IN THE SUPREME COURT OF FLORIDA

MIGUEL OYOLA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC10-2285

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR JEFFERSON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

THOMAS D. WINOKUR
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 906336

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, MIGUEL OYOLA, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal consists of ten volumes, which will be referenced according to the respective Roman numeral designated in the Index to the Record on Appeal, followed by any appropriate page number. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

STATEMENT OF THE CASE

On October 2, 2008, a Jefferson County grand jury indicted Miguel Oyola for first degree murder of Michael Lee Gerrard, kidnaping to facilitate a felony, armed robbery, and theft of a motor vehicle (I 6-8). Oyola proceeded to a jury trial, and on August 30, 2010, the jury returned guilty verdicts for first degree murder as charged (Count I), for false imprisonment as a lesser included offense (Count II), for robbery with a deadly weapon as charged (Count III), and for grand theft of a motor vehicle as charged (Count IV) (I 49-54; VII 434-436). The trial court orally adjudged Oyola guilty the verdicts were rendered (VII 436). The court conducted the penalty phase on September 3, 2010, at the conclusion of which the jury recommended a death sentence by a vote of 9 to 3 (I 62; VIII 555).

On October 25, 2010, the court sentenced Oyola to death for the murder (Count I); five years imprisonment for false imprisonment (Count II); life imprisonment for armed robbery (Count III); and five years imprisonment for grand theft of a vehicle (Count IV) (IX 1-14; I 149-163). The court found three aggravating circumstances: the murder was committed while Oyola was on felony probation (great weight); the murder was committed while Oyola was engaged in the commission of a robbery and for pecuniary gain (great weight); and the murder was especially heinous, atrocious or cruel (great weight) (I 144-145). In mitigation, the court rejected the statutory mitigating circumstance that Oyola's capacity to conform his conduct to the requirement of the law was substantially impaired. The court considered evidence that Oyola suffered from schizoaffective disorder, bipolar type, and his that he has a family history of mental illness, and them gave slight weight. As to non-statutory mitigation, the court found and gave slight weight to Oyola's serious drug abuse, his abusive home life as a child that created a cycle of violence, and Oyola's mental disorder (I 145-146).

On November 17, 2010, Oyola timely appealed to this Court (I 181-182).

STATEMENT OF THE FACTS

The victim, Michael Lee Gerrard, owned a lawn maintenance business called C & G Outdoor Services (VI 241). Gerrard had a truck with an enclosed white trailer where he carried equipment (VI 241). At the time of the murder, Appellant Oyola worked for Gerrard (IV 156).

Gerrard maintained a business checking account at Wakulla Bank for C & G Outdoor Services (VI 298-299). The bank issued one debit card for this account (VI 299). Bank records showed three debit card transactions on December 3, 2007: one for $173.21 at Wal-Mart; a second one for $209.54 at Wal-Mart Super Center Tallahassee; and a third one for $419.20 at Wal-Mart (VI 300-301).

The next day, December 4, 2007, Oyola told Gwendolyn Rhodes, with whom he lived, that he did not feel well and did not plan to go to work (IV 157-158). When Rhodes left for work, Gerrard's white truck was not at the residence (IV 158). Oyola's neighbor Travis Reddick knew Gerrard's white truck and trailer, and he also knew that Oyola sometimes drove the truck (IV 140). Between 11:00 a.m. and noon on December 4, 2007, Reddick saw Oyola and Gerrard in Oyola's yard (IV 140-141). After about 20 to 25 minutes, the two of them left together in the white truck (IV 140-141). Reddick said there was no trailer with the truck that morning (IV 140-141).

Shortly after lunch time that day, Gerrard spoke to Chastity Risoldi, an employee of Wakulla Bank, who knew Gerrard and assisted him with his account (VI 303-304). Gerrard called to inquire about the activities on the debit card for his account (VI 304-305). After hearing the information, Gerrard was surprised and angry, and he wanted to know more about the transactions (VI 305). At 2:03 p.m., Gerrard made a cash withdrawal for $900 (IV 301-302). Risoldi expected Gerrard to come to the bank to see the records, but he never came (VI 305-306).

Around 2:00 - 2:30 p.m. that day, Gerrard took the three of his workers to a job site, and left with the truck and trailer (V 226-228). Gerrard never returned to pick up the three men (V 228).

Some time before 3:06 p.m. that day, Christopher Miller was driving his 18-wheel truck down a logging road in Jefferson County (IV 103). Miller worked for Murray Logging, and he was hauling equipment in the woods off Tram Road (IV 103). As he came around a curve on the logging road, there was a white truck and trailer parked in the road (IV 104-105). He did not see anyone around the truck, although when he first arrived, he thought he saw someone standing by the trailer who went inside the trailer (IV 105). After a minute, he blew his horn because the truck and trailer was blocking the road (IV 105). Miller then noticed that the trailer was rocking, and two men fell out of the trailer, fighting (IV 105). Miller saw no weapon in anyone's hand, but did see an object "fall out," like a ring or a hook (IV 106). One or both of them were bleeding because they wore white T-shirts with red stains (IV 106, 112). The two men tussled on the ground, with the medium built man on top of the heavier man punching with his fists (IV 107-108, 111-112). The heavier man seemed tired, and the slender one had "got the best of him" (IV 108). Miller backed his truck back around the curve and called the wood crew to come up (IV 108). A man from the wood crew, Raymond Padgett, came to assist (IV 108-109, 113). The two went back around the curve, but the truck and trailer were gone (IV 108-109, 115). One of the men who had been fighting was on the side of the road, on his knees, trying to get up, but he was "gagging for his last breath" (IV 108-109,

114-115). The man then fell down on his face (IV 108-109). Miller called 911 (IV 109). Padgett went out to the highway to wait for the authorities, and noticed that tire tracks on the dirt road showed that someone had gone left, toward Tallahassee (IV 115).

At 3:06 p.m., Jefferson County sheriff's deputy Christopher Smith received a call to the scene (IV 92-93). The men at the entrance to the logging road took Smith to the man lying on the side of the road (IV 93). Paramedic Kim Rothrock determined that the man was dead (IV 98-101). The man was later identified as Michael Lee Gerrard (IV 93).

Sergeant John Haire of the Florida Highway Patrol was on Tram Road when he noticed a sheriff's car passing and heard a dispatch that there had been an incident off Tram Road (IV 134-136). About ten minutes before other emergency vehicles passed his position, Haire saw a white Chevy GMC truck and white trailer traveling west toward Tallahassee (IV 136). Later, he learned the description of the victim's vehicle and recalled that the truck and trailer he saw matched (IV 136).

Around 3:00 p.m., Oyola's neighbor Travis Reddick left for work and he saw Gerrard's truck and trailer together parked on the road across from the neighborhood (IV 141). The driver's door was open, but Reddick did not see anyone with the truck (IV 141-142). Reddick's mother Paula Moore and his aunt Luella Copeland also saw the white truck only with the door open, without the trailer, but there was a car parked behind the truck (IV 146-151).

Gwendolyn Rhodes returned home about 4:45 p.m., and saw Gerrard's white truck parked across the street from her driveway (IV 160-161). No one was around the truck (IV 162). Inside, Rhodes found Oyola in the bathtub (IV 162). He was bathing in a bleach and water solution, a jug of bleach was beside the tub (IV 162-163). This was unusual since Oyola hated the smell of bleach (IV 163). Rhodes also saw a black trash bag with something beige that appeared to be Oyola's new Dickie brand pants (IV 164). She joked with Oyola and said he was throwing away his pants because he must have been with another woman (IV 164). Oyola told her that she did not want to know what was inside the bag because it would make her sick (IV 164).

Oyola left in Rhodes' car (IV 165). Later, he called her and said she could pick up her car at the end of the road (IV 165). She found the car on the side of the road where the white truck had been parked earlier (IV 165-166). Oyola said he was with friends, but he wanted her to pick him up later (IV 166). He called her, and she picked him up in the K-Mart parking area off Blairstone Road across from the Embarq office (IV 167-168). When Rhodes found him, Oyola was wearing a Dickie brand jacket with a design on it that he did not have when he left the house (IV 168-169). After returning home, Oyola received a telephone call, and told Rhodes that Gerrard did not pick up the work crew (IV 169-170). Oyola took Rhodes' car to get them (IV 170). When he returned, he no longer wore the jacket (IV 171). At some point, Oyola told Rhodes that there was $700 in the glove compartment of her car (IV 171-172). He said that it was money owed

to him, but he did not say where he got it (IV 172). Law enforcement later retrieved the money (IV 171).

Dustin Brown and his cousin, Tyler Williams were driving down Buck Lake Road on December 4, 2007, when they saw a white trailer with something on fire on the ground (IV 174). They stopped and walked to the trailer, and attempted to put out the fire (IV 174-175). However, the fire got bigger, and they smelled gas (IV 174-175). The trailer door was open, and they could see blood smeared on the door and inside the trailer (IV 175). Tyler called his mother to get someone to call for help (IV 175). Deputy Ed Cook responded to the call, noted that the trailer was consistent with the homicide investigation, and he called for the fire marshal and FDLE (IV 176-179).

The workers abandoned by Gerrard at a work site finally called Oyola, who told them that Gerrard said that he, Oyola, was supposed to get them (V 228-229). Oyola arrived in a car, not the work truck (V 229). One of the men, Flaco Cerro, noticed that his jacket that he had left in the truck earlier was in the car (V 229-230). He took the jacket, insisting to Oyola that the jacket belonged to him (V 231). Oyola gave the three men $100 to buy food and beer since they were out so late (V 234).

Deputy Robert Wright located the white truck about 3:00 a.m. the following morning, December 5, parked on Blairstone Road in front of the Embarq Telephone office across the street from K-Mart (IV 180-182).

On December 7, Gerrard's friend Kevin Dunn and others met with Oyola in an effort to determine what needed to be done to keep Gerrard's business operating (VI 246-247). Dunn was uncomfortable speaking to Oyola because there had been some speculation that he may have been involved in Gerrard's death (VI 247-248). Oyola later spoke with Dunn and kept trying to proclaim his innocence (VI 249-250). Oyola told Dunn that he had not seen Gerrard the day he was murdered, but Gerrard did drop money for Oyola, leaving it in Oyola's mailbox (VI 250-251). Oyola mentioned the dollar amount three times and each time it was a different amount (VI 250). He said it was $700 to $800 in cash (VI 251).

Investigator Sally Cole went to Oyola's house on December 4, 2007, at 11:05 p.m. (VI 254-255). She told him that Gerrard had passed away without specifically stating how he had died (VI 255). Cole asked Oyola if he would mind going to the sheriff's office to talk, to which Oyola agreed (VI 256). As they entered the office, Oyola said, "I can't believe someone killed him," even though Cole had never said anything about someone killing Gerrard (VI 257). While in the interview room, Cole noted that Oyola did not have any abrasions, scratches or bruises to his hands, face or neck (VI 258-259). Oyola said he had been sick that day and did not go to work (VI 264). Because he did not have a car, he stayed home all day until his girlfriend returned (VI 264). Later, Gonzalo, from the work crew, called and informed Oyola that Gerrard had not picked them up from a job site (VI 264-265). Oyola picked the men up using his girlfriend's car and he gave the men $50 to buy some beer (VI 265-266).

Oyola said that he had made several phone calls to and from Gerrard during the day (VI 266). Oyola never mentioned getting money in his mailbox from Gerrard (VI 267). During the course of the investigation, the lower half of Gerrard's cell phone was found in the woods off WW Kelly Road about one-tenth of a mile from Oyola's house (VI 269-273, 288-289). A floor mat was also found in the woods off of WW Kelly Road (VI 273-274). Cole acquired Oyola's wallet and no debit card related to Gerrard's account was found inside (VI 273).

Dr. Lisa Flannagan, a medical examiner, performed an autopsy Michael Lee Gerrard on December 7, 2007 (IV 49). Gerrard had several stab wounds and various injuries on his arms (IV 51). Flannagan found multiple abrasions and lacerations to the head (IV 54-57). Some of these appeared to be caused by a sharp edge consistent with the edge of a shovel (IV 54-56). Flannagan identified multiple areas where something scraped or impacted the skin (IV 56-57). Gerrard had a stab wound on his shoulder, and two more on his upper arm, one on his wrist, four on his abdomen (IV 60-70). There were a total of ten stab wounds (IV 83). The deepest wound penetrated seven inches and incised his kidney (IV 68). The fingers and knuckles on Gerrard's right hand were uninjured (IV 65). Gerrard had cuts on his hands consistent with defensive wounds (IV 66-67).

The blows to the right side of the head produced bleeding into the subdural space over the brain (IV 75-77). However, Flannagan could not determine if Gerrard was conscious at the time of the stab wounds (IV 81). The cause of death was head trauma and stab wounds (IV 81).

Chris Scovotto, a detective with the fire marshal's office, examined the trailer (V 219-223). He noted there was blood on the exterior of the trailer, and he found some burnt clothing and grass outside the trailer (V 221). These items and soil samples from underneath the trailer tested positive for gasoline (V 222-223). There was also a pour pattern on the exterior and interior of the trailer (V 223). No mechanical or electrical malfunction was found with the trailer (V 222-223). Scovotto concluded the fire was intentionally set using an ignitable liquid (V 223).

Amy George, an FDLE crime scene investigator, examined and photographed the truck (IV 121-128). In the bed of the truck, she found landscaping materials, fertilizer, a shovel, a gas can, a jacket and drink containers (IV 124-125). Some reddish-brown stains in the back of the truck tested positive for suspected blood (IV 127). Another reddish-brown stain on the shovel also tested positive for possible blood (IV 127). The area of the shovel where one would step on the blade appeared to be bent inward (IV 128). Inside the truck, the driver's side floor mat was missing, that other passenger area had mats (IV 125-126). The driver's area appeared to be cleaner (IV 126). There were marks on the seat that appeared be consistent with a vacuum cleaner (IV 126).

Robert Yao, a laboratory analyst with FDLE, examined and photographed the trailer (V 186-216). At that time the trailer was found, the passenger side entry door appeared to have been forced open, signs of a fire including some soot in the interior, and suspected blood stains on the exterior and interior (V 189). The side

door damage was consistent with some forcing the door open from the inside (V 191-192). Various blood stains throughout the inside the trailer included drips, splatters and smears (V 192-198). There was one concentration of staining appeared to saturate the wood of the trailer wall and likely caused by something soaked in blood in contact with the wood (V 196). The stain was consistent with someone in a blood-soaked shirt bracing himself against the side of the trailer trying to force open the door (V 196). Another series of mist-like stains seem consistent with blood being exhaled (V 198). The trailer also contained "castoff stains," blood stains caused by an blood soaked object being slung (V 204-05).

Yao testified that the door to the trailer was damaged in a manner consistent with a person trying to break out of the trailer (V 199). A blood stain on the door was consistent with a person trying to force the door open (V 207).

Valecia Hickman, an FDLE laboratory analyst, testified about the DNA testing performed on items of evidence (VI 337-339). On the shovel, Hickman found a mixture of DNA for both Gerrard and Oyola (VI 341). A number of places on the shovel, including blood stains, showed Gerrard's DNA alone (VI 342-344). Testing of Gerrard's wallet revealed Gerrard's DNA, including suspected blood stains in the wallet and the edge of the debit card found inside the wallet (VI 294-297, 345). A total of nineteen samples of blood stains found in various places on the utility trailer were tested and all matched Gerrard's DNA profile (VI 350-351).

James Hendrith testified that he was incarcerated with Oyola in November 2008 (VI 276, 280). Oyola told Hendrith that he had robbed and killed someone (VI 278). Oyola said he hit the man with a shovel and stabbed him (VI 278-279). Oyola said he took "like $375" and the man's truck (VI 279). Oyola told Hendrith that he took the knife home and put it on the counter and also that he disposed of the knife (VI 280, 282-283). Oyola took his bloody clothes home and burned them (VI 280). Oyola told Hendrith at one point that he was going to plead insane, but at another point he said he was going to plead self-defense (IV 279).

At the penalty phase, the State introduced a judgment and sentence and related probation orders demonstrating that Oyola was on felony probation at the time of the offense (VIII 459). Oyola presented the testimony of his brother Manuel Oyola, and Dr. Michael T. D'Errico as a mental-health expert. Dr. D'Errico testified that Oyola suffered from schizoaffective disorder, bipolar type, and opined that the symptoms of this disorder interfered with his capacity to conform his conduct to the requirements of law (VIII 479-505).

SUMMARY OF ARGUMENT

ISSUE I.

The record provides ample competent substantial evidence to support the weight assigned the HAC aggravator. Oyola's claim that mental-health mitigation requires the assignment of a weight value to the HAC aggravator when the murder indicated a frenzied, panicked attack is unsupported by law and should be rejected.

ISSUE II.

The record provided ample competent substantial evidence to support the court's rejection of the conform-his-conduct mitigator. First, Oyola's expert never testified that his capacity to conform his conduct to the requirements of law was "substantially impaired." Second, the expert's conclusions were based upon an account of the murder that was contrary to the evidence accepted by the trial court. While the expert's conclusion of a frenzied attack resulting from poor impulse control was consistent with the story Oyola reported to the expert, it was wholly incompatible with the account of the murder accepted by the trial court. This incompatibility provided sufficient reason to reject the mitigator. Moreover, any error in failing to find the statutory mitigating circumstance, or in failing to expressly evaluation the evidence in the sentencing order, is harmless beyond a reasonable doubt.

ISSUE III.

Oyola did not preserve a claim under *Ring v. Arizona* for review. Even if it were preserved, this Court has repeatedly rejected *Ring*

challenges to Florida's death penalty statute. Furthermore, two of the aggravating circumstances found by the trial court were that Oyola was on felony probation at the time of the murder, and that the murder occurred during the commission of a robbery. *Ring* does not apply where these aggravating factors are present. Accordingly, Florida's death penalty does not violate the Sixth Amendment right to a jury trial.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION IN GIVING GREAT WEIGHT TO THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE? (Restated)

Standard of review

"This Court will not disturb a trial judge's determination as to the weight assigned to each established aggravator or mitigator if that ruling is 'supported by competent, substantial evidence in the record.'" *Durousseau v. State*, 55 So.3d 543, 563 (Fla. 2010), citing *Spencer v. State*, 691 So.2d 1062, 1064 (Fla. 1996).

Trial court's ruling

The trial court found that the murder was especially heinous, atrocious or cruel (HAC) as follows:

> The capital felony was especially heinous, atrocious or cruel. This aggravating circumstance has been proved beyond all reasonable doubt, and is given great weight. More than one weapon was used by the defendant to murder the victim, multiple wounds were inflicted by such weapons, including at least seven stab wounds, which occurred at two locations, with victim being confined in a locked trailer, while still alive, while being transported to Jefferson County from another location. During the victim's confinement, while being transported to Jefferson County after the initial extensive injuries, the victim attempted to escape, to avoid further injuries and death, to no avail, but fully conscious during such confinement.

(I 144-45).

Merits

It should be emphasized that Oyola does not challenge that competent substantial evidence supported the HAC aggravator. Instead, Oyola complains only that the court erred in assigning great weight to the aggravator for two reasons: first, the evidence did not establish "when or for how long" Gerrard's confinement in the trailer was; and second, that the "aggravating value" of the wounds Oyola inflicted upon Gerrard is diminished when the evidence tends to establish a "frenzied, panicked attack" that is exacerbated by the defendant's mental condition.

The State first notes that it has failed to uncover a single case where this Court found that a court erred in assigning a particular weight value to an aggravating circumstance. Oyola identifies four cases that he claims stand for the proposition that a properly-found HAC factor is of "diminished aggravating value" when the death is "a product of the defendant's mental status" (IB 28).

In fact, review of the cited cases reveals that none them suggest that the trial court erred in assigning a particular weight value to the HAC aggravator if the murder was a result of a frenzied attack or if mental mitigators are found to exist. Instead, in all but of one of the cited cases, this Court found the sentences to death disproportionate for various reasons. See *Penn v. State*, 574 So.2d 1079 (Fla. 1991)(death sentence disproportionate when only valid aggravator was HAC, defendant had no significant history of prior criminal activity, and defendant acted under the influence of extreme mental or emotional disturbance when he killed his sleeping mother

with a hammer); *Ross v. State*, 474 So.2d 1170 (Fla. 1985) (death penalty was not proportionate in one-aggravator [HAC] case in light of mitigating factors that defendant was an alcoholic, was intoxicated at the time of the homicide, and homicide was the result of an angry domestic dispute); *Jones v. State*, 332 So.2d 615 (death not proportionate when jury recommended life and the evidence demonstrated Jones suffered from paranoid psychosis at the time of the murder). In the remaining case, this Court remanded the case back for resentencing when the judge improperly considered the defendant's future dangerousness as a non-statutory aggravator. *Miller v. State*, 373 So.2d 882 (Fla. 1979).

In short, none of the cases Oyola cites even suggest that a court errs in assigning great weight to the HAC aggravator when "the manner of death is a product of the defendant's mental status." Oyola's argument is, in short, wholly unsupported by the law.

Even if the law supported this claim, Oyola could not show error. Contrary to Oyola's argument, the HAC aggravator does not turn on the mental state of the defendant. Rather, this aggravator focuses on the victim's suffering.[1] Oyola repeatedly and brutally stabbed

[1]"To qualify for the HAC circumstance, the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim." *Hertz v. State*, 803 So.2d 629, 651 (Fla. 2001)(*quoting Richardson v. State*, 604 So.2d 1107, 1109 (Fla.1992)). "HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death." *Barnhill v. State*, 834 So.2d 836, 849-850 (Fla. 2002). A finding of whether the defendant intended to inflict pain is not necessary to a finding of HAC. *Lugo v. State*, 845 So.2d 74, 112 (Fla. 2003); *Guzman v. State*, 721 So.2d 1155, 1160 (Fla. 1998). Moreover, "[i]n determining

Michael Lee Gerrard and beat him with a shovel. Gerrard fought for his life and lost. The medical examiner's testimony supported the trial judge's conclusion that the attack on Gerrard involved more than one weapon and that multiple wounds were inflicted by each weapon. The condition of the interior of the trailer amply demonstrated Gerrard's terror as used his remaining strength in a vain attempt to escape the trailer before Oyola could finish him off. Moreover, even if Oyola's state of mind were relevant, the trial court found there was no evidence that his capacity to conform his conduct to the requirements of law was substantially impaired at the time of the murders.

Oyola also objects to the trial court's "findings about the victim's confinement" (IB 27). While Oyola acknowledges that Gerrard was confined in the trailer, he claims that "the evidence did not establish when or for how long that confinement may have been." *Id.* Oyola claims that the evidence supports only that a confrontation occurred at the scene of Gerrard's death and that Gerrard was confined in the trailer for a period of time. Oyola claims that the court's conclusion that the confrontation occurred at two locations, and that Gerrard was confined in the trailer during the transport to the second location, was "pure speculation." *Id.*

It is difficult to imagine how Oyola believes the murder occurred. Oyola seems to assert that the evidence supported only the

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whether heinous, atrocious, or cruel (HAC) aggravating factor in death penalty cases was present, focus should be upon victim's perceptions of circumstances as opposed to those of perpetrator." *Lynch v. State*, 841 So.2d 362, 369 (Fla. 2003).

theory that he and Gerrard drove out to a remote logging road in Jefferson County for no apparent reason, got out of the truck and got into the trailer, where a violent, bloody confrontation occurred, after which Oyola exited the trailer, locked the door and left Gerrard in the trailer for a period of time to attempt to fight his way out, and then eventually let Gerrard out the trailer to inflict the final blows upon him and leave him for dead.

The theory accepted by the court is far more reasonable: a violent confrontation occurred at an unknown location (most likely in Leon County where both Gerrard and Oyola lived and worked) inside the trailer, which Oyola thought was fatal to Gerrard, followed by a drive to a remote location to dispose of the body. Gerrard regained consciousness in the trailer, attempted to escape during the transport to Jefferson County, and got into a final, and ultimate fatal confrontation with Oyola at the scene of the murder. This theory is fully supported by the evidence. The theory adopted by the court is not based on "speculation;" it is based on reasonable inferences supported by the evidence. Because competent substantial evidence supports the court's conclusion, it did not err in finding the HAC aggravator, much less in assigning it great weight. Oyola has not demonstrated error.

ISSUE II

DID THE TRIAL COURT ERR IN REJECTING AS A STATUTORY MITIGATOR THAT OYOLA'S CAPACITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED? (Restated)

Standard of review

A trial court's rejection of a mitigator is reviewed to determine whether the "the record contains 'competent substantial evidence to support the trial court's rejection of these mitigating circumstances.'" *Reynolds v. State*, 934 So.2d 1128, 1159 (Fla. 2006)(quoting *Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990)). This Court has also indicated that the appellate test is whether there is a "palpable abuse of discretion for the trial court to refuse to find the statutory mitigator." *Foster v. State*, 679 So.2d 747, 756 (Fla. 1996).

Trial court's ruling

Oyola claimed that Dr. D'Errico's testimony established that Oyola's "ability to conform his conduct to the requirements of law was impaired" (I 71). This conclusion was based upon Oyola's "difficulty in controlling his emotions and behavior in response to an attack, real or perceived." *Id.* The State disputed this conclusion, noting that D'Errico's opinion was based on Oyola's false and misleading account of his attack upon Michael Lee Gerrard to D'Errico (I 82). The State asserted that even if the mitigating circumstance were established, it should be given little or no weight based on these circumstances.

In the sentencing order the court found that the evidence was "not sufficient to support any statutory mitigating circumstance, and none is found to exist" (I 145).[2] The court found that the evidence established that Oyola suffered from schizoaffective disorder, bipolar type, but that the evidence was "insufficient to show that such mental condition impaired his ability to conform his conduct to the requirements of law." *Id.* The court nonetheless gave these circumstances "slight weight," emphasizing that it did consider them in weighing the aggravating and mitigating circumstances. *Id.*

Merits

A trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection. *Ault v. State*, 53 So.3d 175, 186 (Fla. 2010)(citing *Coday v. State*, 946 So.2d 988, 1003 (Fla. 2006)). Even expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case. *Ault*, 53 So.3d at 186. The rejection of the mitigation must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons. *Coday v. State*, 946 So.2d 988, 1005 (Fla. 2006).

[2]The jury was instructed on only one statutory mitigating circumstance, "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" (VIII 550). Oyola argues only that his capacity to conform his conduct to the requirements of law was substantially impaired and does not rely on the "appreciate the criminality" portion of this mitigator.

Forensic psychologist Dr. Michael D'Errico conducted an evaluation of Oyola after his arrest and again before trial (III 485, 492). D'Errico testified that Oyola described his confrontation with Michael Lee Gerrard as follows:

> Regarding the alleged offense, Mr. Oyola reported that -- he said, my boss picked me up in the truck and he said, were you sleeping with my wife? I said no. Then I told him, you need to pay the Mexicans -- I'm supposing the Mexicans were fellow workers -- because they weren't getting all their money.
> He said, at that point he punched me on the side of the face. Then he stopped the truck and got out. He got the knife out of the back of the truck that we use to cut the weed-eater string with. He's coming after me. He missed me and I punched him. He swings the knife at me again. I pushed him -- I punched him and threw him on the ground.
> He still had the knife, so I bit him on the ear. And then he let go of the knife. I continued punching him. I picked up the knife and started stabbing him. I stabbed him more than once. I got in the truck and left. But, as I was leaving, I saw him get up with the knife.
> He said that later on he was told that Mr. -- I mean the victim died at the scene.

(VIII 499-500).

D'Errico testified that at the time of the murder Oyola was "very likely experiencing untreated symptoms of a schizo-affective disorder" (VIII 500). This condition would cause "mood disorder symptoms, which would involve poor impulse control, inability to maintain your composure, a tendency to lose control of your emotions and let things get out of hand, let your behavior get out of hand, poor behavioral control as well" (VIII 501). D'Errico surmised that Oyola's reaction was consistent with his condition:

> In my opinion, I think he overreacted to the extent that he kept on with the behavior of stabbing, according to his report. After he bit him on the ear and he dropped the knife, a non-mentally ill individual would probably have ceased and desisted and maybe just stolen his truck or took off with the truck, picked up the knife. But Mr. Oyola apparently lost control and continued to, as he told me, stab the victim impulsively.

(VIII 501). Although Oyola reported to D'Errico that Gerrard had swung at Oyola with a knife and that Gerrard had struck the first blow, punching Oyola in the face, D'Errico claimed that such information would not change his opinion that he "perceived a potential threat" (VIII 502-03). However, in describing how Oyola's poor impulse control affected his conduct during the confrontation with Gerrard, it was clear that D'Errico's conclusion was based on Oyola's false description of the confrontation:

> In this situation, Mr. Oyola was feeling paranoid or somehow the object of attack and he lacked the ability to control his behavior at certain points during that attack, more specifically, after he said that he had managed to get his perceived attacker to let go of the knife.

(VIII 504).

It is clear that D'Errico viewed the confrontation as a sudden combat where Oyola lost control after being attacked by Gerrard and impulsively lashed out at Gerrard with the knife, killing him. D'Errico added that Oyola's "untreated symptoms very likely contributed to his excessive overreaction to being attacked by the victim, which was likely related to his symptoms of loss of emotional control and impulsive behavior" (VIII 505). D'Errico concluded that he "thought the fact that he was uninvolved in treatment for his

schizo-affective disorder symptoms interfered with his capacity to conform his conduct" (VIII 504).

On cross-examination, D'Errico acknowledged that Oyola had not told him numerous critical facts about the murder. Oyola did not tell D'Errico that he struck Gerrard multiple times with a shovel; Oyola told him only that he stabbed Gerrard with a knife (VIII 508). Oyola did not tell D'Errico that Gerrard was held captive in the trailer. Oyola did not tell D'Errico that Gerrard was unable to resist at the point the stabbing occurred. *Id.*

Review of the record shows competent, substantial evidence to support the court's rejection of the "conform his conduct" mitigator. First, it should be noted that at no point did Dr. D'Errico ever testify that Oyola's capacity to conform his conduct to the requirements of law was "substantially impaired," as required by statute. § 921.141(6)(f), Fla. Stat. Instead, D'Errico noted that Oyola suffered from a disorder that can cause "poor impulse control," leading to his ultimate conclusion that the disorder "**interfered** with his capacity to conform his conduct" (VIII 504).

"Poor impulse control" is not equivalent to substantial impairment of one's capacity to conform one's conduct to the requirements of law. The fact that Oyola's poor impulse control "interfered" with his ability to conform his conduct to the requirements of law of alone plainly denotes a lesser degree of impairment than the "substantial impairment" required by statute.

This distinction is not merely semantic. Courts often reject the capacity-to-conform statutory mitigator when the defendant's

capacity is impaired, but not **substantially** impaired, considering the evidence as a non-statutory mitigator instead.[3] *See e.g. Silvia v. State*, 60 So.3d 959, 967 (Fla. 2011); *Lynch v. State*, 841 So.2d 362, 374 (Fla. 2003)("the defendant's capacity to conform his conduct to the requirements of law was impaired, but not substantially impaired); *Gorby v. State*, 819 So.2d 664, 672 (Fla. 2002)(Gorby's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired (but not *substantially* impaired)"(emphasis in original); *Foster v. State*, 654 So.2d 112, 113 n.5 (Fla. 1995)("Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired-not *substantially* impaired")(emphasis in original)). D'Errico's failure even to state that Oyola's disorder substantially impaired his capacity to conform his conduct to the requirements of law is, at the least, evidence supporting the rejection of the statutory mitigator.

To take a recent example, in *Silvia*, the trial court rejected the statutory mitigating circumstance of substantial impairment of ability to conform behavior to the requirements of the law. A defense expert testified that the defendant "would act out the way that he did due to his impulsiveness and alcohol abuse." *Silvia*, 60 So.3d at

[3]The same principles applies to other statutory mitigators. The defendant's capacity to appreciate the criminality of his conduct may have been impaired, but not "substantially" impaired. Likewise, the defendant may have been under the influence of mental or emotional disturbance, but not "extreme" mental or emotional disturbance. § 921.141(6)(b) & (f), Fla. Stat. Such findings can form the basis of non-statutory mitigation.

965. The expert concluded that the defendant's ability to conform his conduct to the requirements of the law was "somewhat" impaired "in that he has a 'severe personality disorder,' is 'impulsive,' was drinking alcohol, and has 'false beliefs.'" *Silvia*, 60 So.3d at 965. Because the defendant's ability to conform his conduct to the requirements of the law was only "somewhat" impaired, the court considered the evidence as a non-statutory mitigator rather than the statutory mitigator. *Id.* at 967.

The same is true here. Like Silvia, Oyola's mental-health expert testified that he has poor impulse control and a personality disorder. And like Silvia, his expert did not actually testify that his capacity to conform his conduct to the requirements of law was "substantially impaired." And like Silvia, the court in Oyola's case considered his disorder as a non-statutory mitigator because the statutory mitigator was unproven.

Second, the trial court was free to conclude that the foundation of Dr. D'Errico's ultimate conclusion was based upon an account of the attack that was so incompatible with the evidence at trial in critical respects that the ultimate conclusion could be rejected. In the story on which D'Errico based his conclusion, Gerrard confronted Oyola was a false accusation that Oyola was sleeping with Gerrard's wife, and Oyola told Gerrard that he needed to pay his workers. At that point, Gerrard punched Oyola in the face, stopped the truck, and approached Oyola with a knife and swung the knife at him. Oyola punched Gerrard and Gerrard swung the knife at Oyola again. Oyola managed to disarm Gerrard, and then picked up the knife and stabbed

Gerrard more than once. Oyola then got in the truck and left, but saw Gerrard still holding the knife as he left.

Under the circumstances of Oyola's story, his act of repeatedly stabbing Gerrard would not only be fairly attributable poor impulse control, it may well have been fully justified as an act of self-defense. One need not have poor impulse control brought upon by schizoaffective disorder before resorting to stabbing an attacker swinging a knife at him.

However, Oyola's story to Dr. D'Errico is utterly contrary to the evidence, as found by the trial court.[4,5] Oyola did not merely disarm Gerrard and turn Gerrard's knife on him in a sudden, frenzied attack. While that scenario is certainly consistent with D'Errico's theory that Oyola simply lost control and repeatedly stabbed Gerrard, the actual evidence at trial shows that Oyola used at least two different weapons on Gerrard. Assuming that Oyola used the knife on Gerrard first, Oyola still had to acquire the shovel and resume his attack on Gerrard with his new weapon. This alone militates against D'Errico's conclusion that Oyola merely lashed out in a frenzied attack when he lost control of his impulses.

[4]It should be emphasized that Oyola's story, as reported by Dr. D'Errico at the penalty phase, is not evidence of the facts of the offense. It is relevant here only to demonstrate the probative value of D'Errico's testimony.

[5]While the evidence arguably supported more than one inference of how the murder occurred, the sentencing order, in particular the section detailing the facts supporting the HAC aggravator, show the facts as accepted by the trial court.

D'Errico's theory also ignores that Gerrard was locked in the trailer for a length of time after this first attack, and as found by the trial judge, was driven by Oyola to a remote location. At this location, Oyola fought again with Gerrard, this time finally ending Gerrard's life, leaving him for dead on a dirt logging road. These are and is wholly incompatible with the facts as found by the trial judge. As such, the court was free to reject D'Errico's conclusion.

Dr. D'Errico did testify that Oyola's perception of danger may have been impaired by his disorder, so even if the details of the attack may in fact have been different than described by Oyola, the attack was still consistent with the lack of impulse control associated with his disorder. Again, this finding could be rejected by the trial court. No reasonable reading of D'Errico's testimony could show that it was irrelevant to his conclusions that Oyola in fact engaged in a prolonged attack upon Gerrard in two different locations involving at least two separate weapons, rather than a sudden, reactive act with a single weapon. This is clear in the following portion of D'Errico's testimony:

> In my opinion, I think he overreacted to the extent that he kept on with the behavior of stabbing, according to his report. After he bit him on the ear and he dropped the knife, a non-mentally ill individual would probably have ceased and desisted and maybe just stolen his truck or took off with the truck, picked up the knife. But Mr. Oyola apparently lost control and continued to, as he told me, stab the victim impulsively.

(VIII 501). Again, it is clear that D'Errico's opinion is premised upon a sudden attack where Oyola disarmed Gerrard, grabbed the knife,

and engaged in a frenzied attack upon him with the knife. Such an attack is certainly consistent with a person who has poor impulse control. However, the version of the attack supported by the evidence and apparently accepted by the trial court was a prolonged attack involving at least two different weapons, where Oyola drove the victim in a locked trailer to a remote area and finished him off there. Accordingly, even if Dr. D'Errico had testified Oyola's capacity to conform his conduct to the requirements of law, the record contains competent substantial evidence supporting a rejection of that mitigator.

Even if the court did err in rejecting the capacity-to-conform mitigator, the error was harmless beyond a reasonable doubt. Error in rejecting mitigating circumstances is subject to the harmless error test. See *Ault*, 53 So.3d at 195. "[T]he question is whether there is a reasonable possibility that the error contributed to the sentence." *Id.* "Reversal is permitted only if the excluded mitigating factors reasonably could have resulted in a lesser sentence. If there is no likelihood of a different sentence, then the error must be deemed harmless." *Id.*

First, the court explicitly noted in the order that it did not ignore Dr. D'Errico's testimony, and considered it in weighing aggravating circumstances against mitigating circumstances, as a non-statutory mitigator, giving it slight weight. There is no reason to conclude that the court would have given the same evidence any more weight had it considered it as a statutory mitigator rather than a non-statutory one. Moreover, the court noted that the aggravating

circumstances "far outweigh the mitigating circumstances" (I 146), so even an alteration in the weight assigned to this evidence "reasonably could have resulted in a lesser sentence." *Ault*. Those aggravating circumstances were murder committed while on felony probation, murder in commission of robbery, and HAC, each of which were given great weight (I 144-45).

Moreover, even if the court should have found the conform-his-conduct mitigator, the evidence supporting it was not particularly compelling. Dr. D'Errico did not testify that Oyola was incapable of ever conforming his conduct to the requirements of law. Indeed, Oyola's position as a trusted supervisor in Michael Lee Gerrard's business suggests that Oyola had been able to comply with the law when needed. Instead, D'Errico testified only that Oyola's disorder caused poor impulse control in response to real or imagined threats.

Bryant v. State, 785 So.2d 422, 434-436 (Fla. 2001), in which this Court affirmed the rejection of mental mitigation ("neurological defects of his brain that would cause a lack of impulse control and impaired judgment"), is instructive in this respect. "The possibility of organic brain damage," this Court noted, "does not necessarily mean ... that one may engage in violent, dangerous behavior and not be held accountable. There are many people suffering from varying degrees of organic brain disease who can and do function in today's society." *Bryant* at 436, n.11, quoting *James v. State*, 489 So.2d 737, 739 (Fla. 1986). A similar point can be made here. The fact that Oyola has "poor impulse control" that may lead him to

"overreact" to a perceived threat does not necessarily mean that he may engage in violent, dangerous behavior and not be held accountable. As such, even if the court should have found the conform-his-conduct mitigator, the court would have been justified in assigning it slight weight. Under these circumstances, any error in rejecting the conform-his-conduct mitigator is harmless beyond a reasonable doubt.

Finally, Oyola also seems to suggest that the court erred in failing to offer a sufficient explanation for its rejection of the conform-his-conduct mitigator in the sentencing order, citing *Campbell v. State*, 571 So.2d 415 (Fla. 1990). Indeed, *Campbell* requires the sentencing court to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence." *Id.* at 419. However, the court's failure to expressly evaluate mitigating circumstances in the sentencing order can be harmless. See e.g., *Deparvine v. State*, 995 So.2d 351, 381 (Fla. 2008)(finding trial court's failure to giving more express consideration to mitigating evidence harmless, because even if the court had given greater weight to the mitigating evidence there was "no reasonable doubt that the trial court would have imposed the death penalty"). The court's reasons for rejecting the conform-his-conduct can be derived from the evidence, as set forth above, and for the same reason, there is no reasonable possibility that more detailed treatment of Dr. D'Errico's testimony would have altered the death sentence.

However, even if the court erred in failing to treat the evidence more thoroughly, and even if such error were not harmless, the proper

remedy is “resentencing before the judge” rather than a new penalty phase. *Campbell*, 571 So.2d at 420.

ISSUE III

DID THE TRIAL COURT ERR IN FINDING THAT OYOLA'S DEATH SENTENCE WAS NOT UNCONSTITUTIONAL PURSUANT TO *RING V. ARIZONA*? (Restated)

Oyola asserts that Florida's death penalty statute violates the Sixth Amendment right to a jury trial as announced in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). Undersigned has failed to discover any such claim in the record on appeal. Claims pursuant to *Ring* must be preserved for appellate review. *Evans v. State*, 946 So.2d 1, 15 (Fla. 2006)(*Ring* claim was "procedurally barred because Evans did not preserve this claim by challenging the constitutionality of Florida's sentencing scheme both at trial and on direct appeal"). Accordingly, Oyola's failure to raise this claim below bars appellate review.

Even if Oyola did claim below that *Ring* renders his death sentence unconstitutional, he is not entitled to relief. This Court has "repeatedly rejected" *Ring* challenges to Florida's death penalty statute. See e.g. Ault v. State, 53 So.3d at 205-06. Furthermore, two of the aggravating circumstances found by the trial court were that Oyola was on felony probation at the time of the murder, and that the murder occurred during the commission of a robbery. This Court has repeatedly held that *Ring* does not apply to cases where these aggravating factors are present.

Oyola was on felony probation at the time of the murder. *Ring* does not apply where the under-sentence-of-imprisonment aggravating factor is present.[6] *Hodges v. State*, 55 So.3d 515, 540 (Fla. 2010);

[6]The aggravating circumstance reads, "The capital felony was committed by a person previously convicted of a felony and under

Victorino v. State, 23 So.3d 87, 107-108 (Fla. 2009)(holding that *Ring* does not apply to cases that include the prior violent felony aggravator or the under-sentence-of-imprisonment aggravator); *Smith v. State*, 998 So.2d 516, 529 (Fla. 2008)(rejecting a *Ring* claim and explaining that the under-sentence-of-imprisonment aggravator "may be found by the judge alone"); *Floyd v. State*, 913 So.2d 564, 577-578 (Fla. 2005)(same). Because the under-sentence-of-imprisonment aggravator is recidivism-based, the judge alone may find it. *Ring* does not apply.

Moreover, even if *Ring* applied to this case, the jury found an aggravator during the guilt phase. The jury convicted Appellant of robbery with a deadly weapon in the guilt phase, thereby necessarily finding the "during the course of a felony" aggravator in the guilt phase. When one of the aggravating circumstances is the murder was committed in the course of a felony and the jury unanimously found the defendant guilty of that felony in the guilt phase, that finding satisfies *Ring*. *Cave v. State*, 899 So.2d 1042, 1052 (Fla. 2005)(citing *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003); *Kormondy v. State*, 845 So.2d 41, 54 n.3 (Fla. 2003) and *Doorbal v. State*, 837 So.2d 940, 963 (Fla. 2003)).

Accordingly, Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial.

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sentence of imprisonment or placed on community control or on felony probation." § 921.141(5)(a), Fla. Stat.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence entered in this case.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to W. C. McLain, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on July 29, 2011.

Respectfully submitted and served,

PAMELA JO BONDI
ATTORNEY GENERAL

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By: THOMAS D. WINOKUR
Attorney for State of Florida

Assistant Attorney General
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674

Florida Bar No. 906336
[AGO# L10-2-1385]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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Thomas D. Winokur
Attorney for State of Florida