IN THE SUPREME COURT OF FLORIDA

CASE NO: 84,841

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

RICARDO GONZALEZ

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STATEMENT OF THE CASE

A. 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, along with co-defendants Leonardo Franqui, Pablo San Martin, Fernando Fernandez and Pablo Abrue. Their indictment charged in Count I, first degree murder of a law enforcement officer, in Count II, armed robbery with a firearm, in Counts III and IV, with aggravated assault, in count v, with unlawful possession of a firearm while engaged in a criminal offense, in Counts VI and VIII, with grand theft third degree, and in Counts VII and IX, with burglary (R:15-20).

Pablo Abrue entered a negotiated plea of guilty prior to trial and, in exchange for his cooperation, avoided the death penalty. Appellant Gonzalez, together with co-defendants Franqui and San Martin were tried together, to a single jury. Co-defendant Fernandez was tried to a separate jury at the same time as appellant's trial.

Pretrial motions were heard May **18, 1994** (TR:1-284). Prior to trial, co-defendant Fernandez filed a motion for severance, joined by all defendants, on grounds that he, Fernandez as well as San Martin and appellant had made post-conviction statements which directly incriminated the others (R:115). After a pretrial hearing in which the trial court sandpapered away the inconsistencies between these three confessions, the Court denied in part the

motion for severance and proceeded to trial allowing admission of the confessions without opportunity for confrontation against the co-defendant accusers, on the grounds that these confessions were "interlocking' (R:122-128).

Jury selection commenced on May 23, 1994. During the course of jury selection, the trial Court interjected itself into the peremptory challenge phase of jury selection in a way which essentially denied the defendants the opportunity to make unencumbered peremptory challenges and elevated the trial court to the final arbiter on these discretionary challenges in a way which impermissibly increased the role of the trial judge from an evaluatory of the statutory challenges for cause and extended his authority into permitting or denying, based on his own perceptions of the jurors, as the final arbiter of the peremptory challenge,

Trial began May 26, 1994 and continued until June 2, 1994. Appellant's timely motions for judgment of acquittal were denied and the jury ultimately found him guilty as charged.

Prior to and during the penalty phase hearing, appellant and his co-defendants renewed their motions for severance. The gravamen of these motions was that the defendants, in general, were prejudiced by the denial of their right to particularized determinations by sentencing hearings conducted as a group. Particularly as to appellant, his prejudice in a joint sentencing hearing was that the significance and merit of his contention that he suffered from brain damage that elevated itself to a substantial statutory mitigator was lost against the similar argument raised by

co-defendant San Martin. San Martin's argument was based on a scientific standard of lesser reliability and carried with it the burden that San Martin was already a convicted first degree murder. Appellant was precluded from arguing the comparative merit of his position in contrast to co-defendant San Martin's position.

Ultimately, the jury recommended death as to co-defendant Franqui by a vote of nine to three; death as to appellant by a vote of seven to five; and life as to co-defendant San Martin (TR:3105). After the jury returned its advisory sentence on September 23, 1994, the Court entertained further argument and testimony from the parties on September 30, 1994 (TR:3306). Thereafter, on October 11, 1994, the Court imposed sentence on appellant and his two co-defendants. The Court's narration of its sentencing order set forth his findings of statutory aggravators and mitigators (TR:3324-3348).

The Court ordered appellant Ricardo Gonzalez sentenced to death.

This appeal was timely filed on October 28, 1994 (R4:770).

STATEMENT OF THE FACTS

GUILT PHASE

Four men robbed the Kislak National Bank in North Miami, Florida, shortly before its scheduled 8:30 a.m. opening on Friday, January 3, 1992 (TR:956-960). The robbers approached tellers Michelle Chen and LaSonya Hadley, while they were carrying their cash boxes from the main structure of the bank to the drive-in teller positions outside of the bank in the armed escort of North Miami Police Department Officer Steven Bauer. During the robbery, Bauer was shot and killed. The bank box of Michelle Chen was taken from her at gun point. The four robbers made an escape in two gray Chevrolet Caprice automobiles which were later determined to have been stolen. Following the escape of the robbers, the vehicles were found abandoned a short distance from the bank.

The essence of the case against appellant was his confession to law enforcement officers. While this confession was consistent with the testimony of law enforcement investigators, the heart of the State's proof against appellant was his own confession as reinforced by the interlocking confessions of the co-defendants with whom he went to trial.

Special Agent William Lee of the Florida Department of Law Enforcement initiated surveillance activity on appellant at approximately 6:00 a.m. on January 18, 1992 (TR:1319). He arrived in the vicinity of appellant's residence at 744 NW 27th Court at approximately 7:00 a.m. He was looking for appellant Ricardo Gonzalez. At approximately 8:00 a.m., a white male drove away from

this house. This person was stopped and identified as Juan Rivera, appellant's brother. At the urging of police, Rivera made a pretext call to Gonzalez asking him for assistance with his broken down automobile, in an attempted to lure appellant out of his residence.

Special Agent Lee observed a second car leaving the residence at 744 NW 27th Court, which he and backup officers proceeded to stop (TR:1325). The appellant was asked if he would go to the police department. The well trained Special Agent Lee claimed that appellant was free to drive away, but he was not even free to pull his own car out of the center of the road to park it on the median of the road (TR:1339).

Detective Richard Spotts of the North Miami Police Department was then called to transport appellant Ricardo Gonzalez. Spotts "asked" him, Gonzalez, to come to the Metro-Dade Police Department Homicide Bureau for questioning. Spotts said that appellant was "cooperative", that he was "not arrested", nor was he "handcuffed" (TR:1349). However, appellant was concerned that his car was left in the middle of the street and that he was not able to do anything about it (TR:1355). Further, he was transported to the police station in the middle of the back seat, between two police officers.

Spotts testified that appellant, while in this presumably non-custodial situation, volunteered the following statements: "I've got bad luck;" “I knew I would get stopped driving the car' (TR:1358). This statement was admitted by the Court as a

spontaneous statement over defense objection on Rule 403 grounds.

Detective Donald Diecidue, an investigator with the City of North Miami Police Department, met with appellant Ricardo Gonzalez at approximately 11:00 a.m. at the Metro-Dade Headquarters, in the company of his partner Tony Ojeda (TR:1376). Diecidue read appellant his *Miranda* rights after advising him that he was under arrest for his participation in the robbery of the Kislak bank and the murder of Officer Steven Bauer.

The essence of appellant's statement as recounted by Detective Diecidue was that appellant Ricardo Gonzalez had met with co-defendant Leonardo Franqui on or about Christmas of 1991 to discuss a "job;" specifically a bank robbery with drive through tellers involving security. They chose Friday. They would steal two cars. Appellant and Franqui would go in one. Two other people would travel in the other (TR:1390).

During the drive to the bank, while Franqui was driving, Franqui handed appellant a .38 caliber revolver while co-defendant Franqui retained possession of a .9mm semi-automatic.

The tellers and the decedent were seen to exit the bank and appellant and Franqui got out of their car. Franqui shouted "don't move," or "freeze" in Spanish; Franqui fired his gun and then Bauer went for his gun. Appellant fired his .38 revolver also (TR:1394). The tape recording of Ricardo Gonzalez's confession on January 18, 1992, was redacted (TR:1405), eliminating the exculpatory statements that he didn't have the gun until given to him by Franqui, that Gonzalez shot once, and that Franqui shot three or

four times.

Following appellant's confession to Diecidue, Detective Spotts reentered the interrogation room and obtained from appellant his signature on a consent to search form (TR:1518; Ex.52). Pursuant to this authority, appellant's bedroom in the residence at 744 NW 27 Court was searched (TR:1519). The searching officers found currency in an Everlast bag on the top shelf of the closet in the bedroom (TR:1523). Approximately $1200 in $20 bills were found (TR:1526).

Detective Spotts returned to the interrogation room in which appellant was detained, and after repeating the Miranda warnings, obtained from appellant the statement that the currency was divided at the "'other' Pablo's" apartment in Hialeah (TR:1526;1534).

PENALTY PHASE

During the penalty phase of this case, appellant Ricardo Gonzalez called on his family to establish the nature and circumstances of his upbringing and education. In addition, witnesses established his history of boxing and the tone of his marriage.

To establish the statutory mitigator of extreme mental or emotional disturbance, appellant called two doctors who had examined him.

Alan M. Wagshul, a board certified neurologist testified regarding his examination of appellant. Dr. Wagshul took appellant's history, conducted a neurological examination and gave a general physical examination. His testing included the taking of

electroemceiphalogram (TR:2674). Because of the appellant's history, Dr. Wagshul referred appellant for magnetic resonance imaging by Dr. Thomas Naidich, chief of neuroradiology at Baptist Hospital in Miami, Florida. Dr. Naidich found two cavities or spaces in appellant's brain, a condition which was consistent with injury sustained by boxers (TR:2678). This injury indicates a high probability of chronic brain injury (TR:2679). Dr. Wagshul consulted with neuropsychologist Himen H. Eisenstein, Ph.D., a board certified neuropsychologist. Their conclusion as to appellant's condition was that he suffered from "pugilistic encephalopathy," a chronic trauma from blows to the head. It was Dr. Wagshul's opinion that this condition can have an impact on behavior and cause an increase in impulsivity (TR:2687).

Dr. Eisenstein also testified. He found the mitigator of extreme mental or emotional disturbance to be present in that the left portion of appellant's brain, specifically the frontal and temporal lobe, were impaired. This would cause psychological disfunction and impair decision making and impulsivity (TR:2741).

SUMMARY OF THE ARGUMENT

Appellant's first argument is that the preemptory strike by a Hispanic attorney on behalf of an Hispanic defendant of an Hispanic male and Hispanic female member of the jury pool was improperly sustained after the challenge by the state. There was no apparent racial or sexual basis for these challenges and the counsel for appellant gave personal, visceral and verified reasons for his exercise of his strikes. Notwithstanding the absolute absence of any hint of impermissible racial or sexual motive, the Court "graded the paper" and held the reason given by appellant's counsel to be insufficient. This application of the *Batson-Neil* standard placed the personal sentiment of the trial judge alone as supreme over the defendant's right to strike jurors with whom he is not comfortable for personal, rather than prohibited, reasons.

The second issue on appeal challenges the trial court's admission of co-defendants' confessions in a joint trial, in violation of the confrontation clause. The Court actually redacted conflicts between the confessions which served to increase the amount of interlock between the appellants confession and the co-defendants' confessions.

The third issue on appeal challenges the trial court's refusal to sever his penalty phase hearing from his co-defendants' penalty phase hearing. Not only was appellant prejudiced by the admission of the co-defendants' confessions, but his evidence of a statutory mitigator, specifically that of severe mental or emotional distress, was lost in the testimony presented by a co-defendant.

The co-defendant's testimony was of an inferior medical quality, but the appellant was precluded from cross-examining the co-defendant's medical experts to highlight these differences and he was precluded from making any argument about these differences in closing argument to the jury. Given the extremely significant nature of the penalty phase hearing, this failure to grant a severance is error and requires a remand.

Appellant's fourth argument on appeal submits that the nature of his conduct and the nature of his criminality is not sufficient to justify, on proportionality grounds, his sentence of death. The death sentence should be commuted set aside and a sentence of life in prison imposed on the defendant.

ARGUMENT

I. THE COURT IMPERMISSIBLY DENIED APPELLANT THE OPPORTUNITY TO EXERCISE PEREMPTORY CHALLENGES.

During the jury selection phase of this trial, appellant's counsel, speaking both for appellant and his Co-defendants, exercised peremptory challenges against juror Adriana Andani, and against juror Aurelio Diaz. Both of these challenges were denied by the trial court. In addition, the state exercised a peremptory challenge against juror Raquel Pascual. This peremptory challenge was sustained by the trial court.

As a consequence of the trial judge's intervention into the peremptory challenge process, two jurors were retained on the jury which determined appellant's guilt and voted his death, and one juror was excused whom appellant wished to sit on his jury. This intervention by the trial court, consequently, caused a three juror swing in the composition of the guilt phase and penalty phase jury that ultimately voted seven to five for appellant's death.

The right of a defendant charged with criminal violations to issue peremptory challenges to potential jurors called to sit in judgement of him is not constitutionally based, but has long been recognized to be an essential component in the process of selecting an impartial jury. In Swain *v. Alabama,* 380 U.S. 202, 219 (1965), the Court:

> The function of the challenge is not only to eliminate extremes of partiality, on both sides, but to assure the parties that the jurors before whom they will try the case will decide on the basis of the evidence placed

before them and not otherwise.

As such, the peremptory challenge is 'one of the most important rights secured to the accused." Pointer v. *United* States, 151 U.S. 396 (1894).

Recent jurisprudence has recognized that the right to issue peremptory challenges is not without limitation. In *Batson* v. *Kentucky, 476* U.S. *79, 106* S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court of the United States ruled that in the balancing of a criminal defendant's right to issue peremptory challenges against the right of a member of a racial minority to participate in the criminal justice system, the right of participation by the racial minority constitutes a valuable and substantial right. Justice Powell's opinion in *Batson* stands as a watershed in the law because it called into question the judicial blind eye to systematic striking of black jurors by the prosecution. Justice Powell concluded that the exclusion of jurors on grounds of race is unconstitutional discrimination against the excluded jurors. *476* U.S. at *84, 106* S.Ct. at 1718. This disapproval of the judicial blind eye to racial motive in peremptory strikes was adopted by the Florida Supreme Court in *State v. Neil, 457* So.2d 481 (Fla. 1984), clarified, *State v. Castillo, 486* So.2d 565 (Fla. 1986).

Batson and Neil and their progeny have reshaped the face of the peremptory challenge. Mr. Justice Powell may have been correct in *Batson, 476* U.S. at 98-99, 106 S.Ct. 1724, that "we do not agree that our decision today will undermine the contribution the [peremptory] challenge generally makes to the administration of

justice." While *Batson* itself may not have had this effect, the cases which followed and extended the Batson-Neil analysis to virtually every significant distinction between human beings certainly has had an impact on the administration of justice. Specifically, the trial judge supervising the jury selection process in this case stated (TR:793): "personally, I think that the entire body of law in this area is outrageous, but it is clear that peremptory challenges no longer exist, and that neutral reasons must be given and you have not given me any."

The core question raised in this appeal is whether the trial court impermissively intruded his own evaluations and assessments into the peremptory challenge process, thereby depriving the appellant of an important right with no corresponding benefit of protecting the jurors against discrimination.

We have here the tremendous irony of an Hispanic appellant, Ricardo Gonzalez, represented by an Hispanic attorney, Reemberto Diaz, striking an Hispanic male juror, Aurelio Diaz, on the grounds given by attorney Diaz that "I don't like him" (TR:797). The trial court denied the strike on the grounds that "it is not a race neutral reason." Whether or not it is race neutral, neither this comment nor any other act or statement suggest that there was any racial motivation for the strike.

The trial court approached the challenge to juror Adriana Andani in the same, subjective and personal manner. Andani was a twenty-nine year old, single woman who managed a photography studio and had been the victim of an auto theft in which she went to Court

as a witness, "but nothing ever happened." (TR:445). When the defense asked if she had any scruples about imposition of the death penalty in a proper case, she responded, “absolutely not" (TR:446). On at least one occasion during the defense voir dir, she made personal reference to the prosecutor, Mr. Rosenberg (TR:669).

Appellant's attorney Diaz, again speaking for other defendants as well, sought to exercise a peremptory challenge against Andani because, "she loves Mr. Rosenberg" (TR:791). Diaz opined that she was “very hesitant to answer my questions." "She made no eye contact with me." "She kept reminding me of things that she had heard from Mr. Rosenberg. I think she has developed an affinity with the prosecution that I could not break and I didn't think she would be fair to the defense in this case." (TR:792).

Rather than ruling on whether this explanation constituted a gender neutral reason, the trial court opined that it had "not observed any of these things," and stated that Mrs. Andani appeared to be to the Court bright, fair and responsive. On the strength of the Court's personal evaluation of the juror, the Court denied her exclusion claiming that the reasons given where not gender neutral (TR:793). Both of the defense strikes for cause where based on the defense attorney's perception of the jurors in question. This Court has recognized that the party's perception of a juror is an appropriate basis for peremptory challenge so long as there is no indication of an improper bias. Reeves v. State, 639 So.2d 1 (Fla. 1994).

The trial judge erroneously disallowed two defense peremptory

challenges and reversal is compelled. *Pollock* ***v, State, 634*** So.2d ***327*** (Fla. 3rd DCA 1994).

The state exercised a peremptory challenge against juror Raquel Pascual. Pascual was a single female who was employed as an accounting assistant. She had no scruples against the imposition of the death penalty in the appropriate case (TR:421-422). She believed the criminal justice system was honest but slow (TR:662). She stated that she could be impartial (TR:750).

Before the jurors were instructed on the law of principles and aiders and abetters, the prosecutor asked if the jurors could vote for death for a person who was not the "trigger man" (TR:580-588). Several of the jurors, including Pascual, answered that they could not vote for death of a non-shooter (TR:587). After instruction was given as to the law required to vote for death, Pascual responded that she could recommend death for a non-shooter if the aggravating circumstances outweighed the mitigating (TR:589). Subsequently, the state moved to exercise a peremptory challenge against Pascual on the grounds of her initial expression of unwillingness to recommend death for a non-shooter (TR:803). The defense argued that this was protectual in that male jurors similarly situated were not excused (TR:804-805). Nevertheless, the trial court permitted this peremptory challenge to stand.

A new trial is compelled because the defense strikes are no more racially or sexually motivated than the State's strike. In neither instance is their any hint of improper motive. The instant case shows that *Batson-Neil* has given rise to an arbitrary process

controlled by the trial judge that serves neither the rights of the parties nor the rights of the jurors. Reversal and new trial should be required.

II. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR SEVERANCE AND PERMITTED THE INTRODUCTION OF CO-DEFENDANT'S CONFESSIONS IN APPELLANT'S TRIAL.

In Bruton *v.* United States, 391 U.S. 123, 88 S.Ct. 1620, L.Ed.2d 476 (1968), the United states Supreme Court declared that the admission of a co-defendant's confession which implicates a defendant at a joint trial constitutes reversible error, and prejudicial error even where the trial court delivers a clear, concise, and understandable cautionary instruction to the jury that the confession can only be considered with regard to that co-defendant and must be disregarded with respect to the defendant, The Bruton Court reasoned that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the inculpatory extrajudicial statements of the co-defendant in determining the defendant's guilt, the admission of the co-defendant's confession at their joint trial violated the defendant's right of cross examination secured by the confrontation clause of the Sixth Amendment to the United States Constitution, 391 U.S. at 126, 88 S.Ct. at 1622. The Bruton Court, by so holding, expressly overruled its earlier opinion in *Delli Paoli v. United* States, 352 U.S. 232 (1957), which held that a curative instruction to the jury could extinguish the potential for prejudice inherent in the situation.

The Bruton Court stated that the key to analysis of admission of a confession by a non-testifying co-defendant was found in Pointer v. *Texas,* 380 U.S. 400, 404, 406-407 (1965), which confirmed

that "the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him" and that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime the opportunity to cross-examine witnesses against him." In a criticism particularly applicable to this case, the Bruton Court condemned the introduction of "powerful incriminating extra-judicial statements of a co-defendant who stands accused side-by-side with the defendant" since the inherent unreliability of the statements is often not appreciated by the jurors, 391 U.S. at 136, 88 S.Ct. at 1628:

> Not only are the incriminations devastating to the defendant, but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.

Finally, without the opportunity to exercise the constitutional right to cross-examine one's condemnor, an accused suffers a disadvantage so unfair as to be constitutionally intolerable. The *Bruton* Court quoted the advisory committee on the rules, 391 U.S. at 132, 88 S.Ct. at 1625-1626:

> This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice.

A month after the *Bruton* opinion, the Supreme Court, in *Roberts*

v. *Russell*, *392 U.S. 293* (1968), announced that the mandate of *Bruton* is applicable to the states through the Fourteenth Amendment and is to be applied retroactively. In holding that a finding of retroactivity was essential, the Court delineated the fundamental nature of the "serious flaw" which results whenever the *Bruton* rule is violated:

> The error 'went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination' of his guilt or innocence.

The appellant here was denied a fair trial in that his right of confrontation was denied him by the introduction of his co-defendant's heresay statements. Appellant should be granted a new and separate trial at which his co-defendant's inadmissible and unreliable confessions are not used against him.

In this case, the admission of the co-defendant's confession was based on reliance on ***Cruz v. New York,*** 481 U.S. 186 (109 S.Ct. 1714) 94 L.Ed.2d 162 (1987). In Cruz the Court held that the introduction of defendant's own confession that corroborates, or "interlocks" with a non-testifying co-defendant's statement "might, in some cases render the violation of a Confrontation Clause harmless." 481 U.S. at 191, 107 S.Ct. at 1718.

In ***Grossman v. State,*** 525 So.2d 833, 838 (Fla. 1988), this Court analyzed the holdings of the Cruz Court:

> First, it is error to admit a non-testifying co-defendant's confession incriminating the defendant notwithstanding an instruction not to consider it against the defendant. This is so even if the defendant's own confession is admitted.

> Second, the defendant's confession may be considered as an indicia of reliability in determining whether the co-defendant's confession may be directly admissible against the defendant.
>
> Third, the count held that the defendant's confession could be considered on appeal in determining whether admission of the co-defendant's confession was harmless.

The *Cruz-Grossman* analysis of admission of interlocking confessions, states that it is error but permitted if the overlap of confession indicates reliability, seems curiously out of place in either the guilt phase or penalty phase of a death case. This is particularly true in light of other reasons the co-defendant has to lie or embellish.

In *Williamson v. United States,* U . S . - I 114 S.Ct. 2431, 2437, 129 L.Ed.2d 476 (1994), the United States Supreme Court held that the "statement against penal interest" exception to the heresay rule does not apply to statements that are not self-incriminating, even if the statements are made within a broader narrative that is generally self-incriminating. The Court stated that, ___ U.S.____, 114 S.Ct. at 2437:

> The question under 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.' and this question can only be answered in light of all the surrounding circumstances.

The *Williamson* Court rejected the notion that simply because the co-defendant's custodial statement is against his own penal interest and probative of the co-defendant's own guilt, that the

statement is necessarily admissible against a defendant who is also implicated by the statement. The *Williamson* Court cited Lee v. Illinois, 476 U.S. 530, 534-545, 106 S.Ct. 2056, 2063-2064 (1986), which held that "a co-defendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another."

Here, the process of evaluating the confessions exacerbated the error. The trial judge "sandpapered" away inconsistencies between the confessions and increased the resulting "interlock." While there were substantial areas of overlap, or "interlock," there were substantial areas of conflict, concerning role and responsibility of the participants. These areas of conflict were carefully sandpapered away by the trial judge during pretrial hearings. As a result, the jury heard a partially redact form of the confessions which actually had areas of conflict removed so that they had the appearance of a higher degree of interlock than the confessions had in fact. Conviction was guaranteed.

Appellant is entitled to a new trial at which he can confront the witnesses against him.

III. APPELLANT WAS DENIED AN IMPARTIAL HEARING AT THE PENALTY PHASE OF HIS TRIAL BY THE COURT'S REFUSAL TO SEVER HIS CASE.

Prior to the commencement of the penalty phase of the trial below, and during the course of the penalty phase, appellant moved for severance of his case from that of his co-defendants. The severance issue discussed above during the guilt phase of trial on the question of interlocking confessions arose again during the penalty phase. Appellant had moved for severance on the ground of a conflict between his proof in mitigation and the proof in mitigation. These motions were denied. This denial of appellant's motions for severance caused injury to appellant in two regards. First, the penalty phase jury heard and was allowed to consider the interlocking confessions of his co-defendants. Second, the evidence presented by appellant to establish a statutory mitigating factor of mental defect was impeded by the presentation of a similar statutory mitigator by a co-defendant, but appellant was not able to fully develop his mitigator because the trial court refused to allow his counsel to cross-examine the witnesses for the co-defendant and refused to permit the appellant to argue to the jury why the evidence in support of his mitigator was superior to the evidence of the co-defendant.

The motion for severance was timely made at the commencement of the sentencing hearing on September 19, 1994 (TR:2331); the motion expressed the legal basis for severance; and the motion was denied by the trial court (TR:2340).

Justice Barkett, dissenting as to the penalty imposed in *Hamblen v.* State, 527 So.2d 800, 807 (19881, noted the Powerful mandate for review of death sentences contained in Florida Statutes, Section 921.141(4), and observed:

> The need for careful judicial scrutiny in cases involving a possible loss of life applies with even greater force when the state itself is the instrument of death. Consequently, stringent procedural and substantive safeguards have been erected to ensure that the state will not take a life in an arbitrary or capricious manner and that the death penalty will be reserved for the most heinous of crimes committed by the most depraved of criminals.

Justice Barkett quoted Justice Stewerd's concurring opinion in Furman v. Georgia, 408 u.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972):

> The penalty of death differs from all other forms of criminal punishment, not only in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

This ultimate sanction has been imposed on appellant, but the process leading to that sanction was flawed. He was denied individualized consideration of his mitigating evidence by the finder of fact and he was, once lumped together with his co-defendant, denied the opportunity to differentiate the nature of his proof of mitigation and to demonstrate to the jury the superior quality and weight of his evidence as compared to the evidence mustered by his co-defendant.

Specifically, on September 21, 1994, during the penalty phase for co-defendant Pablo San Martin, the co-defendant called Dr. Antonio Lourenco, a psychiatrist, who had performed a "brain mapping" evaluation on the co-defendant (TR:2770). This doctor found two areas of extremely low "electrical power" in the left frontal and left temporal areas of San Martin's skull.

On cross-examination by appellant's counsel of the nature of the tests that Dr. Lourenco had performed, the court sua sponte terminated the examination (TR:2800). Court asked: "what is the purpose of your examination." Counsel responded: "His defense certainly seems a lot like mine at this point and it doesn't seem as legitimate as mine." Co-defendant San Martin asked for severance in a mistrial (TR:2803). The Court precluded appellants questions into the nature of the evaluation performed by co-defendant's experts (TR:2805).

Co-defendant San Martin also called Jorge A. Herrera, a forensic neuropsychologist (TR:2841). Again, questions into his activities were precluded on behalf of appellant (TR:2880).

Again, in preparation for closing argument to the penalty phase jury, appellant's attorney was cautioned not to compare or contrast the quality of his medical expertise with the quality of the medical expertise summoned on behalf of co-defendant Pablo San Martin.

The words of Justice Barkett, dissenting in *Espinoza* v. State, 589 So.2d 887 (Fla. 1991), are prophetic:

> Particularly in the penalty phase, which is

> premised on the principle of individualized punishment, extreme animosity between defendants detracts from the real issues of the case and creates too great a risk of unfair prejudice to the defendants to refuse severance merely for the sake of judicial economy.

In Roundtree v. State, 546 So.2d 1042 (Fla. 1989), where the admission of a co-defendant's confession had occurred both in the penalty phase and the guilt phase, the Court observed: "By denying the motion for severance, the trial court ostensibly forced *Roundtree* to stand trial before two accusers: the state and his co-defendant." This fate has befallen appellant Ricardo Gonzalez and his situation is exacerbated by the fact that his statutory mitigating factors were preempted and cheapened by his co-defendant.

Appellant should have been confronted with neither of the dilemma placed before him. He should not have been forced to address the penalty phase jury without the opportunity to confront the witnesses against him, and he should not have been placed in the position of having the credibility of his medical experts thrown into the pot of competing, and inferior, medical experts whom he could not cross-examine. Consequently, this case should be reversed and remanded for a new hearing on the penalty phase as to appellant alone.

IV. THE IMPOSITION OF THE DEATH PENALTY IS A DISPROPORTIONATE PENALTY TO IMPOSE ON APPELLANT RICARDO GONZALEZ.

Florida Statutes, Section 921.141(5) establishes an automatic review by this Court to insure against the disproportionate application of the death penalty. Its conceptual foundation is the belief that the death penalty must "serve both goals of measured, consistent application and fairness to the accused," *Eddings v.* Oklahoma, 455 U.S. 104, 111, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982), and must "be imposed fairly, and with reasonable consistency or not at all" *Id.*

The required proportionality analysis is, of course, a very fact intensive process. For example, in the consolidated appeals of *McCaskill* v. state, *and* Williams v. States, 344 So.2d 1276 (Fla. 1977), both defendants had been charged with attempted robbery, robbery, and first degree murder resulting from the robbery of a liquor store and its patrons. During their getaway, one of the patrons was shot twice in the neck with a handgun at close range and another patron was killed by a shotgun blast by a third, unnamed, accomplice. The trial judge overruled the jury's life recommendation and imposed the death penalty noting, among other things that the killing was wanton and unnecessary, *Id.* at 1278. This Court exercised its ultimate responsibility to review the case in light of other decisions and determine whether or not the punishment was too great. This Court reversed the imposition of the death penalty, *Id.* at 1279:

> Review by this Court guarantees that reasons

> present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or woman live and a man die on the basis of sex. If the defendant is sentenced to die, this Court can review that case in the light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v, Georgia, *supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in judgment at all. *Dixon v. State,* 283 So.2d 1, 10 (Fla. 1973).

Appellant's Crime, while unforgivable, is not the most heinous of crimes and the appellant is not the most depraved of criminals. Accordingly, appellant Ricardo Gonzalez prays this Court to vacate his sentence of death.

CONCLUSION

WHEREFORE, appellant Ricardo Gonzalez prays that his conviction be overturned and his cause remanded for new trial at which he has the opportunity to exercise peremptory strikes that are neither racially nor sexually motivated and in which the opportunity to confront witnesses against him is fully accorded to him. In the alternative, appellant requests that the cause be remanded for renewed sentencing phase hearing as to the appellant himself. Failing this relief, appellant requests that the death penalty be set aside and that a sentence of life in prison be imposed upon him.

Respectfully Submitted,

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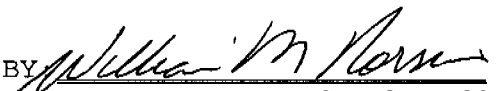
BY 
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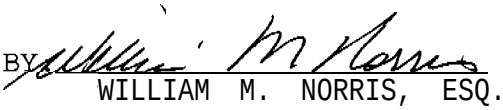
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been mailed this 2nd day of February, 1996, to: Office of the Attorney General, 401 NW 2nd Avenue, Suite 820, Miami, Florida 33128.

BY 
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