

IN THE SUPREME COURT OF FLORIDA

CASE NO: 94,154

RICARDO GONZALEZ,

Appellant,

-v-

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

I. DISPOSITION AND COURSE OF PROCEEDINGS IN THE COURT BELOW:

Appellant Ricardo Gonzalez was indicted on February 4, 1992, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, with several co-defendants. The indictment charged first degree murder of a law enforcement officer (Count I) and charged other offenses which served as statutory aggravators at appellant's penalty phase hearing, such as armed robbery with a firearm, aggravated assault and grand theft third degree, all occurring on January 3, 1992 (R:1-5).

Appellant Gonzalez, together with co-defendants Leonardo Franqui and Pablo San Martin were tried together, to a single jury. He was found guilty of all charges and his penalty phase on the first degree murder conviction was joined with the penalty phase for co-defendants Franqui and San Martin to the same jury that had considered the guilt phase.

The jury returned an advisory verdict recommending death and the sentencing court imposed a sentence of death. Ricardo Gonzalez appealed his conviction and his sentence to this court.

Appellant's conviction was upheld, but his sentence of death as to Count I was vacated and the case remanded for a new penalty phase hearing individualized

as to Ricardo Gonzalez.

That penalty phase hearing was held on August 10 - 20, 1998. An advisory sentence of death was returned. After a *Spencer* hearing on September 4, the court entered its sentence of death against Appellant Ricardo Gonzalez on September 18, 1998.

This appeal follows.

II. STATEMENT OF THE FACTS

A. Voir Dire showed juror predisposition to punish murder of a police officer with death.

Procedural posture of this case, that is a penalty phase hearing in a first degree murder case focused on the Appellant himself for his part in the murder of a police officer during a bank robbery, produced a sharply focused voir dire. Voir dire was extensive, including seven of the fourteen volumes of transcript in the record. The court initially summoned fifty potential jurors, called a second panel of an additional twenty-five potential jurors and was required to summons thirty more. One hundred and five venireman were called to select a jury of twelve plus three alternates in this penalty phase hearing.

During the death qualification of the potential jurors, a number of them expressed an inability to impose the death sentence in any case. Most accepted the fact that their

recommendation of death or life in prison without parole was to be based on a balancing of aggravators and mitigators. However, a number of the potential jurors expressed a predisposition in a case involving the killing of a law enforcement officer to return a sentence of death.

The voir dire of William Johnson is instructive. He had “no problem with the death penalty” (TR:722). He was more sophisticated in criminal matters than most, having been a police officer who spent a year in jail on a perjury conviction for which he was later pardoned (TR:723-4). He did not believe that the death penalty should be imposed in all first degree murder cases. He could weigh aggravating factors against mitigating factors with an open mind, recommending death if the aggravating factors had greater weight and life if the mitigating factors had greater weight (TR:722-23). When the facts of the case were broached, he became a less ideal juror. The Court asked: “Do you think that when someone has been convicted of a First Degree murder of a police officer, that the only sentence they should receive is the death penalty?” He responded: “Yes” (TR:724). He was rehabilitated by confirming that he could vote for life if the mitigators were there, but his predisposition was the voir dire of Christine Benfield also

instructs. She was

disposed against the death penalty, but could follow the law and vote for death if the

aggravators outweighed the mitigators. The following colloquy occurred about the killing of a police officer (TR:737-38):

THE COURT: The question that I'm asking do you think if somebody kills a police officer, the only sentence is the death penalty or do you think - - .

MS. BANFIELD: I believe that that's the way it is.

THE COURT: Okay. When you say you believe that's the way it is, what do you mean by that?

MS. BANFIELD: I believe that's the law, isn't it?

THE COURT: Well, if that were the law -- we know that a police officer was killed and he was convicted of First Degree Murder. If that were the law, our job would be very easy, because if there's only one sentence to be imposed --

MS. BANFIELD: I'm putting it this way. I know that's a very strong possibility.

The record of predisposition of jurors to vote for death of copkillers is set forth here in detail because it plays a part in several of the issues Ricardo Gonzalez has presented for review.

B. The State showed several overlapping statutory aggravators.

At the advisory sentencing hearing, the State presented evidence to establish six statutory aggravating factors.

The first of these was, pursuant to Florida Statutes §921.141(5)(b), previous conviction by the defendant of a felony involving the use or threat of violence to some person. The State had presented evidence that Ricardo Gonzalez had taken part in the

armed robbery of the Kislak Bank and teller Michelle Chin and had engaged in an aggravated assault of teller LaSonya Hadley. The Court instructed the jury that it could consider these contemporaneous felony convictions for purposes of deciding whether the statutory aggravator had been proven (R:184) (TR:1829).

The State sought to prove the aggravator allowed by §924.141(5)(d) on the grounds that the sentencing crime had been committed while the defendant was engaged in a robbery. The State presented evidence that the victim was killed during a robbery of the Kislak Bank and the Court instructed the jury as to the availability of this aggravator (R:185) (TR:1829).

The State also sought an aggravator pursuant to §921.141(5)(e) in that the crime to be sentenced was committed for the purpose of avoiding arrest. Again, the Court instructed the jury as to availability of this aggravating factor (R:186) (TR:1829).

The State sought consideration of the aggravating factor pursuant to §921.141(5)(f) in that the crime had been committed for financial gain. The Court instructed the jury as to this aggravator (R:187) (TR:1829).

The State sought the statutory aggravator under §921.141(5)(g) in that the crime was committed to disrupt or hinder governmental function or enforcement of the law. The Court instructed the jury as to this aggravator (R:188) (TR:1830).

Finally, the government sought to establish the aggravator under §921.141(5)(j)

that the victim was a law enforcement officer engaged in the performance of the officer's official duties. The court instructed the jury as to the availability of this aggravator (R:189)(TR:1830).

Since there is considerable overlap among these six aggravators, the Court gave the "doubling instruction" to the jury: "If you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by single aspect of the offense, you are to consider that as supporting only one aggravating circumstance" (R:190) (TR:1830).

In a sentencing order entered on September 18, 1998, the Court found each of the six aggravators to have been established, but weighed them and consolidated them as follows (R:245):

1. Previous conviction: This aggravator was found to have been proven and entitled to "some weight."
2. The capital felony was committed while the defendant was engaged in the commission of a robbery: The Court found this aggravator to have been established and that it was entitled to "great weight."
3. The capital felony was committed for pecuniary gain: Again, the Court found that this aggravator had been proven, but that it merged with the aggravator of

the capital felony having been committed during the course of an armed robbery.

4. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest: The Court found this aggravator to have been proven and gave it “great weight.”

5. The crime was committed to disrupt the enforcement of the laws: The Court found this aggravator to have been established, but found it to have merged with the aggravator that the crime was committed to avoid lawful arrest and, therefore, was given no additional weight.

6. The victim was a law enforcement officer engaged in the performance of his official duties: The Court found this aggravator to have been proven and gave it great weight, but found that it merged with the aggravators of avoiding lawful arrest and hindering enforcement of the laws. The Court considered these three aggravating circumstances as one.

Consequently, the Court found three aggravators. The victim’s status as a law enforcement officer, the defendant’s conduct to avoid lawful arrest and his efforts to hinder enforcement of the laws were merged into one. The defendant’s contemporaneous convictions were a second. The defendant’s commission of a robbery and seeking pecuniary gain merged into a third aggravating factor.

Ricardo Gonzalez will present argument below that the consolidated aggravators

arising from the victim's status as a law enforcement officer have already been considered in elevating the minimum mandatory sentence. As a consequence, this factor should not be counted again in deciding whether Gonzalez should be sentenced to death.

C. The defense presented competent substantial evidence of neuropsychological and psychological mitigators.

The appellant sought application of the statutory mitigating circumstances under §921.141(6)(a) of no significant history of prior criminal activity. The Court found this mitigator to be present, and found it to be entitled to “some weight.” (R:249).

Ricardo Gonzalez also sought statutory mitigation under §921.141(6)(b) because he “was under the influence of extreme mental or emotional disturbance.” The expert testimony of Dr. Hyman Eisenstein, a board certified clinical neuro-psychologist, was presented to establish this mitigator. Although Dr. Eisenstein's testimony was uncontroverted, the Court rejected this mitigator (R:249-253). This rejection is discussed in Argument II below.

In addition, the Court found as nonstatutory mitigators the defendant's brain damage and psychological problems, his remorse, his cooperation with the authorities and his good conduct in custody and potential for rehabilitation (R:256-258). However, each of these factors were given “little weight.”

D. During closing argument, the prosecutor inserted personal opinion to mock the defense expert's presenting mitigation evidence.

The prosecutor attempted to interject his personal beliefs about the experts called by the defense. He said: “[I] think in one sentence or two, [Frank Lloyd Wright] summarized my beliefs about the next few people I’m going to be talking about” (TR:1785). Defense counsel objected and the Court ruled: “Sustain the form of the argument. Don’t tell us your personal beliefs” (*Id.*)

If Frank Lloyd Wright had anything to tell the jury of value to their deliberative process, it got lost in the dust. Once the objection had been sustained, the prosecution went on to other matters. The jury never learned what Frank Lloyd Wright would have added to the jury’s deliberative process.

The prosecutor went on to say: “And my trial partners were tougher on me that night. They said, “oh, you would have been much more tough on Dr. Fisher.” (TR:1787-88). A defense objection was overruled (TR:1788).

The prosecutor did not miss a beat:

Should have been much more tough on Dr. Fisher. I just should have sort of jumped on his case and really yelled at him because nothing he said made sense. Well the truth was, it was a silly conclusion. Want to know why? * * * If he had met the defendant the day before the murder, knowing everything that he knows, all of the tests, all of the information that he has, he would have said on that day, on January 2, 1992, this defendant will never commit a violent act. And twenty-four

hours later, he would have been wrong to the tune of one bank robbery and one dead police officer. * * * That's not science. That's not mitigation. That's guesswork. And I'm not here to guess about the future. I'm here to tell you that when the defendant committed those acts, he committed them because he wanted to, not for any other reason (TR:1788).

The court *sua sponte* revisited the last objection and sustained it; he instructed the jury to “disregard the comment about what the other prosecutor’s opinions were about the testimony of that doctor” (TR:1789).

Later, defense counsel sought mistrial; “on the characterization where [the prosecutor] had informed the jury that he was having a fight with co-counsel on what his trial partners thought about how he should deal with those experts. And since he trashed the experts, I think that interjects a personal opinion by the prosecutor into the case and that’s improper” (TR:1844). The Court agreed, but noted that the jury had been given a curative instruction and denied the motion for a mistrial (TR:1845).

SUMMARY OF THE ARGUMENT

I. The Custodial statement of a non-testifying accomplice which implicates the defendant has been held to be inherently too unreliable to permit its admission into evidence on Sixth Amendment Confrontation Clause grounds. Consequently, the admission of such evidence is error, subject to harmless error review. This Court conducted such review, but subsequent Supreme Court of The United States authority suggests that this review was incorrectly conducted. The weight of the other

evidence, and the degree of corroboration provided by that evidence to the accomplice's statement is meaningful analysis for hearsay rule purposes, but is inapplicable to Confrontation Clause analysis. Therefore, the Court's affirmance of Appellant's conviction should be overturned.

II. The fact that Appellant killed a police officer while that officer was engaged in the performance of his official duties played a great role in the sentencing process which led to the imposition of the sentence of death. These very factors had already been considered by the Legislature in elevating the penalty for Appellant's crime from life without parole for 25 years to life without eligibility for release. Recounting these factors in the death decision constitutes impermissible double counting.

III. Appellant presented uncontroverted expert testimony in mitigation that he suffered from an organic brain dysfunction classified as Pugilistic Encephalopathy. The sentencing Judge dismissed this testimony on the ground that it was not supported by the facts in the record. However, the Court focused on the planning for the robbery and ignored the impulsive nature of Appellant's unplanned use of the weapon and ignored the fact that the use of the weapon was an utterly aberration episode in Appellant's entire life. Both of these factors support the diagnosis of the impulsive behavior and the Court's rejection of this mitigator was error.

IV. In his closing argument, the prosecutor appealed in the passions of the jury to reject the mitigators presented by defense experts, whom he called hired guns, gullible and lacking in common sense. This scorn was supplemented by the prosecutor's discussion with the jury about the prosecution's team's personal rejection of the defense mitigation evidence.

V. Proportionality analysis of the death sentence in this case requires that the death sentence imposed against Appellant Ricardo Gonzalez be vacated. The aggravating factors established by the state really merge into two: the victim's status and conduct as a law enforcement officer and Appellant's conduct of participating in a robbery that gave rise to contemporaneous felony convictions. The first of these aggravators has already been counted in establishing the minimum sentence. Against these aggravators is the mitigator rejected by the Court of Appellant's organically based impulsivity. Where such substantial mitigation has been shown, the death penalty is not proportional.

ARGUMENT

I. Custodial statements of non-testifying accomplices that inculcate the defendant are inherently too unreliable to be admitted at trial. Can the error of admitting such statements be harmless under the hearsay rule because that there is sufficient corroboration or must the harmless error analysis consider the

defendant’s loss of the dynamic of the confrontation process as a producer of truthful evidence?

In his initial appeal to this Court from his conviction and sentence of death, Ricardo Gonzalez assigned as error the admission into evidence of the custodial confessions of his non-testifying accomplices Leonardo Franque and Pablo San Martin.

¹ The reported cases in this area of the law reflect a conflict between the “Hearsay Rule” focus on whether the statement is sufficiently corroborated by other evidence to be likely to be true and the “Confrontation Clause” focus on whether the circumstances under which the statement was made are sufficiently indicative of truth to render unnecessarily the truth producing process of cross examination.

The tension between these two foci is seen in this Court’s opinion in *Gonzalez v. State*²:

In this case, there is no question that both Franqui’s confession and San Martin’s confession interlocked with Gonzalez’s confession in many respects and was substantially incriminating to Gonzalez. Moreover, we cannot say that the totality of the circumstances under which Franque and San Martin made their confessions demonstrated the particularized guarantee of trustworthiness sufficient to overcome the presumption of unreliability that attaches to accomplice’s hearsay confessions which implicates the defendant.

¹ *Gonzalez v. State*, 700 So.2d 1217, 1218 (Fla.1977)

² *Id.* AT 1219

The United States Supreme Court in *Lilly v. Virginia* recently considered the interaction of the Confrontation Clause and the hearsay rule in the admission of an out of court confession by an accomplice that implicates the accused. Justice Stevens, writing for the plurality, framed the issue: “The question presented in this case is whether the accused’s Sixth Amendment right ‘to be confronted with the witnesses against him’ was violated by admitting into evidence at his trial a nontestifying accomplice’s entire confession that contained some statements against the accomplice’s penal interest and others that inculpated the accused.”³

The Supreme Court began its analysis of whether the Supreme Court of Virginia properly affirmed the admission of such testimony by noting that “the question of whether the statements fall within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law.”⁴ Next, the Court observed that “the simple categorization of a statement as a “ ‘declaration against penal interest’ defines too large a class for meaningful Confrontation Clause analysis.”⁵ Consequently, the statement against penal interest basis for admission of out of court statements was broken down into three parts: admissions admitted against the declarant; exculpatory

³ 119 S.Ct 1887, 1892 (1999)

⁴ *Id.* at 1894

⁵ *Id.* at 1895, citing *Lee v. Illinois*, 476 U.S. 530, 544 n. 5, 106 S.Ct. 2056, 90 L.Ed.2d (1986).

evidence offered by the defendant to shift the blame to a declarant; and statements by an accomplice that incriminate the defendant. Neither *Lilly* nor this case involve the first and second aspects of this rule. Both involve the third, where an accomplice has confessed, incriminating the defendant, and the accomplice's confession is offered without the opportunity for confrontation.

Lilly observed that “this third category of hearsay encompasses statements that are inherently unreliable. Typical of the groundswell of scholarly and judicial criticism that culminated in the *Chambers* decision, Wigmore's treatise still expressly distinguishes accomplices' confessions that inculcate themselves and the accused beyond a proper understanding of the against-penal-interest exception because an accomplice often has a considerable interest in ‘confessing and betraying his co-criminals.’”⁶

Justice Breyer wrote a concurring opinion which provided an historical perspective on the Confrontation Clause. “As traditionally understood the right [of confrontation] was designed to prevent, for example, the kind of abuse that permitted the Crown to convict Sir Walter Raleigh of treason on the basis of the out-of-court confession of Lord Cobham, a co-conspirator.”⁷

⁶ *Id* at 1897, citations omitted

⁷ *Id* at 1902

Justice Breyer asked: “But why should a modern Lord Cobham’s out-of-court confession become admissible simply because a fortuity, such as the conspiracy having continued through the time of the police questioning, thereby bringing the confession within the ‘well-established’ exception for the vicarious admissions of a co-conspirator? Or why should we, like Walter Raleigh’s prosecutor, deny a plea to ‘let my Accuser come face to face,’ with words (now related to the penal interest exception) such as, ‘The law presumes, a man will not accuse himself to accuse another’?”⁸

The plurality in *Lilly* states⁹: The decisive fact, which we make explicit today, is that accomplices’ confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.”

Thus *Lilly* teaches that it is not the degree of corroboration, nor the degree of interlock between the confessions that renders their content probably true. Rather, the question is whether the circumstances of the confession renders it sufficiently reliable to obviate the need for cross examination as an engine to test the truth.

Lilly concluded: “Adhering to our general custom of allowing state courts

⁸ *Id* citations omitted

⁹ *Id* at 1899

initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law, we leave it to the Virginia Courts to consider in the first instance whether this Sixth Amendment error was ‘harmless beyond a reasonable doubt.’”¹⁰ This Court had reviewed the erroneous admission of codefendants’ custodial confessions against Mr. Gonzalez for harmless error and concluded that “with respect to guilt, we conclude that the error was harmless beyond a reasonable doubt.”¹¹ This Court’s conclusion as to the penalty phase was contrary: “We, agree, however, that Gonzalez’s sentence must be reversed.”¹²

Appellant suggests that, in light of *Lilly v. Virginia*, this Court erred in its harmless error analysis and reached opposite results because it used a hearsay rule driven analysis in reviewing the guilt phase and a Confrontational Clause analysis in reviewing the penalty phase. This Court affirmed Gonzalez’s conviction, looking at the evidence in a static way, that is considering how well the custodial statement of the codefendant fit with the other evidence in the case, including Gonzalez’s confession. This Court overturned the penalty because it looked at the codefendant’s statement as a dynamic, reflecting a relationship between and among the codefendants that might be

¹⁰ *Id* at 1901, citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

¹¹ *Gonzalez v. State*, supra, 700 So.2d at 1219

¹² *Id*

altered with the right of confrontation.

The hearsay rule and the Confrontation Clause are related, but they are not the same. Justice Breyer concluded his concurring opinion in *Lilly*:¹³

We need not reexamine the current connection between the Confrontation Clause and the hearsay rule in this case, however, because the statements at issue violate the clause regardless. I write separately to point out that the fact that we do not reevaluate the link in this case does not end the matter. It may leave the question open for another day.

One fundamental difference between the hearsay rule and the Confrontation Clause was noted by Justice Scalia in his dissent to *Maryland v. Craig*:¹⁴ “/T/he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was ‘face-to-face’ confrontation.”

Appellant Ricardo Gonzalez was denied “face-to-face” confrontation in his guilt phase trial. The admission of accomplice confessions in violation of his right to confrontation could not be harmless, regardless of how well those confessions may have interlocked with other evidence in the case.

II. The Legislature used the victim’s status as a police officer and his

¹³ *Id* at 1903

¹⁴ 497 U.S. 836, 862, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)

conduct in that capacity to raise the minimum penalty for first degree murder from life in prison without parole for 25 years to life without eligibility for release. Does the second use of these same factors to raise the sentence to death constitute impermissible double counting?

Appellant Ricardo Gonzalez was convicted of the first degree murder on January 3, 1992, of North Miami Police Officer Steven Bauer. At the time of his offense, the statutory scheme subjected Mr. Gonzalez as a Capitol felon to a sentence of “life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole,” unless the death penalty procedure was invoked and he was sentenced to death.¹⁵ However, the Florida Legislature provided enhanced penalties for violent crimes against police officers. “/T/he Legislature does hereby provide for an increase and the certainty of penalty for any person convicted of a violent offense against any person against any law enforcement . . . officer . . . , which offense arises out of or in the scope of the officer’s duty as a law enforcement . . . officer.”¹⁶ In the case of a person convicted of first degree murder of a police officer, which murder occurs in the scope of the officer’s duty, “if the death sentence is not imposed, a

¹⁵ FSA §775.082(1)

¹⁶ FSA §775.0823

sentence of imprisonment for life without eligibility for release” shall be imposed.¹⁷

Thus, at the time Ricardo Gonzalez murdered Officer Bauer, the Florida Legislature had raised the minimum mandatory sentence to be imposed on Mr. Gonzalez from life with no eligibility for parole for 25 years to life “without eligibility for release,” because of the fact that Bauer was a police officer and he was acting in that capacity when he was killed.

These very factors are reintroduced into the sentencing calculus for capital felonies in the death penalty phase. The Legislature has directed that a statutory aggravating factor in the decision as to whether death should be imposed the status of the victim as “a law enforcement officer engaged in the performance of his or her official duties.”¹⁸

While FSA 775.082(1) was later amended to provide for ineligibility for parole in all life sentences other than death, this Court has made clear that this amendment applies only to crimes committed after May 24, 1994.¹⁹ Mr. Gonzalez’s crime was committed prior to that date.

The centrality of the victim’s status as a police officer to the sentencing process is shown in the assistant states attorney’s closing argument to the penalty phase jury.

¹⁷ FSA §775.0823 (1)

¹⁸ FSA §921.141(5)(j)

¹⁹ In re Standard Jury Instructions, 678 So.2d 1224 (Fla.1996)

His most important argument, given the position of primacy, was that in weighing the evidence, the weight of Officer Bauer's badge outweighed every other consideration.²⁰

And as I was thinking to myself about the idea of weighing, I thought of this piece of metal. Piece of tin, a little rusty and corroded by now, badge number 88 from the City of North Miami Police Department. And it doesn't weigh very much. As an object, in grams or ounces, you can put this on the scale and there's not a whole lot there. But this has different weight than just how much it weighs on the scale. This outweighs everything, that was presented in mitigation. This little piece of metal alone.

We don't want to do that. We'll give you a few dollars, you go do it. And when those people lay down their lives for their friends and their co-workers and their associates and all the people they are protecting, this little badge needs that little extra bit of credit when you go back there in the jury room. It's not just anybody.

The voir dire examination, a portion of which is included in the statement of the case, shows that many jurors were predisposed to punish a cop killer with death.

Justice McDonald, concurring in part, dissenting in part with *Jackson v. State*,²¹ shows that judges can share the juror's view that the law enforcement status of the victim is at the core of the death/life decision:

I would affirm the death penalty because no matter how they are legally described, [the defendant's] actions in killing the police officer under the circumstances as demonstrated in the evidence has properly earned her a ticket to the electric chair.

²⁰ TR:1747

²¹ 648 So.2d 85, 94 (Fla.1994)

Since the identity of the victim as a police officer has already been used as the factor that mandates a minimum sentence of life without chance of parole, this factor is improperly used as an aggravator in the decision between life and death. Florida Statutes §921.141(5)(j) creates as a statutorily authorized aggravator the fact that: “The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.” In short, the death phase reconsiders the factor that was used to enhance appellant’s sentence to life without release.

Justice Anstead’s specially concurring opinion in *Blanco v. State*,²² suggests that under some circumstances, reuse of the felony murder aggravator to justify a death sentence may be unconstitutional. “When the same felony used to establish guilt of first-degree felony murder is again used as an aggravator to justify the imposition of the death penalty, Florida’s felony murder aggravator may well fail to meet the U.S. Supreme Court’s mandate that aggravating circumstances in a state’s death penalty scheme must ‘genuinely narrow the class of persons eligible for the death penalty’ and ‘reasonably justify the imposition of a more severe sentence compared to others found guilty of murder.’²³

²² 706 So.2d 7, 12-15 (Fla.1997)

²³ *Id.* at 12, citing *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235(1983).

This court has prohibited double counting a single factor in considering the death/life decision:²⁴ “Where . . . double consideration of one factor appears to have impaired the process of weighing the aggravating circumstances against the mitigating circumstances, the sentence of death must be vacated.”

The analysis that gave rise to Justice Amstead’s concern about punishment of first-degree felony murders is the same analysis that underlies the prohibition against double counting. *Provelence v. State*²⁵ observed that the pecuniary gain aggravator would be present in all robbery murders: “Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged.”

Ricardo Gonzalez was improperly disadvantaged. His minimum sentence was raised to life without release because he killed a police officer. He should not be sentenced to death on a second use of this factor.

III. The sentencing judge rejected the uncontroverted testimony of appellant’s expert as unsupported. The record contains competent substantial evidence to support the statutory mitigator advanced by the expert, which the

²⁴ *Armstrong v. State*, 399 So.2d 953, 962 (Fla.1981)

²⁵ 337 So.2d 783, 786 (Fla.1976)

Court overlooked. The existence of organic and behavioral support for the expert opinion makes the Court's rejection of the mitigator error.

At the advisory sentencing hearing, the defense presented the testimony of Dr. Hyman Eisenstein, a Board Certified Clinical Neuropsychologist, who testified that it was his opinion that Ricardo Gonzalez acted under a state of extreme mental or emotional disturbance at the time of his murder of Officer Steven Bauer.

An organic basis for this deficiency exists and was established in the record. The transcript of the testimony of Dr. Alan Wagshul, a board certified neurologist, was read into the record. Dr. Wagshul had referred Ricardo Gonzalez to Dr. Tomas Naidich, a neuroradiologist, to perform a magnetic resonance imaging examination on Mr. Gonzalez. The MRI showed that Mr. Gonzalez had two cavities in the middle of his brain which had filled with spinal fluid, a generally abnormal condition, but is frequently found in boxers. This was classified by Dr. Wagshul as pugilistic encephalopathy. Dr. Wagshul agreed that this condition could lead to impulsive behavior.

The diagnosis and opinion was uncontroverted.

The sentencing court looked to the legal proposition stated by this Court in *Walls*

v. State:²⁶

Certain kinds of opinion testimony clearly are admissible - and especially qualified expert opinion testimony - but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking.

Also, *Gudinas v. State*²⁷ affirmed the rejection of mitigation testimony in the form of expert opinion that defendant's ability to conform his behavior was impaired by intoxication by alcohol where that opinion was based on non-record statements concerning the issue of intoxication.

While the proposition exposed by *Walls* is uncontrovertible, its application to the facts of this case constitutes error. Notwithstanding Dr. Wagshul's providing an organic basis for Ricardo Gonzalez's impulsiveness, the sentencing court's ruling that the facts do not support such a conclusion is at odds with the record in two significant regards.

This Court set the standards for review of the various aspects of mitigating circumstances in a death case in *Campbell v. State*.²⁸ These standards were

²⁶ 641 So.2d 381, 390-91(Fla.1994):

²⁷ 693 So.2d 953, 967 (Fla.1997)

²⁸ 571 So.2d 415 (Fla.1990).

summarized in *Blanco v. State*:²⁹

1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Whether Ricardo Gonzalez suffered from impulsivity that rendered him unable to act within the requirements of the law clearly is a mitigator. Since the Court rejected this mitigator, review must follow *Campbell* which instructs that “/T/he Court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence .. .”³⁰

First, the sentencing court concluded that the fact that Mr. Gonzalez was aware of the planning of the robbery of the Kislack Bank for ten days is inconsistent with a conclusion of impulsiveness (RII:252). The question is not whether the robbery was the act of impulsiveness, but whether the shooting and killing of Officer Bauer was an uncontrollably impulsive act. Were this an appeal of a robbery sentencing, the sentencing court's analysis of the facts would be complete. It is not an appeal from

²⁹ 706 So.2d 7, 10 (Fla.1997), as quoted with footnotes omitted in *Cane v. State*, 727 So.2d 227, 230 (Fla.1998).

³⁰ 571 So.2d 419 (footnotes omitted)

a robbery sentence. This is an appeal from a murder sentence. The evidence is uncontroverted that Ricardo Gonzalez had no awareness that guns were to be involved until one was handed to him at breakfast moments before the murder of Officer Bauer. Thus, the sentencing court has rejected Dr. Eisenstein's opinion because the Court focused on the robbery aspect of the case when it was required to consider the murder aspect of the case.

Second, the sentencing Judge has turned the utterly aberrational nature of Ricardo Gonzalez' act of murder on its head. In the sentencing order, the Judge notes that both prior to and even after January 3, 1992, the day Ricardo Gonzalez shot Officer Bauer dead, Mr. Gonzalez was "able to conform his conduct to the law." The sentencing Judge uses this utter aberration from the normal conduct of the defendant to reject the opinion of Dr. Eisenstein that Ricardo Gonzalez was impulsive. Why was there this one single lapse in an otherwise law abiding life? If it was not impulsive, what was it?

On review under the "substantial competence evidence" standard, reversal of the Court's rejection of this mitigator is required.

IV. The Prosecutor's closing argument appealed to the passions of the jury and the prosecution team's introduction of its personal opinion of rejection of defense mitigator evidence to the jury constituted error.

This Court in *Hawk v. State*³¹ recently reversed on proportionality grounds the death sentence imposed on a person who suffered brain damage from an infantile bout with spinal meningitis and who was 19 years old when he committed first degree murder.

Justice Pariente concurred in the reversal because of the prosecutor's appeal to the juror's passions. He quoted *King v. State*³²:

Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant. *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985). Furthermore, if "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured outside the scope of proper argument." *Garron v. State*, 528 So.2d 353, 359 (Fla.1988).

Justice Pariente said:³³ "Labeling the uncontroverted mitigating evidence as 'pathetic excuses' was clearly improper."

The prosecutor in his closing argument to the jury in Ricardo Gonzalez's case launched an aggressive, improper and prejudicial attempt to neutralize otherwise uncontroverted expert testimony for the defense to establish psychological mitigators.

In contrast to his eloquence in his "badge of tin" call for death to the killer of

³¹ 718 So.2d 159 (Fla.1998)

³² 623 So.2d 486, 488 (Fla.1993)

³³ 718 So.2d at 165

Officer Steven Bauer, discussed above, the prosecutor mocked the defense experts. He ascribed desperation by defense counsel as the motive. “They hire a doctor, their own hired gun. Said, look at my guy, I need something to go talk to the jury about”³⁴

The prosecutor asked the jury to disregard the instructions of the Court as to the law. **“You’re going to get instructions from the Judge and I’m going to tell you right now, they have nothing to do with the case.** The Judge is going to instruct you, for example, you can consider whether or not you think that at the time that the defendant committed this crime, he was unable to conform to the requirements of the law because of some sort of mental problems”³⁵ (emphasis added).

“Something strange happened in trial. Two people got on that witness stand. Two people who would have parted with those twenty dollar bills. Dr. Eisenstein and Dr. Fisher. Talk about gullible. We’re going to talk about those people a little bit more, but I want you to think about whether or not they used common sense when they approached their evaluations when they testified to you about their findings.”³⁶

³⁴ (TR:1779)

³⁵ (TR:1781).

³⁶ (TR:1751)

In *Bell v. State*,³⁷ the court voiced its displeasure at improper arguments by trial counsel:

We continue to be concerned when trial counsel make improper arguments to a jury. At times it seems as if certain counsel consider the harmless and fundamental error rules to be a license to violate both the substantive law and the ethical rules that prohibit improper argument. We reiterate the admonition of Judge Blue in his specially concurring opinion on *Luce v. State*, 642 So.2d 4 (Fla.2d DCA 1994): “Trial must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in its use, they should not be members of The Florida Bar.”

The prosecutor’s advice that the prosecution rejected the defense mitigation evidence crossed the line. It was error. Reversal is required.

V. Proportionality analysis requires that the death sentence imposed against Ricardo Gonzalez be vacated.

Ricardo Gonzalez killed a police officer during a bank robbery, but this killing was an aberrant act by a man with organic brain damage that gave rise to impulsivity.

Proportionality analysis of Ricardo Gonzalez’s death sentence should begin consideration of merger of aggravating factors. The State presented evidence of six aggravators, but suggested to the jury that they merged into four (TR:1758). The Court

³⁷ 723 So.2d 896, 897 (Fla.2d DCA1998)

held that they merged into three, but they could be reasonably merged to two, since the “previous conviction” aggravator arose from the same events as the “robbery” aggravator.

In this case, there are two core aggravators: the victim’s status and conduct as a law enforcement officer, and the defendant’s conduct of participating in a robbery that gave rise to contemporaneous felony convictions. The first of these aggravators, the victim’s status as a law enforcement officer, was already counted when the minimum sentence was raised to life in prison without opportunity for release because the victim was a law enforcement officer and was so engaged at the time of the killing.

Even if this factor is still considered a second time determining whether Ricardo Gonzalez should be put to death, the death sentence is not proportional. Arrayed against this are substantial psychological mitigators.

Hawk collected cases pertinent to proportionality review where mitigating factors are shown.³⁸ *Curtis v. State*,³⁹ “vacat/ed/ a death sentence for shooting death of store clerk where two aggravators - including attempted murder of second store clerk- were weighed against substantial mitigation including remorse and guilt.” *Morgan v. State*,

³⁸ 718 So.2d at 164, n.12

³⁹ 685 So.2d 1234 (Fla.1996)

⁴⁰ “vacat/ed/ a death sentence for bludgeoning death of homeowner where two aggravators were weighed against copious mitigation including brain injury and youth.” *Livingston v. State*, ⁴¹ “vacat/ed/ a death sentence for shooting death of store clerk where two aggravators were weighed against substantial mitigation including abusive childhood, diminished intellectual functioning, and youth.” *Knowles v. State*,⁴² “vacat/ed/ death sentence for shooting deaths of defendant’s father and neighborhood child where one aggravator was weighed against substantial mitigation including brain damage and impaired capacity.”

Against this measure, Ricardo Gonzalez’s death sentence is not proportional and should be vacated.

CONCLUSION

For the reasons set forth above, Appellant Ricardo Gonzalez requests that this Court reverse his conviction and remand for new trial or vacate the sentence of death imposed on him.

⁴⁰ 639 So.2d 6 (Fla.1994)

⁴¹ 565 So.2d 1288 (Fla.1988)

⁴² 632 So.2d 1288 (Fl a.1993)

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IN THE SUPREME COURT OF FLORIDA

CASE NO: 94,154

RICARDO GONZALEZ,

Appellant,

-v-

STATE OF FLORIDA,

Appellee.

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

RECORD EXCERPTS OF APPELLANT

RICARDO GONZALEZ

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