IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-1848

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

REPLY 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. This is the Appellant's reply to the State of Florida's Answer Brief and only addresses those issues that Appellant believes require a response.[1]

[1] The following symbols are used to designate references to the record in this reply:

"R. _____" – trial record on direct appeal to this Court;
"PC-R. " – post conviction record on instant appeal to this Court;
"PC-T_"– post conviction transcript of proceedings;
References to other documents and pleadings will be self-explanatory.

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SUMMARY OF ARGUMENT

I. *The Trial Court's Finding That Appellant Waived His Post Conviction Claim of Ineffective Assistance of Counsel Relating To His Spencer Hearing Is Factually and Legally Unsupportable.* By treating the Appellant, a difficult and often delusional and paranoid individual, like a petulant child rather than a mentally disturbed man condemned to die, the trial court ignored important safeguards required by Florida law and should be reversed.

The trial court ultimately denied Appellant's claim of ineffective assistance of counsel during his *Spencer* hearing on grounds that Appellant "insisted that no witnesses be presented," thereby waiving his claim. (PC-R 1125-27) This finding was contrary to both the facts and the law. While the Appellant insisted that he wanted different counsel, he also unequivocally expressed his desire that his claims be heard and not "waived." To the extent that Appellant's rejection of appointed counsel created a presumption of self-representation, the trial court utterly failed to conduct a *Faretta* inquiry to establish on the record that Appellant knowingly, voluntarily and intelligently waived appointed counsel. To the extent that Appellant's rejection of appointed counsel created, as a practical matter, a waiver of his claims, a similar inquiry was required. The trial court's failure to ensure the Constitutional prerequisites for waiver was particularly egregious in light of

serious questions about Appellant's capacity to appreciate the consequences of his actions and make rational decisions.

II. *The Trial Court Erred By Refusing To Allow Post Conviction Counsel Unfettered And Reasonable Access To 80 Boxes Of Materials Relevant To Appellant's Claims.* The trial court allowed Appellant, a delusional and highly paranoid inmate on death row, to withhold relevant information from his postconviction counsel. The materials withheld were neither privileged nor Appellant's personal property. Under Florida law and practice these materials would have ordinarily be supplied to counsel without any need for the defendant's permission if not for their erroneous delivery by former post conviction counsel to Appellant's counsel in a distinctly different case.

The trial court compounded this error by ultimately allowing post conviction counsel only 30 days to review 59 boxes of materials ultimately released despite post conviction counsel's request for a reasonable extension. As a result, only 10 boxes of the 80 were ever accessed by post conviction counsel even though they were described by the attorney that erroneously received them as containing information pertinent and useful to Appellant's claims. (PC-T 383-84).

III. *The Trial Court Misperceived The Basis For Appellant's Claim Of Ineffective Assistance Of Penalty Phase Counsel.* The trial court also dismissed

claims regarding ineffective assistance of penalty phase counsel (Claim IV) upon the premise that Appellant waived those claims by representing himself at the penalty phase. (PC-R 908) This ruling misconstrues the basis for Appellant's claim. Appellant's claim is not about his own representation. Rather, Appellant claims that he received ineffective assistance from appointed counsel who he dismissed on the eve of the penalty phase. It was the deficient representation of penalty phase counsel which forced him into self-representation in the first instance. A defendant does not waive prior ineffective assistance of appointed counsel by dismissing that ineffective counsel and proceeding *pro se*.

IV-V. *The Trial Court Erred In Summarily Dismissing Appellant's Other Claims Without Reasoned Explanation Or Reference To Record Evidence.* The trial court summarily denied relief on all of the defendant's claims except as to part of Claim IV, without providing reasoned explanations, rationale or references to record evidence. The trial court's summary dismissal of such claims without explanation of how the record evidence conclusively refuted Appellant's specific allegations was in error.

With regards to issues VI, VII, VIII and IX, Appellant relies upon the arguments raised in his Initial Brief.

ARGUMENT

ARGUMENT I

THE TRIAL COURT'S CONCLUSION THAT APPELLANT WAIVED HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL RELATING TO HIS *SPENCER* HEARING IS FACTUALLY AND LEGALLY UNSUPPORTABLE.

At a status conference concerning witness lists, Appellant Marshall Gore vociferously complained by telephone about his post conviction counsel. Highly agitated, Gore alleged a number of specific inadequacies and accused his counsel of far-fetched conspiracies with both former post-conviction counsel and counsel in a different capital case. (PC-T 669-78) Appellant similarly complained about resolution of his *pro se* Motion to Disqualify the Trial Judge. The grounds alleged involved imagined conflicts of interest based on delusions that the judge was previously involved in the prosecution of the case against him.(PC-T 670-71) Appellant insisted that he wanted to replace and "waive" his appointed counsel who was conspiring against him but did not want to represent himself. (PC-T 669-74, 678) He also explicitly stated that his counsel had not adequately consulted him about witnesses and that he did not want any witnesses presented until he knew what they would say. (PC-T 669) Obviously and understandably frustrated at the Appellant's delusional rantings, the trial court then ruled that the Appellant had thereby waived his claim of ineffective assistance of counsel at his *Spencer*

sentencing hearing. (PC-T 670, 674, 678)

Any reasonable reading of the transcript reflects an obvious truth – although it is difficult to completely understand what Marshall Gore precisely wanted and why, it is clear what he did not want. He did not want to relinquish his claims. That is precisely what he said. (PC-T 674) The State asserts in its brief that Appellant intentionally and consciously waived his claims regarding the penalty phase in order to expedite a hearing on legally precluded assertions of actual innocence. This is both a distortion of the record and untrue. The State provides little support for its assertion other than bits and pieces of language parsed from Appellant's convoluted ranting. The State persists in unfairly attributing a degree of rationality to the Appellant's words which simply is belied by the record.

Appellant persistently, albeit irrationally, asserted that he did not want to move forward on the pending claims because of his dissatisfaction with post conviction counsel. (PC-T 674, 678) Although at one point he asserted that he would not participate or present witnesses in proceedings which were a "farce," his stated reasons were his dissatisfaction with counsel, lack of knowledge about the witnesses proffered and fear of the judge who he believed had participated in his prosecution. (PC-T 670-71).

Contrary to the State's suggestions, at no point did the Appellant assert or

even imply that he was deliberately choosing to forego his penalty phase claims in favor of others. Indeed, such a thought process would be irrational and legally without basis. Thus, even if the State's characterization of Appellant's motives were true, such motives should have caused the trial court further reasons to carefully establish whether the Appellant understood the practical consequences of his insistence on new counsel.

Given Appellant's explicit desire to not "waive" his claims, the trial court's ruling was not about voluntary "waiver" at all. Rather, although never acknowledged, the trial court essentially found that the Appellant had *involuntarily forfeited* his right to an evidentiary hearing. The reasons for this forfeiture were entirely based upon the Appellant's intransigence, disruptive argumentation and baseless complaints about his counsel, the court and the process. (PC-T 678) The reasons had nothing whatsoever to do with conscious, deliberate decision making based upon a knowing and clear understanding of the consequences or alternatives. Whatever else one might say about the Appellant's behavior, it is clear beyond cavil that he did not knowingly, intelligently and voluntarily relinquish rights.

The entire premise for the trial court's ruling was that the defendant was unwilling to proceed with appointed counsel at the cost of sacrificing his claims. The factual basis for this presumption, contrary to Florida law, was never

established by the court through careful, patient questioning of the Appellant on the record. When a defendant seeks to remove appointed counsel, Florida law requires that the court establish the factual basis for the defendant's dissatisfaction on the record. *Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. App. 1973); *Hardwick v. State*, 521 So. 2d 1071, 1074-75 (Fla. 1988).

Here, although the trial court asked the defendant about his complaints, he essentially failed to explore the factual basis for a whole series of alleged inadequacies. These included alleged conflicts of interest, failure to consult on expected witness testimony, and failure to adhere to previously expressed wishes to not call family members as witnesses. The Appellant also alleged counsel's lack of loyalty based upon an imagined conspiracy with prior post conviction counsel and a "fraudulent billing scheme" with counsel appointed in a distinctly separate capital case. Even though many of the Appellant's allegations were delusional or irrational, the trial court was required to make a reasonable inquiry on the record regarding the basis for such complaints and the effectiveness of counsel, however the trial court did not do so.

When a defendant insists upon removing appointed counsel found effective after an appropriate *Nelson* inquiry, a presumption that the defendant is choosing self-representation is permissible. *See Jones v. State*, 449 So. 2d 253, 258 (Fla.

1984); *Weaver v. State*, 894 So. 2d 178, 193 (Fla. 2004). This presumption of self-representation, however, must be based on an adequate determination on the record that the defendant has knowingly, voluntarily and intelligently waived his right to appointed counsel. *Hardwick*, 521 So. 2d at 1074-75. *See Faretta v. California*, 422 U.S. 806 (1975).

Recognizing that the trial court made no attempt to follow the dictates of *Faretta* or otherwise establish that the defendant fully understood the consequences of his outbursts, the State now suggests that *Faretta* is inapplicable because the Appellant never made an "unequivocal" request for self-representation. State Brief at 50-51. This suggestion is disingenuous at best.

Whether one characterizes the issue as waiver of counsel or waiver of claims, the Constitution requires that the court establish that the defendant has knowingly, intelligently and voluntarily relinquished his rights. *See, e.g.*, *Godinez v. Moran*, 509 U.S. 389, 400-402 (1993); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938); *Hardwick*, 521 So. 2d at 1074-75.

Although Appellant here expressly disavowed any desire for self-representation, as an inmate on death row it was not possible for him to conduct an effective post conviction evidentiary hearing *pro se* in any case. The State quite enthusiastically urged that the rejection of appointed counsel also required

dismissal of Appellant's claims since, at least at that juncture, he did not want to represent himself at the pending hearing. The State's position was that Appellant had waived counsel,[2] and his claims.

The State can't have its cake and eat it too by arguing that Appellant's rejection of appointed counsel was, in effect, a waiver of his claims. The State cannot assert that the Appellant waived his claims by waiving appointed counsel and at the same time suggest that there was no requirement for a record inquiry regarding whether those waivers were knowing, intelligent and voluntary. In essence, the State argues that even though a waiver of counsel always requires a careful record inquiry, no inquiry is required if the defendant also declines self-representation. (State Answer Brief at 50-51) The State urges that this is true even if the consequence is forfeiture of the underlying defense or claim. This untenable position would create the anomaly that waiver of counsel requires a full *Faretta* inquiry, while resulting waiver of claims do not. This is not the law.

Florida law requires that waivers of both counsel and claims be accompanied by a detailed record inquiry establishing that the waiver was knowingly, intelligently and voluntarily made by a competent defendant who was informed and generally understood the consequences of his decision. *See* Fla. R. Crim. Pro.

[2] The State itself suggested to the trial court that it should conduct the same *Faretta* inquiry that it now asserts was not necessary. (PC-T 678).

3.111(d)(2)-(3), Appendix B, 719 So. 2d 873, 878-79; *Porter v. State*, 788 So. 2d 917, 927 (2001)(endorsing an extensive colloquy, especially given competency issues); *Sanchez-Velasco v. State*, 702 So. 2d 224, 228 (1997)(waiver of proceeding requires record inquiry).

This careful record inquiry is obviously even more critical in post conviction capital cases because the waiver of appointed counsel, practically speaking, also constructively precludes effective factual development of the condemned defendant's claims. Thus, while it is clear that capital defendants can waive collateral counsel and their post conviction claims, a full and careful *Faretta* inquiry is essential to the fair administration of justice in such cases. *See Durocher v. Singletary*, 623 So. 2d 482, 485 (1993). When a defendant "exercises a desire to dismiss his collateral counsel and proceedings, the trial court must conduct a *Faretta* – type evaluation." *Sanchez-Velasco v. State*, 702 So. 2d 224, 228 (1997).

This inquiry should "thoroughly expose" defendant's education and experience, and "repeatedly stress" the legal implications of the decision. Caution also dictates a current competency evaluation if any doubts about competency exist. *Id*. The basis for waiver must appear on the record and failure to conduct a proper inquiry is per se reversible error. *See Flowers v. State*, ___So. 2d ___, 2008, 33 Fla. L. Weekly D 756, (1st DCA, March 13, 2008)(per se reversible error for

inadequate *Faretta* inquiry which must be established on record regardless of the trial court's familiarity with the defendant).

Most importantly, Appellant's refusal to proceed with appointed counsel resulted in the trial court's decision that he had thereby also forfeited his substantive claims despite his expressed desire to preserve them. The State cites no cases in Florida where a condemned defendant on death row has been forced into an involuntary waiver of claims based on his insistence that new counsel be appointed. This is not surprising since no rationale defendant would cut off his nose to spite his face -- forfeiting claims he wishes to have heard in order to manifest steadfastly his dissatisfaction with appointed counsel. Instead, the typical case involves a "volunteer" who has knowingly chosen to forego his claims or defenses and waive counsel to that end.

In cases such as the present, in which the defendant's insistence on replacing counsel has the consequence of forcing an involuntary forfeiture of his claims, the court should be especially vigilant about the defendant's understanding and willingness to suffer the consequences of his intransigence. At minimum, the trial court was required to clearly establish that the Appellant fully appreciated that the practical and legal consequence of his removal of appointed counsel would be the loss of his claims. *See Sanchez-Velasco*, 702 So. 2d at 228.

This careful inquiry is particularly critical in cases such as this where the defendant had already been declared incompetent by one expert and contemporaneously expressed irrational and delusional complaints about appointed counsel and the trial court itself. The State here suggests that the Appellant's mental state was irrelevant to the issues of waiver because the trial court had previously determined, after weighing competing evidence, that Appellant was competent to proceed with his post conviction claims under *Godinez v. Moran,* 509 U.S. 389 (1993)(competency standards for guilty plea waivers is the same as competency for trial). [3]

It is true that Florida has yet to clearly distinguish between competency to stand trial and competency to waive rights generally. *See Muhammad v. State,* 494 So. 2d 969, 975 (Fla. 1986). However, a case currently pending before the United States Supreme Court casts considerable doubt on the general proposition that competency to waive is the same for all purposes. *See Edwards v. Indiana*, 866 N.E. 2d 252 (Ind. 2007) *Cert. Granted*, 128 S. Ct. 741, 169 L.Ed.2d 579 (2008). *See also Martinez v. Court of Appeals of California*, 528 U.S. 152, 156-161

[3] The State's citation of *Demosthenes v. Bael*, 495 U.S. 731, 735 (1990) for the proposition that a prior competency determination becomes a "fact" somehow implicitly binding throughout a proceeding is inapposite. In that case the defendant had been evaluated one week prior to the court's disputed ruling. In this case a significant time lapse had occurred since the Appellant had been evaluated and judged incompetent by one of the three experts that examined him.

(2000)(distinguishing and explicitly casting doubt on the rationale of *Godinez* in holding that there is no right to self-representation on appeals). *See also Westbrook v. Arizona*, 384 U.S. 150 (1966); *Massey v. Moore*, 348 U.S. 105, 108 (1954)("one might not be insane in the sense of being incapable of standing for trial and yet lack the capacity to stand trial without the benefit of counsel").

Indeed, the Florida Attorney General has joined an amicus brief submitted to the United States Supreme Court in the pending *Edwards* case. That brief urges that a higher standard of competency be required for waivers which result in *pro se* representation since the general competency standard articulated in *Dusky v United States*, 362 U.S. 402 (1960) explicitly presumes the presence of a lawyer. *See* Amicus Brief of Ohio And 18 Other States in Support of Petitioner, *available at*: http://www.cjlf.org/briefs/Edwards/Edwards.htm.

Moreover, the State's position confuses the issues of waiver with those of competency. Whether a delusional and mentally disturbed defendant rationally understands and appreciates the consequences of his actions is obviously relevant to the requirement that waiver of fundamental rights requires a knowing, intelligent and voluntary relinquishment. Even if competent to assist counsel in post conviction proceedings, the Appellant's mental condition is relevant to a determination of whether his waiver (forfeiture here) was knowing, intelligent and

voluntary. *See Godinez*, 509 U.S. at 400-401("heightened" standard for waiver in guilty plea involves questions of understanding not competency to stand trial).

In *Muhammad v. State*, 494 So. 2d 969, 975 (1986) this Court described this distinction: "Competency may, however, be one of several factors to be considered when a defendant waives a right, as in the case of waiver of counsel – Faretta requires that the court find that the defendant is not only competent, but also 'literate…and understanding, and that he [is] voluntarily exercising his informed free will." Id. at 975, *quoting*, *Faretta*, 422 U.S. at 835.

The Appellant here wanted to dismiss counsel for, among other unfounded reasons, supposedly living in the same neighborhood as a former post conviction counsel and the victim, conspiring with former post conviction counsel to hide evidence relating to civil lawsuits defendant allegedly had filed, conspiring with post conviction counsel in an unrelated case to create a "fraudulent billing scheme" to his detriment, and working with the state to "kill" him. (PC-T 270, 459, 480, 381-85, 670-78, 730-31; PC-R 974, 979-80). At the same hearing during which Appellant supposedly knowing and intelligently waived his rights, he also worked himself into a highly agitated state regarding the trial court's summary denial of his *pro se* motion to disqualify the judge based on unfounded allegations of prior involvement in one of the Appellant's prosecutions. (PC-T 670-71)

At various times during the hearing, the Appellant asserted his desire to not waive his claims and to secure alternative counsel, while at the same time declaring that he wouldn't proceed with a "farce" that he thought would prevent him from "appealing" the court's refusal to disqualify itself. The only thing clear from the transcript is that the Appellant, while intelligent, is also irrational, delusional, paranoid and often infuriatingly difficult. A careful inquiry under these circumstances was required to establish whether the Appellant was thinking rationally and fully appreciated and understood the legal forfeiture that his intransigence would cause. The trial court erred in not providing this safeguard with an appropriate record inquiry.

ARGUMENT II

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING POST CONVICTION COUNSEL COMPLETE ACCESS TO MATERIALS RELEVANT TO APPELLANT'S CONVICTION AND SENTENCE

The dispute over access to "records" in this case pertains to 80 boxes of files and documents relevant to Appellant's conviction and sentence in this case. These materials, at times mistakenly referred to as "public" records in Appellant's Initial Brief,[4] were collected by trial counsel and others. (PC-T 380, 402-03, 407) They

[4] The transcript shows no confusion over whether the disputed documents were "public records" or rather other materials developed during Gore's trial. The

were delivered in due course to Appellant's former post conviction counsel, Arnold, who later withdrew. After withdrawing, Attorney Arnold mistakenly sent the 80 boxes to Attorney Tassone, who had been appointed successor post conviction counsel in a distinctly different capital case against the Appellant.[5]

Appellant's post conviction counsel in this case discovered the existence of these documents when preparing for the evidentiary hearing and immediately requested access.[6] (PC-T 375, 400-403) Attorney Tassone acknowledged that the material was pertinent and probably helpful to Appellant's post conviction claims. (PC-T 383-84) He nevertheless withheld them from counsel on grounds that the Appellant himself objected to disclosure. Appellant objected to counsel's access based upon his manifestly irrational fear that post conviction counsel was

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mistaken reference to these materials as public records in Appellant's opening brief, however, did engender a series of arguments and denials by the State focused on that special category of post conviction discovery. The mistaken reference was completely inadvertent.

[5] The State's suggestion that the trial court "indicated" that there was no evidence to support finding that the files were mistakenly delivered to attorney Tassone is highly misleading. In fact, the trial court simply stated that he didn't know whether or not the delivery was a mistake. (PC-T 580-81) There is ample record evidence to substantiate this claim including the index of documents prepared by Tassone and kept from post conviction counsel under seal by order of the trial court.

[6] Although the State urges dismissal of this claim because of a supposed "lack of diligence," the trial court itself described the materials as newly discovered. (PC-T 375) Any subsequent delay was entirely due to the trial court's own erroneous conclusion that such material had to be reviewed by Attorney Tassone and the Appellant before release to post conviction counsel.

conspiring with others against him and would purposefully use the materials against him. (PC-T 381-85; PC-R 974, 979-80)

The trial court's response to Appellant's irrational effort to keep relevant documents from his appointed counsel was in error in two ways. First, the trial court erroneously believed that Appellant, despite overt expressions of irrational delusions regarding his counsel's loyalties, could prevent access to documents that were neither privileged nor his personal property. The trial court premised this ruling on the notion that a defendant has absolute control over the course of his own defense and can therefore prevent appointed counsel from examining relevant evidence. The State defends this unsupported premise by asserting the trite aphorism that even a capital defendant is the captain of his own ship.

Defendants do have significant control over their own destiny under Florida law. *See Hamblen v. State*, 527 So. 2d 800, 804 (2005)(defendant's guilty plea with waiver of counsel and mitigation described as a completely lucid, conscious and knowing choice); *Mora v. State*, 814 So. 2d 322, 331 (2002)(waiver of mitigation requires a record establishing defendant's desire to waive, potential mitigation evidence available and that the defendant is fully informed by counsel). Nevertheless, the "ability of capital defendants to restrict counsel's argument is not without limit." *Farr v. State*, 656 So. 2d 448, 450 (1995). This is true because

"there are countervailing interests that must be honored" relating to the fair administration of justice. *Klokoc v. State*, 589 So. 2d 219, 222 (1991)(appellate counsel may not be waived in capital cases).

The materials withheld here were not Appellant's personal papers, files or property but rather material developed by trial and penalty phase counsel at public expense. (PC-T 380, 402-03, 407) *See Long v. Dillinger*, 701 So. 2d 1168, 1169 (1997)(materials developed by trial counsel "are the personal property of the attorney" and must be disclosed to post conviction counsel by trial counsel). Nor were there any recognized privileges that might have justified non-disclosure. *See Owen v State*, 773 So. 2d 510, 514 (2000)(claims of ineffective assistance of counsel create a waiver of any prior attorney-client privilege).

The trial court's approach was also directly inconsistent with Florida Rule of Criminal Procedure 3.851(c)(4) which requires that trial counsel provide post conviction counsel all materials and files without reference to any requirement for the defendant's prior review or control. At minimum, the trial court was required to fully inform counsel regarding those documents ultimately withheld so as to permit challenge. Instead, however, the trial court sealed the index. (PC-R 510-11; PC-T 500).

The trial court's second error regarding these materials was in denying

counsel adequate time and opportunity to review those materials ultimately produced by Attorney Tassone. The trial court allowed Tassone several months to review and tabulate these files at taxpayer expense (over $10,000) in order to keep them from post conviction counsel. Inexplicably, it then allowed counsel only 30 days to review 59 boxes of material ultimately released. When counsel was, understandably, only able to review 10 of those boxes within the 30 calendar days allotted, the court refused a reasonable extension. This was an abuse of discretion and especially egregious since any delay caused by the document issues would have been quickly obviated had the court simply allowed counsel access in accordance with Florida law.

ARGUMENT III

THE TRIAL COURT'S FINDING THAT APPELLANT WAIVED HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE MISPERCEIVED THE BASIS FOR THE CLAIM AND WAS IN ERROR.

Despite specific fact based allegations of counsel's deficiencies, the trial court summarily dismissed Appellant's claim that he was denied effective assistance of counsel during the penalty phase of his trial. The State offers three tenuous justifications for this decision. First, the State suggests that Appellant waived such claims by removing appointed penalty phase counsel and proceeding *pro se*. It is, of course, true that a *pro se* litigant can not later complain that he

provided himself ineffective assistance of counsel. *See Allen v. State*, 662 So. 2d 323, 328 (1995). This unremarkable proposition, however, has no relevance to what Appellant now claims.

Appellant's claim is not that his own failings created ineffective assistance of counsel. Rather, Appellant claims that appointed counsel's prior failures to properly prepare an available mitigation defense, including the presentation of available and previously agreed upon witnesses, was itself ineffective assistance. Appellant did not dismiss penalty phase counsel until the eve of the penalty phase when he learned of counsel's lack of preparation. Appellant himself offered this precise explanation to the trial court regarding why he felt compelled to dismiss counsel in favor of self-representation. (Appellant's Initial Brief at 27). Appellant's decision to dismiss penalty phase counsel because of perceived deficiencies can hardly constitute a waiver of that counsel's prior ineffective assistance.

Second, the State also asserts that Appellant's claims are procedurally barred for two reasons. The State first argues that the "claim" of being forced into self-representation is being raised for the first time on appeal. While Appellant disputes the factual validity of this argument, the State's position confuses the difference between a "claim" and its factual predicates. Appellant's "claim" is not "forced self-representation" but rather that he received ineffective assistance from

appointed penalty phase counsel. The fact that he felt compelled to proceed *pro se* because of his trial counsel's deficiencies is nothing more than a reflection of the constitutional violation that took place.

The State also argues that this claim is procedurally barred because ineffective assistance was also raised on direct appeal. Ineffective assistance claims are generally not suitable for resolution on direct appeal. As a result, the Florida Supreme Court disfavors such claims and will only provide relief on direct appeal if counsel's deficiencies are "apparent on the face of the record." *Gore v. State*, 784 So. 2d 418, 438 (Fla. 2001). On direct appeal in this case, the Court rejected the claim of ineffective assistance solely and explicitly on that ground: "Accordingly, because it is not apparent from the record that counsel was ineffective, we deny relief on this claim." *Id*. at 438. The limited scope of review used to evaluate such claims when raised on direct appeal is obviously inapplicable in post conviction claims. Post conviction claims generally require an evidentiary hearing to consider the defendant's specific allegations including evidence not reflected in the trial record. The State's assertion of a procedural bar on these grounds is specious.

Third, the State argues that the effectiveness of counsel was conclusively established by the record even though the trial court made no attempt to justify its

decision on this basis. The State's only evidence to support this proposition consists of the self-serving statements by penalty counsel in the trial transcript that he did an appropriate investigation. Appellant disputes the veracity of these statements and has asserted specific failings of counsel that involve disputed issues of fact that can only be resolved by an evidentiary hearing as required by Florida law.

ARGUMENTS IV-V

SUMMARY DENIAL OF APPELLANT'S REMAINING POST CONVICTION CLAIMS WAS IMPROPER AND LACKED THE EXPLICIT EXPLANATORY RATIONALES REQUIRED BY FLORIDA LAW.

The trial court summarily denied relief without an evidentiary hearing for all claims other than those involving ineffective assistance of counsel during Appellant's *Spencer* hearing. This was in error in two distinct ways that vary by the claims involved. Regarding Claims II (ineffective assistance of trial counsel), III (ineffective assistance regarding competency), X (indictment delay) and other portions of IV (ineffective assistance of penalty phase counsel) the trial court erred because each of these claims presented specific allegations of constitutional error whose merits depend upon disputed facts. Florida Rules and practice clearly establish that an evidentiary hearing must be held on all claims the defendant "lists" as requiring factual determination unless conclusively refuted by the record.

Fla. R. Crim. P. 3.851(d). Florida law also requires that if a hearing is denied on such claims, the trial court must explicitly explain the basis for its conclusions or attach relevant portions of the record. *See Provenzano v. Dugger*, 561 So. 2d 541, 543 (Fla. 1990); *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993).

In this case, there is simply no way to know how or why the trial court found that the alleged disputed facts were conclusively refuted by the record because he simply doesn't say. His order, which was prepared by the State and unchanged by the trial court, provides no specific reasoning or reference to the record that would justify denial of an evidentiary hearing on these claims. The trial court should provide "very specific reasons as to why each claim was denied." *Patton v. State*, 784 So. 2d 380, 387 (Fla. 2000). A "one sentence" order denying relief based simply on the arguments presented by the State's response to the motion is "insufficient." *Id*. at 388.

The *Huff* hearing at which the court considered these claims initially is, contrary to the State's unsupported assertions, likewise devoid of the findings required by Florida law. This is not surprising in one sense. These allegations, especially those involving the drug addiction and failures of trial counsel Genova, depend upon facts that would not be revealed by the existing record and trial transcripts. That is the very purpose of an evidentiary hearing.

The trial court's summary rejection of Claims I and V through IX was in error for similar but distinct reasons. Providing only a boilerplate conclusion that such claims were insufficiently pled, procedurally barred and without merit is hardly sufficient explanation of the reasons that those claims were denied. *See Patton*, 784 So. 2d at 387-88. The State's assertion to the contrary simply confuses the difference between a conclusion and an explanation. Florida law contemplates that trial courts should provide sufficient explanations of their rationale and reasons for denying claims of constitutional error in capital cases. These reasons should be specific enough to at least allow legal challenge. The trial court's failure to provide reasonable explanations for the denial of relief was in error.

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 this Court remand for an evidentiary hearing, and thereafter, 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 Reply 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 12th day of April, 2008.

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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).

Counsel for Appellant