IN THE SUPREME COURT OF FLORIDA
CASE NO. SCO5-1848

MARSHALL GORE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of post-conviction relief pursuant to Fla. R. Crim. P. 3.850 and 3.851 after the denial of an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R. " – trial record on direct appeal to this Court;

"PC-R. " – post conviction record on instant appeal to this Court;

APC-T_@B post conviction transcript of proceedings;

References to other documents and pleadings will be self-explanatory.

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REQUEST FOR ORAL ARGUMENT

Mr. Gore, through counsel, respectfully requests that the Court permit oral argument.

STATEMENT OF THE CASE

The Circuit Court for the Eleventh Judicial Circuit, in and for Dade County, Florida, entered the judgment of conviction and sentence of death at issue in this case. This case arises from the retrial of Marshall Gore as ordered by Florida Supreme Court in *Gore v. State*, 719 So. 2d 1197 (Fla. 1998).

Mr. Gore was found guilty of one count of first degree murder and armed robbery with a deadly weapon of Robyn Novick. *Gore v. State*, 784 So. 2d 418 (Fla. 2001). The jury voted in favor of death and the trial court sentenced Mr. Gore to die. *Id.*

On direct appeal, the Florida Supreme Court affirmed the conviction and sentence. *Id*. Mr. Gore did not petition the United States Supreme Court for certiorari.

Post-Conviction Proceedings

On January 17, 2002, defense counsel Steven Hammer was appointed to represent Mr. Gore after prior post conviction counsel R. Glenn Arnold withdrew. Mr. Hammer accepted the appointment on the express understanding with the court that pre-existing commitments, including a first degree murder trial, would prevent him from immediately preparing Mr. Gore's post conviction motion. (PC-R 45-48).

On June 4, 2002, Mr. Gore filed an incomplete Rule 3.850 motion for post-

conviction relief. (PC-R 38). The trial court granted a state motion to strike based on an October 2001 revision of Fla. R. Crim. P. 3.850 which no longer permits incomplete or shell motions for the purpose of tolling Federal time. (PC-R160-167). *See* Fla. R. Crim. P. 3.851(e)[1] In March, 2003, this Court granted Mr. Gore an extension of time pursuant to Fla. R. Crim. P. 3.851(d)(5) in which to file a fully plead post-conviction motion. (PC-R74).

On May 9, 2003, Mr. Gore=s counsel filed a "Motion to Determine Mr. Gore=s Competency to Proceed in Capital Collateral Proceedings." (PC-R 150-52). In support of this motion, counsel reported that Gore had been unable to give credible and reasonable answers to questions which would assist counsel in developing facts necessary for his defense. Counsel explained that Gore was paranoid, uncooperative, acted under apparent delusions, and believed that a grand conspiracy, which included his counsel, was preventing his exoneration. (PC-R 150-151, PC-T 256). As detailed below, the record demonstrates that this pattern of disturbed thinking has persisted throughout these proceedings and continues to cast serious doubt about both Mr. Gore's competency and his capacity to knowingly and voluntarily waive his rights -- something he has done repeatedly both at trial and in post conviction.[2]

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[1]Mr. Gore continues to contend, as he did before the trial court, that the new rule does not apply to him as his Mandate issued in May of 2001, before the change in the law.

[2]At trial Mr. Gore continually vacillated over dismissing counsel and proceeding pro se. He fired and rehired counsel several times before ultimately dismissing counsel after the

On June 13, 2003, the trial court appointed three experts to evaluate Mr. Gore. (PC-R218-220). Two of the experts found Gore competent while the third expert, who spent over five hours with Mr. Gore, found him incompetent.[3] (PC- T 251). On March 26 and April 8, 2004, the trial court held hearings regarding competency during which Mr. Gore himself insisted that, although he did experience "the associations or loosening or whatever they call that thing" he was "absolutely lucid." (PC-T 268).

Mr. Gore, however, explained that he had a "big trust problem" with his lawyer because he believed (without any factual basis whatsoever) that a former witness or alleged victim had worked in the lawyer's office. (PC-T 269-70). The record reveals that Mr. Gore believed that his post conviction registry counsel was part of a conspiracy to kill or exterminate him and had a "conflict of interest" because Gore had sued Capital Collateral Regional Counsel (CCRC), his former post conviction counsel. (PC-T 270, 459, 674, 730-731). He also believed that the state had purposefully rendered him incompetent at an earlier trial by administering drugs to him and that prior post conviction counsel had sought mental examinations in order to "gain unfair advantage" over him.

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presentation of evidence and conducting the closing argument himself. He also represented himself during the penalty phase expressly on grounds that counsel had failed to prepare and was incompetent. *See Gore v. State*, 784 So. 2d 418, 434 (Fla. 2001). The trial court here held that Mr. Gore waived his right to an evidentiary hearing on his claims in this proceeding. *See* PC-R 1125 (September 1, 2005 Order Denying Claim IV).

[3]Mr. Gore has been evaluated by mental health experts numerous times over the years with mixed results. At trial in this case, two experts found him competent while two other experts reached the opposite conclusion. (*See* PC-R 517-27).

(PC-T 480; PC-R 731). Mr. Gore's delusional thinking and deep paranoia was similarly expressed when he later asserted "conflict" with registry attorney Donoho who he claimed, again without any factual basis whatsoever, lived "in the same subdivision" of his former CCRC lawyer and "two blocks from the home of Robyn Novick, the victim in this case." (PC-T 640). Even though the trial court itself admitted later in the proceedings that Mr. Gore "always leave[s] me confused," (PC-T 474) it found Mr. Gore to be competent to proceed. (PC-T, volume 9, pg. 265).

On June 1, 2004, Mr. Gore filed his "Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" (hereinafter "Amended 3.851 Motion"). On July 26, 2004, a hearing was held before the trial court during which the State filed its response to the Defendant=s Amended 3.851 Motion. At the insistence of Mr. Gore, counsel filed a Supplement to Claim X of his Amended Motion prepared by the defendant himself. (PC-T 308). Over the State=s objection, the trial court granted the Defendant leave to supplement. The State filed its response to the Defendant=s Supplement to Claim X on August 24, 2004.

On September 17, 2004, the trial court held a Case Management Conference pursuant to Rule 3.851(f)(5) and determined that the Defendant was entitled to an evidentiary hearing regarding Claim IV of his Amended 3.851 Motion in so far as it alleged that counsel provided ineffective assistance at the Spencer hearing.[4] (PC-T, vol.

[4]*Spencer v. State,* 615 So. 2d 688 (1993).

13, pg. 357; *See* PC-R 908). The trial court ordered the parties to file a list of witnesses by November 16, 2004.[5]

At some point during the preparation of the Amended 3.851 Motion defendant's counsel began to suspect that they had not received a complete set of available public records from prior counsel. Communication with Gore's former post conviction attorney, Arnold, revealed that he had mistakenly sent over 80 boxes of post conviction records to attorney, Frank Tassone, who represented Mr. Gore in another post conviction case from Northern Florida. Tassone, based on a misplaced notion of ethical obligation, refused to turn these records over to counsel even though, by law and normal practice, they would have been delivered to undersigned counsel as a matter of due course. On October 25, 2004, post conviction counsel filed a Motion to Compel the production of files in the possession of attorney Tassone.(PC-R 902-905).

On October 27, 2004, a hearing was held on the motion to compel. During the course of the hearing, defendant Gore objected to attorney Tassone providing any of the files to post conviction counsel in this case. Consistent with his mental illness, Mr. Gore asserted that he did not want his counsel to have access to these files because they contained material generated by Capital Collateral Regional Counsel, Gore's post

[5]On November 16, 2004, a hearing was held at which time the trial court entered its written order denying all claims presented in Defendant=s Amended 3.851 Motion with the exception of allegations in Claim IV that counsel provided ineffective assistance at the *Spencer* hearing.

conviction attorneys in another proceeding. Under Mr. Gore's obviously twisted logic, he believed that he had filed civil suits against Capital Collateral Counsel which somehow created a conflict of interest with registry counsel in the present case. (PC-T 381-82). Mr. Gore also claimed that CCR lawyers "altered" his records. (PC-T 464). Gore explained his adamant refusal to allow his counsel access to records necessary to his defense (T 383-84) by stating to the court: "I don't want them to have any records they're going to use against me which is what I fear Mr. Hammer is go to do if he follows suit." (PC-T 385). Mr. Gore quite clearly believed, as he frequently expressed throughout the proceedings, that his own counsel was conspiring against him.

On November 18, 2004, the trial court ordered attorney Tassone to review the boxes in his possession to determine whether or not they contained relevant materials, create an index for the court and determine whether Mr. Gore objected to those materials being provided to his post conviction counsel.

On November 24, 2004, attorney Tassone filed a Motion for Rehearing regarding the motion to compel along with an affidavit of Marshall Gore which, with familiar irrationality, alleged "threats" from his counsel, "conflicts of interest" with counsel and fears that his post conviction counsel would use the records "against" him. (*See* PC-R 974; 979-80).

On December 29, 2004, the trial court addressed Attorney Tassone's Motion for

Rehearing regarding the Motion to Compel.[6] The trial court ordered attorney Tassone to prepare and file an inventory of the files in his possession by January 20, 2005, and to file a privilege log regarding the files by January 28, 2005. As a result of the special circumstances being encountered with these records, the trial court also determined that good cause existed to continue the evidentiary hearing previously scheduled for January 24, 2005.

At the conclusion of the hearing on the motion to compel, Gore's post conviction counsel filed an amended witness list. During a discussion regarding the sufficiency of the witness list, the Mr. Gore indicated that he did not want his family members contacted in any way, nor called as witnesses at the evidentiary hearing. Mr. Gore's irrational and delusional justification was that: "My family has been harassed. My family has been imprisoned. My family is going through hell because of this mess. They will not even testify for me as a result of what was done to my little sister by the State Attorney in Columbia County and the Police Department in Columbia County." (PC-T 467). Based upon Mr. Gore=s assertion, the trial court struck the names of all the defendant's family members as witnesses.

On January 6, 2005, the trial court entered its written order requiring Frank

[6]On November 30, 2004, the trial court addressed attorney Tassone=s Motion for Rehearing regarding the Motion to Compel but deferred ruling on his motion. At this time, post conviction counsel filed a motion requesting additional time in which to file an amended witness list. On December 8, 2004, the court granted the request and ordered the counsel to file an amended witness list by December 29, 2004.

Tassone to provide an inventory of records in his possession before January 20, 2005, and to file a privilege log before January 28, 2005. On January 12, 2005, Tassone filed a Motion for Extension of Time until February 22, 2005, due to the volume of material in the boxes under review. He also requested until at least March 22, 2005, in which to file the privilege logs with the trial court. On February 14, 2005, Tassone filed a "Sealed Index and Request for Hearing on Disclosure of the Index". On February 17, 2005, Tassone filed a Motion for Clarification of the trial court=s order regarding the Motion to Compel.

On March 3, 2005, a hearing was held during which the trial court determined that the Defendant Gore – an obviously irrational and delusional thinker whom at least one expert had declared to be incompetent to proceed -- should review the materials in the possession of Tassone and determine which documents he wanted released to post conviction counsel.

On March 21, 2005, Tassone filed a "Status of Inventory and Privilege Log; the Defendant=s Sealed Amended Inventory List; and the Defendant=s Objections to Disclosure of the Sealed Inventory List". At a hearing held April 13, 2005, the trial court ordered Mr. Tassone to retrieve the amended Inventory List upon which Mr. Gore had marked which materials he wanted released to post conviction counsel and to mail that list to counsel by April 15, 2005. The trial court then gave post conviction counsel only 30 days to review any and all documents that the Defendant authorized to be released and

set a hearing for May 16, 2005, as the deadline to file a Motion to Supplement.

Among other things, the sealed inventory was never revealed to post conviction counsel. The court stated "No, I'm going to leave the sealed inventory in the record. That way, some day some appellate court might need to see what you reviewed with or what Mr. Tassone prepared, what you were working with, and then compare that to the amended inventory that's going to be filed." The court's ruling denied post conviction counsel the rudimentary knowledge necessary to mount a challenge to the basis upon which documents were withheld. (PC-R 510-511, PC-T 500).

On May 16, 2005, a hearing was held before the trial court regarding the status of the review of the materials that the undersigned counsel received from attorney Tassone. Counsel indicated that the volume of materials and Tasone only allowing him access to one box at a time, had allowed him to review only 10 of the 59 boxes that the Defendant authorized to be released. (PC-T 523). Counsel therefore requested additional time in which to complete his review of the materials, conduct his investigation into those previously unavailable materials, and prepare an appropriate supplement to the Amended 3.851 Motion for Post Conviction Relief. Despite these highly unusual circumstances and without regard to the need for a full investigation, the trial court denied any further extensions of time to investigate the case, and any further requests for amendments to the 3.851 motion.(PC-T 540). On May 27, 2005, the trial court entered an order setting the evidentiary hearing for August 19, 2005.

On August 4, 2005, a status conference was held to clarify which family member witnesses Mr. Gore would, against counsel's advice, refuse to present at the upcoming evidentiary hearing.[7] Prior to addressing that issue, the Defendant advised Judge Miller, the trial judge, that he had filed a pro se motion to disqualify him. Upon review of the court file, no such motion was found. The court reset the matter for August 8, 2005, and required the Defendant to submit a copy of his motion.

On August 8, 2005, the trial court denied the Defendant=s Motion to Disqualify Judge Miller as legally insufficient. (PC-T 664). The court also denied the Defendant=s pro se "Motion for Reconsideration and Request for Leave to Amend and/or to Renew Motions for Substitution of Counsel" which had been previously filed by the Defendant on October 22, 2004.

After a short tirade by the defendant that post conviction counsel had "been representing the state of Florida and this is absolutely preposterous," the trial court then attempted to clarify which witnesses the Defendant did not want presented at the evidentiary hearing. Obviously agitated, Mr. Gore responded: "I have an objection to

[7]On July 28, 2005, a hearing was held at which post conviction counsel filed an amended witness list with proffers of testimony. The trial court set a status conference for August 4, 2005, to clarify which family members Mr. Gore did not wish called and ordered post conviction counsel to provide a more detailed proffer of each witness to the State *at least 48 hours prior to the scheduled deposition of the witness*. The trial court's final order denying post conviction relief on September 1, 2005, states that defendant's witness list was "wholly insufficient." Since no depositions were ever set or taken, this gratuitous finding in the trial court's final order is entirely inconsistent with the condition the court itself set for the witness list on August 4, 2005.

each and every circumstantial witness named on that list ***until he shows me or tells me what is coming from these witnesses. He has not done so and as I said he's representing the State here not me.***" (PC-T 669).

Then the following exchange took place:

> THE COURT: So, you don't want any witnesses called on your behalf?
>
> MR. GORE: Actually, sir, I am not participating in these hearings and that is the bottom line.
>
> THE COURT: Well, that kind of makes it easy.

(PC-T 670).

When asked if he had heard the State's position that this refusal to present witnesses constituted a failure of proof and waiver, Mr. Gore responded:

> Your honor, respectfully, I have to refuse to participate in these proceedings in order to preserve my right – I am terrified of you. I think you are not going to give me a fair consideration of the… my claims. I know I'm not going to get a fair counsel. I know I am not going to get my claims presented in this court. I know for a fact -- because you have not failed to deny it – I know for a fact now that you have actually operated as a State Attorney or in concert with or at least as a supervisor of, or whatever, in regards to these prosecutions against me in some capacity. You have failed to deny that. There's no way that I can proceed any further in these proceedings and no way that I will participate in these proceedings. It is absolutely ridiculous what is going on here. There is no way that Mr. Hammer can represent me. I have demonstrated a fraudulent billing scheme that he is involved in that he has done with Tassone in order to prevent my claims from being carried out and my consideration has not been reconsidered.
>
> THE COURT: The question is now do you want Mr. Hammer to proceed as best he can or do you want Mr. Hammer to cease and desist and

> withdraw his participation along with yourself for this post-conviction motion?
>
> MR. GORE: ***I want him to cease and desist and I'd request substitute counsel because of a conflict of interest.*** There is a conflict of interest where he cannot and will not present crossover information.

(PC-T 670-1).

When the trial court then suggested Mr. Gore had "made his decision known" thereby creating a "voluntary withdrawal of his post-conviction motion," post conviction counsel objected and offered to proceed with the evidentiary hearing. (PC-T 674). Mr. Gore then responded: "***Can I remove right now – I'm not going to waive the proceedings but I'm going to waive Counsel" and added "I am not going to accept State imposed collateral counsel trying to kill me.***" (PC-T 674). After the state suggested a Faretta[8] inquiry regarding pro se representation, Gore continued to express his deep and highly irrational paranoia:

> MR. GORE: He is following his own avarice interest of being paid rather than presenting my best interests and representing my interests. This is ridiculous. This is a farce and I need to appeal that and I am not able to appeal that if I have Counsel so – "
>
> THE COURT: Are you requesting to be your own counsel?
>
> MR. GORE: ***No, What I'm requesting is for Steven Hammer to be taken off of my case so he cannot obstruct the due administration of justice any further*** and stop me of this Court's recusal.

[8]*Faretta v. California*, 422 U.S. 806 (1974).

The trial judge, obviously at the limits of his patience, then stated:

> Well, you don't want to represent yourself, you don't want Mr. Hammer to present you. You don't want to provide any help in terms of getting the witnesses ready. You have specifically said you don't want to go forward with a hearing. So, at this point, I'm prepared to end these proceedings and just deny the motion for lack of witnesses, lack of desire to go forward, for impeding the State and its ability to discover what we could have gone forward on and I think we are done. I don't know if we are missing something.

(PC-T 678).

In a statement that expresses petulance but neither agreement with dismissal nor other waiver, Mr. Gore simply responded: "***Go ahead and exterminate me or whatever it is that you do."*** *Id*.

The court then denied Claim IV and instructed the parties to prepare proposed orders. (PC-T 688). The court's written order, dated September 1, 2005, asserts that the defendant had a right to control the conduct of his case and voluntarily "waived" his claims of ineffective assistance of counsel at the penalty phase Spencer hearing. Although suggested by the State, the trial court chose not to conduct a Nelson or Faretta inquiry, chose not to clarify the defendant's ambiguous statements about whether to continue and ignored clear evidence that the defendant wanted to proceed but with different counsel. Annoyance at the irrational machinations of a mentally disturbed and difficult defendant is hardly an adequate basis for finding a knowing and voluntary waiver of critical rights. This case must be remanded for an appropriate evidentiary hearing on all claims raised in the Amended 3.851 Motion.

SUMMARY OF ARGUMENTS

I. *The trial court erred in finding that appellant voluntarily waived an evidentiary hearing on Claim IV allegations of ineffective assistance of counsel during the Spencer hearing.* Although the trial court agreed that an evidentiary hearing was required for appellant's Claim IV allegations relating to the Spencer sentencing hearing, (PC-R 908) it eventually ruled that the appellant voluntarily "waived" this claim. (PC-R 1125 September 1, 2005 Order) This finding is incorrect both factually and legally. The record clearly reflects that there was no voluntary, and certainly no knowing or intelligent, waiver by the appellant of his right to present evidence on this claim. Indeed, the appellant's deep paranoia and delusional thinking at the relevant hearing are manifest from his ranting conspiratorial accusations against his counsel and the court itself. Several times the defendant expressly asserted that he wanted only to replace his counsel not waive the hearing. His express reason for refusing a proposed set of witnesses was that he had not consulted with counsel on their expected testimony not that he wished to waive his right to present them. That appellant desperately wanted to present evidence on this claim is reflected in two pro se submissions after the hearing presenting a 43 page rambling rendition of the facts. (PC-R 1073- 1118).

The trial court's decision reflects an understandable, but inappropriate, fit of frustration with a difficult and mentally disturbed defendant. As the trial court stated, the defendant's deranged antics made it "easy." There was simply no factual basis for finding

a voluntary waiver, particularly in light of the court's failure to conduct a detailed Nelson or Farretta inquiry.

II. *The trial court erred in refusing to allow post conviction counsel complete and unfettered access to available public records.* It further erred by refusing to allow counsel adequate time to investigate that portion of the records ultimately made available. As a result of the court's orders, post conviction counsel was only able to review 10 out of 80 boxes of essential public records. The trial court's conclusion that the defendant here had the right to prevent post conviction counsel's access to records is legally unsupportable. There is no such privilege and, in any case, the court erred in relying upon the irrational wishes of a paranoid and delusional defendant whose apparent reasons for non-disclosure were that counsel was "working for the state of Florida," would use the records "against" him, was engaged in a "fraudulent billing scheme" with the attorney holding the records and was ultimately trying to "kill" him. The trial court's entire approach to the records issues in this case was particularly egregious and a clear abuse of discretion in light of its ultimate conclusion that most of appellant's claims lacked adequate factual allegations.

III. *The trial court erred in summarily denying Claim IV allegations of ineffective assistance of counsel during sentencing.* The court's stated reason was that such claims are "waived" simply because the defendant put on his own defense after removing appointed counsel. (PC-R 908). The trial court has misperceived the nature of

this claim. Claim IV alleges, and the record reflects, that defendant removed counsel because of counsel's abysmal failure to prepare a proper mitigation case and other inadequacies. Whether the defendant's decision to conduct the penalty phase of trial himself was voluntary or rather forced by appointed counsel's lack of preparation is a factual issue that requires an evidentiary hearing. In any case, Counsel's complete failure to prepare both statutory and non-statutory mitigation (PC-R.208) and counsel's failure to obtain an adequate mental health evaluation (PC-R.216) demonstrate a lack of adequate assistance to the defendant leading up to his pro se representation at sentencing. Counsel gave the defendant nothing to work with in putting on his own defense.

The trial court's reliance of this Court's refusal to find ineffective assistance in sentencing on direct appeal is misplaced. Such claims are disfavored on direct appeal and counsel's ineffectiveness must appear manifest from the record. Such claims on post conviction almost always rely on additional factual development outside the trial record such as a failure to prepare or investigate. The appellant here has alleged that penalty phase counsel, despite self-serving claims to the contrary, did almost nothing to investigate and prepare a proper mitigation case on his behalf.

IV. *The Trial Court's Boilerplate Conclusion That Claims I, II, III, V, VI, IX and X Were Either "Purely Legal" "Insufficiently Pled" Or Alternatively Without Merit" Was Erroneous and an Inadequate Basis for Denying An Evidentiary Hearing.* The trial court failed to meet the requirements for denying an evidentiary hearing. Under

Fla. R. Crim. P. 3.851(d), a movant is entitled to an evidentiary hearing unless the motion, files, and records conclusively show that the movant is not entitled to relief. To support summary denial without a hearing, a trial court must either state a sufficient supporting rationale or attach those specific parts of the record that conclusively refute each claim presented in the motion.

In this case, the trial court's order fails to provide any rationale whatsoever for denying Appellant's Rule 3.851 claims without an evidentiary hearing. As detailed below, the trial court's use of boilerplate legal conclusions to deny summarily the detailed allegations raised in the Amended 3.851 Motion fails to meet the requirements of Rule 3.851(d) and reflects a complete lack of attention to the merits of the allegations raised.

The trial court's November 16, 2004, order simply and, without a shred of explanation, erroneously states that Claims I, VI, VII, VIII and IX raise "purely legal claims" that are "either procedurally barred…and as such insufficiently pled" or "alternatively without merit." (PC-R 908, November 16, 2004, Order). The order similarly concludes without any explanation that Claims II, III, V, and X were "insufficiently plead" even though each of these claims was supported by detailed factual allegations and legal authority in the Amended 3.851 Motion.

These conclusions are unsupported by the record. For example, Claim II presents detailed allegations involving serious prejudicial omissions of trial counsel, an attorney who was later disbarred and admitted to drug addiction during the time of the trial.

Claims III and V present specific factual allegations of ineffective assistance involving the defendant's mental illness and competency, while Claim X alleges specific prejudicial losses of evidence caused by pre-indictment delay. Such allegations are taken as true under Rule 3.851 unless conclusively refuted by the record. Since the record does not conclusively refute the specific and detailed allegations contained in these claims, the trial court manifestly erred in summarily denying them without an evidentiary hearing.

V. *The trial court erred by failing to conduct a cumulative error analysis that fully considered the defendant's detailed allegations of Constitutional error including ineffective assistance at trial.* The order denying relief simply concludes in boilerplate language that appellant's allegations do not show he is entitled to relief. The number of errors at trial, the ineffective assistance of counsel at both the guilt and penalty phases, the Brady violations, the deprivation of due process suffered by Appellant from being denied a competent mental health expert during sentencing, and all of the claims for which Appellant did not receive an evidentiary hearing, cumulatively indicate that Appellant's conviction and sentence are unreliable.

VI. *The trial court erroneously found the appellant competent to proceed.* Marshall Gore was not competent to undergo the criminal judicial proceedings which resulted in his conviction and sentence of death. A wealth of evidence was available during the trial which would have revealed his lack of competency. A wealth of evidence also exists now, including the post conviction transcripts, which shows that he was not

competent to proceed in post conviction, much less waive his fundamental rights.

VII. *The trial court erred in striking appellant's original incomplete Rule 3.850 motion rather than granting leave to amend.*

VIII. *The Florida Capital Sentencing Procedures Violated Mr. Gore's Sixth Amendment Right To Have A Unanimous Jury Return A Verdict Addressing Guilt Of All The Elements Necessary For The Crime Of First Degree Murder, In Violation Of Ring v. Arizona.*

IX. *Mr. Gore Is Insane To Be Executed, In Violation Of The Eighth and Fourteenth Amendments.*

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT VOLUNTARILY "WAIVED" AN EVIDENTIARY HEARING REGARDING CLAIM IV ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE *SPENCER* HEARING

Although the trial court agreed that an evidentiary hearing was required for appellant's Claim IV allegations of ineffective assistance of counsel during the Spencer sentencing hearing, (PC-R 908) it eventually ruled that the appellant voluntarily "waived" this claim. (PC-R 1125, September 1, 2005 Order). This finding is incorrect both factually and legally.

The record clearly reflects that there was no voluntary, and certainly no knowing or intelligent, waiver by the appellant of his right to present evidence on this claim.

Indeed, *as detailed in the Statement of the Case above*, the appellant's deep paranoia and delusional thinking at the relevant hearing are manifest from his ranting conspiratorial accusations against his counsel and the court itself. Several times the defendant expressly asserted that he wanted only to replace his counsel not waive the hearing. His express reason for refusing a proposed set of witnesses was that he had not consulted with counsel on their expected testimony not that he wished to waive his right to present them. That appellant desperately wanted to present evidence on this claim is reflected in his two pro se submissions after the hearing presenting a 43 page rambling rendition of the facts. (PC-R 1073- 1118).

The trial court's decision reflects an understandable, but inappropriate, fit of frustration with a difficult and mentally disturbed defendant. As the trial court stated, the defendant's deranged antics made it "easy." There was simply no factual basis for finding a voluntary waiver, particularly in light of the court's failure to conduct a detailed Faretta inquiry. Indeed, the court's decision compounded the Spencer hearing errors at trial and is inconsistent with the very rationale of Spencer which is meant to allow the sentencing judge complete access to all information relevant to the imposition of the ultimate punishment – regardless of the defendant's wishes.

Although suggested by the State, the trial court chose not to conduct a Nelson or Farretta inquiry, chose not to clarify the defendant's ambiguous statements about whether to continue and ignored overwhelming evidence that the defendant wanted to proceed but

with different counsel.(PC-T, Vol. 25 674-675, 678-680). Annoyance at the irrational machinations of a mentally disturbed and difficult defendant is hardly an adequate basis for finding a knowing and voluntary waiver of critical rights. This is particularly true here where the trial court was fully aware that at least one mental health expert had found the defendant incompetent while many others had noted serious mental illnesses. This case must be remanded for an appropriate evidentiary hearing on all claims raised in the Amended 3.851 Motion.

II. THE TRIAL COURT ERRED IN REFUSING TO ALLOW POST CONVICTION COUNSEL COMPLETE AND UNFETTERED ACCESS TO AVAILABLE RECORDS OR SUFFICIENT TIME FOR A FULL INVESTIGATION OF THE LIMITED RECORDS EVENTUALLY MADE AVAILABLE

The trial court erred in refusing to allow post conviction counsel complete and unfettered access to available records.

More than 80 boxes of public records were withheld and never reviewed by post conviction counsel. These records undoubtedly contain information essential to the defendant's claims – yet counsel was denied access based on the trial court's erroneous view that a paranoid and delusional defendant has a right to prevent his counsel from accessing records already in the possession of post conviction counsel on a different case. This position finds no support in Florida case law and is inconsistent with this Court's steadfast support for complete access to all records relevant to a capital case. The trial court's conclusions are particularly odd in that counsel would, as a matter of law and

common practice, have had full access to such records had Mr. Gore's former counsel not sent them to the wrong lawyer in the first place.

In any case, even if such a privilege existed, the trial court erred in relying upon the irrational wishes of a paranoid and delusional defendant whose asserted reason for non-disclosure was that counsel was really working for the State, was somehow conspiring with counsel in other cases (as well as the attorney holding the records), would use the material "against" him and was ultimately trying to "kill" him. (*See* portions of transcript cited above in Statement of the Case).

Post conviction counsel is appointed by the State of Florida to represent the Defendant, and with that appointment, comes an obligation to fully investigate the case, present witnesses and evidence to the Court which bear upon whether or not the Defendant's conviction and sentence comport with the Constitution, including effective assistance of counsel. The documents being sought from attorney Tassone were essential to the Defendant=s case, including things like educational history, medical history and military records. (*See* PC-T 464). The trial court's mistaken refusal to allow counsel access itself has denied the defendant effective assistance counsel in this proceeding.

The trial court's misplaced reliance on the State's notion that the defendant is the "captain of his own ship" (PC-T 499) is an egregious abdication of judicial authority under these circumstances and ignores the court's obligation to ensure a fair and just process aimed at discovering the truth. Apparently, the trial court believed that it was his

responsibility to ensure that this delusional and highly paranoid defendant be allowed to irrationally captain that ship over a legal precipice. This was legally unsupportable and an abuse of discretion.

The trial court further erred by refusing to allow counsel adequate time to investigate that portion of the records ultimately made available. Although more than 59 boxes of materials (out of 80) were eventually made available to counsel, the trial court refused to allow counsel more than 30 days to investigate those files in order to supplement the Amended 3.851 Motion. (PC-T 523). Even though counsel later reported that he was only able, working diligently, to review 10 of the 59 boxes in this 30 day period, the trial refused to allow a reasonable extension. (PC-T 540).

The trial court imposed this severe and prejudicial limitation on access even though it took attorney Tassone, in whose possession these materials were mistakenly delivered, more than two months to simply prepare an index and privilege log relating to their contents. A log and index that, shockingly, was eventually "sealed" and never supplied to counsel for purposes of challenging the basis for withheld materials. (PC-T 500, 510).

The trial court apparently believed, as suggested by the State, that such limitations were justified because the delay caused by litigating access were attributable to Mr. Gore. This finding is utterly arbitrary. Mr. Gore is not an attorney and hardly responsible for the trial court's own unsupportable conclusion that the defendant has a privilege to keep his post conviction counsel from accessing public records necessary to his defense. The

trial court's apparent irritation with Mr. Gore is particularly puzzling in light of the State's spirited resistance to allowing access. (PC-T 498-499). It is also highly unjust given Mr. Gore's repeated communication of irrational reasons for withholding such access. (PC-T 381-82, 383-85, 464; *See* Statement of the Case, *supra*).

The trial court's entire approach to the records issues in this case was an egregious abuse of discretion, particularly in light of its ultimate conclusion that most of appellant's claims lacked adequate factual development. (*See* Argument IV, *supra*).

III. THE TRIAL COURT'S FINDING THAT CLAIM IV ALLEGATIONS OF INEFFECTIVE ASSISTANCE DURING SENTENCING WERE "WAIVED" IS ERRONEOUS AND AN INADEQUATE BASIS FOR DENYING AN EVIDENTIARY HEARING

Claim IV alleges that Marshall Gore=s penalty phase attorney failed to present evidence of statutory and non-statutory mitigation. The trial court erred in summarily denying these detailed allegations of ineffective assistance of counsel without an evidentiary hearing.

The court's stated reason for denying this claim was that the defendant had "waived" them simply because the defendant – a man that two experts had already declared incompetent -- put on his own defense after removing appointed counsel. (PC-R 908). The trial court has misperceived the nature of this claim.

Claim IV alleges, and the record reflects, that defendant removed counsel because of counsel's abysmal failure to prepare a proper mitigation case and other inadequacies.

There was no waiver of this claim because the defendant was forced by counsel's incompetence and lack of preparation to defend himself. Whether the defendant's decision to conduct the penalty phase of trial himself was voluntary or rather forced by appointed counsel's lack of preparation is a factual issue that requires an evidentiary hearing.

Courts have recognized that the choice between self-representation and poor counsel may not be a voluntary waiver of the right to counsel. *See Crandell v. Bunnell*, 25 F.3d 754, 755 (9th Cir. 1994). As Mr. Gore explained to the trial court that sentenced him: "He was not going to put on any kind of defense, except me…that was going to be the whole thing….I was told that Ana Fernandez and Jessie Casanova and other people were going to be witnesses here and now, all of a sudden, they are doing it to me again. They done it to me at the first part of this trial…last minute, seventh hour they are not witnesses…." (T 2760-61). When asked if he wished to represent himself Mr. Gore replied: "I have to. I have no other choice. It is a choice between bad counsel and myself…if we are not going to have any witnesses, there is no penalty phase for me anyway with Mr. Pena. …If I cannot have any witnesses because counsel won't call any, then, you know, that's just as bad as me representing myself…" (R 2763-64).

The allegations of the motion are taken as true under Rule 3.851 unless conclusively refuted by the record. Far from being refuted by the record, Mr. Gore's claim that ineffective assistance of counsel forced him to proceed pro se is emphatically

confirmed by the trial transcript. Such involuntary choices can not constitute a waiver. The trial court did not conclude nor demonstrate that the record conclusively refuted the specific and detailed allegations that counsel's lack of preparation forced the defendant to present his own mitigation. The trial court, therefore, manifestly erred in summarily denying this claim without an evidentiary hearing.

Moreover, it is difficult to understand why choosing to defend oneself constitutes a waiver of claims that appointed counsel failed in his constitutional duty to assist in preparing that defense. Even if the defendant voluntarily dismissed counsel this would not negate Counsel's complete failure to prepare mitigation (PC-R.208) or obtain adequate mental health evaluations (PC-R.216) to assist the defendant. Counsel's failings remain relevant and prejudicial even if the defendant voluntarily proceeded pro se and thus required evidentiary development rather than summary dismissal by the trial court.

Trial counsel had the duty to investigate and present available mitigating evidence on behalf of Mr. Gore. *See Rose v. State*, 675 So. 2d 567 (Fla. 1996), *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1994). Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976)(plurality opinion). In *Gregg* and its companion cases, the

Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." *Id*. at 206. *See also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Counsel here did not meet even rudimentary constitutional standards. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, *see Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. *See Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *Kimmelman v. Morrison*, 477 U.S. 365 (1986). *See also Rose v. State*, 675 So. 2d 567 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995); *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1994).

Mr. Gore's sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed below had been presented to the sentencer. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In Mr. Gore's capital penalty proceedings, substantial mitigation, both statutory and non-statutory, never reached the judge. *See Espinosa v. Florida*, 505 U.S. 1070 (1992). Mr. Gore's counsel failed in their duty to provide effective legal representation at the penalty phase by failing to prepare and then completely abandoning Mr. Gore to represent himself.

Penalty phase counsel, Mr. Pena, was not prepared with any mental health experts or any other witnesses. (R. 2773). It is true that Mr. Pena was fired by Mr. Gore,

perhaps based upon his delusional and legally incompetent mental condition. Nevertheless, the record is clear, and the Amended 3.851 Motion alleges, that Mr. Pena was utterly unprepared and offered no meaningful assistance to Gore in developing mitigation. (R.2760). Even when Mr. Pena was re-appointed for sentencing at the Spencer hearing, he failed to present anything to the Judge for her consideration.(R.3-8). Mr. Pena had hired an investigator, Carlos Fuentes, but there is no indication that he did anything in preparation for the penalty phase.

Counsel failed to present the necessary available evidence to convince the court to sentence Mr. Gore to a life sentence or find him insane or incompetent. Had counsel been prepared, he would have presented testimony from many witnesses to prove statutory and non-statutory mitigation. None of these were ever called to do so. Some of those witnesses include Lee Norton Ph.D., Dr. Barry Crown and family members of Mr. Gore. These witnesses would have testified to the facts surrounding Mr. Gore=s life that would have caused the court to find mitigation. Without such evidence, however, she did not.

The judge's life or death determination was rendered in a vacuum, devoid of substantial compelling mitigating evidence that existed at the time of trial. The judge was deprived of critical information reasonably available that would have documented the mitigating circumstances of Marshall Gore's childhood and adolescence.

If properly assisted by counsel, Mr. Gore could have established the severe impact

of trauma on his life - trauma that resulted in brain damage and trauma that was exacerbated and compounded by his severe mental illness. Such evidence regarding Mr. Gore's character and background, his young life marked by severe physical and psychological abuse, as well as emotional and educational deprivation, were never presented to the jury in the penalty phase, nor at the Spencer hearing. This evidence was readily available to trial counsel. No tactical or strategic reason existed for failing to investigate and present Mr. Gore's background. In sum, no significant mitigation investigation was ever prepared or presented on his behalf at the penalty phase.

Prejudice is evidenced by the fact the Florida Supreme Court specifically relied upon the trial court's rejection of these mitigating circumstances - which was the direct result of trial counsel's ineffectiveness - as a basis to conclude that the death penalty was not disproportionate.

Evidentiary resolution of this claim is proper, as the files and records in this case by no means show that Mr. Gore is Aconclusively@ entitled to "no relief" on this and related claims. *See Lemon v. State*, 498 So. 2d 923 (Fla. 1986)(emphasis added); *O'Callaghan v. State*, 461 So. 2d 1354, 1355 (Fla. 1984).

The trial court's reliance of this Court's refusal to find ineffective assistance in sentencing on direct appeal is misplaced. Such claims are disfavored on direct appeal and counsel's ineffectiveness must appear manifest from the record. *See Martinez v. State*, 761 So. 2d 1074, 1078 n.2 (Fla. 2000). This Court specifically noted that it denied the

claim of ineffective assistance at penalty phase on direct appeal because such ineffectiveness was "not apparent from the face of the record." *Gore*, 784 So. 2d at 438. In contrast, such claims on post conviction almost always rely on additional factual development outside the trial record such a failure to prepare or investigate. The appellant here has alleged that penalty phase counsel, despite self-serving claims to the contrary, did almost nothing to investigate and prepare a proper mitigation case on his behalf. (PC-R 367-69).

IV. THE TRIAL COURT'S BOILERPLATE CONCLUSION THAT CLAIMS I, II, III, V, VI, IX AND X WERE EITHER "PURELY LEGAL" "INSUFFICIENTLY PLED" OR ALTERNATIVELY WITHOUT MERIT" WAS ERRONEOUS AND AN INADEQUATE BASIS FOR DENYING AN EVIDENTIARY HEARING

a. The Trial Court Failed To Apply The Correct Standard In Denying An Evidentiary Hearing On Mr. Gore=s Claims

This Court has reiterated many times what is explicit under Rule 3.851 -- a movant is entitled to an evidentiary hearing unless the motion, files, and records conclusively show that the movant is not entitled to relief. Fla. R. Crim. P. 3.850(d); *e.g. Provenzano v. Dugger*, 561 So. 2d 541, 543 (Fla. 1990); *Harich v. State*, 484 So. 2d 1239, 1240 (Fla. 1986), *O'Callaghan v. State*, 461 So. 2d 1354, 1355 (Fla. 1985). To support summary denial without a hearing, a trial court must either state a sufficient supporting rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993); citing

Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). In this case, the trial court's order fails to provide any rationale whatsoever for denying Appellant's Rule 3.851 claims without an evidentiary hearing. As detailed below, the trial court's use of boilerplate legal conclusions to deny summarily the detailed allegations raised in the Amended 3.851 Motion fails to meet the requirements of Rule 3.851(d) and reflects a complete lack of attention to the merits of the allegations raised.

b. The Trial Court Erred In Finding Claims II, III, V and X Were "Insufficiently Plead" In Light of Detailed Factual Allegations Supporting Those Claims in the Amended 3.851 Motion.

The trial court's November 16, 2004, order simply and, without a shred of explanation, erroneously concludes that Claims II, III, V, and X were "insufficiently plead" even though each of these claims was supported by detailed factual allegations and legal authority in the Amended 3.851 Motion.

Claim II, for example, presents both legal support and detailed allegations of serious prejudicial errors and omissions of trial counsel, an attorney who was later disbarred and admitted to drug addiction during the time of trial. As more fully set forth in Argument V, counsel's ineffective representation included an inexplicable failure to challenge Williams Rule[9] evidence crucial to Mr. Gore's conviction – a decision attributable to drug addiction and lack of diligence rather than any conceivable strategy. Subsection 2 of Claim V also details trial counsel's failure to cross examine witnesses,

[9] *Williams v. State*, 110 So. 2d 654 (Fla. 1959)

failure to use extensive prior testimony to impeach, failure to introduce evidence of a similar crime while Mr. Gore was incarcerated, and failure to independently test or introduce a serology report showing negative results for sperm. This claim also alleges that trial counsel failed to call any of a number of available witnesses that the trial court acknowledged "may be relevant" to the defense, and specifically names at least 10 such witnesses. (PC-R 354-56). Trial counsel did no independent investigation of the facts, filed no written motions, requested no discovery, failed to challenge Mr. Gore's delayed indictment and failed to spend any time with Gore to prepare his defense.

Finally, trial counsel's inadequate performance resulted from drug addiction – a fact which would clearly establish that the above omissions and errors had nothing to do with trial strategy but were rather the result of inattentiveness and incompetence. (*See* Argument V, c *infra*).

Claims III and V present specific factual allegations of ineffective assistance involving the defendant's mental illness and competency. The Amended 3.851 Motion alleges that both trial and penalty phase counsel failed their obligation to conduct a full investigation into Mr. Gore's mental health, including background, and failed to secure adequate independent evaluations that would have led to insanity or incompetency defenses. Available evidence regarding Mr. Gore's character and background, his early life marred by abandonment, abuse, emotional and educational deprivation, and head trauma were not presented due to counsel's ineffectiveness. (PC-R 360-63)(*See*

Argument III, *supra*).

Claim X alleges specific prejudicial losses of evidence caused by pre-indictment delay. (*See also* Defendant's Pro Se Supplement to Claim X, PC-R 453). A defendant alleging due process violations from pre-indictment delay has the initial burden of showing actual prejudice. If the burden is met, the court must then balance demonstrable reasons for delay against the gravity of particular prejudice on a case-by-case basis. The outcome turns on whether delay violated fundamental conception of justice, decency, and fair play embodied in the Bill of Rights and the Fourteenth Amendment. *Rivera v. State*, 717 So. 2d 477 (Fla. 1998).

Mr. Gore suffered severe prejudice due to an almost two year delay between the murder of Robin Novick and his indictment. The victim in this case was found murdered in March of 1988. Mr. Gore was not indicted for her murder until March 21, 1990. There appears to be no reason, such as an on-going police investigation, to have postponed the indictment for such a lengthy period of time.

The length it took to indict Mr. Gore caused him severe prejudice in his ability to prepare a defense. There were many witnesses who died or whose memories had faded during the delay, such as an elderly women who heard an argument Gore was involved in and who died before trial. Ana Fernandez and Jessie Casanova's previous statements, compared to their trial testimony, demonstrated a deterioration of their memories. Evidence that could have been discovered by competent counsel was lost, destroyed,

damaged or never found because of the delay. The environment in which Mr. Gore lived, owning an escort service, necessitated immediate defense investigation to prevent the loss of evidence, especially witnesses.

Physical evidence also became unavailable by the time of indictment. For example, the corvette Mr. Gore had been driving around the time of the murder was unavailable for inspection by the defense. Had Mr. Gore had access to all the evidence closer to the time of the murder, the outcome of his trial would have been different.

Coincidentally, the March 21, 1990, indictment was brought on the same day that a jury in Columbia County, Florida began the penalty phase of a second murder conviction against Mr. Gore. It seems likely that the State made a strategic decision to indict Mr. Gore at that time in order to prompt media attention just as he was about to face a jury for sentencing on a separate murder charge. The purposeful nature of the delay on the part of the State caused Mr. Gore severe prejudice. An evidentiary hearing on this claim was necessary.

The allegations made in Claims II, III, V and X are taken as true under Rule 3.851 unless conclusively refuted by the record. Since the record does not conclusively refute the specific and detailed allegations contained in these claims, the trial court manifestly erred in summarily denying them without an evidentiary hearing.

c. The Trial Court's Unsupported Conclusion That Claims I, VI, VII, and IX Presented "Purely Legal Claims" Which Were "Insufficiently Pled" or "Alternatively Without Merit" Constituted An Erroneous Basis For Denying An Evidentiary Hearing

The trial court's November 16, 2004, order simply states that Claims I, VI, VII, VIII and IX raise "purely legal claims" that are "either procedurally barred…and as such insufficiently pled" or "alternatively without merit." (PC-R 908, November 16, 2004, Order). No reasons or record facts are given to support this conclusion. Appellant agrees that Claim VIII, which raises a constitutional challenge to Florida's sentencing scheme under *Ring v. Arizona*, 122 S. Ct. 2428 (2002), does not require an evidentiary hearing. (*See* Argument VIII , *infra*). Some portions of Claims VI and VII, challenging the constitutionality of death penalty jury instructions, voir dire and Florida rules preventing juror interviews, also raise some legal issues not requiring an evidentiary hearing. The merits of these claims, however, depend upon factual allegations requiring investigation and development at an evidentiary hearing.

Claim I alleges that Mr. Gore has been denied effective post conviction representation by virtue of his prior counsel's inaction, incomplete access to public records and inadequate investigation time. (PC-R 347-49). This claim, which is largely fact based, must be read in conjunction with the trial court's refusal to allow post conviction counsel access to public records sent in error to counsel in a different case. (*See* Argument II, *supra*). Such allegations are taken as true under Rule 3.851 unless conclusively refuted by the record.

Claim VI alleges numerous errors in voir dire and jury instructions that mislead the jury regarding its fundamental role in sentencing. Appellant contends that he was deprived of effective assistance of counsel when his lawyer, inadequately prepared and probably under the influence of drugs, failed to make a series of obvious objections regarding such errors to defendant's substantial prejudice. (PC-R 372-81).

Claim VII raises factual issues regarding the defendant's interest in interviewing jurors. While this claim does raise a legal challenge to Rule 4-3.5(d)(4) under the 5th, 6th, 8th and 14th Amendments, it rests upon allegations that jurors witnessed a media interview with an alleged victim of Mr. Gore's violent past. (PC-R 382).

V. THE TRIAL COURT ERRED BY FAILING TO CONDUCT A CUMULATIVE ERROR ANALYSIS THAT FULLY CONSIDERED THE DEFENDANT'S DETAILED ALLEGATIONS OF CONSTITUTIONAL ERROR INCLUDING INEFFECTIVE ASSISTANCE AT TRIAL

The United States Supreme Court has stated that Aa fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding@ *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In order to insure adversarial testing, and hence a fair trial, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment'". *United States v. Bagley*, 473 U.S. 667, 674 (1985), quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to

bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. *Smith v. Wainwright*, 799 F.2d 1442 (11th Cir. 1986).

Counsel's highest duty is the duty to investigate and prepare. *See, e.g.*, R. Regulating Fla. Bar 4-1.1. Where, as here, counsel unreasonably failed to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. All of the errors described in the following cases also occurred in slightly different forms in Mr. Gore's trial. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 384-88 (1986)(failure to request discovery based on mistaken belief state obliged to hand over evidence); *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); *Chambers v. Armontrout*, 907 F.2d 825 (8th Cir. 1990)(en banc)(failure to interview potential self-defense witness was ineffective assistance); *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989)(failure to have obtained transcript witness's testimony at co-defendant's trial was ineffective assistance).

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. *Washington v. Watkins*, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). *See also*

Kimmelman v. Morrison, 477 U.S. 365 (1986). Even a single error by counsel may be sufficient to warrant relief. *Nelson v. Estelle*, 626 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); *Nero v. Blackburn*, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard").

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding. *Strickland*, 466 U.S. at 696 (emphasis added).

The evidence presented in this claim demonstrates that cumulative effects of these violations renders the result of Mr. Gore's trial unreliable.

a. Failure to Object to Williams Rule Evidence.

Williams Rule evidence, pursuant to section 90.404(2)(a), Fla. Stat. (2001) allows the introduction of similar crime evidence when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Trial counsel was ineffective for failing to litigate the introduction of Williams Rule

evidence before the start of Mr. Gore=s new trial. Trial counsel had represented Mr. Gore in his previous 1995 trial. Before the 1995 trial, a hearing was held regarding the admission of Williams Rule evidence before Judge Glick. (1995 trial transcripts, pgs. 54-74). Before Mr. Gore=s 1999 re-trial, trial counsel refused to re-litigate the issue, despite Mr. Gore=s vehement demands, and decided to stand on Judge Glick=s previous rulings regarding the admission of Williams Rule evidence. (R. 67, 70). Counsel stated that he did not believe that he would get a better ruling. However, Judge Glick=s previous ruling allowed in every other collateral crime the state wanted to introduce except for the abduction of the young boy in the Tina Corolis case. A reexamination of the admissibility of this evidence before the new trial judge could not possibly of produced a worse outcome for the defendant than it had in the first trial. Reasonable legal arguments were available for exclusion of this critical evidence. Since the entire case against Mr. Gore was established through Williams Rule evidence, it was egregiously ineffective not to have a new hearing on the issue.

b. Failure to Investigate, Secure or Present Exculpatory Evidence

During the testimony of State=s witness, trail counsel failed to do any meaningful cross examination. Each witness was given a cursory examination or none at all. Specifically, counsel never attempted to impeach a single witness. He did not refer to other depositions and most importantly never referred to testimony given during the previous trial. Although trial counsel did request a copy of the transcript from the previous

trial and the trial court denied the request, trial counsel failed to file an appeal of the trial court's denial of the transcript. Such a failure to secure the transcript was ineffective. Counsel failed to call a number of important witnesses on behalf of Mr. Gore and failed to challenge the exclusion of evidence of a similar murder of women named Johnson while Mr. Gore was incarcerated. Counsel also failed to put in evidence a serology report showing negative results for sperm. Counsel never requested independent testing of the evidence. The record is void of any reasons for not gathering and presenting this evidence.

Similarly, the defendant told his counsel of useful information contained in a telephone book relating to his "escort service" that had been taken from him by police. Yet, apparently no effort was made by counsel to secure this evidence from the police or pursue other leads.

Although trial counsel previously announced his intention to call the witnesses listed below, who even the trial court acknowledged Amay indeed be relevant@ to Mr. Gore=s defense, he instead he rested without any of them. Mr. Gore has alleged that trial counsel, with no reasonable tactical or strategy, failed to call the witnesses he promised and should have called because of inattentiveness and drug addiction. Some of those witnesses include Paulette Johnson's mother; McMinn County, Tennessee Deputy Freddy Schultz; Detectives Otis Chambers and Susan Brown (impeachment of the state's star witness Tina Corolis); Federal Agent Barrows from Tampa; Susan Brown=s

sister; FDLE employees Karen Cooper and Sue Livingston; social worker from Jackson Memorial Hospital and Dr. Wilters. The prejudice to Mr. Gore is clear: both trial counsel and the trial court acknowledged the relevance of this information to Mr. Gore=s defense. Had trial counsel called these witnesses, there is more than a reasonable probability of a different outcome. The jury was thus deprived of important, relevant, and admissible evidence which could have caused them to have a reasonable doubt. Mr. Gore was denied the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984).

c. Trial counsel was suffering from a drug addiction

Trial counsel Genova was suffering from a drug addiction during Mr. Gore=s trial. (PC-R 416). Mr. Genova=s drug addiction caused him to put no effort into representing Mr. Gore. It is clear from the transcript that Mr. Genova did little to represent Mr. Gore. Mr. Genova failed to litigate the Williams Rule issue, was not prepared to call important witnesses, failed to conduct any reasonable independent investigation, was not prepared to cross examine witnesses, prepared no written motions, requested no discovery, failed to file a motion to dismiss Mr. Gore=s indictment for unreasonable pre-indictment delay (*see* Claim X) and spent no time with Mr. Gore in preparation for the trial.

Before closing arguments of the guilt phase and into the penalty phase, Mr. Gore chose to represent himself. Mr. Gore was forced to represent himself because he was faced with inadequate counsel. (*See* Argument III, *supra*). Mr. Gore, through

undersigned counsel, also claims that he was at the time of trial and presently incompetent and/or insane. (*See* Argument VI, *infra*). Mr. Gore was denied the effective assistance of counsel in all phases of his trial and must be given an evidentiary hearing in order to establish such claims.

d. Trial Court Had Off Record Discussions With The State

During the preparation for the penalty phase the following discussion was had between the court and the state:

> Court: All right. State, do you have a response to his request for continuance?
>
> Ms. Seff: We're just talking about it. The Judge wants to make sure what we say on the record.
>
> **(Discussion off the record).**

(R. 2901).

It is clear that off the record conversations were had between the state and the court. It causes concern as to what other conversations were had off record that were pertinent to Mr. Gore's case.(R.2924). In addition there appear to be missing portions of the transcript. This certainly prejudiced Mr. Gore and an evidentiary hearing was warranted.

VI. MR. GORE WAS INCOMPETENT AT THE TIME OF TRIAL AND DURING THE POST-CONVICTION PROCEEDINGS IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Marshall Gore was not competent to undergo the criminal judicial proceedings

which resulted in his conviction and sentence of death. A wealth of evidence was available during the trial which would have revealed his lack of competency. A wealth of evidence also exists now, including the post conviction transcripts, which shows that he was not competent to proceed in post conviction, much less waive his fundamental rights.

Mr. Gore's Fifth, Sixth, Eighth, and Fourteenth Amendment rights were abrogated because he was not legally competent when the trial proceedings at issue were conducted. Those rights were also abrogated because his counsel failed to advocate the issue of his competency although sufficient evidence existed to establish Mr. Gore's incompetence. Similarly, the original trial court failed to protect Mr. Gore's rights when, although it was blatantly obvious that he was incompetent, she removed the mitigator of extreme mental disturbance out of the jury instructions. (R. 3177).

Mr. Gore has never been well. He has suffered from mental instability since childhood. At the time of his trial, Mr. Gore was plagued by his longstanding mental disorders - a personality disorder, paranoia, diminished emotional functioning, and delusions. Because of his disorders he could not deal with counsel, aid in his defense, or understand what the proceedings transpiring before him were truly about. Indeed, Mr. Gore thought he was going to be given a new trial immediately after the guilt phase was completed. (R.2709). In the earlier Corolis case, Mr. Gore himself realized his incompetence but attributed it to a conspiracy by the State perpetrated by the administration of drugs. (PC-R 480).

During trial, Mr. Gore=s attorneys received information that he had been found incompetent by two experts. (R. 55-59). The record is so replete with evidence that Mr. Gore is suffering from paranoia and delusions that to cite them all would take pages. Throughout trial Mr. Gore accuses trial counsel, the court and the jail of being in a conspiracy against him. (R.596, 989, 2834, 3048, 2124, vol. 23 pg. 11). Mr. Gore similarly makes many other irrational and delusional statements on the record. For example, that he states that he is the father of Tina Coralis son, (R.1910, 1990) that numerous (27) women came to visit him while he was in jail including Susan Roark, who was already found murdered.(R.1848). Even the state comments on the record that Mr. Gore is making things up and not making sense. (R.2498,2635). The most obvious explanation for Gore's behavior is, as confirmed by medical experts, that he was delusional. Most importantly however, neither the court, nor the state, nor undersigned counsel is an expert in the field of psychology or psychiatry. Although the court ordered Dr. Mary Haber to examine Mr. Gore for competency, Dr. Haber's one hour interview with Mr. Gore was patently insufficient to detect his pathology. (R.55). Most importantly, trial counsel did almost nothing to develop this critical information.

Mr. Gore was forced to proceed, and was required to make critical life and death decisions, although he completely lacked the mental capacity to rationally make such choices. He could not aid in his defense. He could not deal with counsel. He could not rationally understand the nature and consequences of the judicial proceedings he was

undergoing. He could not testify rationally. He could not make intelligent choices. He failed on the factors specified in Fla. R. Crim. P. 3.211. Mr. Gore's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were denied when he was forced to undergo these proceedings even though he was clearly not competent to do so.

Moreover, Mr. Gore is insane to be executed. *Ford v. Wainwright*, 477 U.S. 399 (1986)(*See* Argument IX, *infra*).

VII. THE TRIAL COURT ERRED IN STRIKING MR. GORE=S ORIGINAL RULE 3.850 MOTION WITHOUT PERMITTING HIM LEAVE TO AMEND

On September 21, 2001, the Florida Supreme Court promulgated a new rule of criminal procedure 3.851 to apply only to motions filed by capital defendants on or after October 1, 2001. The arbitrary application of this new rule by the trial court, which may have significant detrimental effects to Mr. Gore=s attempt to seek state and federal post conviction review of his conviction and death sentence, violates due process and equal protection.

With the passage of the new Rule 3.851, capital defendants are apparently no longer permitted to file Ashell@ motions. Rather, as the State=s motion to strike Mr. Gore=s Ashell@ motion argued, the rule now provides that defendants provide, among other things, a "detailed allegation of the factual basis for any claim." (PC-R 38, Exhibit C). *See* Fla. R. Crim. P. 3.851(e). Because Mr. Gore=s initial motion failed to comport with these requirements, the trial court granted the State's request to strike the motion. Although

this Court thereafter granted an extension of time during which to file a fully pled 3.851 motion, (PC-R 74) the trial court's order striking the original pleading may potentially jeopardize defendant's federal remedies.

Mr. Gore submits that the application of this new rule to him violates his rights to due process and equal protection. In other contexts, capital defendants are entitled, under due process, to have out-of-time post conviction motions treated as timely filed when collateral counsel have failed to file in a timely fashion. *See Williams v. State*, 777 So. 2d 947 (Fla. 2000); *Medrano v. State*, 748 So. 2d 986 (Fla. 1999); *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999). There is no non-arbitrary reason why other capital defendants have been permitted to file such shell motions in order to toll their time under the federal habeas corpus statute (with the acquiescence of the Florida Attorney General), whereas defendants like Mr. Gore are not. Moreover, to the extent that Mr. Gore authorized the filing of the Ashell@ motion, Mr. Gore was relying on the advice of his state-appointed counsel. Certainly, any improprieties in the filing of the Ashell@ motion cannot be attributed to Mr. Gore himself.

The appropriate remedy at this time is for this Court to hold that the filing of Mr. Gore=s Amended 3.851 Motion should relate back to the filing of the original Rule 3.850 motion and be considered filed nunc pro tunc on June 4, 2002. *See Bryant v. State*, 901 So. 2d 810, 818-19 (Fla. 2005)(lower court should not strike a timely-filed original Rule 3.851 motion but rather grant leave to amend so that the amended motion would relate

back to the original filing). To do otherwise would be to deprive Mr. Gore of due process and equal protection.

VIII. THE FLORIDA CAPITAL SENTENCING PROCEDURES VIOLATED MR. GORE=S SIXTH AMENDMENT RIGHT TO HAVE A UNANIMOUS JURY RETURN A VERDICT ADDRESSING GUILT OF ALL THE ELEMENTS NECESSARY FOR THE CRIME OF FIRST DEGREE MURDER, IN VIOLATION OF *RING V. ARIZONA*.

In his Rule 3.850 motion, Mr. Gore alleged that his death sentence violated the Sixth Amendment in light of the then-recent decision in *Ring v. Arizona*, 122 S. Ct. 2428 (2002). (PC-R 235-257). Mr. Gore acknowledges, that this Court has repeatedly rejected *Ring*-based claims and has found that *Ring* is not retroactive in Florida. **He raises them herein in order to preserve them.** *See Sireci v. State*, 773 So. 2d 34, 41 n.14 (Fla. 2000)(Awe take this opportunity to suggest that issues which are being raised solely for the purposes of preserving an error should be so designated. We will consider the issues preserved for review in the event of a change in the law if counsel so indicates by grouping these claims under an appropriately entitled heading and providing a description of the substance@).

IX. MR. GORE IS INSANE TO BE EXECUTED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In his Rule 3.851 motion, Mr. Gore alleged that he may not be sane to be executed under the Eighth and Fourteenth Amendments (PCR257). *See Stewart v. Martinzez-Villareal*, 523 U.S. 637 (1998). The lower court denied this claim without prejudice to

raise the issue in the future should it become ripe (PC-R 257). **Mr. Gore raises this issue on appeal to preserve it.** *See Sireci v. State*, 773 So. 2d 34, 41 n.14 (Fla. 2000).

CONCLUSION

The foregoing authorities, the trial record, and the post conviction record show that a new trial and/or resentencing are warranted. Further evidentiary development is also warranted. Accordingly, Mr. Gore requests that his conviction and sentence of death be vacated and/or any other relief which this Court may deem just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid to Assistant Attorney General Sandra Jaggard, Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida, 33131, this 1st day of October, 2007.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used on this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

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Counsel for Appellant