IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1458

DAVID A. GORE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Points I and II

The Lower Tribunal improperly failed to grant a hearing on the issue of false testimony by defense witness and former State Attorney, Robert Stone. Coupled with the ensuing false instruction to the jury that implied Gore could be released within 15 years, this error required either a new hearing or a new sentencing trial.

Points III and IV

The Court should have granted a hearing on the issue of ex parte communications prior to the sentencing hearing.

Point V

Defense counsel's decision to call Robert Stone, followed by his failure to interview witness Robert Stone prior to taking his testimony was ineffective assistance of counsel.

Point VI

Gore's time on death row, now approaching 23 years, is cruel and unusual punishment.

Point VII

The death penalty is arbitrary and unconstitutionally violates the Eighth and Fourteenth Amendments to the U.S. Constitution.

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).

The State argues in its Answer brief (p. 8) that the *Giglio* claim raised by defendant Gore was properly summarily denied by the trial court and this Court should likewise affirm "because the identical allegations were raised and rejected on direct appeal." Answer brief p. 9.

However, evidence elicited at the Rule 3.850 hearing below established that the Assistant State Attorney met with former State Attorney Robert Stone after Mr. Stone had been subpoenaed by the defense (CP 826) and that the two of them agreed that on cross examination the prosecutor would ask for Stone's opinion about when Gore could be released on the life sentences for kidnaping and rape (CP 826).

Further Stone testified below that, both at the time of his testimony in the penalty retrial in 1992 and at the time of his testimony at the Rule 3.850 hearing in 2003, he did not know what the rules, regulations or guidelines of the Parole Commission were. CP 829, 830.

The instigation of this knowingly false testimony by the State Attorney is clearly a *Giglio* violation which simply could not have been raised on direct appeal because the facts regarding the pre testimony meeting between Stone and the prosecutor as well as Stone's admission that he did not know the parole rules about which he testified were unknown until the Rule 3.850 hearing. Obviously this opinion evidence was not within Stone's expertise. The trial court incorrectly failed to grant a hearing on the issue but some facts were nevertheless adduced at the Rule 3.850 hearing.

The State asserts that even if there is no procedural bar for the *Giglio* issue, Stone's testimony was not false. Answer brief p. 10, 11. The State ignores the effect of the 5 concurrent life sentences without possibility of parole for 25 years on the five other murders. Gore could not be "released at any time". Even the State limits its argument to "parole on the noncapital offenses". Answer brief p. 10. Had an evidentiary hearing on this issue been permitted, Gore could have called witnesses from the Probation and Parole Department who could have definitely established that Stone's opinion testimony was beyond his expertise and wrong, even as to the life sentences for kidnap and rape which were consecutive to the death sentence or 25 years mandatory minimum for the murder of Lyn Elliot. If the State

were correct it would only be because Mr. Stone "guessed right" since he had no knowledge of the Rules of the Parole Commission.

> 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.

Mordenti v. State, 894 So2d 161, 175 (Fla. 2004).

Based upon Stone's testimony elicited by the prosecutor on cross examination, Gore could be released "at any time" or at the most 25 years from arrest or about 15 years from then. The jury was clearly bothered and confused by the sentencing alternative. Two of the three jury questions related directly to how much time Mr. Gore would have to serve:

> Is the 10 years served go towards the 25 years?

R 3621, 5604.

> The standing two life sentences, when and if a parole can occur?

R 3629, 5604.

As Justice Anstead has pointed out in dissent in *Green v. State*, 907 So2d 489, 504, 505 (Fla. 2005):

> The other critical issue on which I differ with the majority concerns the completeness of the trial court's response to the jury's questions as to how a life sentence might play itself out in this case.
>
> It is apparent on the face of the jury's question that the jurors were seriously considering a recommendation of life, but wanted to know in advance how such recommendations would work in this case, since the defendant had been incarcerated since 1987 for these two murders. The questions are logical for jurors considering a recommendation, with the obvious implications being that the defendant's eligibility for parole in less than twenty-five years would work against him.

Green, *supra* 504, 505.

In Green as in the case below, the trial court instructed the jurors that the defendant would receive credit for time served towards the 25 year maximum, but the instructions . . . "was clearly flawed for what it did not

tell the jurors." *Green* p. 505. What the Court did not tell the jurors is that Green could get two consecutive twenty-five year sentences.

This failure to clearly instruct the jury on the true possibilities of parole is a violation of the Eighth Amendment to the U.S. Constitution and Article I Section 17 of the Florida Constitution and in *Simmons v. South Carolina*, 512 U.S. 154 (1994), *Shafer v. South Carolina*, 532 U.S. 36, 38 (2001).

An evidentiary hearing on this point was required, not to relitigate the issue, but to prove the testimony of Robert Stone to be false, beyond his expertise and colluded ahead of time by the prosecutor.

Although impermissible to relitigate issues already disposed of on direct appeal where new facts are adduced reconsideration of the issue is required. CF *Harvey v. Dugger*, 656 So2d 1253 (1995).

Life without parole can be a powerful mitigator. Many commentators have attributed the decline in the use of the death penalty in recent years to the proliferation of life without parole laws coupled with the unease brought about due to the significant number of death row exonerations. Obviously, Stone's rank speculation about "release at any time" was therefore material.

Here Gore has established, even absent an evidentiary hearing on the issue a clear *Giglio* violation:

a) The testimony was false

b) The prosecution knew the testimony was false

c) The Statement was material

See *Mordenti, supra* 175.

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 constitutional issue in this case is simply put:

To what lengths can the prosecution and Court go to to prevent the jury from knowing that a recommendation for life instead of death meant that the Defendant would have to serve at least 50 years in prison from the date of his arrest - July 1983.

The proper alternative sentence to the death penalty herein is life without the possibility of parole for 25 years. However, that does not answer the jury's question of

> "The standing two life sentences when and if a parole can occur?

R 3629, 5604.

The question cannot be properly answered by taking the two life sentences (for the kidnap and rape) standing alone. The true and correct response would require the Court to account for the consecutive mandatory 25 year sentence imposed for the other murders. An inmate cannot be paroled until he has served his mandatory sentence, here 50 years.

The Sixth Amendment right to a jury trial requires that a jury know the actual meaning of a recommendation for life versus a recommendation for death. In this case, the jury obviously wanted to know Gore's possibility for parole. To instruct the jury to rely on "the recollection of testimony" is fundamentally flawed and makes a mockery of the jury recommendation.

The state elicited the "testimony" from Gore's own prosecutor, who was unprepared, and uninterviewed by the defense counsel who did not object to the testimony which we now know was pure speculation by State Attorney Stone.

In essence, this jury's recommendation of death is based upon their understanding that Gore could be paroled "any time" after serving 25 years. This is simply wrong.

Simmons, supra, Shafer, supra, and *Ring v. Arizona*, 536 U.S. 584 (2002) require the jury to make the death/life recommendation based upon proper testimony and instruction. Here, the false testimony of Stone knowingly elicited by the State then emphasized throughout the voir dire, trial and argument that this jury could only recommend life without parole for 25 years or death and the jury's understanding that Gore could be potentially be released in about 15 years, if such a sentence were to be

imposed, deprived Gore of his right to a jury trial and is also a violation of the Eighth Amendment.

Finally, counsel's failure to request a jury instruction which properly reflected what actually would happen if the jury recommended life deprives the defendant of a powerful mitigator; and the Court's failure to properly instruct the jury that Gore could not be considered for parole for 50 years from July 1983 deprives the jury of the tools necessary to function as the Sixth Amendment intended. That is, if life would be recommended Gore would have to serve about 40 more years before he could be considered for parole and therefore this error violates both *Lockett v. Ohio*, 438 U.S. 589 (1978) as well as *Strickland, supra, Simmons, supra*, and *Shafer, supra.*

The jury must know the consequences of its recommendation or the death sentence is flawed and must be reversed for a new sentencing trial.

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.

The issue regarding Ex Parte communications is whether or not a hearing is required to determine the facts.

The Court in the *Huff* order denied a hearing based upon the allegations primarily related to the sentencing memorandum furnished to the Court by the State prior to the sentencing hearing:

> 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.

Defense counsel Udell prepared an affidavit which was attached to the Rule 3.850 Fla. R. Crim. P. motion which provided in pertinent part:

> . . . 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 153.

> . . . I was unaware that the Court had requested such findings from the prosecution and I have no recollection of ever receiving the States proposed findings dated December 4, 1997.

CP 153.

The Court made no findings in the record which rebut Mr. Udell's affidavit. Further, the lower Court Judge was previously an assistant State Attorney on Mr. Stone's staff serving in a small office with the Assistants who were presenting the case. At least one secretary in the State Attorney's office still referred to Judge Vaughn as "Dan", CP 248-313.

A hearing was required.

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).

The feature of the State's case from pretrial, voir dire, opening statement, cross examination and final argument was to mislead the jury about the possibility that Gore would get out on parole to rape and kill again.

Prior to Voir Dire the State told the Veniremen that the defendant can only be sentenced to death, or life without parole for 25 years, and that the jury would recommend to the Judge either death or life without the possibility of parole for 25 years. R 46. Repeatedly, during jury selection the prosecutor asked potential jurors in front of the other potential jurors if whether or not because he was guilty would effect their recommendation that Gore be sentenced to death or life without parole for 25 years. CF R 853-854, R 782.

Counsel for the State argued before the jury that the defense will . . . "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". R 3583. The clear implication was that he would or could get out after 25 years.

In light of the State's clear strategy to emphasize the possibility Gore could be released as early as 2008 after serving 25 years, counsel's failure by calling Stone, not investigating Stone's potential testimony and failing to object to the State's question on cross . . . (When could he receive parol?) is ineffective assistance of counsel.

R 3203.

First, the question seeks an expert opinion and is objectionable on that basis §90.702 Florida Evidence Code. Stone was never qualified as an expert and has since testified that he did not know the rules and regulations of the parole board then and doesn't know now. CP 829, 830. The prosecutor argued during the conference to answer the question from the jury about when Gore could be released on the life sentences:

> 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 . . .

R 3633.

The testimony was actually elicited on cross examination by the prosecutor, however, the Court stated in the same conference:

> I honestly don't know the answer, but my point is Mr. Stone testified on the subject, and whether Mr. Stone correctly stated the law or not, I don't know, but its evidence.

R 3630 - 3633.

At the hearing below, Mr. Udell, the only attorney appointed or hired to represent Mr. Gore testified regarding the decision by Mr. Nickerson to call Stone as a witness:

> "was" surprising then and its probably unusual now

CP 792.

As to why no one from the defense side ever talked to or deposed Stone before the trial Mr. Udell stated:

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

CP 796.

The State claims that Gore's claims of ineffective counsel are procedurally barred "because the underlying allegations regarding the propriety of Stone's testimony was fully litigated on direct appeal". Answer brief p. 22.

Or failing that, relief was properly denied because Jerome Nickerson was not called as a witness. Answer brief p. 23.

However, Robert Stone did testify as did Robert Udell, who was the only counsel appointed by the Court to represent Gore at the penalty trial.

Attorney Nickerson, by the time of the 3.850 hearing, was no longer a member of the Florida Bar and could not be found to testify.

The State asserts in its answer brief that the defendant made no effort to establish Attorney Jerome Nickerson's unavailability. Answer brief p. 25, n. 8. However, at the *Huff* hearing, counsel for Gore advised the Court:

> . . . [a]nd I haven't been able to contact him. He's not in Florida. I did talk to him on the phone one time in Pennsylvania . . .

Supplement to Record p. 17.

Likewise, Mr. Udell testified at the 3.850 hearing that he had not talked to Mr. Nickerson for some time . . .

> About half a dozen years ago I got a call out of no where, he was doing capital litigation somewhere in the south, Georgia or Atlanta sounds right, and that's the last I heard of Jay

CP 806, 807.

Further, this Court can take judicial notice that Mr. Nickerson is no longer a member of the Florida Bar.

Counsel has filed a separate motion asking this Court to relinquish jurisdiction for a reasonable period of time to again try to locate Mr Nickerson for the purpose of taking testimony on the issue of calling Mr. Stone (Gore's prosecutor and the State Attorney) as a witness in the first instance, then failing to interview or depose him prior to his testimony, then failing to object to Mr. Stone's "opinion" on cross by the State that Gore "could be released at any time." Mr. Stone testified at the 3.850 hearing that he did not know the parole regulations and procedures when he testified. Obviously his testimony is flawed in several respects:

1. It is an opinion rendered by someone not qualified to give that opinion;

2. It is false and a violation of the Eighth Amendment of the U.S. Constitution and Article 1 Section 17 of the Florida Constitution in that Gore already had 5 concurrent 25 year mandatory minimum sentences consecutive t all the sentences imposed in the instant case and is thus in violation of *Shafer*, *supra* and *Simmons, supra*;

3. The prosecutor knew it was false because

   a) He had talked to Stone about it ahead of time, CP 825, 826, 827,

   b) A lawyer from Probation and Parole was at counsel's table during the testimony; and

4. The purpose of calling Stone in the first place is better served by simply asking for a jury instruction on the law of parole of the sentences other than the death sentence and asking the Court to take judicial notice of Waterfield's conviction and sentence then publishing that to the jury.

It is hard to conceive of a less reasonable strategic decision to call Stone in the first place, fail to attempt to determine what his testimony might be, and then not object when the Assistant State Attorney on cross

examination of his former employer asks an improper question calling for an opinion.

Such failures nearly amount to the situation where counsel . . . "has entirely failed to function as the clients advocate." as exemplified by *United States v. Cronic*, 466 U.S. 1659 (1984).

However:

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland v. Washington, 466 U.S. 668 (1984) at 690-691.

> . . . for a strategic decision to be reasonable, it must be based upon information the attorney has made after conducting a reasonable investigation.

Wiggin v. Smith, 539 U.S. 510 (2003) at p. 519.

> Even in a limited investigation counsel still must at least interview all witnesses.

Burger v. Kemp, 483 U.S. 776, 794 (1987).

Ineffective assistance of counsel is patent in this case:

Mr. Udell the appointed attorney for Mr. Gore simply "let Jay do it".

> I deferred to his [Nickerson's] expertise through out 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, 799.

> . . . Jay made all the final decisions and this was his mitigation

CP 782, 792.

Mr. Nickerson "volunteered to assist, then basically took the lead, clearly took the lead." CP 779, 780.

> In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

> reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, supra p. 690-691.

See also ABA guideline for the Appointment and Performance of Counsel in Death Penalty Cases. 11.4.1 (c) p 93 (1989) cited with approval *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admission or statements to the lawyer of facts consisting guilt or the accused's stated desire to plead guilty.

ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.) cited with approval by the U.S. Supreme Court in *Rompilla v. Beard*, 125 S.Ct. 2456, 2466 (2005).

The Supreme Court stated:

> We long have referred [to those ABA Standards] as guides to determining what is reasonable. *Wiggins v. Smith*, 539 U.S. at 524 (quoting *Strickland v. Washington*, 466 U.S. at 688 . . .

Rompilla, supra p. 2466.

Udell's and Nickerson's performance fell below the ABA Standards and amounts to ineffective assistance of counsel within the meaning of *Strickland v. Washington, supra*.

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.

As of July 26, 2006, Gore will have served 23 years on Death Row. Because Gore has 5 other 25 year mandatory life sentences concurrent to each other, but consecutive to the Death sentence he is currently serving, even if his Death sentence is reduced to life Gore will serve at least another 27 years. At some point the wearing and corrosive effect of year after year on Death Row becomes cruel and unusual. It cannot be seriously contended that serving time on death row is equivalent to serving a prison sentence in population. Death row in Florida consists only of prisoners sentenced to death, reduced by executions and increased by new prisoners and sentenced to death. Each prisoner does "his own time" in his own cell, there is little to no interaction with persons other than guards, lawyers, and maybe short visits from family. The constant litigation, the ultimate result of which may be one's death, must at some point become cruel and unusual. Gore submits that now, some 23 years after his arrest, the death sentence has become cruel and unusual.

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).

Judge Boyce Martin, a member of the Sixth U.S. Circuit Court of Appeal for 25 years, has recently written in *Moore v. Parker*, 425 F.3d 250 (U.S. C.A.6 2005).

> . . . the death penalty violates the Fourteenth Amendment because it is so transparently arbitrary that the system in its entirety fails to satisfy due process.

Moore, supra. p. 269. Martin in dissent.

> But lest there be any doubt the idea that the death penalty is fairly and rationally imposed in this country is a farce.

Moore, supra. Martin in dissent p. 269.

In the case at bar, a defendant in a notorious crime was sent back by the Federal Court for a new sentencing trial because of *Lockett* violations.

The prosecutor and Trial Judge had recently served in the same State Attorney's office with Robert Stone who during the original prosecution was

the State Attorney. A volunteer, unappointed lawyer decided to call the former State Attorney as a witness without either interviewing or deposing him. However, the prosecutor did talk to Stone ahead of time and on cross examination by the prosecutor elicited false testimony from Stone as to Gore's parole possibility. The prosecutor had successfully argued to inform the jury at every opportunity that Gore could be released 25 years from arrest if they recommended life. Nevertheless, the jury asked a question about parole possibility and the Court instructed them to rely on their recollection of the "evidence". Then in an ex parte communication following the recommendation for death, the State Attorney prepared and furnished to the Court a lengthy sentencing memorandum which the defense denies seeing prior to the sentencing hearing, and the defense did not file their own sentencing memorandum. Many portions of the State's sentencing memorandum were used nearly verbatim by the Trial Judge in his sentencing order.

In short, the State Attorney's strategy was to mislead the jury as to the possibility of parole, and otherwise to do everything he could, including the ex parte sentencing memorandum, to make the entire penalty retrial fundamentally unfair in violation of *Giglio, supra, Nadue, supra, Simmons,*

supra, Shafer, supra, the Eighth, Fourteenth and Sixth Amendment to the U.S. Constitution.

According to Judge Martin the following catalog of ills render the death penalty unconstitutional.

1. In some states the pace of exonerations competes with the pace of executions;
2. Blatant racial prejudice continues to infest the system (see e.g. Miller-El v. Dretke, 125 S.Ct. 2317 (2005) peremptory challenges tilt the balance from outset in favor of death (Breyer J. concurring);
3. The Election of State Judges;
4. Crime labs are unreliable;
5. The quality of lawyering that capital defendants receive has not substantially improved;

and finally:

6. A system whose basic justification is the interest in retribution and general deterrence is not served when guided by such irrelevant factors.

Moore v. Parker, supra p. 269, 270. Martin in dissent.

The penalty retrial was fundamentally unfair so as to lose confidence in the outcome and the case should be sent back once again for a new penalty retrial.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this ____ day of March, 2006 to Terry Catledge, Capital Collateral Contract Manager, Department of Financial Services, Bureau of Auditing, 200 East Gaines Street, Tallahassee, FL 32399-0355; Consiglia Terenzio, Esquire, Office of the Attorney General, 1515 N Flagler Drive, West Palm Beach, FL 33401-3428; Richard B. Martell, Esquire, Chief of Capital Appeals Office of the Attorney General, 400 South Monroe Street, Tallahassee, FL 32399-6536; Lawrence M. Mirman, Esquire, Office of the State Attorney, 411 South 2nd Street, Fort Pierce, FL 34950-1594; Rubin Helms, Vendor Ombudsman, Office of the Comptroller, 101 East Gaines Street Room 414, Tallahassee, FL 32399-0350; Bruce Zahradnick, Justice Administration Commission, Post Office Box 1654, Tallahassee, FL 32301; Roger R. Maas, Executive Director, Commission on Capital Cases, 402 South Monroe Street, Tallahassee, FL 32399-1300.

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CERTIFICATION OF TYPE

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

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