

IN THE SUPREME COURT OF FLORIDA

MIGUEL OYOLA,

Appellant,

v.

CASE NO. SC10-2285

STATE OF FLORIDA,

Appellee.

_____ /

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 201170

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	24
ARGUMENT	26
ISSUE I	
THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING GREAT WEIGHT TO THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.	26
ISSUE II	
THE TRIAL COURT ERRED REJECTING AS A STATUTORY MITIGATING CIRCUMSTANCE THAT OYOLA'S MENTAL CONDITION AT THE TIME OF THE OFFENSE IMPAIRED HIS ABILITY TO CONFORM HIS CONDUCT TO LEGAL STANDARDS AND IN GIVING SLIGHT WEIGHT TO OYOLA' MENTAL CONDITION AS A NON-STATUTORY MITIGATING CIRCUMSTANCE.	31
ISSUE III	
THE DEATH PENALTY IS UNCONSTITUTIONALLY IMPOSED BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO <u>RING v. ARIZONA</u> .	34
CONCLUSION	36
CERTIFICATE OF SERVICE	36
CERTIFICATE OF COMPLIANCE	36
APPENDIX	

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Apprendi v. New Jersey</u> , 530 U.S. 446 (2000).....	24, 34
<u>Bottoson v. Moore</u> , 833 So. 2d 693 (Fla. 2002), <u>cert. denied</u> , 123 S.Ct. 662 (2002).....	25, 35
<u>Campbell v. State</u> , 571 So. 2d 415 (Fla. 1990).....	31, 33
<u>Foster v. State</u> , 679 So. 2d 747 (Fla. 1996).....	33
<u>Jones v. State</u> , 332 So. 2d 615 (Fla. 1976).....	28
<u>King v. Moore</u> , 831 So. 2d 143 (Fla. 2002), <u>cert. denied</u> , 123 S.Ct. 662 (2002).....	25, 35
<u>Marshall v. Crosby</u> , 911 So. 2d 1129 (Fla. 2005).....	35
<u>Miller v. State</u> , 373 So. 2d 882 (Fla. 1979).....	28
<u>Miller v. State</u> , 42 So. 3d 204 (Fla. 2010).....	35
<u>Penn v. State</u> , 575 So. 2d 1079 (Fla. 1991).....	28
<u>Ring v. Arizona</u> , 536 U.S. 584 (2002).....	24, 25, 34, 35
<u>Ross v. State</u> , 474 So. 2d 1170 (Fla. 1985).....	28
<u>Sexton v. State</u> , 775 So. 2d 923 (Fla. 2000).....	26
<u>State v. Steele</u> , 921 So. 2d 538 (Fla. 2005).....	35
<u>Trease v. State</u> , 768 So. 2d 1050 (Fla. 2000).....	31
<u>Walls v. State</u> , 641 So. 2d 382 (Fla. 1994).....	31
 <u>STATUTES</u>	
§ 921.141 (6)(f), Fla. Stat.....	24, 32
§ 921.141,, Fla. Stat.....	25, 34, 35

CONSTITUTIONS

Amend. V, U.S. Const.....30, 33
Amend. VI,, U. S. Const.....30, 33, 34
Amend. VIII, U. S. Const.....30, 33
Amend. XIV, U. S. Const.....30, 33
Art. I, § 16, Fla. Const.....30, 33
Art. I, § 17, Fla. Const.....30, 33
Art. I, § 9, Fla. Const.....30, 33

IN THE SUPREME COURT OF FLORIDA

MIGUEL OYOLA,

Appellant,

v.

CASE NO. SC10-2285

STATE OF FLORIDA,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The record on appeal consists of ten volumes. Volume one contains the records of the lower court. Volumes two through nine contain the transcripts of the jury trial and sentencing. Volume ten contains copies of the various exhibits introduced in the lower court. References to the record will be by volume and page number.

A copy of the trial court's sentencing order is attached to this brief as an appendix.

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

On October 2, 2008, a Jefferson County grand jury indicted Miguel Oyola for first degree murder for the death of Michael Gerrard, kidnapping to facilitate a felony, armed robbery, and theft of a motor vehicle. (R1:6-8) Oyola pleaded not guilty. (R1:13) The case 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). (R1:49-54; T7:434-436) The trial court orally adjudged Oyola guilty immediately after receipt of the verdicts. (T7:436) After the penalty phase of the trial held on September 3, 2010, the jury recommended a death sentence with a vote of 9 to 3. (R1:62; T8:555) The Defense and the State filed sentencing memoranda on September 27, 2010. (R1:63-83) The court received and considered a report of Oyola's psychological evaluation and transcripts of interviews of Oyola and his mother. (R1:87-142, 146)

On October 25, 2010, Circuit Judge L. Ralph Smith, Jr. 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). (T9:1-14; R1:149-163) In the court's order supporting the death sentence (R1:143-147)(App.A), the court found three aggravating circumstances: (1) the homicide was committed while Oyola was on felony probation for 2006 judgment for grand theft (great weight); (2) the homicide was committed during a robbery and for pecuniary gain (great weight); (3) the homicide was especially heinous, atrocious or cruel (great weight). (R1:144-145)

In mitigation, the court initially rejected the statutory mitigating circumstance that Oyola had an impaired capacity to conform his conduct to the requirement of the law. The court considered and gave slight weight to the mental health expert's opinion that Oyola suffered Schizoaffective Disorder, Bipolar Type, to Oyola's abusive childhood home and his family history of mental illness. The court noted that transcripts of interviews of Oyola's father and mother were presented and considered. As non-statutory mitigation, the court found and gave slight weight to Oyola's serious drug abuse history, his abusive home life as a child that created a cycle of violence, and Oyola's mental illness. (R1:145-146)

On November 17, 2010, Oyola filed a notice of appeal to this Court. (R1:181-182)

The Guilt Phase

On December 4, 2007, Christopher Miller drove his 18-wheel truck down a logging road in Jefferson County. (T4:103) He worked for Murray Logging, and he was hauling equipment in the woods off Tram Road. (T4:103) As he came around a curve on the logging road, there was a white truck and trailer parked in the road. (T4:104-105) 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. (T4:105) After a minute, he blew his horn because the truck and trailer blocked the road. (T4:105) About that time, he noticed that the trailer was rocking, and two men fell out of the trailer. (T4:105) They were fist-fighting. (T4:105, 111) Miller saw no weapon in anyone's hand. (T4:106) One or both of them were bleeding because they wore white T-shirts with red stains. (T4:106, 112) The two men tussled on the ground, with the medium built man on top of the heavier man punching with his fists. (T4:107-108, 111-112) The heavier man seemed tired. (T4:108) Miller backed his truck back around the curve and called the wood crew for assistance. (T4:108) A man from the wood crew, Raymond Padgett, came to assist. (T4:108-109, 113) The two went back around the curve, but the truck and trailer were gone. (T4:108-109, 115) One of the men who had been fighting was on the side of the road, on his knees, trying to get up. (T4:108-109, 114-

115) He seemed to have difficulty breathing, and he fell down. (T4:108-109) A Jefferson County deputy and emergency medical service arrived at the scene. (T4:91-101) Paramedic Kim Rothrock determined that the man found was dead. (T4:98-101) Sergeant John Haire, with the Florida Highway Patrol was on Tram Road on December 4, 2007, when he noticed a sheriff's car passing and heard a dispatch that there had been an incident off Tram Road. (T4:134-136) About ten minutes before other emergency vehicles passed his position, Haire saw a white truck and trailer traveling west toward Tallahassee. (T4:136) Later, he learned the description of the victim's vehicle and recalled that the truck and trailer he saw matched. (T4:136)

Dr. Lisa Flannagan, a medical examiner, performed an autopsy on the man identified as Michael Lee Gerrard on December 7, 2007. (T4:49) Gerrard had various injuries including abrasions, blows to the head and stab wounds. (T4:51-83) Flannagan found multiple abrasions and lacerations to the head. (T4:54-57) Some of these appeared to be caused by a sharp edge consistent with the edge of a shovel. (T4:54-56) The blows to the right side of the head produced bleeding into the subdural space over the brain. (T4:75-77) There were seven stab wounds to various areas including the arm, wrist, abdomen, and shoulder. (T4:57-70, 73-74, 81-83) The stab wounds were one inch to seven inches in depth. (T4:67-69, 73-

74, 81-83) The single wound of seven inches penetrated the right side of the abdomen and incised the kidney. (T4:67-69, 73-74, 81-83) Based on several abrasions and incised wounds to the arms and hands, along with the location of other wounds, Flannagan testified these were consistent with defensive wounds during a struggle. (T4:79-81) However, Flannagan could not determine if Gerrard was conscious at the time of the stab wounds. (T4:81) The cause of death was head trauma and stab wounds. (T4:81)

Gwendolyn Rhodes lived with Miguel Oyola in a house off WW Kelly and FA Ash roads. (T4:156) They shared the residence for five years. (T4:156) Oyola worked for Lee Gerrard in December 2007. (T4:156) Gerrard owned a white, extended cab truck and sometimes pulled an enclosed trailer. (T4:156-157) Oyola occasionally drove the truck. (T4:157) On December 4, 2007, Rhodes was leaving for work around 6:00 a.m., and she asked Oyola if he was working that day because he was still in bed. (T4:157) He said he did not feel well and did not plan to go to work. (T4:157-158)

When Rhodes left for work, the white truck was not at the residence, since Oyola was not driving it at that time. (T4:158) During the morning, Rhodes called both the house telephone and Oyola's cell phone to check on him, but no one answered. (T4:158-159) Oyola answered his cell phone around noon, he said that he had been sleeping and that he felt better. (T4:159-160) Rhodes

thought Oyola was still at the house, but she did not know where he was at that time. (T4:160)

Rhodes returned home about 4:45 p.m., and she saw Gerrard's white truck parked across the street from her driveway. (T4:160-161) No one was around the truck. (T4:162) At home, Rhodes found Oyola in the bathtub. (T4:162) He was bathing in a bleach and water solution, a jug of bleach was beside the tub. (T4:162-163) This was unusual since Oyola hated the smell of bleach. (T4:163) Rhodes also saw a black trash bag with something beige that appeared to be Oyola's new Dickie brand pants. (T4:164) She joked with Oyola and said he was throwing away his pants because he must have been with another woman. (T4:164) Oyola told her that she did not want to know what was inside the bag because it would make her sick. (T4:164)

Oyola left in Rhodes' car. (T4:165) Later, he called her and said she could pick up her car at the end of the road. (T4:165) She found the car on the side of the road where the white truck had been parked earlier. (T4:165-166) Oyola said he was with friends, but he wanted her to pick him up later. (T4:166) He called her, and she picked him up in the K-Mart parking area off Blairstone Road across from the Embarq office. (T4:167-168) 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. (T4:168-169) After

returning home, Oyola received a telephone call prompting him to leave for a second time. (T4:169-170) He said Gerrard did not pick up the work crew, and he took Rhodes' car to get them. (T4:170) When he returned, he no longer wore the jacket. (T4:171) At some point, Oyola told Rhodes that there was \$700 in the glove compartment of her car. (T4:171-172) He said that it was money owed to him, but he did not say where he got it. (T4:172) Law enforcement later retrieved the money. (T4:171)

Gonzalo Hernandez worked for Michael Gerrard cutting grass in December 2007. (T5:226) Jesus de Leon and Flaco Cerro also worked with Hernandez. (T5:226) On December 4, 2007, Gerrard took the three men to one job site around 2:00 p.m., and Gerrard left with the truck and trailer. (T5:227-228) Gerrard never returned to pick up the three men. (T5:228) Finally, they called Oyola, who had not worked that day, and he agreed to pick up the men. (T5:228-229) Oyola arrived in a car, not the the white work truck. (T5:229-230)

Flaco Cerro noticed that his jacket that he had left in the truck earlier was in the car. (T5:229-230) He took the jacket, insisting to Oyola that the jacket belonged to him. (T5:231) At a later time, Cerro gave the jacket to Hernandez who wore it when he spoke to law enforcement. (T5:231) Oyola gave the three men \$100 to buy food and beer since they were out so late. (T5:234)

Neighbors of Oyola's observed Gerrard's white truck around the

area on December 4, 2007. (T4:138-154) Travis Reddick was Miguel Oyola's neighbor. (T4:138-139) He was also familiar with Oyola's boss and knew him by "Lee." (T:139-140) Reddick knew Lee's white truck and trailer, and he also knew that Oyola sometimes drove the truck. (T4:140) Between 11:00 a.m. and noon on December 4, 2007, Reddick saw Miguel and Lee in Miguel's yard. (T4:140-141) After about 20 to 25 minutes, the two of them left together in the white truck. (T4:140-141) Reddick said there was no trailer with the truck that morning. (T4:140-141) When Reddick left for work around 3:00 p.m., he saw the truck and trailer together parked on the road across from the neighborhood. (T4:141) The driver's door was open, but Reddick did not see anyone with the truck. (T4:141-142) At this time, Reddick's mother and aunt were with him. (T4:142) Paula Moore was taking her son, Travis, to work that afternoon. (T4:145, 149) She saw the white truck only, without the trailer, but there was a car parked behind the truck. (T4:146) A man or a woman was kneeling beside the car. (T4:146) Both of the truck doors were open, but Moore did not see anyone by the truck. (T4:146-147) Luella Copeland was in the car with Travis Reddick and Paula Moore. (T4:148-149, 151) She saw the white truck, without a trailer, parked on the side of road. (T4:151-152) One truck door was open, but she did not see anyone by the truck. (T4:151)

Deputy Robert Wright located the white truck about 3:00 a.m.

on December 5, 2007, parked on Blairstone Road in front of the Embarq Telephone office across the street from K-Mart. (T4:180-182)

Amy George, an FDLE crime scene investigator, examined and photographed the truck. (T4:121-128) In the bed of the truck, she found landscaping materials, fertilizer, a shovel, a gas can, a jacket and drink containers. (T4:124-125) Some reddish-brown stains in the back of the truck tested positive for suspected blood. (T4:127) Another reddish-brown stain on the shovel also tested positive for possible blood. (T4:127) The area of the shovel where one would step on the blade appeared to be bent inward. (T4:128) Inside the truck, the driver's side floor mat was missing, that other passenger area had mats. (T4:125-126) The driver's area appeared to be cleaner. (T4:126) There were marks on the seat that appeared be consistent with a vacuum cleaner. (T4:126)

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. (T4:174) They stopped, walked to the trailer and attempted to put out the fire. (T4:174-175) However, the fire got bigger, and they smelled gas. (T4:174-175) The trailer door was open, and they could see blood smeared on the door and inside the trailer. (T4:175) Tyler called his mother to get someone to call for help. (T4:175)

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. (T4:176-179) Chris Scovotto, a detective with the fire marshal's office, examined the trailer and scene. (T5:219-223) He noted there was blood on the exterior of the trailer, and he found some burnt clothing and grass outside the trailer. (T5:221) These items and soil samples from underneath the trailer tested positive for gasoline. (T5:222-223) There was also a pour pattern on the exterior and interior of the trailer. (T5:223) No mechanical or electrical malfunction was found with the trailer. (T5:222-223) Scovotto concluded the fire was intentionally set using an ignitable liquid. (T5:223)

Robert Yao, a laboratory analyst with FDLE, examined and photographed the trailer. (T5:186- 216) He examined the trailer where it was found. (T5:189) At that time, he noted 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. (T5:189) The side door damage was consistent with some forcing the door open from the inside. (T5:191-192) Various blood stains throughout the inside the trailer included drips, splatters and smears. (T5:192-198) 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. (T5:196) Another series of mist-like stains

seem consistent with blood being exhaled. (T5:198) Yao testified about a number of photographs of the trailer. (R5:190-214)

Michael Lee Gerrard maintained his business checking account at Wakulla Bank for C & G Outdoor Services. (T6:298-299) Tammy Moore, a fraud investigator with the bank, testified about the account records. (T6:298) The account had one debit card issued. (T6:299) There were three debit card transactions on December 3, 2007, at Wal-Mart. (T6:300-301) One was 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. (T6:300-301) On December 4, 2007, there was a cash withdrawal by Gerrard for \$900 at 2:03 p.m. (T6:301-302) Another bank employee, Chastity Risoldi, knew Michael Gerrard and assisted him with his business account. (T6:303-304) She dealt with him on almost a daily basis giving him account information in balances, transactions and cashing payroll checks. (T6:304) Risoldi also met Miguel Oyola who sometimes accompanied Gerrard to cash checks. (T6:306) On December 4, 2007, shortly after lunch time, Gerrard spoke to Risoldi by telephone to inquire about his account. (T6:304-305) In particular, he inquired about the debit card transactions. (T6:305) After hearing the information, Gerrard seemed surprised and angry, and he wanted more information about the transactions. (T6:305) Risoldi expected Gerrard to come to the bank to see the records. (T6:305-306)

Thomas Roddenberry testified about records and security video at Wal-Mart. (T6:308-325) Roddenberry was able to retrieve electronic transaction records made with the debit card from Gerrard's business bank account. (T6:311-313) Cameras over the registers produce a video of each transaction. (T6:313-314, 319-323) There were transactions involving the debit card on December 3, 2007, at the Appalachee Parkway Wal-Mart. (T6:315-322) At 9:06 a.m., at register #7, three \$50 gift cards were purchased. (T6:315) At the same store at 3:35 p.m., at register #9, four \$100 gift cards were purchased. (T6:315) A third transaction occurred at 7:47 p.m. at register #13 where there was an attempt to purchase a total of \$3054.13 worth of items, including six \$500 gift cards. (T6:316-317) The transaction was declined. (T6:315-316) Nine minutes later at the same register, an attempt to purchase three \$500 gift cards was declined. (T6:318) A purchase of merchandise for \$84.09 was then made using the card. (T6:318) Another transaction using the card occurred at the Tennessee Street Wal-Mart at 10:09 p.m. (T6:323) Three \$50 gift cards were purchased. (T6:323)

After Gerrard's death, some friends and family members met to determine if there was a way to keep the lawn maintenance business operating. (T6:246-247) They met with Miguel Oyola because he was a key part of the business in that he knew the day-to-day

operations and customers. (T6:247) A family friend, Kevin Dunn, said he was uncomfortable speaking to Oyola because there had been some speculation that he may have been involved in the homicide. (T6:247-248) After the business discussion, Oyola spoke with Dunn and proclaimed his innocence. (T6:249-250) Oylola said that he had not seen Gerrard the day of the homicide, but Gerrard did drop money for Oyola, leaving it in Oyola's mailbox. (T6:250-251) He said it was \$700 to \$800 in cash. (T6:251)

Investigator Sally Cole went to Oyola's house on December 4, 2007, at 11:05 p.m. to inform him that his boss had died. (T6:254-255) She told him that Gerrard had passed away without specifically stating how he had died. (T6:255) Cole asked Oyola to come to the sheriff's office to talk, and she gave him the option of riding with her or driving his own vehicle. (T6:256) He rode with Cole. (T6:256) As they entered the office, Oyola said, "I can't believe someone killed him." (T6:257) While in the interview room, Cole noted that Oyola did not have any abrasions, scratches or visible injuries to his hands, face or neck. (T6:258-259) Oyola agreed to be interviewed and signed a waiver of his rights. (T6:260-263) He said he had been sick that day and did not go to work. (T6:264) Because he did not have a car, he stayed home all day until his girlfriend returned. (T6:264) Later, Gonzales, from the work crew, called and informed Oyola that Gerrard had not

picked them up from a job site. (T6:264-265) Oyola picked the men up using his girlfriend's car and he gave the men \$50 to buy some beer. (T6:265-266) Oyola said that Gerrard called him during the day, and he talked about taking Oyola and his girlfriend out for Christmas dinner. (T6:266) Oyola never mentioned getting several hundred dollars in his mailbox from Gerrard. (T6:267) Oyola gave some names of people who had a conflict with Gerrard. (T6:267) 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. (T6:269-273, 288-289) A floor mat was also found in the woods off of WW Kelly Road. (T6:273-274) Cole acquired Oyola's wallet and no debit card related to Gerrard's account was found inside. (T6:273)

James Hendrith, in prison at the time of his testimony, testified that he was incarcerated with Oyola in November 2008. (T6: 276, 280) According to Hendrith, Oyola told him he had robbed and killed someone. (T6:278) He said he hit the man with a shovel and stabbed him. (T6:278-279) Oyola said he took \$375 and the man's truck. (T6:279) Additionally, Oyola allegedly told Hendrith that he took the knife home and put it on the counter before later disposing of it. (T6:280, 282-283) He took his bloody clothes home before burning them. (T6:280) Oyola was talking about the offense because he had just received an indictment in the case.

(T6:279) Hendrith acknowledged he wrote the State Attorney about the information. (T6:278, 286)

Valecia Hickman, an FDLE laboratory analyst, testified about the DNA testing performed on items of evidence. (T6:337-339) On the shovel, Hickman found a mixture of DNA for both Gerrard and Oyola. (T6:341) A number of places on the shovel, including blood stains, showed Gerrard's DNA alone. (T6:342-344) 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. (T6:294-297, 345) An unknown person's DNA was a minor contributor to the DNA mixture found on the debit card, but Oyola was excluded as a contributor. (T6:345-346) Regarding the victim's truck, several tested areas and items revealed a DNA mixture including both Gerrard and Oyola. (T6:346-350) 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. (T6:350-351)

The Penalty Phase And Sentencing

At the penalty phase of the trial, the State presented a 2006 judgment from Leon County where Oyola was placed on probation for grand theft. (T8:459)(Exhibit A) Prepared victim impact statements from Michael Gerrard's wife, parents and sister were introduced and read to the jury. (T8: 460-465)(Exhibit B) Each

statement described the loss the family endured because of Gerrard's death. (T8: 460-465) Additionally, each one asked that Oyola be sentenced to life in prison. (T8:461, 462, 465) Gerrard's wife explained her reason for asking for Oyola's life:

... My whole adult life I never believed in the death penalty. I'm telling you this because you're going to make your decision one way or another, but I want to make it clear that if you give him the death penalty, you're making that decision on your own and I have nothing to do with that. I've never believed in it, it doesn't make sense, and it's not going to bring Lee back. And I don't want to be responsible for somebody dying. I've already had to deal with this enough.

(T8:465)

The defense first presented Miguel Oyola's brother, Manuel Oyola, to testify. (T8:465) Manuel is nine years older than Miguel, and he remembered Miguel as a young child. (T8:467) At that time, the family lived in Connecticut. (T8:467) Miguel was the youngest of several children and a good child. (T8:468-469) All of the children suffered abuse at the hands of their mother, and all left the home as young teenagers. (T8:469) Their mother beat them with belts, broomsticks, and pointed shoes. (T8:469) The boys left around age 15, and the girls left earlier at 13 and 14. (T8:469-471) Manuel left the home at 15, leaving Miguel alone at the home at age six or seven. (T8:469-470) At age 12 or 13, Miguel started using drugs. (T8:470) The physical abuse impacted Miguel's ability to handle stress and emotional situations. (T8:471) He had

a temper and acted impulsively. (T8:471) Manuel testified that over time, he had forgiven his parents, and he still visited them. (T8:478) They were unable to travel to the trial due to health problems. (T:472-474)

Dr. Michael Thomas D'Errico, a forensic psychologist, examined Miguel Oyola and testified for the defense. (T8:479) D'Errico initially evaluated Oyola on March 4, 2008, regarding an earlier case, to determine Oyola's competency to stand trial. (T8:485) Although no tests were administered in this evaluation, D'Errico did review various medical records and performed a structured interview. (T8:486) These showed that Oyola had several symptoms of a psychotic mental illness and a history of cocaine abuse. (T8:486) Oyola reported hallucinations with voices telling him negative things about himself and urging him to hurt himself. (T8:486) He reported olfactory hallucinations of smelling wet dogs. (T8:486) Oyola had a family history of mental illness, reporting that his mother had schizophrenia and bipolar disorder. (T8:489) A brother also had schizophrenia and some cousins had mental health issues. (T8:490) Oyola's school records revealed that he was in special education classes and tested in the seventh percentile in both reading and math. (T8:490) Records from a correctional center in Philadelphia showed various psychiatric treatments for schizo-affective disorder including psychotropic

medications. (T8:491) Oyola was diagnosed with substance abuse for cocaine, heroin and PCP. (T8:491) Psychiatrists at the jail had working diagnosis of schizophrenia/paranoid type that involves hallucinations and delusions. (T8:487) D'Errico testified that individuals with these disorders who stop taking medications for the symptoms have the symptoms return. (T8:491) D'Errico found Oyola incompetent and recommended inpatient treatment to aid in restoring him to competency. (T8:487-488)

On June 10, 2010, D'Errico evaluated Oyola in reference to this case. (T8:491-492) At that time, Oyola was being treated with antipsychotic medication and antidepressants. (T8:493) As a result, his mental condition was much improved compared to the 2008 evaluation. (T8:493) D'Errico determined that at the time of the homicide in 2007, Oyola was not receiving treatment for his mental illness, because he was unable to afford the medications. (T8:494)

The evaluation in 2010 included several tests and clinical interviews. (T8:495-503) D'Errico tested and controlled for possible malingering, and he found no indication that Oyola was malingering during the evaluation. (T8:495-496) Oyola's intellectual functioning on the Wechsler Intelligence scale was borderline with a full-scale score of 74, 26 points below average. (T8:496) Testing used for possible brain damage did not reveal a finding of damage, even though Oyola had a history of some head

injury. (T8:496-497) Personality testing revealed conclusions consistent with Oyola's psychiatric history, anxiety and drug abuse problems. (T8:497)

Dr. D'Errico addressed how Oyola's untreated schizo-affective disorder impacted Oyola's behavior at the time of the offense. (T8:499-505) Oyola described a confrontation with his boss. (T8:499-500) His boss punched him in the face, stopped the truck and got a knife from the back of the truck. (T8:500) A fight continued, Oyola punched his boss, threw him to the ground and managed to get the knife. (T8:500) Oyola stabbed the victim more than once, got into the truck and drove away. (T8:500) As Oyola left, he saw the victim getting up with the knife. (T8:500) D'Errico stated that Oyola was likely experiencing psychotic symptoms - being paranoid, hearing voices. (T8:501) He would have had poor impulse control and an inability to control his behavior. (T8:500) D'Errico testified that Oyola's paranoia lead him to overreact and see a severe, life-threatening situation where one did not really exist. (T8:501-502) He could have misinterpreted mere verbal anger as a physical threat. (T8:502, 504) Once he perceived a physical threat, Oyola's lack of impulse control would have prevented him from stopping his impulse to attack. (T8:504) D'Errico stated that Oyola had the ability to appreciate the criminality of his conduct, but he lacked the capacity to conform

his conduct to the requirements of the law due to his untreated schizo-affective disorder. (T8:503-505)

Prior to the court's sentencing, the defense submitted a sentencing memorandum with a copy of Dr. D'Errico's written evaluation and transcripts of investigative interviews of Oyola's father and mother. (R1:63-79,87-142) Manuel Oyola and Leonarda Oyola married in 1956, and raised six children, Miguel was the youngest. (R1:89) Manuel confirmed that his wife had mental health problems. (R1:90-91) The problems became apparent after the birth of their first child. (R1:91) There were times that Manuel was concerned for the safety of the child. (R1:91) Leonarda was hospitalized for her "nerves", and she received electroshock therapy. (R1:91-92) Manuel was away from the family for long periods of time for work, and he and his wife had some informal separations. (R1:95, 101) Manuel knew his wife had angry outbursts, but because he was away so much, he did not know how she was acting with the children. (R1:96) There were times when his wife would not take her medications. (R1:102) There were times when she hit the children. (R1:96) During this time, Manuel also drank alcohol, and he sometimes came home drunk. (R1:96-97) Manuel thinks the children suffered as the result of his wife's illness. (R1:102)

The family moved a number of times. (R1:93-94) Miguel attended

several different schools. (R1:94) He was not a good student, and he did not like school. (R1:102) When Miguel was in the second or third grade, Manuel notice the he would talk and argue with himself. (R1:102) Miguel did not have many friends growing up, but he was close to his brother, Tony. (R1:94,99) When Tony left home to join the Marines, Miguel was greatly affected. (R1:99) He was unhappy and misbehaved. (R1:99) One boy who had actually been Tony's friend and was older, continued a friendship with Miguel. (R1:99) Unfortunately, that boy was killed. (R1:99-100) Miguel lacked direction, and at 14 years old, he began to get into trouble. (R1:100)

Leonarda Oyola, Miguel's mother, acknowledged that she was sick, and she also stated that Miguel was sick "with nerves." (R1:105-108) Miguel started talking to himself when he was six or seven years-old. (R1:108) They did not take him to the hospital because they did not have the means to take him. (R1:109) Miguel did poorly in school, and he suffered "greatly from nerves. (R1:140) He was very agitated, "hopelessly frustrated", and made constant movements with his hands. (R1:109) No psychiatric treatment was sought for Miguel. (R1:140) Leonarda stated that her mental condition is much improved because of the medication she has now taken for several years. (R1:113-114) She knew the medicine was for her "nerves", and she thought it might be for schizophrenia.

(R1:114) Additionally, Leonarda confirmed she was treated with electroshock therapy after her first child was born. (R1:115-116) Over the years, she noted that she had anger episodes and she is bothered when things are not perfectly clean. (R1:123) She would hit the children. (R1:124) Sometimes she used things to hit them, threw items at them, but she denied ever hitting them with the broom. (R1:124-125) She remembered throwing a glass container at one of the children, and he had to go to the hospital for stitches. (R1:1260) One of the girls came home late and her clothes were dirty -- prompting Leonarda to hit her with an electrical cord, leaving marks on her stomach. (R1:126) The children were hit in the face in public sometimes. (R1:128) All of the children left home between the ages of 14 and 16 years-old. (R1:131

SUMMARY OF ARGUMENT

1. The trial court found the aggravating circumstance that the homicide was especially heinous, atrocious or cruel based on the number of wounds and the confinement of the victim in the utility trailer. However, trial court abused its discretion in determining the weight of the circumstance, because the court placed undue reliance on the prosecutor's unproven theory of the case and also failed to evaluate the evidence of multiple wounds in light of Oyola's mental condition at the time of the crime.

2. The evidence proved that Oyola's mental condition qualified for the statutory mitigating circumstance under Section 921.141 (6)(f), Florida Statute. In sentencing Oyola to death, the trial court improperly evaluated the evidence of Oyola's mental impairments, erred in rejected the statutory mitigating circumstance and in giving Oyola's mental condition only slight weight as a non-statutory mitigator.

3. Florida's death penalty statute is unconstitutional in violation of the Sixth imposed a sentence of death based on the Sixth Amendment 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. Florida's death penalty statute violates Ring in a number

of areas including the following: the judge and the jury are co-decision-makers on the question of penalty and the jury's advisory sentence recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to be unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous; and the State is not required to plead the aggravating circumstance in the indictment.

Oyola 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. 662 (2002). Oyola now asks this Court to reconsider its position in Bottoson and King.

ARGUMENT

ISSUE I

THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING GREAT WEIGHT TO THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

Standard of Review

A trial court's decision as to the weight afforded an aggravating circumstance is reviewed on appeal for abuse of discretion. See, e.g., Sexton v. State, 775 So.2d 923, 934 (Fla. 2000).

Discussion

The trial court found the aggravating circumstance that the homicide was especially heinous, atrocious or cruel (HAC) based on the number of wounds and the confinement of the victim in the utility trailer. (R1:144-145) (App.) In the sentencing order, the court wrote:

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.

(R1:144-145)(App.)

Initially, the trial court's findings about the victim's confinement are not based on evidence presented at trial. Instead, the court has adopted, completely, the prosecutor's theory presented in closing argument. (T7:383-389) While the physical evidence did establish that the victim was, at some point, confined in the utility trailer, the evidence did not establish when or for how long that confinement may have been. The only evidence at trial was that a confrontation occurred at the one location where a witness actually observed the fight occurring both inside and outside the trailer and where the victim was found. (T4:103-112)

Based on the evidence, the only proof was that an altercation occurred at the one location and included a time where the victim was confined in the trailer. (T4:103-112) The prosecutor's theory that the fight occurred at another location and that the victim was transported in the trailer to the second location is pure speculation. (T7:383-389) No evidence supports the position that the fight occurred anywhere but the site where fighting was actually observed and the victim was found.

Second, the trial court failed to evaluate the number of wounds taking into account the defendant's mental condition at the time. Although the number of wounds can be evidence tending to establish this aggravating circumstance, many wounds are also indicative of a frenzied, panicked attack and reflect a causal

relationship between the nature of the wounds and the defendant's loss of control at the time of the homicide. This Court has held that in such cases, the HAC factor, although properly found, is of diminished aggravating value since the manner of death is a product of the defendant's mental status. See, e.g., Penn v. State, 575 So.2d 1079 (Fla. 1991)(cocaine addicted defendant beat his sleeping mother with a hammer as he stole property from her house); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985)(victim brutally beaten when defendant who had drinking problems lost control of his anger in a domestic argument); Miller v. State, 373 So.2d 882, 886 (Fla. 1979)(defendant's stabbing a taxi driver seven times during a robbery deemed a product of defendant's mental illness); Jones v. State, 332 So.2d 615 (Fla. 1976)(mentally ill defendant stabbed victim multiple times).

In this case, the court gave the HAC circumstance great weight without ever addressing the legal and factual point that the multiple wounds indicated the defendant's mental and emotional state and loss of control. Dr. D'Errico testified that Oyola suffered from untreated schizo-affective disorder that included psychotic symptoms of paranoia and hallucinations -- hearing voices. (T8:479-505) He also lacked the ability to control impulses leading him to overreact to perceived threats. (T8:501-505) D'Errico concluded that Oyola's paranoia likely lead him to overreact to a verbal

confrontation as if it were a life-threatening situation. (T8:501-502) Then, his lack of impulse control kept Oyola from stopping the attack he began to defend himself from the perceived threat. (T8:499-505) The multiple wounds administered to the victim in this case are consistent with an out of control attack, such as one Oyola's mental condition could produce. As a result, the weight afforded the HAC circumstance must be evaluated in light of Oyola's mental condition. The trial court improperly rejected that Oyola's mental problems proved a statutory mitigating circumstance, See, Issue III, *infra*. However, the trial court did find and consider that these mental problems are mitigating. (R1:145-146)(App.) Consequently, the court abused its discretion in weighing the HAC circumstance without considering that the number of wounds were reflective of Oyola's loss of control during the offense.

Even though the evidence may be sufficient to support the trial court's finding of the HAC circumstance, the evidence does not support the weight afforded the aggravating circumstance. The trial court abused its discretion in determining the weight of the circumstance because the court placed undue reliance on the prosecutor's unproven theory of the case and also failed to evaluate the evidence in light of Oyola's mental condition at the time of the crime.

Oyola's death sentence has been imposed in violation of his

constitutional rights to due process, a fair trial and right to be free from cruel and unusual punishment. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. He now asks this Court to reverse his death sentence.

ISSUE II

THE TRIAL COURT ERRED REJECTING AS A STATUTORY MITIGATING CIRCUMSTANCE THAT OYOLA'S MENTAL CONDITION AT THE TIME OF THE OFFENSE IMPAIRED HIS ABILITY TO CONFORM HIS CONDUCT TO LEGAL STANDARDS AND IN GIVING SLIGHT WEIGHT TO OYOLA' MENTAL CONDITION AS A NON-STATUTORY MITIGATING CIRCUMSTANCE.

Standard of Review

A mitigating circumstance is proven and must be found to exist when supported by the preponderance of the evidence. See, e.g., Walls v. State, 641 So.2d 382 (Fla. 1994). The weight a trial court affords a mitigating circumstance is a discretionary ruling reviewed on appeal for abuse of the discretion. See, e.g. Campbell v. State, 571 So. 2d 415 (Fla. 1990), *receded from on other grounds*, Trease v. State, 768 So.2d 1050 (Fla. 2000).

Discussion

The defense presented the testimony of Dr. D'Errico who testified that Oyola suffered from untreated schizoaffective disorder that included psychotic symptoms of paranoia and hallucinations -- hearing voices. (T8:479-505) Oyola also lacked the ability to control impulses leading him to overreact to perceived threats. (T8:501-505) D'Errico concluded that Oyola's paranoia likely lead him to see a life-threatening situation in a verbal confrontation where there was no such threat. (T8:501-502) Then, his lack of impulse control kept Oyola from stopping his attack to defend himself from that perceived threat. (T8:499-505)

D'Errico testified that Oyola had the ability to appreciate the criminality of his actions, but he lacked the ability to conform his conduct to the requirements of the law. (T8:503-505) The evidence proved that Oyola's mental condition qualified for the statutory mitigating circumstance under Section 921.141 (6)(f), Florida Statutes.

The trial court improperly evaluated the evidence of Oyola's mental impairments in rejected the statutory mitigating circumstance and in giving Oyola' mental condition only slight weight as a non-statutory mitigator. In the sentencing order, the trial judge wrote:

This Court has reviewed each statutory mitigating circumstance and now finds that the evidence is not sufficient to support any statutory mitigating circumstance, and none is found to exist. The defendant contends that the evidence established mental mitigation, as provided by Sec. 921.141 (6)(f), Fla. Stats. He contends that he suffered from a mental illness impairing his ability to conform his conduct to the requirements of law. He also contends that he was raised in an abusive home, which mitigates against the imposition of the death penalty. The evidence did establish that the defendant suffered from Schizoaffective Disorder, Bipolar type, and that there was a history of mental illness in his family, but the evidence was insufficient to show that such mental condition impaired his ability to conform his conduct to the requirements of the law. The circumstances were only given slight weight in weighing the aggravating circumstances against the mitigating circumstances, but they were considered by the Court.

(R1:145)(App A)

The trial court improperly discounted the record evidence and

the expert's opinion without an explanation for doing so based on the evidence. See, Campbell v. State, 571 So. 2d 415, 419-420 (Fla. 1990). A trial court's decision regarding mitigation must be supported with substantial competent evidence in the record. *Ibid.*

While the prosecutor did cross-examine Dr. D'Errico, the State presented no evidence to refute D'Errico's evaluation and conclusions. (T8:450-515) An expert's opinion may be rejected, even when not directly rebutted, but there must be an evaluation of the factual basis in the record for discrediting the expert's conclusions. See, Foster v. State, 679 So. 2d 747, 755-756 (Fla. 1996). The trial court performed no such evaluation in this case to support the rejection of the evidence establishing the mitigating circumstance. Additionally, in considering Oyola's mental illness non-statutory mitigation, the Court abused its discretion in giving the mitigation slight weight without explaining the record basis for rejecting the testimony of the mental health expert. (R1:145)

Oyola's death sentence has been imposed in violation of his constitutional rights to due process, a fair trial and right to be free from cruel and unusual punishment. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U. S. Const. He now asks this Court to reverse his death sentence.

ISSUE III

**THE DEATH PENALTY IS UNCONSTITUTIONALLY IMPOSED BECAUSE
FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL
UNDER THE SIXTH AMENDMENT PURSUANT TO RING v. ARIZONA.**

The trial court erroneously imposed a sentence of death based on the Sixth Amendment 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. Florida's death penalty statute violates Ring in a number of areas including the following: the judge and the jury are co-decision-makers on the question of penalty and the jury's advisory sentence recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to be unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous; and the State is not required to plead the aggravating circumstance in the indictment.

Oyola 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, Oyola 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., Miller v. State, 42 So. 3d 204 (Fla. 2010); 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, Oyola 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. Oyola's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

For the reasons presented in this initial brief, Miguel Oyola asks this Court to reverse his death sentence and remand his case for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Carolyn Snurkowski, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and to Appellant Miguel Oyola, #N15968, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026-1000, on this ____ day of April, 2011.

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
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
Assistant Public Defender
Florida Bar No. 201170
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
Bill.McLain@flpd2.com
(850) 606-1000

ATTORNEY FOR APPELLANT