

IN THE SUPREME COURT OF FLORIDA

MARSHALL LEE GORE  
Plaintiff

vs

MICHAEL W. MOORE, Secretary  
Florida Department of Corrections  
Defendant

Case Number: SC02-684  
Lower Tribunal Number: 88-607 CF

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AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Comes now Marshall Lee Gore, by and through his undersigned attorney, and moves the Court for the entry of a Writ of Habeas Corpus directing the Florida Department of Corrections to immediately release the Plaintiff from unlawful detention and custody, and for cause says:

1. The Court has jurisdiction pursuant to the provisions of Article V, Section 3(b)(1), Florida Constitution, and pursuant to F.S.79.01.
2. The Plaintiff has been denied a fair and impartial trial by jury, and has been denied due process of law, all in violation of the 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendments to the Constitution of the United States, and the Plaintiff is being unlawfully detained as an inmate by the Florida Department of Corrections.

3. The Plaintiff was convicted, after trial by jury, of kidnaping, robbery, and first degree murder, in Columbia County, Florida, and was sentenced, among other things, to a death sentence. The said convictions were obtained by the State of Florida in an Unconstitutional manner, and as a result of the Plaintiff's Constitutional Rights being violated.
4. The Plaintiff is entitled to immediate release from said incarceration.
5. The Plaintiff has previously filed a direct appeal, and his convictions and sentences have been upheld by the Florida Supreme Court. Gore v. State, 599 So.2d 978 (Fla. 1992) cert. den. 506 U.S. 1003 (1992)
6. The Plaintiff has prior hereto filed a motion for post-conviction relief pursuant to the provisions of Fla.R.Crim.P.3.850, and 3.851. The said motion has been denied by the trial court, and Plaintiff remains incarcerated.
7. Plaintiff's appellate counsel was ineffective, and failed to raise numerous claims in the direct appeal, which claims would have caused the convictions and sentences complained of to be overturned and set aside. Said appellate counsel's conduct deviated from the norm, and fell outside of the range of professionally acceptable performance.

8. The said performance of appellate counsel compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome.
9. Fundamental error was committed during the trial of the Plaintiff, which resulted in Plaintiff's convictions and unlawful detention.
10. Plaintiff has simultaneously herewith filed an appeal of the denial of his post-conviction motion. The matter is presently pending before the Court in Case Number SC01-1524.
11. Plaintiff has no other adequate remedy.
12. In his direct appeal, the Florida Supreme Court examined six assignments of error pertaining to the guilt phase, one assignment of error pertaining to the penalty phase, and one assignment of error pertaining to the trial court's findings at sentencing. Gore, supra. The assignment's of error are as follows: (1) the trial court erred in denying is motion to suppress statements made to Miami detectives, (2) The trial court erred in admitting collateral crime evidence through the testimony of Lisa Ingram and Tina Corolis, (3) The trial court erred by denying a continuance so that a pregnant witness could appear at trial, (4) The trial erred in not allowing him to attend the deposition of the

same pregnant witness, (5) The trial court erred by denying his motion for acquittal as to the kidnaping charge, (6) The trial court erred by excusing the victim's grandmother from the sequestration rule, (7) The trial court erred by allowing the State to question, during the penalty phase, a defense psychiatrist on the issue of Gore's mental state at the time of the offense, (8) the trial court erred in finding a particular aggravator.

13. Plaintiff will refer to record references from Gore's direct appeal as R-234, which will refer to the record on appeal, page 234. Also, Plaintiff will refer to the supplemental record on appeal as SR-V-234, which will refer to the supplemental record, volume V, page 234.

#### CLAIM ONE

14. Appellate counsel was ineffective when he failed to raise as an assignment of error on appeal, the issue of the insufficiency of the evidence. In this case, the indictment charged Gore with premeditated murder, robbery, and kidnaping. It did not charge felony murder. (R-2758-2759) Further, no jury instruction was given on felony murder. (R- 2503 thru 2525) As a matter of law, the State is required to prove each and every element of the charged offense beyond a reasonable

doubt. In Re Winship, 397 U.S. 358 (1970) The pertinent evidence introduced in this case, is as follows: (See Gore's Amended Motion to Vacate Judgments and Sentences for more detail. SR-VI-956 thru 960)

- A. The State's theory at trial was that Gore met Susan Roark (victim) on January 30, 1988, in Cleveland, Tennessee, and that she was murdered in Columbia County, Florida on January 31, 1988. (R- 932 thru 935) The victim's body was found in Columbia County, Florida on April 2, 1988. (R- 956 thru 957) The body could have been at the scene for two weeks to six months. (R- 1112)
- B. Sergeant Randall, one of the officers investigating the crime scene, found hair fragments. (R-985) The hair sample was examined by FDLE (R-986) and compared to Gore's hair samples. (R-987)
- C. Captain Nydam, lead investigator, testified that no latent prints at scene matched Gore (R-1046), no objects at scene linked to Gore (R-1046), no objects, fibers, hairs, footprints, or anything at scene linked to Gore (R- 1046)
- D. No witnesses saw Gore in Columbia County, or at the

crime scene. (R-1047)

E. Karen Cooper, FDLE crime laboratory analyst, found hair in the victim's hand, the hair was compared to Gore's.

(R-1073)

F. Susan Livingston, FDLE crime laboratory analyst, processed crime scene for body fluids, performed blood tests, blood groupings, and enzyme tests-- none matched Gore (R-1082 thru 1084) The witness was unable to identify the blood group found to that of Gore. (R-1092)

G. Doctor Floro, medical examiner, testified that an overdose of drugs could not be ruled out as cause of death (R-1157 thru 1958), natural causes could not be ruled out as cause of death (R- 1158) and (1164 thru 1166) he could not determine cause of death. (R-1155 thru 1164). Although, the witness' opinion was that it was a homicide. (R- 1170)

H. Paul Eumiker, victim's prior boyfriend, one week after victim's disappearance was reported, he saw victim twice in her vehicle, in Tennessee. (R- 1297 thru 1301)

- I. The pregnant witness mentioned in the direct appeal was a witness by the name of Stephanie Refner, who had a telephone conversation with Dewey Chastain, a police officer from Cleveland, Tennessee. The trial court admitted the transcript and cassette tape of the telephone conversation, but over objection, refused to publish it to the jury. The pertinent information within the transcript and cassette was Refner's testimony that she saw the victim in Cleveland, Tennessee, after her disappearance was reported. (R- 2328 thru 2337) Appellate counsel should have raised this as an issue, in conjunction with the insufficiency of the evidence.
- J. None of the scientific evidence found at the scene was connected to Gore.
- K. The evidence was insufficient to convict Gore of premeditated murder, and appellate counsel was ineffective for failing to raise the issue on direct appeal.

### CLAIM TWO

- 15. Appellate counsel was ineffective when he failed to raise as an

assignment of error, the issue of circumstantial evidence.

16. The facts set forth in claim one are herein re-alleged.
17. In order to convict Gore on the facts presented at trial, the jury would necessarily have had to pyramid inference upon inference. As this Court has previously held regarding circumstantial evidence, if the State does not offer evidence which is inconsistent with the defendant's hypothesis, then no view of it by the jury favorable to the State can be sustained under the law. See State v. Law, 559 So.2d 187, 189 (Fla. 1989)
18. Further, regarding the pyramiding of inferences, in Keys v. State, 606 So.2d 669, 673 (1<sup>st</sup> DCA 1992) the First District has held that where two or more inferences of criminal intent or acts must be drawn from the evidence, and then be pyramided to prove the offense, the evidence cannot support the conviction.

### CLAIM THREE

19. Appellate counsel was ineffective for his failure to raise as an assignment of error the failure of the trial court to excuse prospective juror Hollinsworth for cause.
20. During voir dire, defense counsel challenged for cause prospective

juror Hollingsworth. The trial court denied the challenge for cause. (R-512 thru 516)

21. Although Hollingsworth was eventually removed with a peremptory challenge, it was error to deny the challenge for cause, resulting in defense counsel running out of peremptory challenges and having to ask for additional challenges, only to be denied, to the prejudice of defendant. (R-664)
22. Prospective juror Hollingsworth was a legislator for 14 years in Florida. (R-505) He was involved in the drafting (or re-drafting) of Florida's death penalty statute. (R-505) He had also read newspaper accounts of Gore's case, and felt that Gore should receive the death penalty. On each and every effort to rehabilitate him, he equivocated. (R-506 thru 508) It was fundamental error for the trial court to fail to remove a juror in such a situation -See, Ross v Oklahoma, 108 S.Ct. 2273 (1988), Morgan v. Illinois, 112 S.Ct. 2222 (1992) and it was ineffective appellate counsel who failed to raise the issue on appeal. Strickland v. Washington, 104 S.Ct. 2052 (1984)

#### CLAIM FOUR

23. Appellate counsel was ineffective for his failure to raise the issue

concerning defendant being shackled in the presence of the jury.

24. During the trial, defense counsel expressed concern about the prejudicial effect of the jury seeing Gore shackled and handcuffed in the proceeding. (R- 220 thru 225) (There is no record reference as to why Gore was shackled and handcuffed.) The trial court relented, and granted the motion, but guards failed to remove the shackles and handcuffs. (R- 223 thru 225) Defense counsel later renewed his motion, but during this time the defendant remained shackled and handcuffed in the presence of the jury. (R- 225 thru 229) The trial court's response, and the State's response, was that it was Gore's fault. (R-227 thru 231) The trial court then ordered a re-enactment with photographs, but no evidence of the photos exist in the record. (R- 229 thru 230) The trial court offered to poll the jury for possible prejudice, but trial counsel opted against it for fear of exacerbating the issue. (R- 231) There was no cautionary instruction or other remedy to the situation by the trial court.

The practice depicted in this record was disapproved of in Elledge v. Dugger, 823 F.2d 1439 (11<sup>th</sup> Cir.) Modified on other grounds, 833 F.2d 250 (11<sup>th</sup> Cir.) cert. den. 485 U.S. 1014 (1987) See also Sireci v.

Moore, 2002 WL 276292, at 4 (Fla.) Where the Florida Supreme Court stated “...It is well established that the decision to restrain a criminal defendant in the presence of the jury is subject to very close judicial scrutiny....”

From the record, it does not appear that Gore’s exposure to the jury was brief, and the same was to deprive him of a fair trial, in violation of the Fair and Impartial Trial Clause of the 6<sup>th</sup> Amendment, and in violation of the Due Process Clause of the 5<sup>th</sup>, and 14<sup>th</sup> Amendments. See Holbrook v. Flynn, 475 U.S. 560 (1986) and Illinois v. Allen, 397 U.S. 337 (1970) and Estelle v. Williams, 425 U.S. 501 (1976) For appellate counsel to fail to raise this fundamental issue in the direct appeal, constitutes ineffective appellate counsel.

WHEREFORE, Plaintiff Marshall Lee Gore prays that his convictions and sentences be vacated, and that a Writ of Habeas Corpus issue directing the Defendant, and the Florida Department of Corrections to immediately release and discharge him. Alternatively, Plaintiff demands a new trial.

#### CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Amended

Petition for Writ of Habeas Corpus has been served on Barbara Yates, Assistant Attorney General, The Capital, Tallahassee, Florida 32399-1050, and upon George R. Dekle, Assistant State Attorney, PO Drawer 1546, Live Oak, Florida 32060, and sent to Marshall Lee Gore, Plaintiff, #401256, Box 221, UCI, P-2125, Raiford, Florida 32083-0221, all by United States Mail, on this the 24<sup>th</sup> day of April, 2002.

CERTIFICATE OF COMPLIANCE

I DO HEREBY CERTIFY that this Amended Petition for Writ of Habeas Corpus complies with the font requirements of Fla.R.A.P.9.100(l), and the fonts used in this amended petition are Times New Roman 14.

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