

IN THE SUPREME COURT OF FLORIDA

RICARDO IGNACIO GILL,

Appellant,

v.

CASE NO. SC06-1572

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE CIRCUIT COURT  
OF THE EIGHTH JUDICIAL CIRCUIT,  
IN AND FOR UNION COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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**INITIAL BRIEF OF APPELLANT**

**PRELIMINARY STATEMENT**

References to the items contained in the lower court's record will be designated with the prefix "R" followed by the volume number and page number. There was no trial in this case. The transcripts of the various hearing will be referenced with the prefix "T." The supplemental record filed in this case will be referenced with the prefix "SR." Exhibits introduced in evidence will be referenced with the exhibit identification used in the trial court.

## STATEMENT OF THE CASE AND THE FACTS

A Union County grand jury, on February 6, 2002, indicted Ricardo Ignacio Gill for first degree murder for the strangulation death of Orlando Rosello occurring on July 25, 2001. (R1:1-2) Gill was appointed a public defender on February 6, 2002, and a written not guilty plea was entered on the same day. (R1:3-4) The Public Defender's Office was allowed to withdraw due to a conflict on February 20, 2002. (R1:5-10) Attorney Stephen Bernstein was appointed, but he withdrew as counsel on May 17, 2002. (R1:18-24) The court appointed Attorney Lloyd Vipperman. (R1:24) Gill filed his own motions to represent himself on April 8 and May 20, 2002. (R1:20. 25-26) On May 20, 2002, the court abated the request to proceed pro se until Gill had the opportunity to determine if he wished to continue with Vipperman as counsel. (R1:27) Gill filed a pro se motion for production of the list of qualified counsel to handle death penalty cases on June 11 and July 5, 2002. (R1:31-38) Vipperman moved to withdraw as counsel on July 9, 2002. (R1:64-65) At an arraignment hearing on July 11, 2002, Vipperman raised his concerns about Gill's competency and sanity. (T9:6-9) The court agreed to appoint an expert to examine Gill. (T9:6-9) The motion Vipperman filed to withdraw as counsel at Gill's request was left pending. (R1:64-65; T9:6-9) On November 18, 2002, the court

entered an order appointing Dr. Clifford Levin to evaluate Gill's mental competency to proceed. (R1:79-82)

On December 23, 2002, Dr. Levin wrote a report. (R1:94-96) Gill had refused to be interviewed, but Levin performed a review of Gill's medical and classification records at the prison. (R1:94) Gill had a dysfunctional childhood, did not know his biological father and reported physical abuse by a step-father. (R1:94) At age ten, Gill began institutional placement including one and one-half years at a psychiatric center in Miami. (R1:94) When Gill was 13-years-old, he was placed in the state hospital for psychiatric problems. (R1:94) The description of his symptoms included "... extremely impulsive, violent, hyperactive, and as exhibiting possibly delusional or psychotic features." (R1:94) Tranquilizers had no effect. (R1:94) At age 17, Gill began 13 years of multiple adult incarcerations. (R1:94) In prison, he was disruptive, committed assaults and was the subject of psychiatric reviews. (R1:95) The records showed various diagnoses ... "Major Depressive Disorder with Psychotic Features, Attention Deficit Disorder, Asperger's Disorder, Polysubstance Dependency, and Antisocial Personality Disorder." (R1:95) For the year preceding Levin's report, the prison records showed an ongoing diagnosis of Psychoses, NOS. (R1:95) Gill had periods of refusing medications,



but he began accepting prescriptions for Zyprexa, Lithium and Thorazine. (R1:95) These medications were given to stabilize his mood and treat auditory hallucinations--voices telling him to kill someone. (R1:95) He was also described as logical and goal oriented with no reports of delusional thinking. (R1:95) One psychiatrist noted that Gill may not be hallucinating. (R1:95) Gill filed numerous complaints and grievances. (R1:95) He also had at least twelve disciplinary referrals. (R1:95) Levin noted the difficulty of reaching an opinion on competency without interviewing Gill, but he saw nothing in the records to indicate that Gill did not have the capacity to assist counsel in his defense. (R1:96)

At a motion hearing on February 14, 2003, the issue of competency was again addressed. (T10:27-33) Attorney Vipperman stated that there had been a misunderstanding resulting in Gill's not seeing Dr. Levin. (T10:28-29) Vipperman said he would arrange another opportunity for Dr. Levin to see Gill. (T10:29) The court found Dr. Levin's report incomplete and asked that Dr. Levin again attempt to see and evaluate Gill. (T10:19) Additionally, the court agreed to appoint two additional mental health professionals to perform a competency evaluation. (T10:32-33) On March 17, 2003,

the court reappointed Dr. Levin and also appointed Dr. Elizabeth Cadiz and Dr. Alan Waldman. (R1:101)

On April 4, 2003, the court heard a pending motion to have Gill transported to the Alachua County Jail to afford him access to a law library. (T12:46-64) Wayne Mack, the deputy director of the Alachua County Jail, testified about 44 prior incident reports involving Gill when he was last in the jail between June 1999 and July 2001. (T12:52-53, 5, 564) The reports were introduced in evidence. (T12:53-54) In summary, Mack said the incidents included "...disobeying officers orders committed by Mr. Gill, incidents of Mr. Gill flooding his cell, incidents of Mr. Gill destroying his cell, incidents of Mr. Gill smearing feces in his cell, incidents of Mr. Gill propelling urine on officers, propelling urine and feces mixed on officers, incidents of Mr. Gill injuring himself, incidents of him threatening to injure himself, incidents of him injuring officers, and general disruption." (T12:54) Mack stated there was an incident where Gill bit an officer. (T12:54) During this time, Gill was housed in the mental health unit of the jail, moved to the infirmary and then to the protective custody section. (T12:59) The court denied the motion to transport Gill back to the Alachua County Jail. (T12:64)

Pursuant to a point Gill made in a pro se pleading, the State on April 15, 2003, filed a motion for a hearing regarding defense counsel qualifications pursuant to Fla. R. Crim. P. 3.112. (R1:31-34, 110-112; T12:66) The court heard the motion on June 27, 2003. (T13:73-77) Attorney Vipperman advised the court that he did not meet the qualification under the rule, but his law partner in Ocala, Tricia Jenkins, did meet the qualifications. (T13:75-76) There had not yet been a list of qualified counsel to handle capital cases created for the circuit, and the court stated that such a list would be created. (T13:76) The court reserved ruling on the motion. (T13:77) The court appointed Tricia Jenkins as co-counsel. (R1:132, R2:226-227) After discussion about the progress of the experts' competency evaluations of Gill, the court agreed to reschedule the competency hearing, and, subsequently, three continuances of the hearing were granted. (T13:77-80: R1:136-137, 143; R2:281)

On November 6, 2003, Gill filed a pro se motion requesting a Nelson hearing. (R2:286-287) The court held a hearing on November 21, 2003. (T14:88-109) Although the court, the defense, and the State still had questions about Gill's competency (T14:88-91), the court agreed to allow Gill to speak to his complaints. (T14:96) Attorney Vipperman objected to the process out of concern that what

Gill might say would jeopardize his defense. (T4:97-98) After hearing Gill's complaints about having been represented for many months by counsel who was not qualified under the rules, the court agreed to have Vipperman and Jenkins withdraw as counsel. (T14:98-109) Gill asked for a Faretta hearing and to proceed pro se, but the court deferred such a hearing until substitute counsel was available and a competency hearing completed. (T14:110-112) The court also heard and granted the State's motion to strike Gill's various pro se motions filed while he was represented as a nullity. (T14:113-114)

On June 18, 2004, Gill's new attorney, Bill Salmon, appeared for a hearing regarding the competency issue, another Nelson hearing, and the postponed Faretta inquiry. (T15:119) The court had Dr. Levin, Dr. Krop and Dr. Werner present in the courtroom to assist in addressing the competency of Gill. (T15:121) Each of the experts conducted an examination of Gill and reported back to the court with an opinion that Gill was competent to stand trial. (T15:130-131, 134-137) Dr. Werner filed a report. (R3:370-373) Gill withdrew his motion to have Salmon withdraw as counsel and his request to represent himself. (T15:132-134)

On February 18, 2005, the court heard Gill's renewed requests for a Nelson hearing and for appointment of conflict free counsel.

(R3:407-410, 439-444; T17:205-259) After an inquiry, the court ruled that there was no basis to discharge Bill Salmon as counsel. (T17:256) Gill asked to waive counsel and represent himself. (T17:256-257) The court was concerned about Gill's competency to waive counsel. (T17:257) With Gill's agreement, the court appointed Dr. Helen Cadiz to evaluate Gill. (T17:257; R3:456-457)

Dr. Cadiz prepared her report on April 14, 2005. (R3:482-493) She noted that Gill was diagnosed with Impulse Control Disorder, Bipolar Disorder and Personality Disorder. (R3:483) His symptoms included self-injury, poor anger management and social skills. (R3:483) A neurosurgeon had recommended surgery for an intracranial bleeding probably due to injury. (R3:483-484) Gill refused surgery because he did not trust the physician hired by the Department of Corrections. (R3:484) Cadiz found that Gill exhibited mistrust and paranoia. (R3:488-490) Gill has difficulty communicating choices because he is ambivalent about whether he wants to live or die. (R3:490) Although capable of understanding information and the legal significance of his case, his ability to make rational choices is impaired. (R3:491) Cadiz thought it unlikely that Gill would have the emotional control and concentration ability to represent himself. (R3:492)

The court held a hearing on the issue of Gill's request for self-representation on April 15, 2005. (T18:271-322) First, the court suggested a review of Dr. Cadiz's report. (T18:272-273) Gill advised the court that he wanted to withdraw his request for a Faretta hearing and consider a motion to allow him to enter a plea. (T18:273) Gill stated, "Mr. Salmon has instilled fear in me. He's reached his objective. I do not wish to proceed with a Faretta hearing."(T18:273) The court repeated that he first wanted to review Dr. Cadiz's report about Gill's competency. (T18:273) Counsel for the State, the Defense, the Court and Gill reviewed the expert's report and mental evaluation of Gill. (T18:273-274) The conclusion was that Dr. Cadiz never stated an opinion on the question of whether Gill was competent or incompetent. (T18:274-278) As a result, the court suggested a telephone conference with Dr. Cadiz or the appointment of another expert. (T18:278) After some discussion, the court agreed to try to talk to Dr. Cadiz. (T18:281) Gill interjected and told the judge,

Your Honor, you might as well make your decision today because I'm not speaking to another expert. If you can't make your decision, this case will never end. With or without Mr. Salmon's assistance, I will implicate myself in a crime that will result in my death. So you might as well make the decision today.

(T18:281) The prosecutor argued for the court to decide the matter since Gill had never been found incompetent, even though mentally ill, in any prior evaluation. (T18:275, 282) The Court agreed to enter an order finding Gill competent. (T18:283)

Next, the court advised Gill that his request for waiver of a jury trial and entry of a plea would be considered. (T18:287-288) First, the court began with a Faretta hearing. (T18:288) Gill advised the court that his lawyer, Bill Salmon, had threatened his life if he proceeded with a Faretta hearing. (T18:291) He stated that he had received a letter from Salmon with the threat. (T18:292-293) The court conducted a hearing on the matter with Bill Salmon being sworn and testifying. (T18:294-297) A copy of a letter on Salmon's office letterhead was presented. (T18:295-296) The letter read, "Dear Mr. Gill: If you proceed to request leave of the court to represent yourself, you will be killed. Sincerely, Bill Salmon."(T18:296) Salmon testified that he did not write the letter and no such letter came from his office. (T18:296) Salmon had no idea how such a letter was created. (T18:296) Additionally, Salmon testified that he would never threaten Gill for exercising his right to represent himself. (T18:297) Salmon did state that he thought an irreconcilable conflict now existed in his ability to continue to represent Gill. (T18:297-298) Judge Cates asked Gill

if he had anything to say about the letter, and Gill responded that he thought the judge may have had something to do with the letter and that this had been orchestrated with Judge Morris. (T18:299-300) Gill confirmed that he wanted the court to remove Salmon as his lawyer and appoint another lawyer if that was what the court wanted to do. (T18:301-302) The court denied Gill's request to discharge Salmon. (T18:303) Gill said he wanted the court to discharge Salmon and allow him to enter a plea. (T18:303)

Judge Cates began a Faretta inquiry regarding Gill's understanding of the trial process, his ability to personally handle such matters and Gill's understanding of how a lawyer could help. (T18:303-317) Gill acknowledged he did not know all about the trial process or have the skills to handle a trial. (T18:304-317) However, Gill stated that if representing himself he would only be present at trial and would not present a defense. (T18:306, 309, 314, 319) Gill said he was clear on what a lawyer could do, but reasserted that he would not allow Salmon to perform that role. (T18:317) He had no problem with Salmon being present but not acting as his lawyer. (T18:319) Salmon urged the court to appoint successor counsel. (T18:320) Judge Cates then asked Gill if he was freely and knowingly giving up his right to counsel. (T18:320-321) The following exchange between the court and Gill occurred:



[GILL]: I cannot waive my right to an attorney because Mr. Salmon has reached his objective of instilling fear in me of waiving my right to counsel.

[THE COURT]: So we'll go to trial --

[GILL]: I will just be at trial. I won't go to trial. I will be here. I cannot --- Mr. Salmon didn't threaten me to keep him as my attorney so that I can live after the jury hears my trial. That wasn't the point. That's not the way that's supposed to be construed.

[THE COURT]: Do you want to represent yourself at trial, or do you want ---

[GILL]: I cannot represent myself. I just told you that.

(T18:321) The court concluded that Gill had not made a clear and convincing waiver of his right to counsel. (T18:322)

On May 5, 2005, Judge Cates presided over a status conference for another criminal case Gill had pending in Gilchrist County. (SR1:55-69) Attorney Bill Salmon also represented Gill in that case, and the assistant state attorney prosecuting Gill in Union County was also prosecuting in Gilchrist County. (SR1:55-69) In a joint hearing for both cases, the court conducted another Nelson inquiry on new complaints and ruled on Gill's request to represent himself. (SR1:56-65) The inquiry was based on a lengthy pleading Gill filed listing his complaints because Gill refused to speak at the hearing. (SR1:57) After completing the Nelson inquiry, the court found no reasons to discharge Salmon. (SR1:65) The court

ruled that Gill was competent to waive counsel. (SR1:65-66) Based on the Faretta inquiry conducted on April 15, 2005, in Union County, and without further inquiry of Gill, the court ruled that Gill waived his right to counsel and could represent himself in both cases. (SR1:65-66) Additionally, the court retained Bill Salmon as stand-by counsel for Gill in both cases. (SR1:66)

On July 8, 2005, Gill changed his plea to guilty as charged. (T19:335-358) Initially, the court acknowledged that Gill was representing himself with stand-by counsel. (T19:335-336) When asked if he wanted to enter the plea with counsel, Gill responded that he would represent himself. (T19:336) The court reminded Gill that he had the right to counsel at any time during the proceeding, and Gill declined the offer of counsel's representation. (T19:337-338) The court read the indictment, advised Gill of the possible penalties, the that the State was seeking a death sentence, and the process of consideration of aggravating and mitigating circumstances. (T19:337-340) Gill was sworn. (T19:345) Again, the court advised Gill of his right to counsel which Gill declined. (T19:345-346) Gill further stated that he had no reservations about proceeding with the plea without a lawyer. (T19:347) During the colloquy with the court, Gill acknowledged a guilty plea would give up his right to a jury trial, the assistance of counsel, to

testify and present evidence. (T19:349-350) When asked, Gill said he took medications for mood swings but he did not take his medications that day. (T19:350-351) He stated that his thinking was clear. (T19:351) Gill said he was pleading guilty without promises or threats. (T19:351-352) He told the court he was entering the plea freely, knowingly and voluntarily, without compulsion by anyone. (T19:353) The court accepted the guilty plea. (T19:355) At that point, the prosecutor asked that he be permitted to present a factual basis for the charge and a summary of the evidence. (T19:356) The summary included that Gill had been adjudged guilty of first degree murder on July 20, 2001, in an Alachua County case and sentenced to life. (T19:356) Four days later, Gill killed Orlando Rosello, another inmate who was locked in the same cell. (T19:356-357) Rosello was found in the cell, and he had been strangled with a bed sheet. (T19:357) Gill was the only other inmate in the cell with Rosello for the hours preceding the homicide. (T19:356-357) Two written confessions to the offense were found -- one in Gill's shirt pocket and one in the plumbing in the cell. (T19:357) Gill's statement described the homicide. (T19:357) He stated that he wrapped a sheet around Rosello's neck and "...strangled the shit out of him." (T19:357) When blood came out of Rosello's ear, Gill started punching Rosello's chest, trying

to stop his heart. (T19:357) Gill tied the sheet in a knot wrapped around Rosello's neck and left him there for two hours. (T19:357)

Gill waived his right to a penalty phase jury on July 8, 2005, and a penalty phase before the court commenced the same day. (T19:358-377) Additionally, Gill, again, declined the assistance of counsel. (T19:377) The State presented its case for aggravation asserting the existence of five aggravating circumstances: (1) under sentence of imprisonment; (2) previous conviction for another capital felony; (3) heinous, atrocious and cruel; (4) cold, calculated and premeditated; and (5) disrupt or hinder government function or enforcement of laws. (T19:379-393) In support of its case for aggravation the State presented a composite exhibit containing judgments and sentences for various offenses dating back to 1986. (T19:380-385) Specifically, judgments for the following were introduced: first degree murder (Alachua County #1999-CF-2277-A); attempted first degree murder (Gilchrist County #21-2000-CF-0007); battery on detention staff (Alachua County #99-4240); battery on a law enforcement officer (Alachua County #2000-2185-CFA); burglary of a dwelling with a battery (Orange County #CR-86-5568); and burglary of a dwelling with an assault and robbery (Orange County #CR-86-6240). (T19:380-383)(State Composite Exhibit A1, A2, A3, A4, A5, A7, A8 & W) The

State relied on these judgments to support the circumstances of the homicide committed while under sentence of imprisonment and a previous conviction for a violent or capital felony. (T19:384-385, 398-399) The State relied on Gill's statement about the commission of the crime to support the heinous, atrocious or cruel aggravating circumstance. (T19:385-386) To support the cold, calculated and premeditated and the hindering law enforcement circumstances, the State relied on statements Gill made at his sentencing on a homicide in Alachua County and letters Gill wrote to Judge Morris, the prosecutor and the newspaper. (T19:387-392)(State Exhibit B, C, D & E) These indicated that the murder in this case was committed in order to receive a death sentence. (T19:387-392)

Since Gill waived counsel and chose not to present mitigation, the prosecutor introduced evidence he deemed relevant to mitigation. (T19:393-401) The State introduced the following:

1. Defense sentencing memorandum filed for Gill in Alachua County murder case, No. 1999-2277. (State Exhibit F) (T19:394)

2. Report from Dr. Alan Waldman, dated May 27, 2003. (State Exhibit G) (T19:395)

3. Report from Dr. Helen Cadiz, dated April 14, 2005. (State Exhibit H) (T19:395)

4. Report from Dr. Helen Cadiz, dated March 21; April 2, 2003. (State Exhibit I) (T19:395)
5. Deposition of Dr. Clifford Levin, dated December 4, 2000. (State Exhibit J) (T19:395-396)
6. Report from Dr. Clifford Levin, dated June 18, 2004. (State Exhibit K) (T19:396)
7. Report from Dr. Clifford Levin, dated March 17, 2003. (State Exhibit L) (T19:396)
8. Report from Dr. Clifford Levin, dated December 23, 2002. (State Exhibit M) (T19:396)
9. Report from Dr. Clifford Levin, dated July 14, 2000. (State Exhibit N) (T19:396)
10. Report from Dr. Tonia Werner, dated June 18, 2004. (State Exhibit O) (T19:396)
11. Report from Dr. Harry Krop, dated June 28, 2004. (State Exhibit P) (T19:397-398)
12. Report from Dr. Harry Krop, dated May 7, 2004. (State Exhibit Q) (T19:397)
13. Report from Dr. Harry Krop, dated April 4, 2000. (State Exhibit R) (T19:397)

14. Compilation of records from Alachua County Sheriff's Office documenting three suicide attempts by Gill. (State Exhibit S) (T19:397)

15. Presentence Investigation Report in Alachua County case. (State Exhibit T)(19:398)

16. Compilation of employment records of Mr. Gill for June 1999. (State Exhibit U) (T19:398)

17. Medical records documenting various hospitalizations of Mr. Gill in his youth. (State Exhibit V) (T19:398)

18. Report from Dr. Alan Waldman, dated December 23, 2004. (State Exhibit X) (T19:399)

The prosecution acknowledged Gill's mental illness and life-long arterial venous malformation in the brain which caused a loss of control over aggression. (T19:399-401) However, the State argued death was appropriate to protect society. (T19:402-403) Gill also urged the court to impose a death sentence. (T19:403-405)

On February 1, 2006, the State presented the testimony of Dr. Alan Waldman, a physician practicing forensic psychiatry and neuropsychiatry. (T20:407-442) Gill declined the court's offer of counsel.(T20:411-412) Initially, the State presented a notebook containing mitigating evidence, some of which was stricken earlier and some additional material. (T20:413) The Court had the notebook

marked as State's exhibit number one for this hearing. (T20:413) Dr. Waldman testified about the discovery of an abnormal growth of arteries and veins in Gill's brain, an arterial venous malformation, in the left temporal lobe pressing on the amygdala. (T20:415-442) Gill likely had this malformation at birth. (T20:434) Waldman explained that injury to the amygdala can cause rage attacks, temporal lobe seizures which can cause rage attacks, and interictal personality disorder where the person's ability to learn from experience is impaired. (T20:427-429) As Waldman explained,

The amygdala is an essential part of the conscience. It's an essential part of this thing that we call the superego, because it helps us learn right from wrong.

(T20:427) Waldman stated that in his opinion Gill exhibited past behavior consistent with the rage attacks. (T20:429-436) Waldman also stated that Gill displayed violent behavior which was inconsistent with rage attacks. (T20:430) When given a hypothetical question with the basic facts of this case, Waldman said that the offense seemed to be a thought-out act, but Waldman also said he could not be sure because was not present to witness the event. (T20:431) In his written report, Waldman wrote in his conclusion:



It is my conclusion that Ricardo Gill has had this malformation for his entire life, as these are things that don't develop spontaneously. Though I cannot say that the physiologic ramifications of the arteriovenous malformation would result in exculpation, they certainly are a very strong mitigator in this type of case, as there is the possibility that he has no more control over his aggression than an amygdalized animal.

(Waldman's report dated December 23, 2004) (State Exhibit X)

(T19:399)

Waldman explained the interictal personality disorder Gill suffers. (T20:431-434) This disorder involves personality changes that occur between temporal lobe seizures. (T20:431) The changes can result in very different personality traits, including hostility. (T20:431) Temporal lobe seizures are difficult to detect, and although Gill had a normal electroencephalogram at age 12, Waldman concluded that Gill must have had such seizures based on documented prior behavior. (T20:432-436) Waldman also concluded that Gill's interictal personality disorder was a factor in the homicide of Rosello. (T20:433-436)

Gill filed a motion to withdraw his guilty plea on December 12, 2005. (R4:578-587) He filed additional related motions on December 30, 2005. (R4:591-604) At the February 1, 2006, hearing, the court declined to hear the motion to withdraw the plea and indicated that a written order would be entered. (T20:442-443) On June 30, 2006, the date of sentencing, the court revisited Gill's

motion to withdraw his plea, and Gill indicated to the court his wish to proceed to sentencing. (T21:446-462)

On June 30, 2006, Circuit Judge Robert P. Cates adjudged Gill guilty and sentenced him to death for the murder. (T21:462-489)(R4:687-694; R5:695-670) As aggravating circumstances, the court found: (1) Gill was under a sentence of imprisonment for a previous murder at the time of the homicide; (2) Gill had been previously convicted of a capital felony; (3) the homicide was committed in a cold, calculated and premeditated manner. (R5:697-702) In mitigation, the court found: (1) the homicide was committed while Gill was under extreme mental or emotional disturbance; (2) Gill's ability to appreciate the criminality of his conduct or to conform his conduct to the law was impaired; (3) Gill suffered a brain malformation pressing on the amygdala which controls impulse behavior and rage. (R5:703-708) The court's sentencing order and supporting attached appendix is the entirety of volume five of the record. (R5:695-904)

## SUMMARY OF THE ARGUMENT

I. A review of this case shows that the death sentence is not proportionate and must be reversed. Proportionality review requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. Such a review shows that Gill's death sentence is disproportionate and must be reversed. Art. I, Secs. 9, 17, Fla. Const.

II. The trial court improperly found the aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner. Gill's brain malformation and mental problems rendered him incapable of calculating the homicide with the requisite "cool, calm, reflection." See, Sec. 921.141 (5)(i) Fla. Stat.; Jackson v. State, 648 So.2d 85 (Fla. 1994). As a result, the death sentence has been imposed in reliance on an aggravating circumstances not factually supported, and the sentence is unconstitutional. Amends. V, VI, VIII, XIV U.S. Const.

III. Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Gill acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141 Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional

questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Gill now asks this Court to reconsider its position in Bottoson and King.

## ARGUMENT

### ISSUE I

#### **THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.**

Proportionality review of a death sentence requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. See, e.g., Offord v. State, 959 So.2d 187 (Fla. 2007); Urbin v. State, 714 So.2d 411, 417 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1996). Death sentences are reserved for the most aggravated and least mitigated of cases. *Ibid.* However, proportionality review is not a counting process -- the review is a qualitative evaluation of the facts to insure uniformity in the application of the death penalty. *Ibid.* The fact that a capital defendant may have actively sought the imposition of a death sentence does not affect the proportionality review required. See, Klokoc v. State, 589 So.2d 219 (Fla. 1991). A review of this case shows that the death sentence is not proportionate and must be reversed. Art. I, Secs. 9, 17, Fla. Const.

#### **A. Ricardo Gill's Life-Long Mental Impairments And The Impact These Impairments Had On The Criminal Behavior Substantially Mitigates This Case**

As the trial court recognized in its sentencing order, Ricardo Gill has suffered from mental impairments his entire life. (R5:703-708) In mitigation, the court found two statutory circumstances and one nonstatutory circumstance based on Gill's mental problems: (1) Gill committed the offense while under extreme mental or emotional disturbance; (2) Gill's ability to appreciate the criminality of his conduct or to conform his conduct to the law was impaired; and (3) Gill suffers from a brain abnormality, an arteriovenous malformation pressing on the amygdala that controls impulse and rage behaviors. (R5:703-708) The various records and reports of experts reveal that Gill's psychiatric difficulties began in his childhood. Circuit Judge Stan Morris in his order entered in the Alachua County murder case and that Judge Robert Cates relied upon in this case, also chronicled Gill's mental illness treatment. (R5:731-739) Judge Morris' order summarized Gill's ordeal beginning with being expelled from nursery school and first grade until his history of discipline problems in jail and prison. (R5:706, 731-738) Gill was first institutionalized at age ten for over a year for violent, uncontrolled temper tantrums. (R5:706, 731) At age twelve to thirteen, Gill was hospitalized at Northeast Florida State Hospital for aggressive, violent behavior. (R5:731-732) He spent the much of his time in the hospital confined in four-point restraints to control him. (R5:706) The evaluation at the hospital recommended two or three years of residential program treatment if

Gill was to have even a chance for some success. (R5:732) Gill was incarcerated as an adult at age 17, and his incarceration history includes many disciplinary actions for impulsive, disruptive behavior and aggressive behavior toward prison staff. (R5:732-733) He also attempted suicide by hanging and cutting himself. (R5:733) One time he attempted to drain his own blood with a syringe. (R5:733) After his release from prison, Gill had some unsuccessful attempts at employment and he continued criminal conduct until committing a homicide in Alachua County resulting in his conviction. (R5:742-747; State Exhibit A & U) During his time awaiting trial, his jail conduct included numerous act of aggression and disruption. (T12:52-59; State Exhibit S) Gill injured himself in an attempt to commit suicide three times while in jail. (T12:52-59; State Exhibit S) Gill sought the imposition of a death sentence for the Alachua County murder. Due to Gill's life-long mental problems, Circuit Judge Stan Morris concluded that a life sentence was the proper sentence. See, Judge Morris' extensive sentencing order findings attached as an appendix to the sentencing order in this case. (R5:713-739)

Although mental health professionals made several possible diagnoses for Gill's mental problems over the years, an important key to understanding Gill's condition came with the additional scans of his brain. Dr. Waldman's report after these scans and Waldman's testimony taken prior to sentencing explained the finding of the

arteriovenous malformation, an abnormal growth of arteries and veins in Gill's brain. This malformation in the left temporal lobe presses on the amygdala. (T20:415-442; State Exhibit X) Injury to the amygdala can cause rage attacks, temporal lobe seizures which can cause rage attacks, and interictal personality disorder where the person's ability to learn from experience is impaired. (T20:427-429) As Waldman explained in his testimony,

The amygdala is an essential part of the conscience. It's an essential part of this thing that we call the superego, because it helps us learn right from wrong.

(T20:427) In part, Waldman wrote in his report:

I have come to know Ricardo Gill well through the multitude of records that I have read and the one interview I have had with him. He is an individual who frequently lies, is manipulative with suicidal threats, and in my opinion with reasonable medical certainty has no purely psychiatric disorder. Having said this, it is clear that he is suffering from a very serious neurological abnormality, that of an arteriovenous malformation of the left temporal lobe, a condition that will probably take his life within the near future as he is refusing surgery. An arteriovenous malformation, or AVM, is like a bird nest of useless arteries and veins intertwined together. The walls of these vessels are in some places aneurysm like and ready to burst like a bubble on an innertube.

In addition, the research shows that this type of lesion could be responsible for temporal lobe epilepsy. This is a kindling phenomenon, much like the word kindling itself, in that a subseizure threshold builds until the threshold is reached and a complex partial seizure that does not cross the midline, resulting in unconsciousness, occurs. Should this occur in this area, it would certainly result in fits of rage and violence. In addition, there is the phenomenon of interictal (between seizures) personality change which is consistent with Mr. Gill, his violence, demeanor of continual anger, and



defiance regardless of whether it would help him or not....

\* \* \* \*

It is my conclusion that Ricardo Gill has had this malformation for his entire life, as these are things that don't develop spontaneously. Though I cannot say that the physiologic ramifications of the arteriovenous malformation would result in exculpation, they certainly are a very strong mitigator in this type of case, as there is the possibility that he has no more control over his aggression than an amygdalized animal.

(Waldman's report dated December 23, 2004, State Exhibit X)

**B. One Aggravating Circumstance Was Improperly Found, And The Remaining Aggravating Circumstances Are Of Reduced Weight When Evaluated In The Context Of Gill's Mental Impairments.**

The trial court found three aggravating circumstances: Gill was under a sentence of imprisonment at the time of the homicide; Gill had a previous conviction for a capital felony, the Alachua County murder conviction; and Gill committed the homicide in a cold, calculated and premeditated manner. (R5:679-702) Initially, the cold, calculated and premeditated aggravating circumstance was improperly found for the reasons set forth in Issue II, *supra.*, and should not be considered in aggravation. Moreover, even if this Court concludes the CCP circumstance was sufficiently proven, that factor, like the other two aggravating circumstances in this case are of reduced weight in context of Gill's mental impairments. Each of the aggravating factors can be attributed to Gill's behavior fueled by his life-long mental illness. Gill's criminal conduct is

consistent with the symptoms of his mental illness and brain impairments.

Two aggravating circumstances are based on the prior conviction for murder in Alachua County. (R5:697) A prior homicide does not automatically render a death sentence for a subsequent murder an appropriate sentence. See, e.g., Almeida v. State, 748 So.2d 932 (Fla. 1999); Jorgenson v. State, 714 So.2d 423 (Fla. 1998). This principle is particularly applicable in this case since prior murder, as well as the murder in this case, was the product of Gill's mental illness. (See, Judge Morris' sentencing order in Alachua County case, R5:713-739)

### **C. Comparable Cases**

Ricardo Gill's case is not one of the most aggravated and least mitigated of capital cases. This Court has held a death sentence disproportionate when there is evidence that the defendant's mental illness was the causal factor in the criminal behavior. Gill's brain impairment and mental illness place his case in that same category of cases. The cases discussed below where this court reversed the death sentences because of substantial mental mitigation are comparable to this case.

1. Cooper v. State, 739 So.2d 82 (Fla. 1999). Cooper and a codefendant robbed and murdered a pawnshop owner. This Court affirmed the finding of three aggravating circumstances: a previous conviction for another robbery-murder that actually

occurred a few days after the one in this case; commission of the homicide during a robbery; and the homicide was cold, calculated, and premeditated. Mitigation included the fact of Cooper's frontal lobe brain damage that affected his impulse control; an abusive childhood; and his age. This Court concluded that the aggravation was sufficient to place the case among the most aggravated, but the mitigation placed the case among the most mitigated warranting a reversal of the death sentence.

2. Crook v. State, 908 So.2d 350 (Fla. 2005). Crook was convicted of first degree murder during a robbery and sexual battery. This Court concluded the aggravation in Crook's case was substantial and included: homicide committed for pecuniary gain; homicide committed during a sexual battery; and the homicide was especially heinous, atrocious or cruel. However, this Court concluded a death sentence was not proportionate because of substantial mitigation that included frontal lobe brain damage that affected impulse control; abusive childhood; borderline mental retardation; and age.

3. DeAngelo v. State, 616 So.2d 440 (Fla. 1993). DeAngelo murdered Mary Anne Price who rented a mobile home with DeAngelo and his wife, Joy. DeAngelo and Price had frequent arguments about Price's drug use, drinking, failing to pay rent and promiscuous life-style. One time, DeAngelo forced Joy to accompany him to Price's room where she lay passed out and directed Joy to put a

blanket over Price's head as DeAngelo strangled her. However, DeAngelo backed out of the plan. He told his wife not to tell anyone. A few days later, DeAngelo did go into Price's room and strangled her both manually and with a ligature. This Court approved the cold, calculated and premeditated aggravating circumstance. Although the State argued that the trial court should have found the HAC factor, this Court rejected the argument because the evidence was that the victim may have been unconscious before the strangulation. The mitigation included that DeAngelo suffered from brain damage, hallucinations, delusional paranoid beliefs and mood disorders. This Court held the death sentence was disproportionate.

4. Knowles v. State, 632 So.2d 62 (Fla. 1993). After an afternoon of drinking beer and huffing toluene, Knowles went to his father's trailer and obtained a .22 rifle. He then went next door where he shot and killed a ten-year-old girl, Carrie Woods, who was waiting for guests to arrive for her birthday party. He did not know the girl. Knowles walked back to his father's trailer as his father entered his truck. Knowles pulled his father out of the truck, said "No you won't," and shot his father two times in the head. Knowles took the truck and drove 250 miles to a friend's house to whom Knowles admitted to shooting "a bunch" of people and his father. Six weeks earlier, Knowles told someone that his father had a surprise coming and he was going to blow him away.

Several months earlier, Knowles told another resident of the trailer park that "the day might come that he just may loose it" and start shooting people in the park. A mental health expert said Knowles suffered neurological problems due to abuse of alcohol and solvents. He was intoxicated and in an acute psychotic state at the time of the crimes. Another expert agreed with the opinion that Knowles suffered organic brain damage and was intoxicated at the time. This Court reduced the conviction for the murder of the girl to second degree murder. Additionally, this Court held invalid the findings that the father's murder was to avoid arrest and during a robbery based on the taking of the truck. The trial court's rejection of the statutory mental mitigating circumstances was found to be improper. The prior violent felony aggravator based on the contemporaneous conviction for the murder of the girl remained. This Court found the death sentence disproportionate.

5. McKinney v. State, 579 So.2d 80 (Fla. 1991). McKinney was convicted of murder, unlawful display of a weapon, armed robbery, armed burglary, armed kidnapping and grand theft. The victim stopped his rental car to ask directions when he was abducted, robbed and killed by seven gunshots. Experts testified that McKinney had mental impairments including organic brain damage, borderline intelligence and drug and alcohol abuse. The trial court found that McKinney had no significant history of prior criminal activity. This Court found invalid the aggravating

circumstances of heinous, atrocious or cruel and cold, calculated, and premeditated, leaving only the aggravating circumstance that the homicide was committed during the commission of violent felonies. This Court concluded the death sentence was disproportionate.

6. Hawk v. State, 718 So.2d 159 (Fla. 1998). Hawk was convicted of first degree murder for the bludgeoning an elderly couple in their home. One victim survived to testify. The victims' money and car were taken. Later, Hawk bragged about beating up old people and displayed the car and money. This Court approved two aggravating circumstances: homicide committed for pecuniary gain and the contemporaneous conviction for attempted murder. The mitigation included Hawk's brain damage due to spinal meningitis he suffered as a small child. Due to the brain impairments, Hawk had poor impulse control that was diagnosed when he was age five and delusional thinking. This Court held the death sentence disproportionate.

7. Besaraba v. State, 656 So.2d 441 (Fla. 1995). A local bus driver told Besaraba to get off the bus for drinking alcohol. Besaraba left the bus, but he went to another bus stop and waited for the same bus to stop there about a half-hour later. Besaraba pulled a handgun and fired into the side of the bus. He walked to the front of the bus and killed the driver. He also shot a passenger in the back, killing him. After leaving the bus,

Besaraba went to a car stopped at a red light, ordered the driver out, shot the driver three times in the back, and took the car. The driver survived. Three days later police in Nebraska arrested Besaraba after a struggle during which he pulled a gun on the officers. A jury convicted Besaraba of two counts of first degree murder, attempted murder, robbery, and possession of a firearm. The court found two aggravating circumstances -- previous conviction of another capital felony and the homicide was committed in a cold, calculated and premeditated manner. This Court concluded the CCP circumstance was not proven. Mitigation included no significant prior criminal history, the crime committed while under extreme mental or emotional disturbance, and nonstatutory mitigation. The evidence showed that Besaraba suffered childhood deprivation and suffered mental illness which included paranoid behavior, delusion and hallucinations. He also was alcoholic, abused drugs and had various physical illnesses. This court reversed the death sentences as disproportionate.

8. White v. State, 616 So.2d 21 (Fla. 1993). White and his former girlfriend, Melinda Scantling, had some altercations after the end of the relationship resulting in a restraining order on White. A few months later, White broke into Scantling's apartment and attacked her companion with a crowbar. White was subdued and arrested. While still detained in jail, White told another inmate that if released on bond he was going to kill Scantling. The next

day after White's release, he redeemed a shotgun he had earlier pawned. He approached Scantling in a parking lot as she left work around 5:00 p.m. and killed her in front of eyewitnesses. White told one of the eyewitnesses, "Deke, I told you so" and then he drove away. The following day he was arrested, and while in jail three days later, a psychiatrist interviewed him. White told the psychiatrist that during the six days preceding the homicide, he had consumed five ounces of cocaine, heroin, valium, and over 50 marijuana cigarettes. The psychiatrist said that White was exhibiting withdrawal symptoms consistent with a six-day drug binge and that White was under extreme mental and emotional disturbance and his capacity to appreciate the criminality of his conduct was impaired at the time of the homicide. Other evidence confirmed White's history of drug addiction and that his addiction had intensified during the time before the homicide. This Court held the CCP aggravating factor was invalid, leaving the prior violent felony convictions for the burglary and assault occurring a few days before the murder as aggravators. Mitigation included the statutory mental mitigators and some nonstatutory factors. This Court reversed the death sentence as disproportionate.

9. Kramer v. State, 619 So.2d 274 (Fla. 1993). Kramer was convicted of murder for the beating death of Walter Edward Traskos. The body was found along the interstate and had evidence of a beating with a blunt object. A large rock was near the body.



Kramer said he threw a rock at the victim after the victim pulled a knife. The victim's injuries indicated he had been attacked while in a passive position. In aggravation, the trial court found: (1) a prior conviction for a violent felony -- an attempted murder -- and (2) the homicide was heinous, atrocious or cruel. The mitigation included: (1) Kramer was under the influence of emotional stress; (2) Kramer's capacity to conform his conduct was severely impaired; (3) alcoholism and drug abuse; (4) model prisoner. This Court held the death sentence was disproportionate.

In conclusion, Ricardo Gill's case is not one of the most aggravated and least mitigated of capital cases. His life-long brain impairment and the resulting mental problems which developed from this brain impairment significantly mitigates the crime. The crime itself and the aggravating circumstances found to exist are all the product of Gill's unfortunate mental condition. As in the above discussed cases, this Court should also reverse Gill's death sentence for imposition of a sentence of life in prison.

ISSUE II

**THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.**

The trial court improperly found the aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner. Gill's brain malformation and mental problems rendered him incapable of calculating the homicide with the requisite "cool, calm, reflection." See, Sec. 921.141 (5)(i) Fla. Stat.; Jackson v. State, 648 So.2d 85 (Fla. 1994). As a result, the death sentence has been imposed in reliance on an aggravating circumstances not factually supported, and the sentence is unconstitutional. Amends. V, VI, VIII, XIV, U.S. Const.

This Court has defined the CCP aggravating factor as requiring the proof of four elements. See, Jackson v. State, 648 So.2d 85 (Fla. 1994); Walls v. State, 641 So.2d 381 (Fla. 1994). As discussed in Walls, the four elements are defined as follows:

Under Jackson, there are four elements that must exist to establish cold calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." Jackson [648 So.2d at 89] ...

\* \* \* \*

Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." Jackson, .....

\* \* \* \*

Third, Jackson, requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder.

\* \* \* \*

Finally, Jackson states that the murder must have "no pretense of moral or legal justification." ... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide ...

Walls, at 387-388. The important focus of this aggravating circumstance is the state of mind of the defendant. See, e.g., Mahn v. State, 714 So.2d 391, 398 (Fla. 1998); Stano v. State, 460 So.2d 890, 893 (Fla. 1984).

The facts of this case fail to establish the cold, calculated and premeditated aggravating circumstance. Rather than a planned killing acted upon after cool reflection, the evidence shows a killing committed while Gill was suffering from a brain malformation and significant mental impairments characterized by impulsive rage and an inability to learn consequences of behavior. (See, discussion in Issue I, *infra*.) The trial court's findings recounted the evidence of premeditation and calculation prior to the offense. However, the court failed to consider the impact of Gill's mental impairments on his state of mind at the time. (R5:699-702) Gill suffers from a life-long brain malformation that presses on the amygdala impairing his ability to control impulses and

rage. Such impairments negate the requirement for this aggravating circumstance that any planning and calculation before the killing be the product of cool, calm reflection. See, e.g. Mahn v. State, 714 So.2d 391, 398; Besaraba v. State, 656 So.2d 441, 444-446 (Fla. 1995). Gill's after-fact statements and admissions about the offense are the foundation for finding this aggravator. (R5:699-702) Because Gill was seeking a death sentence after his unsuccessful suicide attempts, his statements may or may not have been factually accurate because he was trying to obtain a death sentence. While Gill's statements described actions that appeared calculated, such actions are not necessarily the result of the calm, cool, and reflective state of mind the aggravator requires given Gill's mental condition. *Ibid.* When the evidence tends to both support and negate an aggravating circumstance, the interpretation of the evidence negating the circumstance must be followed. See, Mahn v. State, 714 So.2d at 398; Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992). As Dr. Waldman stated in his evaluation, Gill simply lacked the ability to control his behaviors. (T20:407-442; T19:399, State Exhibit X) The trial court agreed with this assessment when finding as mitigation that Gill lacked the ability to control his behavior. (R5:703-708)

The trial court erred in finding and weighing the cold, calculated and premeditated aggravating circumstance in imposing the death sentence. Gill's sentence is unconstitutionally imposed.

Amends. V, VI, VIII, XIV, U.S. Const. This Court should reverse the death sentence for imposition of a life sentence.

### ISSUE III

#### THE TRIAL COURT ERRED IN SENTENCING GILL TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

The death penalty was improperly imposed in this case because Florida's death penalty statute was unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context. Section 921.141, Florida Statutes does not provide for such jury determinations.

Gill acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141 Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002). Additionally, Gill is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court

continues to grapple with the problems of attempting to reconcile Florida's death penalty statutes with the constitutional requirements of Ring. See, e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); State v. Steele, 921 So.2d 538. At this time, Gill asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare Section 921.141 Florida Statutes unconstitutional. Gill's death sentence should then be reversed and remanded for imposition of a life sentence.

### **CONCLUSION**

Based on the arguments contained this initial brief, undersigned counsel requests this Court to reverse the death sentence and remand this case for imposition of a life sentence.



**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by mail to Steve White, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to Appellant, Ricardo Gill, #105559, F.S.P., 7819 N.W. 228<sup>th</sup> St., Raiford, FL 32026-2600, on this \_\_\_\_ day of May, 2008.

**CERTIFICATE OF COMPLIANCE**

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

NANCY A. DANIELS  
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SECOND JUDICIAL CIRCUIT

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