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

APPELLANT'S REPLY BRIEF

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

In seeking appellate review of the trial court's rulings on peremptory challenges, Appellant does not seek to avoid the powerful policy considerations which underlie this Court's ruling in *State* ***v. Neil,*** 457 So.2d 481 (Fla. 1984), clarified, State ***v.*** *Castillo,* 486 So.2d 565 (Fla. 1986). Nor does the Appellant question the United States Supreme Court's opinion in *Batson v.* ***Kentucky,*** 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Rather, Appellant asserts that the trial court has used these opinions and their progeny in such a way as to eliminate what has long been recognized as "one of the most important rights secured to the accused," the preemptory challenge. ***Pointer v. United*** *States,* 151 U.S. 396 (1894). Appellee's brief demonstrates the degree to which the preemptory challenge portion of the jury selection process can become a process driven by "magic words" that is totally within the control of the trial judge.

Appellee's discussion of Appellant's attempts to strike juror Diaz is illustrative. Appellee cites ***Wright v.*** *State, 586* So.2d 1024, 1028 (Fla. 1991) (counsel feeling "uncomfortable" not a neutral reason). However, in *Wright* the prosecutor initially stated an expressly racial basis for his strike. When that reason was not accepted by the trial court, he said that he was "uncomfortable." In this case, the challenged juror was a male Hispanic named Diaz. He was struck peremptorily by an attorney who

is a male Hispanic named Diaz, on behalf of his male Hispanic client. Any suggestion that this preemptory strike was based on racial or ethnic animosity is absurd. Nevertheless, the Appellant was unable to remove a juror of his own sex and his own ethnicity because the court felt the reason given by his attorney was not good enough.

Similarly, Appellant's efforts to strike juror Andani on grounds that the defense believed she had an affinity for the prosecutor demonstrated not only by what she said but by her body language, have been attacked by Appellant. Appellant's brief at page 39 rejects, on the authority of *Wright,* the justification given by the defense: "Looks or gestures are not valid neutral reasons to exercise preemptory challenges unless observed by the trial judge and confirmed by the iudse of the record" (emphasis added). This puts the trial judge in an unchallengeably dominant position in the preemptory challenge phase of jury selection. In essence, the Appellee contends that no matter what the Appellant may have seen, if the judge did not see it, it **did** not happen.

Appellee's defense of the preemptory strike of juror Pascual is illustrative of the check off list mentality that has replaced the discretion of the parties in exercising the preemptory strike. The Appellee justifies this strike on the ground that: "Juror equivocation regarding the ability to impose the death penalty is recognized as a valid neutral reason for exercising a preemptory." *Kramer v. State,* 619 So.2d 274, 276 n.2 (Fla. 1993). In his initial brief, Appellant conceded that this juror had initially indicated

reluctance to impose the death penalty on a non-trigger man, but after the court had instructed the panel as to the law in this regard, juror Pascual was unequivocal in her ability to follow the law and to recommend death for a non-shooter if the aggravating circumstances outweigh the mitigating circumstances. See initial brief of Appellee page 15.

Appellee also contends that Appellant did not preserve the objection to the preemptory strike to Pascual for appellate review. Appellant accepted the jury "subject to our prior objections" (T.823). The trial judge stated "Diaz, Andani and Weaver ____." (T.824). If this is intended to exclude Pascual, it is correct that Appellant did not at that point expressly reaffirm his objection to the strike of Pascual, but Pascual was one of Appellant's "prior objections."

Appellant's dissatisfaction with the disposition of preemptory challenges in this case appears to be shared by the trial court. The court state: "Personally I think that the entire body of law in this area is outrageous, but it is clear that preemptory challenges no longer exist, and that neutral reasons must be given and you haven't given me any" (T.789). The right of a criminal defendant to make preemptory strikes has been limited in the interest of opening participation in the criminal justice system to persons of all races. Once that door was open, the right of the criminal defendant to make preemptory strikes has been shifted to the trial court and the trial judge is concerned with matters of secondary import to the criminal defendant, such as judicial economy. In

this case, for example, the trial judge's desire to seat two alternates required that either voir dire be repeated with a new panel or that the parties agree that one of the prospective jurors who had been stricken be reseated. For a trial judge who must keep one eye on the efficient movement of his calendar, a preemptory challenge to a dwindling pool of prospective jurors must compete with the interests of judicial economy.

This Court's stated goal, in the language of ***Reed*** *v. State,* 560 So.2d 203, 206 (Fla. 1990), has been to "achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory strikes."

Clearly, the Appellant's right to make preemptory challenges was totally eviscerated **by** the trial court in this case. This Court's announced goal of balance has been lost in the courts below.

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

Appellee defends the joint trial of Appellant and two of his co-defendants, with the admission of interlocking confessions by each of the three, ultimately, with a harmless error analysis. Appellant reviews the evidence against the defendants and concludes that "the admission of the statements could not have had any probable impact on the jury." Appellee's brief pp.56-57.

If the co-defendants' confessions are deemed to be outside of the scope of the hearsay rule, then Appellee's arguments regarding the great weight of the evidence outside of these confessions raises another pertinent point. The confessions would be relevant evidence that would tend to prove or disprove a material fact and admissible under Section 90.401 of the Florida Evidence Code. However, admission of relevant evidence is subject to the analysis of Section 90.403, which provides, in part: "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice..." Appellant submits that the confessions of his co-defendants were extremely prejudicial and if, as Appellee now appears to concede, their probative value is lessened by the abundance of other evidence, then the prejudicial value of these confessions clearly outweigh their probative value and their admission was in improper. *The* sponsors note to this latter section cites *Young* v. *State*, 234 So.2d 341, 348 (Fla. 1970), in which the Supreme Court found an abuse of discretion in the

admission of a large number of gruesome photographs:

> Where there is an element of relevancy to support admissibility then the trial judge in the first instance and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and impassioned consideration of the evidence.

The fact that everyone confessed could well lead the jury to be less careful in their consideration of the evidence and simply return a verdict based on the fact: of confession rather than the sufficiency of the evidence.

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

Appellant raised two objections to the integrity of the penalty phase of his case. These were the limitations on his right to cross-examine experts called by a co-defendant and on the corrosive carry-over effect of the improper admission of co-defendants' confessions at a joint trial.

The Appellee challenges the preservation of these issues for appellate review, After Dr. Antonio Lourenco testified for co-defendant SanMartin, the court invited cross-examination by Appellant's counsel (T.2797). After a few questions designed to distance SanMartin's experts from Appellant's experts, the trial court, sua sponte, injected himself into the cross-examination and terminated it, absent objection by any party (T.2800-2806).

The transcript of the penalty phase shows the following (T.2805-2806):

> The Court: To be frank, I don't even know any of you have standing to question each others witnesses I have asked and I guess we are here and this will be reserved for appellate review but I don't see absent any accusatory statement by a witness against a co-defendant that a co-defendant even has standing to cross-examine the witness.

Mr. Diaz [co-counsel for Appellant]: So this court is withdrawing the invitation on us to cross-examine him?

The Court: Yeah.***

Mr. Fleischer [co-counsel for Appellant]: Are you preventing me from going into asking him if he gave Mr. SanMartin an MRI or any questions about an MRI?

The Court: Yes. I think it's totally irrelevant.

Mr. Fleischer: Then we object.

(Emphasis added).

If this express reservation for appellate review by the trial court is not sufficient, then the following exchange should suffice (T-2807):

Ms. Garcia [co-counsel for SanMartin]: Judge, I don't know if you ruled on my motion for severance and a mistrial.

The Court: No, that is denied.

The issue had been raised at the beginning of the sentencing phase by counsel for co-defendant SanMartin in support of the proposition that the penalty phase should be severed (T.2329-32).

In addition, Appellee's contention that the issued were not reserved for appellate review disregards the clear pattern in the trial of this case, as is typical with a multiple defendant case, that the objection of one is deemed to be the objection of all

unless expressly opted out. Thus, in connection with SanMartin's motion for severance of the penalty phase, the court inquired of counsel for Appellant, not whether he joined or did not join the motion but rather: "Is there anything else from the defendant?" (T-2333). Any vestige of a doubt on this point was eliminated by the court (T-3082): **"As** I said earlier, the objections of one is the objection of all" (emphasis added).

Prior to trial, Eric Cohen on behalf of Defendant Franqui raised the point that introduction of joint confessions at a joint trial would cause problems down the road at the penalty phase. His concerns were not heard but they certainly demonstrate the inter relationship between the guilt phase and the penalty phase. The penalty phase in this case shows the great danger of attempting to make the determination of life or death with one eye toward judicial economy. Clear proof that Appellant's penalty phase was tainted by the joint nature of the hearing is found in the fact that the jury knew that Co-Defendant SanMartin, with the same medical theory in support of mitigation as advanced for Appellant, already had a prior conviction for attempted first degree murder. If SanMartin, with a prior attempted first degree murder conviction, had the same medical problem as Appellant, then who is to say that if given leniency, Appellant would not do as SanMartin did, that is, murder again.

Appellant's counsel were hamstrung in dealing with this problem. The following colloquy is illustrative (T-3109-110):

Mr. Fleischer: I have a question on summation,

on the issue of commenting on the evidence of the other evidence [sic, probably (Defendants)].

As I know that the Defendants, as I know that Mr. Franqui and SanMartin have moved for a severance from us, and I feel that based on the medical testimony that Mr. SanMartin has brought up has put into the records as far as the brain damage, it's very similar to ours, I feel that I should **be able** to comment on the quality of the case that they have put on, quality of evidence and the expertise of their witnesses.

And the court indicated earlier that we were going to be limited with that, and I want to get a ruling from the court because I don't want to **be** contemptuous but I also want to protect my client because I don't think that the testimony in and the evidence brought forth by Mr. SanMartin is as good or as credible as what I put on fox Mr. Gonzalez.

The Court: *** There was absolutely nothing in this case that would require you to argue some kind of comparative merit among the

> experts. They are not going to challenge your mitigating circumstances. Nor are you going to challenge theirs.

The trial judge's confidence that the evidence would be **sealed** into separate compartments is unrealistic, given the strong emotional nature of a first degree murder case. The problem of how to instruct the jury as to separate consideration of the evidence at the penalty phase in the event of joint trial is interesting. There is no standard, or pattern instruction on this matter. The trial judge noted that such a circumstance had not been contemplated in drafting the standard instructions. Nor should it have been because joint penalty phase hearings in capital cases demand individualized hearings.

Appellant requests, that at a minimum, his case **be** remanded for a new sentencing hearing where the jury considers his case, and his case alone.

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

Appellant submits that, considering the course of proceedings below as a whole, but with special emphasis on the joint trial with admission of interlocking confessions and a joint sentencing phase with overlapping theories of mitigators, that the jury might not have allowed factors relevant to one defendant to bleed into their consideration of factors relevant to punishment of Appellant. In light of the unique and utterly final nature of the death penalty, Appellant requests this Court to reverse the death penalty as a disproportionate sanction.

CONCLUSION

For the foregoing reasons, Appellant requests that the case be remanded for new trial of the Defendant alone, with a jury he freely selects. In the alternative, the Defendant requests that the case be remanded for rehearing on the penalty phase, or that his death sentence be overturned as disproportionate,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct: copy of the foregoing Brief has been mailed this 3RD day of June, 1996, to: Randal Sutton, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 401 NW 2nd Avenue, Suite N-921, Miami, Florida 33128.

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