

IN THE SUPREME COURT OF FLORIDA

Case Number: SC01-1524
Lower Tribunal: 88-607CF

MARSHALL LEE GORE
Appellant

vs.

STATE OF FLORIDA
Appellee

Appellant's Amended Initial Brief

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RECORD REFERENCES

RECORD: References to the record in this brief shall be to volume and page number of the record on appeal, or to the supplemental record on appeal, as follows:

SR-VI-901 shall refer to the supplemental record, volume VI, page 901.

R-1149 shall refer to the original record on appeal, page 1149

PARTIES: The appellant shall either be referred to as the “appellant” or as “Gore”.

The Trial Court shall be referred as the “trial court”.

The State shall be referred to as the “State” or “Prosecutor”.

Any witness or other individual shall be referred to by name.

STATEMENT OF THE CASE AND FACTS

NATURE OF THE CASE:

This is an appeal from the denial of Appellant's Amended Motion to Vacate Judgments of Conviction and Sentences filed June 23, 1997. The appellant's amended motion to vacate is found at SR-VI-901. The trial court's ruling following the Huff Hearing, which summarily denied many of the appellant's claims, is found at SR-V-869. The trial court's order denying relief following the evidentiary hearing is found at SR-IX-1498.

COURSE OF PROCEEDINGS:

On July 28, 1989 the grand jury of Columbia County, Florida returned an indictment against Gore, charging him with premeditated murder, kidnaping, and robbery. (R-2758-2759) Following trial, Gore was found guilty as to all charges, and the jury recommended a death sentence. (R-2723) On or about April 3, 1990, the trial court imposed a death sentence on the murder conviction, life imprisonment on the kidnaping conviction, and 15 years on the robbery conviction, all consecutive. (R-2729 thru 2752)

The Supreme Court, after striking the CCP aggravator, affirmed Gore's conviction and sentence in Gore v. State, 599 So.2d 978 (Fla. 1992), cert. den. 506 U.S. 1003, 113 S.Ct.610 (1992). Mandate issued August 5, 1992. (SR-I-1)

Following numerous motions filed by CCR, and other motions filed pro se, and following various hearings on said motions (see index SR-I), the Amended Motion to Vacate Judgments of Conviction and Sentence, which is the motion at issue in the instant appeal, was filed by CCR on February 27, 1997. The said amended motion consists of 145 pages and numerous counts or claims. (SR-VI-901 thru 1045) An additional amended motion to vacate was filed by CCR on July 22, 1997 (SR-VI-1048), but it is repetitive of the instant motion.

Following a Huff hearing, the trial court entered an Order on June 13, 1997, summarily denying a number of Gore's claims, and granting an evidentiary hearing on other claims. (SR-V-869)

Additional motions to vacate were subsequently filed, for example SR-VII-1089, as were other motions to disqualify the trial judge (SR-VII-1160 and SR-VIII-1296), and to disqualify the office of the State Attorney, Third Judicial District (SR-VII-1272), etc.

Eventually, however, following the withdrawal of CCR, the undersigned was appointed, and filed for an extension of time to file an amended motion to vacate on November 15, 1999. (SR-VIII-1431)

Notwithstanding the appellant's refusal to cooperate, an effort was made to file another fourth amended motion to vacate on February 14, 2000 (SR-VIII-

1436), but the appellant refused to sign the motion (SR-VIII-1441), and the appellant thereafter filed a pro se emergency motion for substitution of counsel on February 28, 2000. (SR-VIII-1444)

During a status conference hearing (SR-XVI-1728), the trial court entertained Gore's emergency motion for substitution of counsel; then, following Gore's comments that counsel should remain on the case (SR-XVI-1732), the trial court gave counsel an additional 90 days to file another amended motion.

Finally, because the appellant continued not to cooperate with counsel, the undersigned filed a motion to proceed on the amended motion to vacate filed by CCR back in February, 1997, the instant motion. (SR-IX-1469)

That motion to proceed on CCR's amended motion was granted by the trial court on July 5, 2000, and authorized counsel to proceed on 22 claims set forth in sections VII and XVIII of the said amended motion, all as previously referred to in the trial court's order of June 13, 1997. (SR-IX-1471)

Finally, an evidentiary hearing was held on December 14, 2000. (SR-XVII-1742) During the evidentiary hearing, counsel requested that the trial court reconsider the claims which had been summarily denied at the Huff hearing. (SR-XVII-1744 thru 1754)

On May 31, 2001, the trial court entered an order denying all of Gore's

claims for post-conviction relief. (SR-IX-1498)

Notice of Appeal was timely filed. SR-IX-1519)

DISPOSITION IN LOWER TRIBUNAL:

The appellant was sentenced to death in the trial court, and the said sentence was upheld by the Supreme Court, as previously stated herein. The trial court has denied all of appellant's claims for post-conviction relief (SR-IX-1498 thru 1513), and this appeal follows.

STATEMENT OF THE FACTS:

As found by the Florida Supreme Court, Gore, supra, 599 So.2d 978, 980-981, "Susan Roark was last seen alive on January 30, 1988, in Cleveland, Tennessee, in the company of Marshall Lee Gore. Gore had planned to travel to Florida with a friend from Cleveland. While waiting for his friend at a convenience store, Gore struck up a conversation with Roark. Gore then entered Roark's car, a black Mustang, and they drove away....

On April 2, 1998, the skeletonized remains of Roark's body were discovered in Columbia County, Florida. The naked body was found in a wooded area which had been used as an unauthorized dumping ground for household garbage and refuse. Expert testimony established that the body was placed in its location either at the time of death or within two hours of death. The body could have been there

anywhere from two weeks to six months prior to the discovery. The forensic pathologist who testified for the State concluded that the cause of death was a homicide, given the situation in which the body was found and the fact that the neck area of the body was completely missing. The pathologist explained that this was probably due to some injury to the neck, such as a stab wound or strangulation trauma, which provided a favorable environment for insects to begin the deterioration process....

Gore was arrested in Paducah, Kentucky, on March 17, 1988, on federal charges unrelated to this case. At this time, FBI agents informed Gore of his Miranda rights, Gore signed a written waiver form, and the agents began questioning him. When the agents asked Gore how he arrived in Paducah, he stated that he didn't want to answer any more questions. The agents immediately ceased their interrogation and took Gore to a federal prison. Several days later, on March 24th, Gore was interviewed by detectives from the Metro Dade police department. At the start of this interview, Gore was again informed of his Miranda rights and waived them. The detectives asked Gore various questions about his background and his knowledge of several crimes in the Miami area, as well as the Roark abduction. Gore made several statements at this time which were subsequently introduced at trial.”

On his direct appeal, Gore was represented by Nancy A. Daniels, Public Defender, and W.C. McLain, Assistant Public Defender, Tallahassee, Florida.

On appeal, the Florida Supreme Court considered the following issues: (1) The trial court erred in denying his motion to suppress statements made to the Miami detectives (Gore, Page 981), (2) The trial court erred in admitting evidence of two other collateral crimes through two witnesses, Lisa Ingram and Tina Corolis. (Gore, Page 983) (3) The trial erred by denying him a continuance so that he could secure the attendance of a witness at trial who was pregnant. Gore also asserted error because he was not present at the videotaped deposition of the witness. (Gore, Page 984) (4) The trial court erred by denying his motion for acquittal as to the kidnaping charge. (Page Gore, 985) (5) The trial court erred in excusing the victim's grandmother from the sequestration rule. (Gore, Page 985) Gore's next assignments of error on appeal pertained to the penalty phase, where he claimed that the trial court erred by allowing the State to question a defense psychiatrist on the issue of his mental state at the time of the offense. (Gore, Page 986) The final arguments on appeal dealt with the trial court's findings at sentencing. (Gore, Page 986)

In his Amended Motion to Vacate Judgments and Sentences (SR-VI-901 thru 1045) Gore presented the following pertinent claims for post-conviction relief:

Claim II (SR-VI-Page 908)- The State lacked jurisdiction to try Gore, and ineffective assistance of counsel. The claim asserts that no evidence established that any of the essential elements of the three offenses occurred in Florida. The claim also asserts that trial defense counsel failed to raise jurisdiction as an issue, either in pleadings, argument, or jury instructions. The claim also asserts that the failure to raise jurisdiction as an issue was compounded by the prosecutor's argument (R-2499) that the State did not have to prove where the crime was committed beyond a reasonable doubt.

Claim IV (SR-VI-Page 913)- Among other things, Gore asserted in this claim that trial counsel failed to effectively object to the introduction of Lisa Ingram's testimony regarding a purse found, and regarding statements made to her by Gore concerning the purse and a woman he had killed. At trial, and on direct appeal, Gore argued that the testimony was not relevant. The Supreme Court found that the testimony was admissible as an admission, but commented: "Testimony had previously established that Roark had a purse with her on the night she disappeared. While there are some timing problems with this testimony, as well as a lack of connection between Roark's purse and the purse Ingram saw in the car, these were matters to be considered by the jury in evaluating the weight to give this testimony and did not render the evidence inadmissible. (Gore, supra, Page 983)

Gore further alleged in claim IV that trial counsel was prevented by the State from effectively deposing witnesses. (Sr-VI-Page 913)

Gore also asserted that he told trial counsel prior to trial about an address or phone book obtained from Gore by the State, which had the names, addresses, and telephone numbers of witnesses who could corroborate his statements. Trial counsel failed to procure the book. (SR-VI-Page 914) Gore also asserted that the State violated F.R.Crim.P.3.220 by failing or refusing to give the book or witness information to the defense. (SR-VI-Page 915)

Claim VII (SR-VI-Page 20)- Gore asserted in this claim that trial counsel failed to investigate Gore's complaints that witnesses were violating the sequestration rule and were violating the court's order by discussing the case, failed to move for a change of venue, and there existed a level of enmity between trial counsel and Gore, resulting in counsel's failure to pursue Gore's timely request for new counsel. In this claim Gore again asserts that trial counsel failed to understand the difference between venue and jurisdiction, and claims, among other things, that trial counsel failed to investigate present available mitigation evidence.

Claim XIV (Page SR-VI-942)- Gore asserted in this claim that the prosecutor made repeated inflammatory, improper, and prejudicial comments during both the guilt phase argument and in the penalty phase argument. Examples of the alleged

misconduct were cited from the record. Gore also asserts that to the extent trial counsel failed to object, Gore was prejudiced, and denied effective counsel.

Claim XVII (SR-VI-Page 954)- In this claim Gore asserts that since the indictment only charged him with premeditated murder, with no charge of felony murder, there was insufficient evidence to convict him at trial, and that the State would, of necessity, have had to pyramid inference upon inference to convict him.

The claim further asserts that trial counsel was ineffective because counsel failed to argue to the court during his motion for acquittal, or in his motion for new trial, either the insufficiency of the evidence, or that the jury would have had to pyramid inferences to convict as charged. Further, no claim for insufficient evidence was made in the direct appeal.

Claim XVIII (SR-VI-Page 961)- This claim asserts that the appellant was prejudiced, and that trial counsel was ineffective for his failure to investigate or present evidence of mitigation during the penalty phase. Specific claims about trial counsel's failure to present mitigation testimony concerning the defendant's mental problems and mental disabilities are asserted.

Claim XIX (SR-VI-Page 972)- In this claim Gore asserts that the prosecutor made impermissible statements and suggestions to the jury during voir dire, and trial counsel failed to object, or to move for mistrial, etc. The prosecutor is alleged to

have repeatedly asked prospective jurors if they could vote for death if the aggravating factors required or called for such a sentence. (Citing R-278-280, 308, 310, 519, 533, 540, 574-575, 614, 763, and 776)

Claim XX (SR-VI-Page 975)- This claim asserts, among other things, that Gore did not have adequate mental health assistance at or during trial, and further asserts that he was prejudiced, and trial counsel was ineffective by his failure to provide background materials to the mental health experts who were involved in the case, especially during penalty phase.

Claim XXII (SR-VI-Page 981)- This claim asserts fundamental error which diluted the jury's sense of responsibility towards sentencing. The claim asserts that the trial court impermissibly stated during penalty phase instruction that the jury's role was simply to recommend a sentence in an advisory capacity, while the final decision regarding punishment rests solely with the judge. (Citing R-2588, 2716)

Claim XXIX (SR-VI-Page 999)- This claim asserts essentially that the trial court prepared his written findings and the sentencing order prior to a Spencer hearing, and prior to trial counsel having an opportunity to be heard. The claim also asserts that trial counsel was ineffective for failing to preserve the issue.

Claim XXX (SR-VI-Page 1002) asserts that trial counsel was ineffective for his failure to challenge certain jurors for cause, although cause existed in the record.

The claim further alleges prejudice to the appellant, and ineffective assistance of counsel for his failure to object, or to preserve the issue.

Claim XXXI (SR-VI-Page 1006)- This claim asserts that the trial judge had improper ex parte communications with a juror, and excused the juror without consulting either trial counsel. The claim also asserts that trial counsel was ineffective for his failure to object to the matter.

Claim XXXV (Pretrial publicity) (SR-VI-Page 1011)- This claim asserts that Gore was denied Due Process of law because of pretrial publicity, and failure to change venue. Please note that claim VII, also alleges ineffective counsel for trial counsel's failure to move for a change in venue.

The trial court entered an Order following the Huff hearing, wherein all of the claims filed by Gore were summarily denied, except for the ineffective assistance of counsel claims set forth within claims VII and XVIII. (SR-V-869 thru 877)

More specifically, and with reference to the pertinent claims mentioned herein, the trial court, on the grounds that they were procedurally barred, summarily denied claim II (jurisdiction), claim XIV (prosecutorial argument), claim XVII (sufficiency of the evidence), claim XIX (mandatory death recommendation), claim XX (adequacy of mental health assistance), claim XXII (violation of Caldwell v Mississippi), claim XXIX (recess prior to sentencing), claim XXX (challenging for

cause), and claim XXXI (defense witness testimony), and claim XXXV (pretrial publicity). (SR-V-872)

The trial court continued by saying that “Any allegations of ineffectiveness in these claims are insufficient either to overcome the procedural bars or to warrant an evidentiary hearing”. (SR-V-873)

As to claim IV, the trial court summarily denied it as being insufficiently pled, and then added that “Any allegations of counsel’s ineffectiveness in claim IV are insufficient to provide relief.” (SR-V-873)

At the evidentiary hearing held December 14, 2000, counsel re-stated the claims which were summarily denied, and objected to the summary denial of the claims, while asking for an evidentiary hearing on said claims. The trial court adopted its previous rulings. (SR-XVII-1754)

During the evidentiary hearing, Jimmy Hunt, Gore’s trial counsel, was sworn, and was asked questions concerning pre-trial publicity, and whether he moved for a change of venue. (SR-XVII-1761 thru 1763) Witness Hunt stated that some of the venire had heard about the case, but compared to other murder cases, little was known about Gore’s case. The witness also testified that he and Gore discussed filing for a change of venue, but he did not file a motion. (SR-XVII-1762)

Also during the evidentiary hearing, witness Hunt was asked about the

information he had available concerning Gore's mental history. (SR-XVII-1778 thru 1780) The witness admitted that he had information concerning Gore's prior efforts at attempting suicide, drug overdose, and substance abuse. Notwithstanding this information, the said trial counsel did not use any of the information during penalty phase.

During the evidentiary hearing, the State placed into evidence (Exhibit One) witness Hunt's trial counsel notes of interviews with Gore. (SR-XVII-1790) Also introduced as evidence (Exhibit Three) were copies of correspondence between witness Hunt and doctors Krop and Mhatre. (SR-XVII-1793)

Following the State's examination of witness Hunt, undersigned counsel readdressed questions to the witness concerning the trial counsel notes and the correspondence between himself and the two doctors. (SR-XVII-1802 thru 1805) During this series of questions and answers, the witness admitted making notes concerning Gore's use of various drugs, and his effort to commit suicide was explained. In essence, Gore told Hunt that it was not himself he was trying to kill. Instead, it was another person (his alter ego) Tony James Jordan. (SR-XVII-Page 1802) Also, Gore told Hunt about his visualization of a pipeline into heaven like Jacobs ladder, and that he had "delivered" Susan Roark. (SR-XVII-Page 1803) Hunt admitted also that there were numerous other references to God and other

alter egos used by Gore in his notes, but there was no mention whatever of any of the material to either of the two doctor experts in the correspondence. Further, Hunt did not send his notes to the doctors. (SR-XVII-Page 1804)

Following the evidentiary hearing held December 14, 2000, and following written arguments by counsel, the trial court entered its order denying the claims asserted in claim VII and XVIII. (SR-IX-1498 thru 1513)

SUMMARY OF THE ARGUMENT

- Issue I- Appellant argues that trial counsel was ineffective in a number of areas, and that the trial court committed error when it summarily denied claims II thru XXXV as being procedurally barred, when there existed no record reference conclusively refuting the claims filed by appellant, and/or where fundamental error was claimed. By denying these claims summarily, the trial court has denied the appellant due process of law.
- Issue II- Appellant argues that trial counsel was ineffective in failing to effectively object to the introduction of collateral crime evidence, and in failing to procure exculpatory evidence and defense witnesses, thereby denying appellant due process of law.
- Issue III- Appellant argues that the trial court erred when it denied claims VII and XVIII subsequent to an evidentiary hearing, because there exists supporting evidence to establish trial counsel's ineffectiveness in failing to investigate or to provide defense experts with mental mitigation evidence during the penalty phase, and by failing to seek a change of venue, depriving appellant of a fair trial.

ISSUES

- ISSUE I: Did the trial court commit error when it summarily denied as procedurally barred claim II (jurisdiction), claim XIV (prosecutorial argument), claim XVII (sufficiency of evidence), claim XIX (mandatory death recommendation), claim XX (adequacy of mental health assistance), claim XXII (violation of Caldwell v Mississippi), claim XXIX (recess prior to sentencing), claim XXX (challenge for cause), claim XXXI (defense witness testimony), and claim XXXV (pretrial publicity)?
- ISSUE II: Did the trial court commit error when it summarily denied claim IV (no adversarial testing) as being insufficiently pled?
- ISSUE III: Did the trial court commit error when it denied Appellant's claims of ineffective counsel following the evidentiary hearing, as said claims were set forth in claims VII and XVIII?

ARGUMENT

ISSUE I: Did the trial court commit error when it summarily denied as procedurally barred claim II (jurisdiction), claim XIV (prosecutorial argument), claim XVII (sufficiency of evidence), claim XIX (mandatory death recommendation), claim XX (adequacy of mental health assistance), claim XXII (violation of Caldwell v Mississippi), claim XXIX (recess prior to sentencing), claim XXX (challenge for cause), and claim XXXI (defense witness testimony)?

Summary Denial of Postconviction Claims in general-

The standard of review to uphold a trial court's summary denial of claims raised in a 3.850 motion is that the claims must either be facially invalid, or be conclusively refuted by the record. (Peede v State, 748 So.2d 253, 257 (Fla. 1999)) Further, and pursuant to Fla.R.Crim.P.3.850(d), a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. See Floyd v State, 2002WL58547, 27 Fla.L.Weekly S75, at 2. See also Peede, supra., at 257.

Further, upon review of a trial court's summary denial of post-conviction claims, the Supreme Court must accept a defendant's factual allegations as true to the extent they are not refuted in the record. Occhicone v. State, 768 So.2d 1037,

1041 (Fla.2000), Peede, supra., at 257.

Claim II (Jurisdiction)-

Gore asserted in claim II of his Amended Motion to Vacate Judgment and Sentence that the State of Florida lacked jurisdiction to try him, and that his Fifth, Sixth, Eight, and Fourteenth Amendment rights were violated. The primary basis for the claim was that none of the essential elements of the charged offenses were proven to have occurred in Florida. Gore also asserted in claim II, that trial counsel was ineffective for his failure to raise jurisdiction as an issue, either during pleadings, argument, or in his motion for new trial. (SR-VI-908 thru 912) In his claim, Gore also alleges that the State's argument concerning not having to prove where the offense occurred actually compounded the problem, and trial counsel failed to object, and failed to raise the issue of jurisdiction.

The State's theory of the case at trial was that Gore met Susan Roark on January 30, 1988, in Tennessee, and that she was murdered on January 31, 1988, the same day she was reported missing in the State of Tennessee. (R-932 thru 935)

We know from the evidence that Gore arrived in Tampa, Florida on the same day, January 31, 1988, driving a black Mustang. (Gore, supra, at page 980)

The victim's body (Roark) was found in Columbia County, Florida on April 2, 1988. (R-956 thru 957) Doctor Maples, a forensic anthropologist, testified that the

body had been at the scene for two to six months. (R-1112) He also testified that the victim had been dead from two weeks to four months before the body was discovered. (R-1117) Doctor Floro, the medical examiner, testified that the body was deposited at the scene within two hours after her death. (R-1149 thru 1150) He also testified that the victim could have died elsewhere, and her body transported to the scene where it was found. (R-1149 thru 1150)

There was no testimony to establish that either the victim was killed in Florida, that Gore was at the scene, or that an essential element of any of the charged offenses occurred in Florida, other than the fact that the body was found in Columbia County. In fact, the State argued during closing argument that the only thing the State did not have to prove beyond a reasonable doubt was where the offense was committed. (R- 2499)

Trial counsel argued during closing argument that the State failed to establish venue, (R-2226 thru 2235) but other than that, trial counsel did not object to the lack of jurisdiction, did not raise the issue of jurisdiction, or argue jurisdiction. In fact, it appears from the argument that counsel did not know the difference between venue and jurisdiction. Trial counsel likewise failed to object to the State's argument that it did not need to prove jurisdiction beyond a reasonable doubt.

This set of facts presents an interesting twist. The truth is, F.S.910.005(2)

provides that if either the conduct or the result that is an element of the offense occurs within the state, then the state has jurisdiction. To go on, the statute provides that if a homicide victim's body is found in the state, then the death is presumed to have occurred within the state. Further, in Lane v. State, 388 So.2d 1022, 1027 (Fla. 1980) the Court held that F.S.910.005 broadened Florida's jurisdiction to allow the prosecution of a homicide when either the death occurs in the state, or when an essential element of the homicide occurs within the state.

In Lane, however, the Court held that the weight of authority, including Florida, holds that territorial jurisdiction must be proved beyond a reasonable doubt. (Lane, Page 1028) Unlike venue, jurisdiction cannot be waived. (Lane, 1026)

A case somewhat similar to the instant matter was before the Court in Deaton v. State, 635 So.2d 4 (Fla. 1993) In Deaton, the appellant asserted that a factual issue existed as to whether the victim was killed in Florida or Tennessee, as in the instant case. Deaton also asserted that the jury was incorrectly instructed that venue had to be proved with reasonable certainty, when in fact the jury should have been instructed that jurisdiction had to be proved beyond a reasonable doubt. Deaton also argued that his attorney was ineffective for failing to seek an instruction on jurisdiction. (Deaton, 5) The State countered that jurisdiction was not an element, jurisdiction was not raised as a defense, and an instruction was not needed. (Deaton,

6)

The Court held in Deaton that even though counsel's failure to request an instruction on jurisdiction could be characterized as ineffective, the evidence was such that there was not a reasonable probability that the result would have been different. There was substantial evidence that the criminal acts, except the actual disposal of the body, were done or begun in Florida. (Deaton, 7)

In the matter at bar, such is not true, In fact, other than the body being found in Columbia County, there was no evidence concerning any other element which occurred in Florida. And, since the State made the argument that it did not have to prove beyond a reasonable doubt where the offense was committed, the matter of jurisdiction was placed at issue. Additionally, trial counsel obviously had some understanding that no evidence existed to show the murder, or elements of it, occurred in Columbia County, else he would not have made the argument concerning the State's failure to prove venue.

It was ineffective for trial counsel to fail to plead, argue, or otherwise place at issue jurisdiction. Likewise, it was ineffective for counsel not to have asked for a jury instruction on jurisdiction. Jurisdiction cannot be waived, and must be proved beyond a reasonable doubt. (Lane, supra and Deaton, supra) Additionally, since the State made the comments it did during closing argument, there is no rational basis

for concluding exactly what the jury based their decision on regarding the jurisdictional issue.

The Due Process Clause of the 14th Amendment protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Further, when a possibility exists that a reasonable juror could have interpreted an instruction, or the argument of the State Attorney, to allow a finding of guilt, based on a degree of proof below that required by the Due Process Clause, a fundamental error has occurred. See Cage v. Louisiana, 498 U.S.39, 111 S.Ct. 328 (1990) Appellant is entitled to a new trial.

Claim XIV (Prosecutorial argument)-

Gore asserts in this claim that the prosecutor's misconduct rendered the convictions fundamentally unfair, and his sworn motion sets forth a number of specific facts and comments, with reference to the record, which the prosecutor made during guilt phase arguments. (SR-VI-942 thru 944) Gore ends the guilt phase claim XIV, by claiming that trial counsel was ineffective for failing to object to the comments, thereby not preserving them for appeal. Thereafter, claim XIV continues to assert improper prosecutorial comments made during the penalty phase argument, which are alleged as fundamental error. These allegations also refer to the specific facts in the record. (SR-VI-946 thru 947) Gore then contends that trial counsel's

failure to object was ineffective counsel.

The claims set forth in claim XIV are not conclusively refuted by the record, and they are not invalid on their face. Furthermore, the allegations must be accepted as true, since they are not refuted by the record. (Floyd, 2) The trial court summarily denied the claims without an evidentiary hearing, contrary to Peede, supra, and Floyd, supra.

The standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged. The appellant must show that trial counsel's performance was deficient, and that he was prejudiced by the deficiency. The appellate court reviews the trial court's conclusions on deficiency and prejudice, de novo. The appellate court generally defers, however, to the trial court's findings on factual issues. Bruno v State, 26 Fla. L. Weekly S803 (Fla. 2001)

Furthermore, the trial court denied the claim as being procedurally barred. (SR-V-872 thru 873)

In Bruno, at 2, the Supreme Court dealt with certain claims which the trial court ruled were procedurally barred, and held such to be error. "Whereas the main question on direct appeal is whether the trial court erred, the main question in a Strickland claim is whether the trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and—of

necessity—have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant has little choice: As a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that Bruno’s claim was procedurally barred.” The same is true in the instant case, and the Appellant should be granted a new trial.

Also in Bruno, at 5, the Court stated that if a claim was denied because counsel failed to preserve the issue for appellate review, then postconviction motion would be the proper vehicle to raise such a claim. The trial court erred by summarily denying this claim as being procedurally barred.

Claim XVII (Insufficient Evidence)-

Gore alleges in his sworn motion to vacate, as follows: He was indicted on a premeditated murder charge, and without any felony murder charge. (SR-VI-955, See also R-2758 thru 2759) There was no jury instruction given on felony murder. (SR-VI-955, See also R-2503 thru 2525) There is no evidence in the record of premeditation. (SR-VI-955) Thereafter, Gore alleges in his sworn motion, with reference to numerous specific facts in the record, which support his claim

regarding the insufficiency of the evidence, among them the fact that he could not be placed at the scene, nor were his fingerprints found, etc. (SR-VI-956 thru 959)

Following these allegations and factual references, Gore asserts that the jury would have had to pyramid inference upon inference to convict him of the charged offense of premeditated murder.

Next Gore asserts that trial counsel was ineffective for failing to argue in either of his motions for judgment of acquittal the insufficiency of the evidence, or the pyramiding of inferences. (SR-VI-961)

Similarly, Gore asserts that trial counsel also failed to argue insufficiency of the evidence, or the pyramiding of inferences during his motion for new trial. (SR-VI-961) Neither the insufficiency of the evidence, nor pyramiding of evidence was argued on appeal.

These assertions by Gore are not conclusively refuted by the record. The trial court erred in summarily denying this claim. See Peede, Floyd, Bruno, *supra*. The Appellant's conviction and sentence should be vacated, and the Appellant should be discharged.

Claim XIX (Mandatory death recommendation)

Gore asserts in this claim that during voir dire the State repeatedly asked prospective jurors if they could vote for a death sentence if the aggravating

circumstances required or called for that sentence. (Emphasis added) The allegation within the claim references numerous pages in the trial record to support the claim. (SR-VI-972) Thereafter, Gore asserts that trial counsel was ineffective because he failed to object, and failed to move for mistrial. (SR-VI-975)

These comments by the prosecutor could possibly have diminished the sense of responsibility for its determination of a life or death sentence in the minds of those jurors selected. In Florida, the jury has complete discretion to decide between a life or death sentence. And, as stated in Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) “Mercy may be a part of that discretion.” If in fact the jury believed that the existence of aggravating circumstances required or called for a death sentence, then the statements violated the 8th Amendment, and undermined the integrity of the independence and unprejudiced consideration required by law. See Wilson v. Kemp, 777 F.2d 621, 627-28 (11th Cir. 1985), cert. den. 476 U.S.1153 (1986).

This claim that trial counsel was ineffective for his failure to object, or to move for mistrial, is not conclusively refuted by the record, and it was improperly summarily denied by the trial court as being procedurally barred. Bruno, supra. Furthermore, prejudice is clear if the jury could have believed or been misled by the comments. Brooks v Kemp, supra.

Claim XX (Adequacy of mental health assistance)

Gore asserts in this claim, among other things, that trial counsel failed to provide background materials to the mental health experts to assist them in their evaluation of Gore. (SR-VI-978) Gore also asserted in this claim, among other things, that if properly informed, the expert who examined Gore could have identified mitigating factors, both statutory and non-statutory, for the penalty phase. (SR-VI-980) Gore also asserts that trial counsel failed to properly investigate mental health mitigation, and same resulted in Due Process violations in violation of the 5th, 6th, 8th, and 14th Amendments, and contrary to Ake v. Oklahoma, 470 U.S. 68 (1985). (SR-VI-980)

The allegations set forth in claim XX are not conclusively rebutted by the record, and they were summarily denied by the trial court. Further, while examining trial counsel Hunt, during the evidentiary hearing regarding the claims set forth in claim XVIII, the trial counsel admitted that he had information concerning Gore's childhood, attempted suicide, drug abuse, and many references to God, references to a pipeline to heaven, his "delivery" of Susan Roark, and to his alter egos, including the attempt to kill one of his alter egos when he, himself, attempted suicide. Many of these facts were not provided to the experts, and none were used during penalty phase. (SR-XVII-1802 thru 1805) Appellant is entitled to a new penalty phase. (Bruno, supra) See, for example, Gaskin v. State, 737 So.2d 509

(Fla. 1999) where trial counsel presented limited evidence in mitigation during the penalty phase, and where the Court concluded that the appellant should have had an evidentiary hearing on such a claim.

Further, prejudice, in the context of penalty phase errors, is shown, where absent the errors there is a reasonable probability that the ratio or balance of aggravators and mitigators would have been different, or where the deficiencies substantially impair confidence in the outcome of the proceedings. Gaskin, 516, FN14, citing Rose v. State, 675 So.2d 567, 569 (Fla. 1996) Appellant is entitled to a new penalty phase.

Claim XXII (Caldwell v. Mississippi)

Gore asserts in this claim that his jury was misled by comments, questions and instructions which improperly diluted the jury's sense of responsibility towards sentencing. (SR-VI-981)

The primary thrust of this claim is that during instructions the trial court informed the jury "the final decision as to what punishment shall be imposed, rests solely with the judge of this court." (SR-VI-983, citing R-2588 thru 2716) By so instructing the jury, and by other judicial comments concerning that responsibility, the trial court failed to properly instruct the jury that their recommendation would carry great weight and could only be overridden in circumstances where no

reasonable person could agree with it. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)

In Caldwell v. Mississippi, 472 U.S. 320, 332-33, 105 S.Ct. 2633 (1985), the Court said that the uncorrected suggestion to a jury that the responsibility for the ultimate determination of death lay elsewhere presents an intolerable danger that the jury will minimize the importance of their role. Similarly, a capital habeas petitioner was granted relief when judicial comments and instructions diminished the jury's sense of responsibility in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)

There is no claim or mention in the amended motion to vacate which suggests that trial counsel failed to object to the court's comments or instruction in the instant case, but it is clear from the record that he did not. Nevertheless, the trial court summarily denied this claim, when in fact there was no conclusive information in the record to rebut it. It is noted in Bruno, at 7, the Court dealt with a so-called Caldwell allegation, and stated that the trial court incorrectly concluded that the claim was procedurally barred. In Bruno, however, the Court continued to note that Bruno failed to show deficient performance or prejudice concerning the claim.

The undersigned would respectfully suggest that, if in fact the jury could have misunderstood their responsibility, then, per Caldwell and Mann, it would appear that such would be fundamental error, requiring a new trial.

Claim XXIX (Recess prior to sentencing)

In this claim, Gore asserts that the trial court had already prepared its sentencing order prior to the Spencer hearing, which obviously means that trial counsel had no chance to present additional evidence or comment concerning an appropriate sentence at the Spencer hearing, nor did the defendant have an opportunity to address the court. This, Gore argued, coupled with the fact that trial counsel failed to object, and failed to preserve the issue, constituted ineffective assistance of counsel. (SR-VI-999)

Following the penalty phase, the trial court announced that the sentencing hearing would commence the following day, and that the court would prepare its written findings and the sentence that night. (R-2727)

The Supreme Court did provide in Spencer v. State, 615 So.2d 688, 690-691 (Fla. 1993) that the trial court should hold a hearing and give the defendant and counsel an opportunity to be heard, and if appropriate, give the State and the defense an opportunity to present additional evidence and to comment further, and allow the defendant to be heard personally. Thereafter, the court should recess to consider the appropriate sentence. Then, if the court decides that death is the appropriate sentence in accord with F.S.921.141, the court shall set forth the reasons for imposing the death sentence in writing. Thereafter, the trial court should

set a hearing to impose the sentence and contemporaneously file the sentencing order.

This claim was summarily denied by the trial court, and the record does not conclusively refute the claim. The Appellant is entitled to an evidentiary hearing, and/or to a new sentencing. (Bruno, 5).

Claim XXX (Challenge for cause)-

Gore asserts in this claim that the trial court improperly failed to excuse jurors who were properly challenged for cause. The claim also alleges that trial counsel was ineffective for his failure to challenge other jurors for cause, when in fact cause existed. (SR-VI-1002 thru 1006)

Specifically, Gore refers to the record, and claims that trial counsel failed to challenge jurors Roof, Scott, Anders, and Crawford, who were seated on his jury, despite the existence of a challenge for cause. (R-919 thru 920)

Juror Roof stated during voir dire, "...but I feel that if a person is found guilty beyond any doubt, that they should be sentenced to death." (R-293 thru 294)

Juror Scott stated that if Gore was found guilty of all three charges she would automatically vote for the death penalty. (R-340 thru 341)

Juror Anders said he believed in a life for a life. (R-543)

Mrs Crawford stated that she believed the death penalty was always

appropriate in cases of premeditated murder. (R-715 thru 716)

Trial counsel did not challenge for cause any of the above witnesses, and to Gore's prejudice, Roof, Scott, Anders, and Crawford were seated on his jury. (R-919 thru 920)

Juror Powers stated that he felt the death penalty should be imposed in every first-degree murder case. (R- 381) Trial counsel used a peremptory challenge, instead of challenging for cause. (R-666)

There are other fact-specific examples referred to in the claim (SR-VI-1004 thru 1005) where such comments were made by prospective jurors, and where trial counsel used peremptory challenges, instead of making a challenge for cause.

This claim alleges that jurors who will automatically vote for death, or who have already formed opinions on the merit, cannot properly consider aggravating or mitigating circumstances, thereby depriving the defendant of Due Process. (SR-VI-1005)

The claim was summarily denied by the trial court, and there does not exist record reference to conclusively refute the claim. Bruno, Peede, Floyd, supra.

The failure of the trial court to remove the jurors for cause is fundamental error. Ross v. Oklahoma, 108 S.Ct. 2273 (1988), and the failure of trial counsel to challenge for cause said jurors, constitutes ineffective counsel. Strickland v.

Washington, 104 S.Ct. 2052 (1984) Appellant is entitled to a new trial.

Claim XXXI (Defense witness testimony)-

In this claim, Gore asserts that the trial court had an improper ex parte communication with at least one prospective juror. (SR-VI-1006) Essentially, according to the claim, the trial court announced to counsel that prospective juror Pete Schlipp had asked for a hardship excuse, whereupon the trial court took his telephone number, but was unable to reach him. Thereafter, the trial court reached the juror at night, and after conversation, excused him as a juror, ex parte. (R-689)

Numerous authority was cited in the claim, supporting the claimed prejudicial error by the trial court, first in having ex parte communications with the juror, and secondly for not allowing input by the defense. (SR-VI-1006 thru 1009) Thereafter, the claim asserts that because trial counsel failed to object, he rendered ineffective counsel. (SR-VI-1009)

This claim was summarily denied, and it is not conclusively refuted in the record. The Appellant is entitled to a new trial.

Claim XXXV (Pretrial publicity)-

In this claim Gore alleges that the trial court should have ordered a change of venue because pretrial publicity precluded the selection of a fair and impartial jury. (SR-VI-1011) The claim cites case law reflecting such issues as being fundamental,

and refers to several instances in the record wherein Gore claims that evidence exists to support the claim of pretrial publicity. Of note, is the fact that in claim VII, Gore has alleged prejudice due to pretrial publicity, and has alleged ineffective assistance of counsel for trial counsel's failure to move for a change in venue. (SR-VI-924)

Within claim XXXV, at page 1014, Gore cites to the record (R-664, 689 thru 692) and alleges that trial counsel exhausted his peremptory challenges, then requested more from the court, so that he could clear the panel of afflicted prospective jurors, but the request was denied. (SR-VI-1014)

This scenario may also be of import in the consideration of claim XXX, where it is alleged that trial counsel failed to make certain challenges for cause, when cause existed, and ended up using peremptory challenges instead.

It is noted that at the evidentiary hearing, while examining trial counsel Hunt, with regard to claim VII, he testified that he remembered that some of the jury had heard about the case, but as compared to other murder cases, little was known by the jury. Hunt was also asked about comments allegedly made by other officers of the court, but could not remember same. (SR-XVII-1762)

It is also noted that within the body of claim XXXV, Gore makes record reference to efforts by trial counsel to challenge unsuccessfully prospective jurors due to pretrial publicity, after certain witnesses commented about having read the

news papers, and stating that Gore deserved the electric chair. (SR-VI-1014, referring to R-500, 506, 509, also referring to R-512 thru 514, 657 thru 659, and 664) Gore then refers to the exhaustion of peremptory challenges and the request for additional peremptory challenges at SR-VI-1014, with reference to R-664, 689 thru 692.

Also within claim XXXV is reference to comments made by State Attorney Jerry Blair to the Florida Times Union, (SR-VI-1014, with reference to R-689-92) in violation of a court order. (SR-VI-1014, with reference to R-219)

In any event, claim XXXV was summarily denied by the trial court, and no record reference exist to conclusively refute the claim. Pursuant to Bruno, 5, the Appellant is entitled to an evidentiary hearing. Alternatively, he is entitled to a new trial.

ISSUE II: Did the trial court commit error when it summarily denied claim IV (no adversarial testing) as being insufficiently pled?

Claim IV (No adversarial testing)-

Gore asserts in this claim that prior to trial Gore informed trial counsel that a phone book containing names, telephone numbers, and addresses for defense

witnesses existed, and that the State had obtained the book. Thereafter, Gore asserts that either trial counsel failed to procure the book, thereby depriving him of the ability to locate those witnesses, or the State improperly concealed or failed to produce the book. (SR-V-913 thru 919)

Essentially, the basis for the claim is two-fold, i.e. trial counsel was ineffective for failing to procure the book and/or the witnesses for trial, and/or the State violated discovery rules and case law for either concealing or otherwise failing to disclose the book.

In Garcia v State, 622 So.2d 1325, 1329 (Fla. 1993) the Supreme Court held it to be ineffective counsel when a defense lawyer failed to seek admission of another inmate's exculpatory statement during the penalty phase. The same is true in Gore, but on a bigger scale. Herein, defense counsel failed to seek the phone book which contained the names, addresses, and telephone numbers of favorable defense witnesses, and failed to procure said witnesses at trial.

Numerous citations are cited within the claim to support the ineffectiveness claim, and to support the prosecutorial misconduct, and there does not exist any record reference to conclusively refute the claim.

Additionally, within the claim, Gore asserts that trial counsel was ineffective for failing to effectively object to the trial testimony of Lisa Ingram concerning a

purse seen in a vehicle Gore was driving, and regarding Gore's statements allegedly made to her. The testimony is found at R-1757 thru 1767, and 2024 thru 2035. The claim is made at SR-VI-919. Again, no record reference exists to conclusively refute the claim, and the trial court summarily denied the claim as being insufficiently pled. The ineffectiveness claims were said by the trial court to be insufficient to provide relief. (SR-V-873)

Although the issue concerning Lisa Ingram's testimony was the subject of the direct appeal, where error was claimed when the trial court admitted the testimony of collateral offenses (Gore, supra, 983), the issue of ineffectiveness was not submitted, and is now permissible in a 3.850 motion pursuant to Bruno, supra.

According to Bruno, Floyd, Peede, and other cases, the Appellant was entitled to an evidentiary hearing. Further, Appellant should be entitled to a new trial.

ISSUE III: Did the trial court commit error when it denied Appellant's claims of ineffective counsel following the evidentiary hearing, as said claims were set forth in claims VII and XVIII?

Claim VII-

Among other things in claim VII, Gore asserted that he was denied effective assistance of counsel because trial counsel failed to move for a change of venue, thereby prejudicing him at trial. The claim also alleges that pretrial publicity

precluded the selection of a fair and impartial jury, and resulted in Gore not receiving a fair trial.

See the comments herein above, with reference to Issue II, claim XXXV for the argument as to this claim.

Claim XVIII-

Among other things, this claim asserted prejudice and ineffective assistance of counsel because trial counsel failed to properly investigate or to provide mental mitigation information to experts, or failed to present same during the penalty phase. (SR-VI-961 thru 972)

During the evidentiary hearing, witness Hunt was asked concerning his client notes and concerning correspondence between himself and the two appointed mental health experts. (SR-XVII 1778 thru 1793) and (SR-XVII-1802 thru 1805)

The essence of this testimony was that Hunt had information from Gore and from others which reflected some bizarre thoughts by Gore, concerning God, Jacobs Ladder, a pipeline to heaven, his deliverance of the victim, and regarding his efforts to kill his own alter ego, when he attempted to commit suicide as a child, and concerning drug abuse and drug overdoses. None of the said information was not provided to the experts, and none of it was elicited during penalty phase. None of the above-mentioned matters were presented during the penalty phase trial (R-2595

thru 2687), nor was any of it mentioned in penalty phase argument. (R-2701 thru 2715)

Clearly, under any analysis, there existed significant mitigation evidence which was not used during the penalty phase.

There are numerous case which provide that defense counsel's failure to present significant mitigating evidence during penalty phase may have affected the sentence imposed, thus entitling the defendant to a new penalty phase. State v. Mara, 581 So.2d 1288 (Fla. 1991), Ragsdale v. State, 720 So.2d 203 (Fla. 1998), Gaskin v. State, 737 So.2d 509 (Fla. 1999), and Floyd, supra.

The trial court improperly denied claim XVIII, and the appellant should be entitled to a new penalty phase.

CONCLUSION

Appellant seeks an order vacating his judgments and sentences, and discharging him.

Alternatively, appellant seeks an order vacating his convictions and sentences, and ordering a new trial, both guilt phase and penalty phase.

At the very least, appellant seeks an order requiring an evidentiary hearing on those claims summarily denied by the trial court.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing initial brief has been provided to Barbara Yates, Assistant Attorney General, The Capital, Tallahassee, Florida 32399-1050, to George R. Dekle, Assistant State Attorney, PO Drawer 1546, Live Oak, Florida 32060, and to Marshall Lee Gore, Inmate, #401256, Box 221, UCI, P-2125, Raiford, Florida 32083-0221, all by US Mail on the 18th day of March, 2002.

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CERTIFICATE OF COMPLIANCE

I DO HEREBY CERTIFY, pursuant to Fla. R. A. P. 9.210(2), that the fonts used in this brief are Times New Roman 14, and said fonts comply with the provisions of said Rule.

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