nine justices in *Furman*. Unfortunately, this effort has proven to be futile. All mentally retarded persons executed under *Penry v. Lynbaugh*, 494 U.S. 302 (1989) have no appeal even though the retarded will no longer be executed after *Atkins v. Virginia*, 536 U.S. 304 (2002). The result applies to juveniles executed prior to *Roper, supra*.

The attempt of the Supreme Court of the United States to define and recognize the Eighth Amendment's march towards the elusive "evolving standard

of decency" idea the court's jurisprudence fails to address the conundrum of continued executions of those sentenced to death under formerly lawful but now unconstitutional laws. *See, Ring v. Arizona*, 536 U.S. 584 (2002); *and Summerlin v. Arizona*, 494 U.S. 1039 (1990), *Justice Breyer in dissent.*

The present incarnation of the death penalty in Florida was enacted in response to the decision in *Furman v. Georgia*, 408 U.S. 238 (1972), when the death penalty throughout the United States was struck down because it was applied in an arbitrary and capricious manner in violation of the cruel and unusual punishment provisions of the Eighth Amendment to the Constitution. Florida was the first state to re-institute the death penalty. Florida's death penalty statute, Section 921.141, Florida Statutes, was upheld by this Court in *State v. Dixon*, 283 So.2d 1 (Fla. 1973). The *Dixon* Court held that the law as written would reduce arbitrariness enough to satisfy the Eighth Amendment and, thus, the Supreme Court of the United States. In *Proffitt v. Florida*, 428 U.S. 242 (1976), the Court approved Florida's revised death penalty statute. Now, some 33 years after *Furman*, and with the experience of hundreds of death sentences imposed in Florida, the arbitrariness seems to this writer to be no different in kind, quality or magnitude from that condemned in *Furman*. The heightened due process requirements of all courts involved in the imposition and review of death cases have still rendered empty the promises of *Dixon* and *Proffitt*.

Since *Furman*, we have been instructed that rapists cannot be subject to the death penalty, *Gregg v. Georgia*, 428 U.S. 153 (1976); that persons eighteen or younger may not be executed; *Roper, supra*; that the mentally retarded and insane cannot be executed; *Atkins, supra*. We have learned that neither the courts nor legislatures can restrict the scope of mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586 (1978).

The demands and rigors of the penalty require defense lawyers who must be specialists and who nearly always must be compensated by the state. Not only must counsel be provided; due process requires that the state must also make available investigators, mental health experts, and that condemned persons have the right to litigate the death decision right up to the moment of execution.

Full litigation of a death penalty case takes ten to twenty years even when diligently pursued. Gore's crime in this case was committed in 1983. This case has been in litigation every moment since the Defendant's arrest. Over the last 22 years, DAVID ALAN GORE has been represented by at least nine different, court appointed attorneys. This case is typical in that regard. Florida's criminal justice system, even at this late date, simply cannot distinguish those first degree murderers who should be executed from those that should not. It is collapsing under its own weight. That is the very definition of arbitrariness.

Since 1976, hundreds of persons have received the death penalty in the State of Florida, but only a few have been executed. Since 1976, many have had their convictions or the death penalty overturned by either state or federal appellate courts. In approximately 50% of death cases nationwide, the courts ultimately determine that death was not the appropriate penalty. The only conclusion to be drawn is that the death penalty is imposed arbitrarily. After 33 years, there is no bright line distinction between Defendants who are executed and those not. Failure of the death penalty jurisprudence to provide such a distinction is a failure of the system. The death penalty is arbitrary and capricious; it violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17, of the Florida Constitution.

The finality of the sentence imposed in death cases warrants protections that may or may not be required in other cases. *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985), *Burger concurring*. The qualitative difference of death from all other punishments - its severity and irrevocability - requires a correspondingly greater degree of scrutiny of the capital sentencing determination than that of other criminal judgments. *California v. Ramos*, 463 U.S. 992, 998, 999 (1983). The Eighth Amendment demands a greater degree of accuracy than a non-capital case. *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).

> A major reason that Justice Harlan espoused limited retroactivity in collateral proceedings was the interest in making convictions final, an interest that is wholly inapplicable to the capital sentencing context.

Teague v. Lane, 489 U.S. 288, 321 n. 3 (1989).

The Eighth and Fourteenth Amendments to the United States Constitution require that the modern death penalty employed by the several states, including Florida, be abolished, because in a constitutional sense arbitrariness cannot be removed from the system to a sufficient degree to satisfy the "evolving standards of decency" required by our American system of justice.

CONCLUSION

Wherefore, based upon the foregoing points and authorities, this case should be remanded for a new sentencing trial.

CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 14 point Times New Roman.

GRAHAM, MOLETTEIRE & TORPY

_____

ANDREW A. GRAHAM, ESQUIRE
10 Suntree Place
Melbourne, FL 32940
Phone: (321) 253-3405
Fax: (321) 242-6121
Bar No.: 0218871
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this ____ day of April, 2005 to Consiglia Terenzio, Esquire, Office of the Attorney General, 1515 N Flagler Drive, West Palm Beach, FL 33401-3428; Lawrence M. Mirman, Esquire, Office of the State Attorney 411 South 2nd Street, Fort Pierce, FL 34950-1594.

GRAHAM, MOLETTEIRE & TORPY

_____

ANDREW A. GRAHAM, ESQUIRE
10 Suntree Place
Melbourne, FL 32940
Phone: (321) 253-3405
Fax: (321) 242-6121
Bar No.: 0218871
Attorney for Appellant