Docket No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES

RICARDO GONZALEZ,

Petitioner,.

V.

STATE OF FLORIDA,

and

JULIE L. JONES,
Secretary, Florida Department of Corrections

Respondents.

APPENDIX

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Supreme Court of Florida

No. SC17-1499

RICARDO GONZALEZ,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[March 23, 2018]

PER CURIAM.

We have for review Ricardo Gonzalez's appeal of the circuit court's order denying Gonzalez's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

Gonzalez's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). This Court stayed Gonzalez's appeal pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017).

After this Court decided *Hitchcock*, Gonzalez responded to this Court's order to show cause arguing why *Hitchcock* should not be dispositive in this case.

After reviewing Gonzalez's response to the order to show cause, as well as the State's arguments in reply, we conclude that Gonzalez is not entitled to relief. Gonzalez was sentenced to death following a jury's recommendation for death by a vote of eight to four, and his sentence of death became final in 2001.[1] *Gonzalez v. State*, 786 So. 2d 559, 563 (Fla. 2001). Thus, *Hurst* does not apply retroactively to Gonzalez's sentence of death. *See Hitchcock*, 226 So. 3d at 217. Accordingly, we affirm the denial of Gonzalez's motion.

The Court having carefully considered all arguments raised by Gonzalez, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.
PARIENTE, J., concurs in result with an opinion.
LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.

I concur in result because I recognize that this Court's opinion in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017), is now

1. Although our decision affirming Gonzalez's death sentence does not specify the number of Gonzalez's jurors who voted to recommend death, our decision affirming the denial of his initial motion for postconviction relief does. *See Gonzalez v. State*, 990 So. 2d 1017, 1022 (Fla. 2008).

final. However, I continue to adhere to the views expressed in my dissenting opinion in *Hitchcock*.

An Appeal from the Circuit Court in and for Miami-Dade County,
Ellen Sue Venzer, Judge - Case No. 131992CF002141D000XX

Jeffrey Evan Feiler, Miami, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Melissa J. Roca, Assistant Attorney General, Miami, Florida,

for Appellee

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Ricardo GONZALEZ, Appellant,
v.
STATE of Florida, Appellee.
No. 84841.
Supreme Court of Florida.
Sept. 18, 1997.

Rehearing Denied Oct. 30, 1997.

William M. Norris of the Law Offices of William M. Norris, P.A., Coral Gables, for appellant.

Robert A. Butterworth, Attorney General, and Randall Sutton, Assistant Attorney General, Miami, for appellee.

PER CURIAM.

This is an appeal from a judgment of guilt and sentence of death upon Ricardo Gonzalez. We have jurisdiction under article V, section 3(b)(1) of the Florida Constitution.

FACTS

The defendant, Ricardo Gonzalez, along with codefendants Pablo San Martin, Leonardo Franqui, Fernando Fernandez, and Pablo Abreu were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft in the third degree, and burglary. [1] Gonzalez, Franqui, and San Martin were tried together before a jury in May, 1994.

The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, police officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank.

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Approximately two weeks later, Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that Franqui had procured the two stolen Chevrolets, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. He was subsequently reinterviewed by police and, among other things, described how Franqui had shouted at the victim not to move before shooting him. [2]

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars, but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez, and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez--and not himself--who yelled at the victim to "freeze" when they saw him

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pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of Gonzalez, the confessions of codefendants San Martin and Franqui were introduced without deletion of their references to Gonzalez, upon the trial court's finding that their confessions "interlocked" with Gonzalez's own confession.

Gonzalez was convicted on all counts, and after a penalty phase trial, the jury recommended death by a vote of seven to five. The trial court followed the jury's recommendation and sentenced Gonzalez to death. Gonzalez raises the following issues on appeal: (1) that the trial court erred in denying Gonzalez's peremptory challenges of jurors Diaz and Andani; (2) that the trial court erred in denying Gonzalez's motion for severance based upon the introduction of the confessions of nontestifying codefendants Franqui and San Martin at their joint trial; (3) Gonzalez was denied an impartial hearing at his penalty phase because of the court's refusal to sever his case and to permit him to cross-examine San Martin's experts; and (4) his death sentence is disproportionate.

JURY SELECTION

Speaking for all three defendants, defense counsel sought to exercise a peremptory challenge to excuse prospective jurors Diaz and Andani from the jury. The State objected to the challenges. The court conducted an inquiry pursuant to State v. Neil, 457 So.2d 481 (Fla.1984), and ultimately struck these challenges. We conclude that the court's determination to strike the challenges of prospective jurors Diaz and Andani was not clearly erroneous. The rationale for approving the striking of the challenge of Diaz is set forth in our opinion relating to the appeal of Franqui arising out of the same case. Franqui v. State, 699 So.2d 1332 (Fla.1997).

ADMISSION OF CODEFENDANTS' STATEMENTS AGAINST GONZALEZ

Gonzalez also asserts that the trial court erred by permitting the confessions of his codefendants Franqui and San Martin to be admitted against him in their joint trial and by denying his motion to sever his trial

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from that of his codefendants. In Franqui v. State, 699 So.2d 1312 (Fla.1997), we discussed in detail the law applicable to the admissibility of a codefendant's confession. In this case, there is no question that both Franqui's confession and San Martin's confession interlocked with Gonzalez's confession in many respects and was substantially incriminating to Gonzalez. Moreover, we cannot say that the totality of the circumstances under which Franqui and San Martin made their confessions demonstrated the particularized guarantee of trustworthiness sufficient to overcome the presumption of unreliability that attaches to accomplices' hearsay confessions which implicate the defendant.

Thus, the admission of the confessions of Franqui and San Martin was error. However, with respect to guilt, we conclude that the error was harmless beyond a reasonable doubt. Not only did Gonzalez confess to participating in the robbery, he also admitted shooting the victim. He does not contest the legality of his confession in this appeal. In addition, it was determined that the fatal bullet came from the gun that Gonzalez was carrying. Gonzalez admitted being with Franqui, and an eyewitness identified Franqui as the driver of one of the stolen cars leaving the scene of the crime. Further, Franqui's fingerprints were found on one of the stolen vehicles. Moreover, Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. Thus, we conclude that there is no reasonable possibility that the erroneous admission of

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the confessions of Franqui and San Martin contributed to Gonzalez's conviction for felony murder.

PENALTY

We agree, however, that Gonzalez's sentence must be reversed. In Franqui's confession, he said that upon approaching the bank, Gonzalez pulled out a gun and told the security guard not to move. Thereafter, he heard a shot, so he also shot his gun. He said he did not know if the shot he heard was fired by Gonzalez or the security guard, but the evidence later developed that the security guard never fired his gun. On the other hand, Gonzalez said it was Franqui who told the security guard not to move and that Franqui shot the security guard before Gonzalez shot him. He said Franqui fired three or four shots and that he only shot once. Consequently, in determining whether or not Gonzalez should be sentenced to death, we cannot say that the erroneous admission of Franqui's confession which portrayed Gonzalez as the aggressor who had precipitated the shooting was harmless beyond a reasonable doubt. Accordingly, we affirm Gonzalez's convictions but vacate the sentence of death and remand for a new penalty phase proceeding consistent with this opinion.

It is so ordered.

OVERTON, GRIMES and WELLS, JJ., concur.

SHAW, J., concurs in result only as to conviction and concurs as to sentence.

HARDING, J., dissents with an opinion, in which KOGAN, C.J., and ANSTEAD, J., concur.

ANSTEAD, J., dissents with an opinion, in which KOGAN, C.J., concurs.

HARDING, Justice, dissenting.

For the reasons expressed in my dissenting opinion in Franqui v. State, 699 So.2d 1332 (Fla.1997), I dissent from the majority's resolution of the jury selection issue regarding juror Diaz in this case. Id., at 1339-1343 (Harding, J., dissenting). Because I conclude that Gonzalez's peremptory challenge was improperly denied, I would reverse his convictions and remand for a new trial.

KOGAN, C.J. and ANSTEAD, J., concur.

ANSTEAD, Justice, dissenting.

I dissent for the same reasons that are discussed in detail in the separate opinions in Franqui v. State, 699 So.2d 1332 (Fla.1997). I agree with Justice Harding's opinion on the juror selection issue. Further, it is apparent that trying these several defendants together and erroneously utilizing the hearsay out-of-court statements of each of them against one

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another severely prejudiced the defendants in both the guilt and penalty phases of the trial. It would have been virtually impossible for the jury not to have considered the erroneously admitted co-defendants' statements as major building blocks in the case against appellant. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

KOGAN, C.J., concurs.

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1 One count of aggravated assault and the unlawful possession of a firearm while engaged in a criminal offense were nol-prossed by the State after its opening statement.

2 San Martin also made a confession to police, in which he stated that the robbery was planned by a black friend of the codefendant Fernandez and that the planning occurred at Fernandez's apartment. San

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Martin admitted that he had grabbed the money tray during the robbery, but could not say who carried guns or did the shooting.

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786 So.2d 559

Ricardo GONZALEZ, Appellant,
v.
STATE of Florida, Appellee.

No. SC94154.

Supreme Court of Florida.

May 10, 2001.

[786 So.2d 561]

William M. Norris, Coconut Grove, FL, for Appellant.

Robert A. Butterworth, Attorney General, and Sandra S. Jaggard, Assistant Attorney General, Miami, FL, for Appellee.

PER CURIAM.

We have on appeal an order of the trial court reimposing the death penalty upon Ricardo Gonzalez. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons stated below, we affirm the trial court's determination that death is the appropriate sentence in this case.

PROCEDURAL AND FACTUAL BACKGROUND

On February 14, 1992, Ricardo Gonzalez (Gonzalez) was charged in the Eleventh Judicial Circuit of Florida with committing first-degree murder of a law enforcement officer; armed robbery; aggravated assault; two counts of grand theft; and two counts of burglary in connection with a January 3, 1992, bank robbery. Gonzalez was tried jointly with his codefendants, Leonardo Franqui (Franqui) and Pablo San Martin (San Martin). Gonzalez was convicted on all counts and sentenced to death for the murder. This Court previously summarized the facts of this case as follows:

The defendant, Ricardo Gonzalez, along with codefendants Pablo San Martin, Leonardo Franqui, Fernando Fernandez, and Pablo Abreu, were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft in the third degree, and burglary. Gonzalez, Franqui, and San Martin were tried together before a jury in May, 1994.

The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, police officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank.

Approximately two weeks later, Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that Franqui had procured the two stolen

[786 So.2d 562]

Chevrolets, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. He was subsequently reinterviewed by police and, among other things, described how Franqui had shouted at the victim not to move before shooting him.

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars, but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez, and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez-and not himself-who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of Gonzalez, the confessions of codefendants San Martin and Franqui were introduced without deletion of their references to Gonzalez, upon the trial court's finding that their confessions "interlocked" with Gonzalez's own confession.

Gonzalez was convicted on all counts, and after a penalty phase trial, the jury recommended death by a vote of seven to five. The trial court followed the jury's recommendation and sentenced Gonzalez to death. Gonzalez raises the following issues on appeal: (1) the trial court erred in denying Gonzalez's peremptory challenges of jurors Diaz and Andani; (2) the trial court erred in denying Gonzalez's motion for severance based upon the introduction of the confessions of nontestifying codefendants Franqui and San Martin at their joint trial; (3) Gonzalez was denied an impartial hearing at his penalty phase because of the court's refusal to sever his case and to permit him to cross-examine San Martin's experts; and (4) his death sentence is disproportionate.

Gonzalez v. State, 700 So.2d 1217, 1217-18 (Fla.1997).

On direct appeal, this Court held that the trial court's decision to deny the challenges to prospective jurors Diaz and Andani was not clearly erroneous, and that the admission of

statements by Gonzalez's codefendants, Franqui and San Martin, was harmless during the guilt phase but detrimental to Gonzalez during the penalty phase. Thus, we affirmed Gonzalez's conviction but vacated his death sentence and remanded for a new penalty phase proceeding. *Id.* at 1219. The State and Gonzalez filed for certiorari with the United States Supreme Court; both petitions were denied. *See Florida v. Gonzalez,* 523 U.S. 1145, 118 S.Ct. 1856, 140 L.Ed.2d 1104 (1998); *Gonzalez v. Florida,* 523 U.S. 1062, 118 S.Ct. 1393, 140 L.Ed.2d 652 (1998). A new penalty phase was held on August 10, 1998.

At the resentencing, several witnesses testified for the State, including the tellers who were with Officer Bauer the morning of his murder; officers who arrived at the

[786 So.2d 563]

scene after the shooting to gather evidence and render emergency assistance to the victim; detectives who questioned the suspects and obtained both oral and taped statements from Gonzalez describing his role in the crimes leading to Officer Bauer's death; and doctors who, after examining Officer Bauer, determined that the fatal heart injury he had sustained was inflicted by the .38 revolver that Gonzalez admitted to possessing during the crime.

Gonzalez presented the testimony of several witnesses to substantiate his claims for mitigation. Family members testified Gonzalez has a history of migraine headaches; has always been law-abiding; is a member of loving, supportive households; and is well educated and religious. The testimony of three doctors was also presented. The prior testimony of Dr. Wagschul, a board certified neurologist, was read to the jury. Dr. Wagschul testified concerning head injuries Gonzalez received, including injuries during boxing. As a result of his examination and the information received, Dr. Wagschul diagnosed Gonzalez as suffering from pugilistic encephalopathy. However, on cross-examination Dr. Wagschul stated Gonzalez performed normally on all the neurological tests. The trial court also allowed the testimony of Dr. Fisher who had done research and a thesis on future dangerousness. Dr. Fisher indicated Gonzalez was not psychotic, had no major mental disturbance, was not retarded, did not use drugs or alcohol, and did not show signs of suffering damage as a result of boxing. This expert opined that Gonzalez would make a good adjustment to prison. Dr. Hyman Eisenstein, a neuropsychologist, opined that Gonzalez was under extreme mental or emotional distress at the time he committed the offenses and committed the crimes to get money to make his wife happy.

The trial court sentenced Gonzalez to death, finding six aggravating factors, which were merged into three factors: prior violent felonies based on the contemporaneous convictions for armed robbery and aggravated assault; murder committed during a robbery/murder committed for pecuniary gain; and murder committed to avoid a lawful arrest/victim a law enforcement officer performing his duties/murder committed to hinder enforcement of laws. These aggravating circumstances were found to outweigh the following mitigating circumstances: no significant prior criminal history; brain damage, learning disability and below-average intelligence; remorse; cooperation with authorities; life sentences given to two codefendants; and good conduct while incarcerated and potential for rehabilitation. The trial court considered but rejected the statutory mental health mitigators, as well as the minor participation mitigator. The nonstatutory mitigator of family background was likewise rejected.

In this appeal Gonzalez contends: (1) this Court improperly used a harmless error analysis based on the hearsay rule rather than one based on the confrontation clause to determine whether or not the admission of

codefendant statements was proper during Gonzalez's trial; (2) using the victim's status as a police officer as an aggravator as well as to increase the penalty for homicide from twenty-five years without eligibility for release to life without parole constitutes impermissible doubling; (3) substantial organic and behavioral support existed for the expert opinion that was erroneously rejected by the Court when it considered the mental distress mitigator; (4) prosecutor's passionate closing and impermissible personal statements were error; and (5) proportionality analysis requires that Gonzalez's death sentence be vacated.

[786 So.2d 564]

DISCUSSION

Harmless Error Analysis Used By the Supreme Court

Gonzalez contends this Court used a hearsay-based harmless error analysis rather than a confrontation clause analysis in reviewing the trial court's admission of his codefendants' inculpatory statements during his initial trial. On direct appeal, Gonzalez argued the trial court's admission of these statements was error. This Court found harmful error occurred in the penalty phase of his trial,[1] but that the error was harmless in the guilt phase. *See Gonzalez*, 700 So.2d at 1219. Thus, this claim is procedurally barred since it was addressed by this Court on direct appeal of Gonzalez's original case and is the law of the case. *See Turner v. Dugger*, 614 So.2d 1075, 1078 (Fla.1992) (claims procedurally barred if they, or variations thereof, were raised on direct appeal).[2]

Impermissible Doubling of Police Officer's Status Used to Increase the Penalty for Murder and As An Aggravator

Gonzalez claims that using the victim's status as a police officer as an aggravating factor and as a reason to change the possible sentence from life with eligibility for parole to life without parole constitutes impermissible doubling. As the State contends, this issue has not been preserved for appellate review since it was not presented to the trial court. There was no objection made at the resentencing hearing to consideration of the officer's status as an aggravating factor. *See Larzelere v. State*, 676 So.2d 394 (Fla.1996).[3]

Psychological Mitigators

Gonzalez next contends the trial court erred in rejecting the statutory mitigating factor that he committed the murder while he was under extreme mental or emotional disturbance. On the other hand, the State responds that the trial court examined all the evidence regarding this mitigator and simply found that it was not established by the evidence. Gonzalez's claim on this issue is refuted by the record. The trial court, in a detailed order, specifically addressed and evaluated the testimony of each witness who testified for Gonzalez regarding the psychological aspects of his character and, in the end, found little substantiation for Gonzalez's claim of mental distress during the commission of this crime.

This Court has long held that a trial court in its written order must evaluate each mitigating circumstance offered by the defendant. In *Campbell v. State*, 571 So.2d 415, 419 (Fla.1990), we said, "When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence ...." *See also Zack v. State*, 753 So.2d 9, 18 (Fla.2000). Furthermore, in order to be sustained, the court's findings must be supported by

[786 So.2d 565]

competent, substantial evidence in the record. *See Brown v. Wainwright,* 392 So.2d 1327, 1331 (Fla.1981). In *Zack,* the defendant complained the trial court failed to consider a list of mitigating circumstances. After reviewing the sentencing order, we determined the factors were in fact discussed and referenced in the order with each mitigating factor properly set forth. *See* 753 So.2d at 20. That finding is similarly applicable in this case.

During resentencing, the testimony of three doctors, Dr. Wagschul, a neurologist, Dr. Fisher, a clinical forensic psychologist, and Dr. Eisenstein, a neuropsychologist, was presented. The work of another doctor, Dr. Nadich, was also discussed. The sentencing order references the evidence presented by each of these physicians. The trial court relied on *Walls v. State,* 641 So.2d 381 (Fla.1994), as a guidepost in evaluating the expert testimony of each of the experts, particularly Dr. Eisenstein, whose testimony was most favorable to Gonzalez. In *Walls* we said:

> [A] distinction exists between factual evidence or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable or contradictory. *E.g., Brannen v. State,* 94 Fla. 656, 114 So. 429 (1927). This rule applies equally to the penalty phase of a capital trial. *Hardwick,* 521 So.2d at 1076.
>
> Opinion testimony, on the other hand, is not subject to the same rule. *Brannen.* Certain kinds of opinion testimony clearly are admissible—and especially qualified expert opinion testimony—but they are not necessarily binding even if uncontroverted. *Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking.*

Walls, 641 So.2d at 390 (emphasis added).

Dr. Eisenstein, a neuropsychologist, reviewed Gonzalez's school records, medical records, police reports, and confession. He also interviewed Gonzalez concerning his family history. In addition, Eisenstein gathered information concerning Gonzalez's motor functions, sensory perceptions, language ability, intelligence, and personality traits through a variety of tests. On most of these tests, Gonzalez scored in the normal range. However, personality tests did show that Gonzalez was nervous, shy, and introverted and that he possessed minimal socialization skills. Language tests indicated Gonzalez ranged from normal on the fluency tests to profoundly impaired on the naming test to mildly retarded on reading articulation. On the WAIS R test, Gonzalez's full range IQ was found to be 80, the lower average range. However, his school records indicated an IQ of 75 at age 12. Dr. Eisenstein stated Gonzalez responded to the stress of incarceration, his trial, and his marriage. Based on these results, Dr. Eisenstein concluded that Gonzalez acted impulsively in killing Officer Bauer. He also opined that Gonzalez was under extreme emotional and mental distress at the time of the crime due to his having been raised in both the United States and Puerto Rico, his language deficits, his learning disability, pressure from his wife to make more money, and his brain injury.

According to the trial court, Dr. Eisenstein's findings were not supported by Gonzalez's own confession, which showed a lack of impulsivity. Gonzalez was aware the robbery was being planned several days in advance of its execution, and even drove early

to the bank with the other codefendants to ensure they would be the first "customers" there. The planning and

[786 So.2d 566]

"laying in wait" contradict the doctor's opinion that impulsiveness caused Gonzalez to kill Officer Bauer. The fact that Gonzalez had his gun drawn as he approached the bank employees also belies the contention that his actions were impulsive.

The trial court went on to find that despite Gonzalez's brain damage, which was proven by the MRI testing Dr. Nadich performed showing evidence of pugilistic encephalopathy, his learning disabilities, and life stresses, Gonzalez had managed to conform his life to the law each day until January 3, 1992. As the trial judge pointed out in his order, Dr. Eisenstein's testimony was further weakened by the testimony of Dr. Wagschul. The deposition of Dr. Wagschul was read at the resentencing. Dr. Wagschul, a neurologist, diagnosed Gonzalez as having pugilistic encephalopathy, a condition common in boxers characterized by the filling of brain cavities with spinal fluid. He stated this condition could cause sudden changes in mood and behavior, but acknowledged that the literature he had read did not show a link between that illness and the commission of robbery or murder. Furthermore, Dr. Wagschul testified that Gonzalez had not suffered neurological difficulty as a result of this brain injury. Wagschul opined that although Gonzalez's brain injury could lead to impulsiveness, it would not cause someone to rob a bank and kill a police officer.

The trial court also noted that Gonzalez's attempts to establish that brain damage affected his conduct was further undermined by the testimony of another expert, Dr. Fisher. Dr. Fisher, a clinical forensic psychologist who had developed a system for predicting future dangerousness, also testified. He examined Gonzalez and found that he was not psychotic, had no major mental disturbance, was not retarded, and did not use drugs or alcohol.

In the final analysis, the evidence presented did not show that Gonzalez had a mental impairment that caused him to behave in this manner. After closely analyzing the testimony of the witnesses Gonzalez presented, the trial court found that Gonzalez had not sufficiently established evidence of psychological problems that would have affected his behavior when the murders were committed. *See Walls v. State.*

The written sentencing order shows that the trial judge adequately considered the evidence presented in mitigation. The testimony of Dr. Eisenstein that Gonzalez's pugilistic encephalopathy may have caused him to commit murder was refuted by the opinions of Dr. Wagschul and Dr. Fisher as well as evidence that Gonzalez had been law-abiding until the day of the crime. Given the detailed analysis provided by the trial court, this claim by Gonzalez is meritless.

Although the trial court found the statutory mental mitigators had not been established by the evidence, the evidence was sufficient to establish nonstatutory mitigation. The trial judge said:

> Although the testimony of the defense witnesses did not establish the statutory mitigating circumstances, the court finds that the defendant's brain damage, learning disability and below average intelligence have been reasonably established and constitute a non-statutory mitigating circumstance. In addition, witnesses testified that the defendant has suffered migraine headaches since boyhood. Regardless of those physical problems, the

> defendant was able to work, marry, comply with the law, and contribute to society in spite of these deficiencies. Accordingly, the court
>
> [786 So.2d 567]
>
> gives this mitigating circumstance little weight.

It is clear from the sentencing order that the trial court considered, evaluated and weighed all the mental health evidence submitted in mitigation. Error in failing to find the statutory mental mitigators has not been demonstrated.

Prosecutor's Comments

Gonzalez contends the prosecutor's comments during closing argument inflamed the passions of the jury. The State maintains the comments to which Gonzalez refers either were not objected to, were remedied by curative instructions, or constituted proper comments on the evidence. In order for a prosecutor's comments to be deemed prejudicial, they must "vitiate the trial or so poison the minds of the jurors that Appellant did not receive a fair trial." *Harris v. State,* 742 So.2d 835, 839 (Fla. 2d DCA 1999); *See King v. State,* 623 So.2d 486 (Fla.1993).

In *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985), this Court outlined the proper parameters of a prosecutor's argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Gonzalez contends that the prosecutor exceeded the parameters outlined in *Bertolotti.* Gonzalez points to three instances where the prosecutor allegedly inflamed the passions of the jury with inappropriate comments during his closing argument.

Gonzalez first contends that while discussing his duress argument, the prosecutor mocked the defense experts. The prosecutor pointed out that Gonzalez did not mention being pressured by his wife into participating in this crime when initially questioned by police. It was not until Gonzalez spoke with the defense experts that he claimed duress. The prosecutor then said:

> *They hire a doctor, their own hired gun. Said, look at my guy, I need something to go talk to that jury about.* He says, well, my wife wanted me to do this. Does the doctor say, why didn't you just get a job like everybody else in the universe? Why didn't you work a little bit harder? Nobody ever told you you had to rob a bank and shoot and kill somebody? Well, my wife stressed me. What an interesting excuse. It's everybody's fault, it's everybody's responsibility except for this defendant's responsibility. The truth is, he fired that gun and he took that money because he wanted to keep the money and he wanted to kill the man who was going to stop him from getting the money and for no other reason.

(Emphasis added.)[4] No objection was made by counsel to this argument. Although a motion for mistrial was made after the jury

retired to deliberate, this issue was not included in that motion.

[786 So.2d 568]

Since the propriety of the comment was not raised in the trial court, it has not be preserved for appellate review. *See Henry v. State*, 649 So.2d 1361 (Fla.1994).

Secondly, Gonzalez attacks a statement made by the prosecutor as he attempted to refute one of the mitigation arguments proffered by the defense:

> MR. LAESER: *You're going to get instructions from the Judge and I'm going to tell you right now, they have nothing to do with the case. The Judge is going to instruct you, for example, you can consider whether or not you think that at the time that the defendant committed this crime, he was unable to conform to the requirements of the law because of some sort of mental problems.*
>
> MR. DIAZ (defense counsel): Judge, objection to the form of the argument.
>
> THE COURT: All right. It's just argument, ladies and gentlemen. I will read you the instruction on the law.
>
> MR. LAESER: He was unable to conform his action to the requirements, his obligations under the law. Let's think about that. What a bad coincidence it was that the defendant, now twenty-eight years old, had one moment somewhere around 7:55 in the morning of January 3, 1992 when he could not conform his own actions to the requirements of law. And it was just at that moment that Steven Bauer was in front of him.

(Emphasis added.) As the State points out, Gonzalez objected only to the form of the argument regarding the instructions the jurors would receive from the judge. The objection at trial was not based on the same grounds presently argued by Gonzalez; therefore, it is not preserved. *See Henry v. State*, 649 So.2d at 1365. In addition, a curative instruction was given to the jurors by the court. When read in context, this comment on the instructions appears to be the prosecutor's attempt to call into question the propriety of the mitigation evidence presented. He in essence said that despite an instruction on mental health mitigators, the evidence presented does not support their existence.

The third comment Gonzalez attacks as improper occurred during the prosecutor's argument imploring the jury to use its common sense in evaluating the evidence presented. The prosecutor said:

> You don't need any legal training to be a juror. And frankly, there wasn't much common sense going around in law school as I recall anyway. Common sense is something you don't need any special education for. It's what you use every day to make all of your lifetime decisions. You know what things make sense to you; you know when things seem absolutely foolish. Somebody knocks on your door one day and says, excuse me, I'm a little short on cash, I need twenty dollars, that new Mercedes Benz parked out in front of your house. I'll let you keep that Mercedes Benz if you get [sic]

> give me twenty dollars in cash. Anybody listening? Anybody who hasn't slammed the door yet? Common sense tells you whatever this is, I'm not in it. It's something crooked, something dishonest and I'm about to get scammed out of twenty bucks. Fifteen people are sitting in front of me and I'd like to believe fifteen people would have slammed that door.
>
> *Something strange happened in trial. Two people got on that witness stand. Two people who would have parted with those twenty dollar bills. Dr. Eisenstein and Dr. Fisher. Talk about gullible. We're going to talk about those people a little bit more, but I want you to think about whether or not they used common sense when they approached*
>
> [786 So.2d 569]
>
> *their evaluations when they testified to you about their findings.*

(Emphasis added.) Defense counsel failed to object to this comment at trial. Therefore, it is not preserved for appeal. *See Rose v. State,* 461 So.2d 84 (Fla.1984). Gonzalez has failed to demonstrate that the comments either individually or collectively amount to fundamental error so as to entitle him to any relief.

Proportionality

Lastly, we address the proportionality of Gonzalez's death sentence pursuant to our constitutional mandate. *See* art. I, § 17, Fla. Const.; *Tillman v. State,* 591 So.2d 167, 169 (Fla.1991). The death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders. *See Urbin v. State,* 714 So.2d 411 (Fla.1998); *State v. Dixon,* 283 So.2d 1 (Fla.1973). Our proportionality review rests upon recognition that death is a uniquely irrevocable penalty requiring uniformity in its imposition. *See Urbin,* 714 So.2d at 416-17; *Sinclair v. State,* 657 So.2d 1138, 1142 (Fla.1995). Thus, this Court must undertake a qualitative review of the particular circumstances of the instant case in comparison to other capital cases and then decide if death is the appropriate penalty in light of those other decisions. *See Tillman,* 591 So.2d at 169.

Here, the trial court found six aggravating factors: (1) Gonzalez was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the felony was committed while Gonzalez was engaged, or was an accomplice in the commission of, or an attempt to commit or in flight after committing or attempting to commit a robbery; (3) the felony was committed for pecuniary gain; (4) the felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from justice; (5) the murder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; and (6) the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties. The court merged aggravators two and three, robbery and pecuniary gain, giving the merged aggravator great weight. Aggravators four, five, and six were also merged and given great weight. Thus, the court found and considered three weighty aggravating circumstances.

On the other hand, the trial court found one statutory mitigator, lack of significant history of criminal activity. Several nonstatutory mitigators were found to be established including Gonzalez's brain damage, learning disability and below average intelligence; Gonzalez's remorse and cooperation with the authorities; life

sentences imposed on codefendants Abreu and San Martin; and Gonzalez's good conduct in custody and potential for rehabilitation. The trial court gave each mitigating circumstance little weight.

A review of the record reveals competent, substantial evidence in support of the aggravating circumstances and the rejection of some mitigating circumstances. The resentencing judge clearly outlined all his reasons for considering each factor in his sentencing order. This case is similar to *Burns v. State,* 699 So.2d 646 (Fla.1997), where the defendant was sentenced to death for the murder of a law enforcement officer. In that case, the avoiding arrest and hindering law enforcement aggravators were found and merged. Again, only the statutory mitigator of no significant criminal history was found. Burns had fewer aggravators than Gonzalez, which were weighed against the same statutory mitigator and insignificant nonstatutory mitigation, and this Court upheld his sentence as proportionate.

[786 So.2d 570]

In *Armstrong v. State,* 642 So.2d 730 (Fla.1994), we also addressed a murder which involved the killing of a police officer during the course of a robbery. The same three aggravators that were found here were also found in that case. In *Armstrong,* the defendant claimed a brain injury but failed to show how it had affected his behavior and presented several nonstatutory mitigators. The same mitigation found in this case was also found in *Armstrong,* and this Court upheld the death sentence.

Pursuant to *Palmes v. Wainwright,* 460 So.2d 362, 364 (Fla.1984), a "[p]roportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Id.* at 362. Other defendants who have committed similar crimes have had their death sentences affirmed on appeal as evidenced by the aforementioned cases. Gonzalez's death sentence is proportional and is hereby affirmed.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, LEWIS and QUINCE, JJ., concur.

PARIENTE, J., concurs with an opinion, in which ANSTEAD, J., concurs.

PARIENTE, J., concurring.

I concur in the affirmance of the death sentence. Our affirmance, however, should not be read as an approval of the prosecutor's closing argument remarks. Rather, these isolated remarks were not objected to, and I agree that in this case the arguments do not rise to the level of fundamental error.

I also write to commend Judge Scola's comprehensive and well-reasoned sentencing order. In particular, Judge Scola's detailed evaluation of the evidence related to statutory mitigation and his explanation as to why he did not find that the testimony established the mitigating circumstance of "under the influence of extreme mental or emotional disturbance" greatly assisted this Court in our review of the death sentence in this case.

ANSTEAD, J., concurs.

Notes:

1. The codefendants' statements were not used in the resentencing proceeding.

2. Gonzalez' reliance on the United States Supreme Court's opinion in *Lilly v. Virginia,*

527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), does not change the result in this case since this Court's analysis of this issue in *Gonzalez v. State,* 700 So.2d 1217 (Fla.1997), is consistent with *Lilly*.

3. Moreover, the argument being made in this instance does not involve doubling of aggravators. Gonzalez is really complaining that the court can consider the status of the victim as a police officer in determining whether death is the appropriate sentence and in determining parole eligibility when life has been determined the appropriate sentence. The two issues are mutually exclusive.

4. The underlined portions of the arguments represent the statements the defense now claims constitute improper comments and, therefore, reversible errors. In this instance, the comment was not objected to and thus not preserved for appellate review. We stress, however, that prosecutors should be careful about the language used in these arguments. We certainly do not approve of this type of language. *See Barnes v. State,* 743 So.2d 1105 (Fla. 4th DCA 1999).

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990 So.2d 1017
Ricardo GONZALEZ, Appellant,
v.
STATE of Florida, Appellee.
No. SC04-225.
Supreme Court of Florida.
July 3, 2008.
Rehearing Denied September 11, 2008.

[990 So.2d 1020]

Todd G. Scher of the Law Office of Todd G. Scher, P.L., Miami Beach, FL, and Jeffrey E. Feiler of Jeffrey E. Feiler, P.A., Miami, FL, for Appellant.

Bill McCollum, Attorney General, Tallahassee, FL, and Sandra S. Jaggard, Assistant Attorney General, Miami, FL, for Appellee.

PER CURIAM.

Ricardo Gonzalez appeals an order of the circuit court denying his motion to vacate his conviction for first-degree murder and his sentence of death filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm the circuit court's order denying postconviction relief.

[990 So.2d 1021]

FACTS AND PROCEDURAL HISTORY

On February 14, 1992, Ricardo Gonzalez along with codefendants Pablo San Martin, Leonardo Franqui, Fernando Fernandez, and Pablo Abreu, were charged with committing first-degree murder of a law enforcement officer; armed robbery; aggravated assault; two counts of grand theft; and two counts of burglary in connection with a January 3, 1992, bank robbery. Gonzalez was tried jointly with Franqui and San Martin. Gonzalez was convicted on all counts and sentenced to death for the murder.

The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, police officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank. On January 18, 1992, Gonzalez was stopped by police after leaving his residence. He subsequently made unrecorded and recorded confessions in which he told police that Franqui planned the robbery, involved the other participants including himself in the scheme, and chose the location and date for the crime. He said that Franqui procured the two stolen Chevrolets, drove one of the cars, and supplied the gun Gonzalez used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. Gonzalez was subsequently reinterviewed by police and, among other things, he described how Franqui had shouted at the victim not to move before shooting him.

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars, but denied any involvement in the theft of the vehicles. According to Franqui, San Martin, Fernandez, and Abreu stole the vehicles. Franqui admitted that he and Gonzalez were armed

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during the robbery, but he stated that it was Gonzalez who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot after Gonzalez had initiated gunfire.

At trial, over Gonzalez's objection, the confessions of codefendants San Martin and Franqui were introduced without deletion of their references to Gonzalez after the trial court found that their confessions "interlocked" with Gonzalez's own confession. Gonzalez was convicted on all counts, and after a penalty phase trial, the jury recommended death by a vote of seven to five. The trial court followed the jury's recommendation and sentenced Gonzalez to death. On direct appeal, Gonzalez raised four issues.[1] This Court affirmed

[990 So.2d 1022]

Gonzalez's conviction, but vacated his death sentence and remanded for a new penalty phase. *Gonzalez v. State,* 700 So.2d 1217, 1217-18 (Fla.1997).[2]

The new penalty phase was held on August 10, 1998. Several witnesses testified for the State, including the tellers who were with Officer Bauer the morning of his murder; officers who arrived at the scene after the shooting to gather evidence and render emergency assistance to the victim; detectives who questioned the suspects and obtained both oral and taped statements from Gonzalez describing his role in the crimes; and doctors who, after examining Officer Bauer, determined that the fatal heart injury he had sustained was inflicted by the .38 revolver that Gonzalez admitted to possessing during the crime.

Gonzalez presented the testimony of several witnesses to substantiate his claims for mitigation. Family members testified that Gonzalez has a history of migraine headaches; has always been law-abiding; is a member of a loving, supportive household; and is well educated and religious. The testimony of three doctors was also presented. The prior testimony of Dr. Alan Wagschul, a board certified neurologist, was read to the jury. Dr. Wagschul testified concerning head injuries Gonzalez received, including injuries during boxing. As a result of his examination and the information received, Dr. Wagschul diagnosed Gonzalez as suffering from pugilistic encephalopathy. However, on cross-examination Dr. Wagschul stated Gonzalez performed normally on all the neurological tests. The trial court also allowed the testimony of Dr. Brad Fisher, who has done research and a thesis on future dangerousness. Dr. Fisher indicated Gonzalez was not psychotic, had no major mental disturbance, was not retarded, did not use drugs or alcohol, and did not show signs of suffering damage as a result of boxing. Dr. Fisher said Gonzalez would make a good adjustment to prison. Dr. Hyman Eisenstein, a neuropsychologist, opined that Gonzalez was under extreme mental or emotional distress at the time he committed the offenses and that he committed the crimes to get money to make his wife happy.

The jury recommended death by a vote of eight to four. The trial court followed the jurys recommendation and sentenced Gonzalez to death, finding six aggravating factors, which were merged into three factors. The three merged aggravators were: (1) prior violent felonies based on the contemporaneous convictions for armed robbery and aggravated assault; (2) murder committed during a robbery/murder committed for pecuniary gain; and (3) murder committed to avoid a lawful arrest/victim a law enforcement officer performing his duties/murder committed to hinder enforcement of laws.

These aggravating circumstances were found to outweigh the following mitigating circumstances: no significant prior criminal history; brain damage; learning disability and

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below-average intelligence; remorse; cooperation with authorities; life sentences given to two codefendants; and good conduct while incarcerated and potential for rehabilitation. The trial court considered but rejected the statutory mental

[990 So.2d 1023]

health mitigators, the minor participation mitigator, and the nonstatutory mitigator of family background.

On direct appeal, Gonzalez raised five issues.[3] This Court rejected Gonzalez's arguments, and affirmed his conviction and sentence of death. *Gonzalez v. State,* 786 So.2d 559, 562-63 (Fla.2001).

In March 2003, Gonzalez filed a consolidated amended motion for postconviction relief raising seven claims. After a *Huff*[4] hearing, the circuit court denied an evidentiary hearing on all claims except one. The claim on which an evidentiary hearing was granted concerned counsel's presentation of the testimony of the mental health experts during the new penalty phase. The circuit court found that none of the other claims warranted an evidentiary hearing because they did not require further factual determination and could be decided based upon the existing record. After an evidentiary hearing on the one claim, on January 2, 2004, the circuit court issued an order denying all of Gonzalez's claims.

RULE 3.851 APPEAL

Gonzalez has appealed the denial of postconviction relief to this Court, raising eight issues. He contends (1) trial counsel rendered ineffective assistance during the guilt phase of trial; (2) trial counsel rendered ineffective assistance during the new penalty phase; (3) the circuit court erred in summarily denying Gonzalez's claim that newly discovered evidence of a life sentence imposed on Fernando Fernandez requires that Gonzalez receive a life sentence; (4) the circuit court erred in failing to disclose records allegedly exempt from production under Florida Rule of Criminal Procedure 3.852; (5) the circuit court erred in striking Gonzalez's original postconviction motion without permitting him leave to amend; (6) the application of the new rule 3.851 to Gonzalez violates his rights to due process and equal protection; (7) Florida's capital sentencing procedures violates Gonzalez's Sixth Amendment right to have a unanimous jury return a verdict addressing guilt of all the elements necessary for the crime of first-degree murder, in violation of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); and (8) his constitutional right against cruel and unusual punishment will be violated as he may be incompetent at the time of execution.

Gonzalez argues that trial counsel rendered ineffective assistance during the guilt and penalty phases of his trial. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (affirming the *Strickland* two-prong analysis for

[990 So.2d 1024]

claims of ineffective assistance of counsel). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052; *see also Cherry v. State,* 659 So.2d 1069, 1072 (Fla.1995). For the second prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the

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result of the proceeding would have been different. *See Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S.Ct. 2052.

Generally, this Court's standard of review following a denial of a postconviction claim where the trial court has conducted an evidentiary hearing accords deference to the trial court's factual findings. *McLin v. State,* 827 So.2d 948, 954 n. 4 (Fla.2002). "As long as the trial court's findings are supported by competent substantial evidence, `this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Blanco v. State,* 702 So.2d 1250, 1252 (Fla.1997) (quoting *Demps v. State,* 462 So.2d 1074, 1075 (Fla. 1984)). However, the circuit court's legal conclusions are subject to de novo review. *See Sochor v. State,* 883 So.2d 766, 771-72 (Fla.2004).

Gonzalez also contends that the circuit court erred in summarily denying several of his postconviction claims. To uphold the circuit court's summary denial of claims raised in an initial postconviction motion, an evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *See generally Amendments to Fla. Rules of Crim. Pro. 3.851,* 772 So.2d 488, 491 n. 2 (Fla.2000); *see also Booker v. State,* 969 So.2d 186, 195 (Fla. 2007). Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent that they are not refuted by the record. *See Lightbourne v. Dugger,* 549 So.2d 1364, 1365 (Fla.1989).

Ineffective Assistance of Counsel During Guilt Phase
Failure to Object to Inflammatory Opening Argument and Evidence

Gonzalez asserts that trial counsel was ineffective for failing to object to certain portions of the State's opening argument that he contends were improper, and also for failing to object during the testimony of bank teller LaSonya Hadley.

With regard to the State's opening argument, Gonzalez points to several specific statements that he argues were improper: (1) referring to the victim as a "good natured guy"; (2) stating that the victim "liked his job and people liked him"; and (3) discussing how "bullets ripped through the body of Steve Bauer," and describing how the bullets ripped through the tissues in his body leaving his blood seeping from his body. In summarily denying this claim, the circuit court found that the statements were not improper because they were accurate and consistent with the evidence presented at trial, and further finding there was no reason for counsel to object.

Opening statements "are not evidence, and the purpose of opening argument

[990 So.2d 1025]

is to outline what an attorney expects to be established by the evidence." *Occhicone v. State,* 570 So.2d 902, 904 (Fla. 1990) (citing *Whitted v. State,* 362 So.2d 668 (Fla.1978)). Further, the "control of comments is within the trial court's discretion." *Occhicone,* 570 So.2d at 904. We find that the prosecutor's comments during opening arguments were proper. The prosecutor began his opening statement by explaining who the victim was and what his job was and, in one brief comment, stated that the victim was a good-natured person whom people liked. Such a comment is not improper during the opening statements. The comments about how the

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bullets killed the victim were also not improper because they were consistent with what the evidence established during trial. The evidence presented showed that the victim was shot and killed with a gun and the bullets from the gun penetrated his body.[5]

Because the prosecutor's comments were proper, we find that counsel's failure to object did not constitute ineffective assistance. *See Jones v. State,* 949 So.2d 1021, 1029 (Fla.2006). Accordingly, the circuit court did not err in summarily denying the claim.

Gonzalez also argues that counsel was ineffective for failing to object when the State elicited evidence about the bank teller's relationship with the victim. The circuit court found that although the testimony was not relevant or material, and an objection on these grounds would likely have been sustained, Gonzalez was not prejudiced because of the benign nature of the testimony. We agree. Although Hadley's testimony may have been immaterial to the case, Gonzalez fails to demonstrate that counsel's failure to object to the testimony resulted in prejudice sufficient to undermine confidence in the outcome of the case. *See Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. Gonzalez fails to show that had counsel objected to such testimony, there is a reasonable probability that the jury would not have found Gonzalez guilty of the crimes charged. Because Gonzalez fails to satisfy the prejudice prong of *Strickland,* we need not address the deficiency prong. *See Maxwell v. Wainwright,* 490 So.2d 927, 932 (Fla.1986) (stating that a court considering a claim of ineffectiveness of trial counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied).

We affirm the circuit court's summary denial of relief on this claim.

Failure to Present Evidence

Gonzalez next contends counsel was ineffective for failing to present evidence through the testimonies of Detective Ronald Pearce and Detective LaPorte that a nine millimeter firearm and latex gloves were discovered at another scene a few blocks away from the scene of the robbery and murder. Gonzalez argues that had counsel called these two witnesses to testify, there is more than a reasonable probability of a different outcome because such evidence was relevant. We agree with the trial court that counsel's failure to call these witnesses was not ineffective assistance of counsel because no prejudice has been demonstrated.

The evidence and facts revealed that two guns were used in the robbery and murder. One of the guns was a .38 caliber and

[990 So.2d 1026]

the other was a nine millimeter. Codefendant San Martin told Detective Albert Nabut that he disposed of the guns used in the crime by throwing them in a particular river. Detective Nabut testified that when he went to this location the next day with trained police divers, the divers recovered both guns. Detective Pearce testified that at the scene of the robbery and murder, the police recovered one projectile, one casing, and several fragments of projectiles. Robert Kennington, a firearms examiner, testified that he conducted the ballistics testing on the two guns recovered from the river. Kennington was also given the projectiles recovered from the victim's body by the medical examiner. Kennington testified that the two guns recovered from the river conclusively matched the casing and bullet recovered from the murder scene and the projectiles recovered from the victim's body. He also testified that the projectile fragments recovered from the crime scene were consistent with having come from the nine millimeter recovered by police at the river.

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Because the evidence adduced at trial conclusively linked the two guns found in the location described by codefendant San Martin with the two guns used in the robbery and murder, the circuit court properly found that presenting the evidence of a third inoperable weapon that had no link to the crime would not have supported Gonzalez's contention that someone else committed the robbery and murder. Therefore, Gonzalez fails to demonstrate prejudice under *Strickland*. We affirm the circuit court's summary denial of relief on this claim.

Ineffective Assistance of Counsel During New Penalty Phase
Failure to Object to Misstatements of the Law

Gonzalez asserts that counsel was ineffective during the penalty phase for failing to object to three different alleged misstatements of the law: (1) instructing the jury that the law required a recommendation of death if the aggravating circumstances outweighed the mitigating circumstances; (2) misinforming the jury about its responsibility in the sentencing process; and (3) misinforming the jury about the burden of proof.

With regard to his first contention, Gonzalez points to several statements during the penalty phase where the jury was allegedly instructed that the law required a recommendation of death if the aggravating circumstances outweighed the mitigating circumstances. However, out of these allegedly improper misstatements, there is only one statement that was actually improper. While having a discussion with a potential juror during voir dire, the trial judge improperly stated, "The law says that if the aggravators outweigh the mitigators, then the law would require a recommendation in favor of the death penalty." The circuit court found that although counsel was deficient in failing to object to this misstatement, Gonzalez was not prejudiced because the statement was isolated and the trial judge later read the standard jury instructions, which included an accurate statement of the law.

We agree with the circuit court's findings as to both deficiency and prejudice. The judge's misstatement of the law was an isolated comment that occurred at the beginning of the penalty phase and the statement was not repeated. Additionally, at the outset of jury instructions, the trial judge informed the jury that "it is your duty . . . to render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to

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exist." Therefore, Gonzalez fails to demonstrate that this one isolated misstatement undermined confidence in the outcome under *Strickland*. *See Henyard v. State,* 689 So.2d 239 (Fla.1996) (finding that the prosecutor's misstatement of the law during voir dire was harmless error because it only happened three times and the misstatement was not repeated by the trial court when instructing the jury prior to deliberations).

Gonzalez also contends that counsel's performance was deficient because he failed to object when the jury was misinformed about its responsibility in the sentencing process. The alleged misstatements that Gonzalez points to informed the jury that it was their responsibility to advise or recommend a sentence to the judge, but that the judge had the duty to impose the sentence. Gonzalez also argues that the jury verdict form was incorrectly titled "Advisory Sentence." The circuit court found the statements to the jury and the form accurate and consistent with the existing law. We agree.

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The trial judge and the prosecutor properly stated the role of the jury as advisory as stated in the standard jury instructions.[6] Furthermore, this Court has repeatedly determined that the standard jury instructions that refer to the jury's role as advisory do not violate *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). *See Brown v. State,* 721 So.2d 274, 283 (Fla.1998) (holding that the standard jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate *Caldwell*). Accordingly, Gonzalez fails to satisfy either prong of *Strickland.*

Gonzalez's final contention is that counsel was ineffective in failing to object when the jury was instructed that it was Gonzalez's burden to demonstrate that the mitigators outweighed the aggravators. The comment made by the trial judge that Gonzalez refers to was: "It is your duty to follow the law . . . and to render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." This instruction did not address or change the burden of proof; the trial judge properly stated the law. Therefore, Gonzalez fails to demonstrate deficiency or prejudice.

Because all of Gonzalez's claims are without merit, we affirm the circuit court's summary denial of relief.

Failure to Object to Inflammatory Victim Impact Evidence

Gonzalez asserts counsel was ineffective for failing to object to alleged inflammatory victim impact evidence elicited through the testimonies of LaSonya Hadley and Michelle Watson. Gonzalez argues that their testimonies were irrelevant to the jury's consideration of the aggravators, and that counsel should have requested an instruction relating to the proper role of victim impact evidence.

Under section 921.141(7), Florida Statutes (2007), victim impact evidence is permissible.[7] The testimonies of Hadley and

[990 So.2d 1028]

Watson were properly elicited to demonstrate Officer Bauer's uniqueness as an individual human being. Contrary to Gonzalez's contention, it does not matter that neither witness was a member of Office Bauer's family because section 921.141(7) does not limit victim impact evidence to family members. There is no merit to Gonzalez's claim.

Gonzalez's ineffectiveness claim based on counsel's failure to request an instruction on the use of victim impact testimony is also meritless. As we have previously held, the approval of standard instructions on a particular issue does not foreclose the parties from requesting alternative instructions on the same issue. *See Kearse v. State,* 770 So.2d 1119, 1132 (Fla.2000). However, nothing within this holding suggests that counsel must request special instructions. Counsel cannot be deemed deficient for not requesting the alternative instructions when the issue is adequately covered by the standard jury instructions.

Because the circuit court correctly denied this claim without an evidentiary hearing, we affirm.

Failure to Object to Improper Penalty Phase Closing Arguments

Gonzalez next questions counsel's performance because counsel did not object to several portions of the prosecutor's closing argument. He contends these arguments were

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improper because they were used to inflame the passions and emotions of the jury. We only address four of these instances because the other three are procedurally barred.[8] With regard to these four instances, the circuit court found that none of the comments was so prejudicial as to undermine confidence in the reliability of the jury's recommendation. We agree. When read in context, these comments were not improper and did not undermine confidence in the outcome.

With regard to closing arguments, this Court emphasized in *Bertolotti v. State,* 476 So.2d 130, 134 (Fla.1985), that "[t]he

[990 So.2d 1029]

proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." The first alleged improper comment was made by the prosecutor at the beginning of his penalty phase closing argument. In this portion of the argument, the prosecutor displayed Officer Bauer's police badge and explained what it symbolizes. The prosecutor then discussed the significance of a police officer's duties and how killing a police officer is different from other murders.

In the penalty phase of a capital trial, the State has the burden of establishing the aggravating circumstances beyond a reasonable doubt. Three of the aggravators argued by the prosecutor were based on the victim's status as a law enforcement officer. The prosecutor argued that (1) the murder was committed to avoid a lawful arrest; (2) the victim was a law enforcement officer performing his duties; and (3) the murder was committed to hinder enforcement of the laws. Thus, in his closing argument, the prosecutor was attempting to demonstrate to the jury that these aggravators should be given great weight by emphasizing that the victim was not just another citizen, but a police officer killed while he was performing his duties. This type of comment is not improper. *See Patten v. State,* 598 So.2d 60 (Fla.1992) (finding that the prosecutor's references to the slaying of a police officer during voir dire and the trial was not improper and did not deny Patten due process in his sentencing proceeding because the State was attempting to establish the aggravating circumstance of "hindering the enforcement of laws").

The second comment that Gonzalez argues was improper concerns the following quotation, which the prosecutor attributed to George Bernard Shaw: "It is long and hard and painful to create a life. It is short and easy to steal the life that others have made." The prosecutor then related this quotation to the life of Officer Bauer and explained that it took the officer many years to create a life for himself, but that that life was taken from him in a matter of seconds by Gonzalez. We find that when this quotation is read in context of what the prosecutor said before and after it, it was not improper.

The third comment concerns the officer's question to two bank employees after he was shot. Officer Bauer asked them, "Are you okay?" The prosecutor emphasized these words to show that the officer was doing his job and risking his life for others. This statement was admitted into evidence during the guilt phase of the trial through the testimonies of Hadley and Watson. Therefore, the prosecutor was properly reviewing this evidence to demonstrate that the law enforcement officer aggravator had been established and that it should be given weight.

The final comment pertains to the prosecutor's statement to the jury that their responsibility "based upon all the evidence in this case, is to return a recommendation for the death penalty." In making the argument that this comment was improper, Gonzalez takes the comment out of context and misses a key phrase—"based upon all the evidence in

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this case." Before making this comment, the prosecutor reviewed all the evidence in the case and properly asserted that, based on this evidence, death was an appropriate recommendation. *See, e.g., Rimmer v. State,* 825 So.2d 304 (Fla.2002) (holding that the "do the right thing" comment was not so erroneous because it was coupled with references to evidence in the record).

Because none of the comments were improper, Gonzalez fails to establish ineffective assistance of counsel under *Strickland.*

[990 So.2d 1030]

Accordingly, we affirm the circuit court's summary denial of relief on this claim.

Improper Use of Mental Health Experts

Gonzalez argues counsel erred by presenting three mental health experts who contradicted each other. Gonzalez specifically argues that counsel should have only presented the testimony of Dr. Eisenstein and should not have presented the testimonies of Dr. Fisher and Dr. Wagshul because Dr. Fisher and Dr. Wagshul's testimonies contradicted Dr. Eisenstein's testimony. Because an evidentiary hearing was conducted on this claim, this Court gives deference to the trial court's findings to the extent that they are supported by competent, substantial evidence. *See McLin v. State,* 827 So.2d 948, 954 n. 4 (Fla.2002); *see also Blanco v. State,* 702 So.2d 1250, 1252 (Fla.1997).

Gonzalez first contends that Dr. Wagshul and Dr. Eisenstein's testimonies were inconsistent because Dr. Eisenstein testified that Gonzalez's organic brain damage caused him to act impulsively. Counsel was attempting to use this testimony to support the mitigating circumstance of extreme mental or emotional disturbance at the time defendant committed the crime. Dr. Wagshul, on the other hand, testified that although Gonzalez suffered from organic brain damage, it would not lead to the impulsive act of robbing a bank and killing someone. Gonzalez asserts that because counsel allowed these inconsistent testimonies to be presented, the trial court rejected the extreme mental or emotional disturbance mitigator.

A review of the trial court's sentencing order demonstrates that the extreme mental or emotional disturbance mitigator was rejected due to the lack of credibility of Dr. Eisenstein's own testimony and not a comparison of his testimony to the other experts. In rejecting this mitigator, the trial court thoroughly evaluated Dr. Eisenstein's findings and testimony and compared it to other evidence in the case. The trial court reviewed the different tests conducted on Gonzalez, including a personality test, which revealed that Gonzalez suffered from severe anxiety, nervousness, and impulsivity, among other characteristics. However, the trial court noted that a personality test depends on the honest responses from the defendant. It was noted that Gonzalez lied to Dr. Eisenstein about his grades in school and his proclaimed innocence of this murder. As a result, the trial court questioned the validity of the results.

The trial court also found that the facts in the record did not support Dr. Eisenstein's opinion. Gonzalez's own confession established that he was aware of the planned robbery at least ten days before the crimes were committed. The day before the crimes, Gonzalez again met with the codefendants and discussed the plans. On the day of the crime, Gonzalez and the codefendants drove the getaway car and the two stolen cars to the area of the bank early enough to make sure their cars were first in line. They then went to a bakery and waited for the bank to open. Gonzalez exited the car with his gun drawn, pointed, and ready for action. Such facts do not support Dr. Eisenstein's opinion that Gonzalez acted out of impulse. The trial court also found that despite his brain damage,

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Gonzalez was able to conform his conduct to the requirements of the law for every day of his life prior to the day of the crimes. Moreover, Gonzalez was able to hold different jobs for long periods of times. Because Dr. Eisenstein's opinion lacked credibility on its own, counsel cannot be deemed ineffective for calling Dr. Wagshul to testify.

[990 So.2d 1031]

Moreover, calling Dr. Wagshul to testify to support the mitigating circumstance that Gonzalez suffered from brain damage benefited Gonzalez because the trial court found and gave weight to the facts of Gonzalez's brain damage, learning disability, and below average intelligence. Counsel testified at the evidentiary hearing that if he had eliminated Dr. Wagshul's testimony, it would have been grounds for ineffective assistance of counsel for not presenting every potential statutory and nonstatutory mitigating circumstance.

Gonzalez also argues that counsel erred by presenting Dr. Fisher's testimony because it was inconsistent with Dr. Eisenstein's testimony. This claim is also without merit. Dr. Fisher was appointed to support a different mitigating circumstance that had nothing to do with organic brain damage. Dr. Fisher testified to the lack of future dangerousness and to the fact that Gonzalez would adjust well to a prison setting. Counsel used this testimony to support the mitigating circumstance of Gonzalez's lack of future dangerousness and potential for rehabilitation, which the trial court found had been reasonably established.

Because counsel made a strategic decision to present the testimonies of the three mental health experts to demonstrate different mitigating factors, counsel cannot be deemed ineffective. The circuit court properly denied relief on this claim.

Failure to Present Gonzalez's Testimony

Gonzalez contends that counsel was ineffective for failing to present his testimony to show his version of the events leading to the death of Officer Bauer. Gonzalez concedes that a colloquy was conducted by the trial court concerning his right to testify. He further concedes he ultimately indicated that he would not be testifying. Gonzalez alleges, however, that his decision to follow the advice of counsel and not testify was not voluntary because of his mental and intellectual deficits. The circuit court found that the claim was conclusively refuted by the record because the record shows that Gonzalez made a knowing and voluntary waiver of his right to testify.

When a defendant raises a claim that counsel interfered with the defendant's right to testify, the defendant must satisfy the *Strickland* standard to prevail on the claim. *See Oisorio v. State,* 676 So.2d 1363 (Fla.1996). To prove that the defendant validly waived his right to testify, the record should at least "support a finding that such a waiver was knowingly, voluntarily, and intelligently made." *Lott v. State,* 931 So.2d 807, 818 (Fla.2006) (quoting *State v. Lewis,* 838 So.2d 1102, 1112 (Fla.2002)). Although this Court has held that "a trial court does not have an affirmative duty to make a record inquiry concerning a defendant's waiver of the right to testify," this Court has stated that in order to avoid postconviction disputes, "it would be advisable for the trial court, immediately prior to the close of the defense's case, to make a record inquiry as to whether the defendant understands he has a right to testify and that it is his personal decision, after consultation with counsel, not to take the stand." *Torres-Arboledo v. State,* 524 So.2d 403, 411 n. 2 (Fla.1988).

In the instant case, the record conclusively demonstrates that Gonzalez knowingly, voluntarily, and intelligently waived his right to testify, and that it was his

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personal decision. After counsel informed the trial judge that Gonzalez was not going to testify and that it was counsel's recommendation that Gonzalez not testify, the judge conducted a colloquy with Gonzalez. During this colloquy, Gonzalez stated that he understood that he had a constitutional right to testify even if his counsel believed

[990 So.2d 1032]

that he should not. He stated that he was going to follow his counsel's advice to not testify, but also stated that it was his personal decision not to testify, and counsel did not promise him anything or force him into not testifying. Additionally, there is nothing in the record to support Gonzalez's claim that he could not understand this proceeding. Brain damage and below average intelligence do not equate to a lack of voluntariness.

The colloquy before the trial court was sufficient to demonstrate that Gonzalez validly waived his right to testify.

Newly Discovered Evidence

Gonzalez contends that the circuit court erred in summarily denying his claim that newly discovered evidence of the life sentence imposed on codefendant Fernando Fernandez requires that Gonzalez's sentence be reduced to life. Gonzalez asserts that had the penalty phase jury been informed of Fernandez's life sentence, there is a reasonable probability that the jury would have recommended a life sentence for Gonzalez.

In order for newly discovered evidence to warrant postconviction relief, the defendant must satisfy two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State,* 709 So.2d 512, 521 (Fla.1998) (*Jones II*). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence must be of a nature that it would probably yield a less severe sentence. *See Jones v. State,* 591 So.2d 911, 915 (Fla.1991) (*Jones I*). The circuit court found that Gonzalez satisfied the first prong of the test because the evidence was unknown and could not have been discovered by due diligence as this evidence did not exist until after the imposition of Gonzalez's death sentence. However, the court found that Gonzalez failed to satisfy the second prong because Fernandez and Gonzalez were not equally culpable. We agree with the circuit court and affirm the denial of relief.

Gonzalez's second penalty phase took place in August 1998. Fernandez's sentence was reduced to life by this Court while Gonzalez's direct appeal was pending. *See Fernandez v. State,* 730 So.2d 277 (Fla.1999). Thus, Fernandez's sentence was not known at the time of Gonzalez's second penalty phase. We find, however, that Gonzalez fails to establish that the subsequent imposition of a life sentence for Fernandez would probably yield a life sentence for him.

In certain instances, this Court has concluded that a codefendant's life sentence precludes a death sentence for the defendant. *See, e.g., Slater v. State,* 316 So.2d 539, 542 (Fla.1975) (holding that less culpable non-triggerman cannot receive a death sentence when the more culpable triggerman receives a life sentence). However, this Court has also found disparate treatment permissible in situations where the defendant is more culpable than the codefendant who has received a life sentence. *See, e.g., Larzelere v. State,* 676 So.2d 394, 406-07 (Fla.1996) (upholding death sentence where evidence showed that defendant was the dominating force behind the murder and was far more culpable than the State's two key witnesses

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who were not prosecuted despite involvement in the crime).

The record establishes that Gonzalez was more culpable than Fernandez. In his confession, Gonzalez said he and Franqui

[990 So.2d 1033]

were the two individuals who directly participated in the actual killing of Officer Bauer. In addressing the mitigating circumstance of disparate sentencing because codefendants Abreu and San Martin received life sentences, the trial court stated that Gonzalez fired the fatal shot killing Officer Bauer, making Gonzalez's participation in the murder greater than that of the codefendants. The trial court also stated that Gonzalez was a major participant in the bank robbery and in the murder of Officer Bauer. This difference in culpability is the principal reason this Court vacated Fernandez's death sentence and remanded for imposition of a life sentence. We found that the record established that Fernandez was inside the getaway car during the robbery of the bank and the murder of Officer Bauer. *See Fernandez,* 730 So.2d at 283. We also found Fernandez's degree of participation in the crime to be similar to that of codefendant Abreu, who was also a getaway car driver, and codefendant San Martin, who was not armed during the robbery and murder and whose role was to take the money tray from the bank tellers and to dispose of the guns. *Id.* In contrast, Franqui, who shot at Officer Bauer, was also sentenced to death. In addressing Franqui's claim that the death sentence was disproportionate, this Court noted that Gonzalez also received a death sentence. *See Franqui v. State,* 804 So.2d 1185, 1198 (Fla.2001).

Because Gonzalez fails to demonstrate that the evidence of the subsequent imposition of a life sentence for Fernandez would probably have yielded a life sentence for Gonzalez, we affirm the circuit court's summary denial on this claim.

Failure to Disclose Public Records

As his next issue, Gonzalez contends the circuit court erred in finding certain records exempt from production. Gonzalez asserts that the type of documents requested were not subject to exemption and should have been disclosed. We disagree. The trial court's determination of whether certain documents are exempt from production is subject to an abuse of discretion standard. *Johnson v. State,* 904 So.2d 400, 405 (Fla.2005) (citing *Mills v. State,* 786 So.2d 547, 552 (Fla. 2001)). "Discretion is abused only when the trial court's decision is `arbitrary, fanciful, or unreasonable.'" *Johnson,* 904 So.2d at 405 (quoting *White v. State,* 817 So.2d 799, 806 (Fla.2002)).

Gonzalez requested various documents from the Eleventh Judicial Circuit State Attorney's Office. The circuit court conducted an in-camera inspection of the records in the five files and specifically noted what the files contained and why they were exempt. The court found that the five files contained various drafts prepared by the State for use in litigating the case. For example, one file contained notes of attorneys' meetings and conversations with witnesses, handwritten notes of opinions and impressions of attorneys during the meetings, and notes made during pretrial conferences or in preparation for trial. Another file contained handwritten and typewritten drafts of pleadings, motions, jury instructions, plea agreements, and affidavits for warrants. This Court has held that attorneys' notes and other such preliminary documents used in preparing and litigating a case are not public records. *See Ragsdale v. State,* 720 So.2d 203, 205 (Fla.1998); *Johnson v. Butterworth,* 713 So.2d 985, 987 (Fla.1998); *see also Jennings v. State,* 782 So.2d 853, 864-65 (Fla. 2001) (affirming order finding notes of witness interviews not to be public record).

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The circuit court did not abuse its discretion in denying Gonzalez's request for production of these documents. Relief on this issue was properly denied.

[990 So.2d 1034]

State's Motion to Strike Gonzalez's Original 3.851 Motion

Gonzalez contends that the circuit court erred in granting the State's motion to strike Gonzalez's original 3.851 motion without allowing him to amend. Gonzalez's original postconviction motion was filed on July 19, 2002. The State moved to strike this motion on the basis that it was a shell motion and was not fully pled as required by the rule. The circuit court granted the State's motion to strike because the motion did not comply with the specific requirements of rule 3.851, Florida Rules of Criminal Procedure. This Court granted Gonzalez permission to file an amended 3.851 motion within a specific time period. Gonzalez now argues that because the trial court granted the State's motion to strike Gonzalez's original motion instead of granting leave to amend, the amended motion filed pursuant to this Court's order cannot relate back to the original filing. Even assuming the trial court should have allowed the defendant leave to amend,[9] Gonzalez fails to demonstrate any prejudice because he was in fact allowed to file an amended 3.851 motion and that motion was heard and determined by the trial court.

Application of the New Rule 3.851

Gonzalez contends that the new rule 3.851 violates Gonzalez's rights to due process and equal protection because it no longer permits capital defendants to file shell motions. Florida Rule of Criminal Procedure 3.851 was amended in 2001 to add a subdivision concerning the contents of these motions. *See Amendments to Fla.Rules of Crim. Pro. 3.851, 3.852, & 3.993 & Fla. Rule of Jud. Admin. 2.050,* 797 So.2d 1213 (Fla.2001). Rule 3.851 specifically includes a provision that the motion shall include "a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought." Fla. R.Crim. P. 3.851(e)(1)(D). This section was added to eliminate the filing of shell motions.

Gonzalez's argument really questions the constitutionality of the one-year time limit for filing postconviction motions after a defendant's conviction and sentence of death become final. We have held that the rule 3.851 as amended in 2001 does not violate a defendant's due process rights or equal protection rights. *See Vining v. State,* 827 So.2d 201 (Fla.2002). To the extent that Gonzalez is making an ineffective assistance of postconviction counsel claim, this Court has repeatedly rejected such a claim. *See Waterhouse v. State,* 792 So.2d 1176 (Fla.2001) (finding that ineffective assistance of postconviction counsel is not a cognizable claim); *see also Lambrix v. State,* 698 So.2d 247 (Fla.1996).

Accordingly, we affirm the circuit court's denial of relief on this claim.

Ring v. Arizona Claim

Gonzalez asserts that Florida's death penalty scheme is unconstitutional under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). However, both the United States Supreme Court and this Court have held that *Ring* does not apply retroactively. *See Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *Johnson v. State,* 904 So.2d 400 (Fla.2005). Gonzalez's death sentence became final in 2001 after this

[990 So.2d 1035]

Court affirmed the sentence imposed after a new penalty phase. Therefore, Gonzalez cannot rely on *Ring* as a basis for finding his death sentence unconstitutional. *See*

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Washington v. State, 907 So.2d 512, 514 (Fla.) (finding defendant not entitled to relief under *Ring* because *Ring* is not applied retroactively), *cert. denied,* 546 U.S. 1064, 126 S.Ct. 802, 163 L.Ed.2d 632 (2005). Accordingly, relief is hereby denied on this claim.

Competency to be Executed

Gonzalez concedes that the claim that he may not be competent at the time of execution is not ripe for review because he has not been found incompetent and a death warrant has not been signed. However, he contends that he is raising the issue for preservation purposes. This Court has repeatedly found that no relief is warranted on similar claims. *See State v. Coney,* 845 So.2d 120, 137 n. 19 (Fla. 2003) (rejecting claim that defendant was insane to be executed where he acknowledged that claim was not yet ripe and was being raised only for preservation purposes); *Jones v. State,* 845 So.2d 55, 74 (Fla.2003) (finding claim that defendant may be insane to be executed was "not ripe for review" where defendant had not been found incompetent and a death warrant had not been signed; noting that defendant made claim "simply to preserve it for review in the federal court system"); *Hall v. Moore,* 792 So.2d 447, 450 (Fla. 2001) (stating that it is premature for a death-sentenced individual to present a claim of incompetency or insanity, with regard to his execution, if a death warrant has not been signed). Gonzalez is likewise not entitled to relief on this claim.

CONCLUSION

For the reasons stated above, we affirm the circuit court's denial of postconviction relief on all claims.

It is so ordered.

QUINCE, C.J., and WELLS, ANSTEAD, PARIENTE, LEWIS, CANTERO, and BELL, JJ., concur.

Notes:

1. The issues raised were: (1) the trial court erred in denying Gonzalez's peremptory challenges of jurors Diaz and Andani; (2) the trial court erred in denying Gonzalez's motion for severance based upon the introduction of the confessions of non-testifying codefendants Franqui and San Martin at their joint trial; (3) Gonzalez was denied an impartial hearing at his penalty phase because of the court's refusal to sever his case and to permit him to cross-examine San Martin's experts; and (4) his death sentence is disproportionate.

2. The State and Gonzalez filed for certiorari with the United States Supreme Court; both petitions were denied. *See Florida v. Gonzalez,* 523 U.S. 1145, 118 S.Ct. 1856, 140 L.Ed.2d 1104 (1998); *Gonzalez v. Florida,* 523 U.S. 1062, 118 S.Ct. 1393, 140 L.Ed.2d 652 (1998).

3. The five issues raised were: (1) this Court improperly used a harmless error analysis based on the hearsay rule rather than one based on the Confrontation Clause to determine whether or not the admission of codefendant statements was proper during Gonzalez's trial; (2) using the victim's status as a police officer as an aggravator as well as increasing the penalty for homicide from twenty-five years without eligibility for release to life without parole constitutes impermissible doubling; (3) substantial organic and behavioral support existed for the expert opinion that was erroneously rejected by the court when it considered the mental distress mitigator; (4) the prosecutor's passionate closing and impermissible personal statements were error; and (5) proportionality analysis requires that Gonzalez's death sentence be vacated.

4. *Huff v. State,* 622 So.2d 982 (Fla.1993).

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5. Codefendant Fernando Fernandez raised a similar claim in his direct appeal. *Fernandez v. State,* 730 So.2d 277 (Fla.1999). Fernandez argued that the prosecutor attempted to inflame the jury by "describing the bullet's trajectory through the victim's body." *Id.* at 281. We held that the trial court did not abuse its discretion in allowing the statements because they were later supported by the evidence presented. *Id.*

6. The standard jury instructions states that the "[f]inal decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant." *See* Fla.Std. Jury Instr. (Crim.) 7.11.

7. This section provides:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

8. The three instances that are now procedurally barred were raised in Gonzalez's direct appeal after his new penalty phase. Gonzalez first argued that while discussing Gonzalez's duress argument, the prosecutor mocked the defense experts. This Court found that because counsel did not object, the claim was not preserved for appellate review. Gonzalez also argued that the prosecutor made an improper statement as he attempted to refute a mitigation argument offered by the defense. This Court found that the claim was not preserved because the objection at trial was not based on the same grounds as the grounds raised on direct appeal. The last argument raised by Gonzalez dealt with the prosecutor's comments to the jury telling them to use their common sense in evaluating the evidence presented. This Court again found that the claim was not preserved because counsel failed to object. However, with regard to all three claims, this Court concluded, "Gonzalez has failed to demonstrate that the comments either individually or collectively amount to fundamental error so as to entitle him to any relief." *See Gonzalez,* 786 So.2d at 569. Because Gonzalez failed to show that the comments amounted to fundamental error on direct appeal, Gonzalez fails to demonstrate that counsel's failure to object to the comments resulted in prejudice under *Strickland. Chandler v. State,* 848 So.2d 1031, 1046 (Fla. 2003) ("Because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* test.").

9. In *Bryant v. State,* 901 So.2d 810 (Fla.2005), we said that by finding that Bryant's 3.851 motion should not have been stricken without leave to amend, we were not condoning or encouraging the practice of filing shell postconviction motions. Indeed in the *Bryant* case the sixty-nine page motion was not a shell motion but did have some technical deficiencies. The motion in this case, however, was a true shell motion filed simply to comply with the time limitations.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RICARDO GONZALEZ, CASE NO. 08-22909-CIV-DIMITROULEAS

Petitioner,

vs.

WALTER A. MCNEIL,

Respondent.
_____/

FINAL JUDGMENT AND ORDER DISMISSING HABEAS PETITION AS TIME-BARRED

THIS CAUSE is before the Court on Petitioner Gonzalez's October 20, 2008 Petition For Writ of Habeas Corpus [DE-1]. The Court has considered the State's November 13, 2008 Response. [DE-4] and Gonzalez's November 24, 2008 Reply [DE-7] and finds as follows:

1. On February 4, 1992, Gonzalez, along with Leonardo Franqui, Pablo San Martin, Fernando Fernandez and Pablo Abreu, was indicted and charged with First Degree Murder of a Law Enforcement Officer; Armed Robbery; two counts of Aggravated Assault, Possession of a Firearm While Engaged in a Felony; two counts of Grand Theft; and two counts of Burglary (Volume 5, Appx. N, pp. 1-5). Fernandez's case was severed and tried before a separate jury; however, there were dual juries, and the trials were somewhat simultaneous.

2. On June 2, 1994, a jury found Gonzalez guilty of First Degree Murder of a Law Enforcement Officer with a Firearm; Armed Robbery with a Firearm; Aggravated Assault with a

Firearm;[1] two counts of Grand Theft; and two counts of Burglary, (Volume 7, Appx. N, pp. 480-482]; he was adjudicated guilty. (Volume 5, Appx. N, pp. 7-8].

3. On September 23, 1994, by a vote of 7-5, the jury recommended the death penalty for Gonzalez. (Volume 7, Appx. N, p. 559).

4. On October 11, 1994, Gonzalez was sentenced to death. (Volume 8, Appx. N, pp. 746-750). Judge Sorondo entered a detailed order. (Volume 26, Appx. N, pp. 2-22]. Judge Sorondo also sentenced Franqui and San Martin to death.[2]

5. On September 18, 1997, the Florida Supreme Court affirmed Gonzalez's convictions. The issues affirmed on appeal were the denial of defense peremptory challenges, the denial of severance, and the introduction of the co-defendants' confessions. However, the Florida Supreme Court remanded for a new penalty phase. (Volume 27, Appx. O, pp. 55-57). Gonzalez v. State, 700 So. 2d 1217 (Fla. 1997). Rehearing was denied on October 30, 1997. The United States Supreme Court denied two petitions for certiorari, first, on April 16, 1998; and second, on May 26, 1998. Gonzalez v. Florida, 523 U.S. 1062 (1998); Gonzalez v. Florida, 523 U.S. 1145

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[1]After the opening statement, the State filed a nolle prosequi as to one count of aggravated assault and the charge of unlawful possession of a firearm during a felony. (Volume 13, Appx. N, p. 867). San Martin v. State, 717 So. 2d 462-464 n. 1 (Fla. 1998). Pablo Abreu pled guilty and received a life sentence.

[2]The Florida Supreme Court later vacated both Fernando Fernandez and Pablo San Martin's death sentences. Fernandez v. State, 730 So. 2d 277 (Fla. 1999); San Martin v. State, 717 So. 2d 462 (Fla. 1998) cert. denied, 526 U.S. 1071 (1999). San Martin, along with Franqui and Abreu, also was convicted of another murder and sentenced to death. San Martin v. State, 705 So. 2d 1337 (Fla. 1997). Habeas Corpus has been denied in that case. See Martin v. McNeil, No. 08-23487 CV Huck (S.D. Fla. September 4, 2009). Franqui's death sentence was affirmed by the Florida Supreme Court. Franqui v. State, 804 So. 2d 1185 (Fla. 2001). Franqui's habeas petition in this case was finally denied by Judge Moore in 07-22384 CV Moore on April 20, 2009. [DE-26]. An appeal is pending in the Eleventh Circuit (08-16389 and 09-12626).

(1998).

6. On August 20, 1998, another jury, by a vote of 8-4, recommended death for Gonzalez after a penalty phase. (Volume 28, Appx. O, p. 219).

7. On September 18, 1998, Judge Scola imposed a death sentence. (Volume 28, Appx. O, pp. 245-260); (Volume 28, Appx. O, pp. 265-266). (Volume 28, Appx. O, pp. 345-364).

8. On May 10, 2001, the Florida Supreme Court affirmed.[3] Gonzalez v. State, 786 So. 2d 559 (Fla. 2001). Gonzalez's conviction became final ninety (90) days later on August 8, 2001, when he did not petition the U.S. Supreme Court for a writ of certiorari. Bond v. Moore, 309 F. 3d 770, 774 (11th Cir. 2002).

9. Three hundred forty-five (345) days later, on July 16, 2002, Gonzalez filed his "shell" Motion to Vacate under Fla. R. Crim. Proc. 3.850. (Volume 40, Appx. P, pp. 145-158). Although counsel certified the motion on July 16, 2002, it was not filed until July 19, 2002. Gonzalez does not get the benefit of the "mailbox rule", as he was represented by counsel. Sandvik v. U.S., 177 F. 3d 1269, 1271 (11th Cir. 1999) reh'g denied, 207 F. 3d 666 (11th Cir. 2000); Rutledge v. U.S., 230 F. 3d 1041, 1052 (7th Cir. 2000) cert. denied, 531 U.S. 1199 (2001). An Amended Motion to Vacate was filed on March 10, 2003. (Volume 40, Appx. P, pp. 187-259).

10. The trial court granted an evidentiary hearing on whether re-sentencing counsel was ineffective in the improper use of mental health experts. (Vol. 42, App P, pp, 546-600).

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[3]The following issues were raised: erroneous admission of co-defendants' statements, double counting by using victim's status as a police officer, rejection of the un-controverted testimony of defense expert, prosecutor's improper closing argument and disproportionate death sentence.

11. As to the issue that was heard at the evidentiary hearing and as to the other issues, the trial court, Judge Kevin Emas, denied relief, finding:

A. Trial counsel was not ineffective in failing to object to the prosecutor's opening statement, in that the statements made in opening were not improper. Any objection would have been overruled.

B. Trial counsel was not ineffective in failing to call Detectives La Porte or Pearce or failing to introduce a 9 millimeter firearm discovered at an unrelated scene.

C. Trial counsel was not ineffective in failing to object to inaccurate statements of law regarding the jury's role and the burden of proof.

D. Trial counsel was not ineffective in failing to object to the prosecutor's comments or presentation of victim impact evidence.

E. Trial counsel was not ineffective in calling three (3) expert witnesses who contradicted each other.

F. Trial counsel was not ineffective in failing to call Gonzalez as a witness.

G. The life sentence subsequently imposed on co-defendant Fernando Fernandez would not have produced a life recommendation at a new sentencing proceeding.

H. Rule 3.851 is not unconstitutional.

I. Public records were properly disclosed.

J. Florida's statutory scheme is not unconstitutional.

K. An insanity claim is premature. (Volume 42, App. P, pp. 505-600).

12. On July 3, 2008, the Florida Supreme Court affirmed the denial of Gonzalez's motion for post conviction relief. (Volume 45, Appx. U) Gonzalez v. State, 990 So. 2d 1017 (Fla. 2008). Mandate issued on September 29, 2008. (Volume 45, Appx Z).

13. Twenty-one (21) days later, on October 20, 2008, Gonzalez filed this instant petition alleging:

A. It was error to admit Franqui and San Martin's confessions in a joint trial.

B. It was error to deny Gonzalez the opportunity to exercise peremptory challenges against Jurors Aurelio Diaz and Adriana Andani.

C. Ineffective Assistance of Counsel at the Guilt Phase:

(1) Failure to object to the prosecutor's opening statement

(a) Victim, a good-natured guy

(b) People liked him

(c) Bullets ripped through the victim's body, exploding his heart

(2) Failure to object to teller LaSonya Hadley's relationship with the victim or that victim was singing a little song.

(3) Failure to call Det. La Porte to testify about an inoperable gun, found blocks away from the bank.

D. Ineffective Assistance of Counsel at Re-Sentencing:

(1) Failure to object to:

(a) Comments about the weighing process

(b) Comments about the jury's role

(c) Jury instruction on Burden of Proof

(d) Victim impact evidence

(i) LaSonya Hadley's testimony about the victim

(ii) Michelle Watson's testimony

(e) Improper Prosecutorial Closing Argument

(i) Denegration of defense experts

(ii) Denegration of mitigation

(2) Failure to request jury instruction on victim impact evidence.

(3) Inconsistent defense mental health experts

E. Gonzalez can not be executed because he is insane.

TIME-BARRED

14. Gonzalez' conviction became final on August 8, 2001.[4] Three Hundred Forty-Five (345) days elapsed before Gonzalez filed his "shell" Motion for Post Conviction Relief on July 19, 2002. Collateral counsel filed this "shell" motion in an attempt to toll the time limits under the federal habeas statute. (Volume 40, App. P, p. 146). At that time, Gonzalez requested leave to file an amended motion to vacate. On August 13, 2002, the trial court granted the State's Motion to Strike Gonzalez' motion, due to non-compliance with the specific requirements of Rule 3.851, Fla. R. Crim. Proc. (Volume 40, App. P, p. 161)[5]. If Gonzalez's "shell" motion was not properly

[4]Collateral counsel in 2001 apparently believed that the 90 days for filing a writ of certiorari would run from the mandate. (Volume 40, Appx P, p. 146). However, it runs from the entry of judgment. Chavers v. Fla. Dep't of Corr., 468 F. 3d 1273, 1275 (11th Cir. 2006).

[5]There is some authority that the statute of limitations might have been tolled from July 19, 2002 until August 13, 2002, when the state trial court struck the motion for post conviction relief. Hemmerle v. Schriro, 495 F. 3d 1069, 1075 (9th Cir. 2007). Therefore, Gonzalez would

filed, the statute of limitations ran on August 8, 2002. If Gonzalez's request to file an amended motion to vacate tolled the statute of limitations, then the clock began to run again on August 13, 2002, when the trial court struck the "shell' motion. At that point, the one year statute of limitations ran no later than September 3, 2002. On March 10, 2003, Gonzalez filed his consolidated Amended Motion to Vacate. (Volume 40, App P, pp 187-259). If Gonzalez' July 19, 2002, Motion to Vacate was not properly filed, then the statute of limitations was not tolled, and more than one year of non-tolled time elapsed prior to Gonzalez' filing his Consolidated Amended Motion to Vacate on March 10, 2003. However, the Florida Supreme Court granted Gonzalez' permission to file an Amended 3.851 motion within a specific period of time. It would seem that such an order might allow the amended petition to relate back to the July 19, 2002 filing date, but only if the request had been made prior to the statute of limitations running. Here, unless the "shell motion" tolled the statute, it would appear that the one year AEDPA statute clearly ran no later than five (5) days before the trial court granted the state's Motion to Strike.[6] Alternatively, even considering that the Florida Supreme Court allowed the amendment, an amended motion would not relate back to an initial motion that itself was insufficient to toll the

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have had, at the latest, until September 3, 2002, to file his state collateral attack. Gonzalez certified his Emergency Motion For Extension of Time to File his Motion for Post Conviction Relief on September 5, 2002. It was received by the Attorney General's Office on September 9, 2002. (Volume 45, Appx. V). On October 11, 2002, the Florida Supreme Court granted the emergency motion (Volume 45, Appx. W). On January 30, 2003, the Florida Supreme Court granted additional time, until March 10, 2003 to file the collateral attack. (Volume 45, Appx. Y). However, tolling does not operate to revive an expired limitations period. Moore v. Crosby, 321 F. 3d 1377, 1381 (11th Cir.) reh'g denied, 67 Fed. Appx. 585 (11th Cir. 2003).

[6]Moreover, it does not appear that Gonzalez had asked the Florida Supreme Court for permission to file an amended motion to vacate prior to September 3, 2002, which is when the statute of limitations ran, if the dates of July 19, 2002 - August 13, 2002 are tolled.

limitations period because it was not properly filed. Melson v. Allen, 548 F. 3d 993, 998 (11th Cir. 2008) citing Sibley v. Culver, 377 F. 3d 1196, 1204 (11th Cir. 2004). Here, as the Florida Supreme Court noted, Gonzalez's motion was a true shell motion, filed simply to comply with the time limitations. Gonzalez, 990 So. 2d at 1034 n. 9. Gonzalez's one year statute of limitations under AEDPA ran, at the latest, on September 3, 2002, before he asked the Florida Supreme Court for permission to file an amended motion to vacate. Under the most liberal construction to Gonzalez, three hundred eighty-eight (388) days of non-tolled time elapsed prior to Gonzalez's filing this federal petition on October 20, 2008. Alternatively, in his Reply, Gonzalez contends he is entitled to equitable tolling of the statute of limitations. Gonzalez's conclusory allegations about extraordinary circumstances beyond his control are insufficient to warrant equitable tolling or even a hearing to consider that remedy. Moreover, that remedy should be sparingly applied. Even gross negligence[7] of post conviction counsel is not a basis for equitably tolling the AEDPA one year statute of limitations. Here, there are no allegations of bad faith, dishonesty, divided loyalty or mental impairment on behalf of post conviction counsel. Holland v. Florida, 539 F. 3d 1334, 1339 (11th Cir. 2008).pet for cert. filed (May 13, 2009). The fact that the attorney who recommended the filing of a "shell" motion had previously been an Attorney General prosecuting death penalty cases, does not rise to the level of a divided loyalty, nor does it warrant an evidentiary hearing. There is no allegation of affirmative misrepresentations. Id. n. 9; Hammond v. Frazier, 275 Fed. Appx. 896 (11th Cir. 2008). An attorney's miscalculation of the limitations

[7]Certainly, collateral counsel must have been aware of the principle that a state court petition, filed after the expiration of the limitations period, cannot toll the period, as there would be no period remaining to be tolled. Webster v. Moore, 199 F. 3d 1256, 1259 (11th Cir. 2000), see also, Alexander v. Sec'y, D.O.C., 523 F. 3d 1291, 1294 (11th Cir. 2008).

period does not warrant equitable tolling, Lawrence v. Florida, 549 U.S. 327, 336 (2007), particularly where prisoners have no constitutional right to counsel. Coleman v. Thompson, 501 U.S. 722, 756-57 (1991). A state's effort to assist prisoners in post conviction proceedings does not make the state accountable for a prisoner's delay in filing. Downs v. McNeil, 520 F. 3d 1311, 1320 n. 6 (11th Cir. 2008). Ordinary attorney negligence, like miscalculating a deadline, does not warrant equitable tolling. Id. at 1325; McMillan v. Sec'y for D.O.C., 257 Fed. Appx. 249, 253 n.12 (11th Cir. 2007); Melendez v. Sec'y for D.O.C., 247 Fed. Appx. 188, 189 (11th Cir. 2007). Moreover, mailing mistakes do not warrant equitable tolling. Sandvik v. U.S., 177 F. 3d 1269, 1271 (11th Cir. 1999) reh'g denied, 207 F.3d 666 (11th Cir. 2000); Wainwright v. Sec'y, D.O.C., 537 F. 3d 1282, 1286 (11th Cir. 2007). This petition is time-barred. Finally, there is no allegation that Gonzalez is actually innocent.

15. This court will attempt to address alternatively, Gonzalez' other claims. Clisby v. Jones, 960 F. 2d 925, 936 (11th Cir. 1992).

MERITS

16. First, Gonzalez complains that it was error to admit Leonardo Franqui's and Pablo San Martin's confessions in a joint trial. Gonzalez moved for a severance on April 14, 1994. (Volume 5, Appx. N, pp. 110-112]. On May 12, 1994, the State filed a Response in Opposition to the Severance Motions (Volume 5, Appx. N., p. 133-141). On May 19, 1994, the trial court found that the confessions of Franqui, San Martin and Gonzalez were indistinguishable from each other as to the material aspects of the case. (Volume 6, Appx. N, pp. 215-221]. On September 18, 1997, the Florida Supreme Court found that the admission of Franqui's and San Martin's confessions in the guilt phase was harmless error. Gonzalez v. State, 700 So. 2d 1217, 1219 (Fla.

1997). Two justices dissented on this issue. The Florida Supreme Court found the error to be harmless beyond a reasonable doubt because: Gonzalez confessed to participating in the robbery and shooting the victim; the fatal bullet came from Gonzalez's gun; Gonzalez admitted to being with Franqui, who was identified as the driver of one of the stolen cars leaving the scene of the crime; and Gonzalez consented to a search of his apartment where $1200 of the stolen money was found. In co-defendant San Martin's appeal, the Florida Supreme Court related the following facts:

> The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators drove away in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, police officer Steven Bauer was shot and killed. Shortly, after the robbery, the vehicles were found abandoned two blocks west of the bank.
>
> Approximately two weeks later, co-defendant Gonzalez was stopped by the police after leaving his residence on January 18, 1992. Gonzalez subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, recruited the other participants, and chosen the location and date for the crime. Gonzalez also stated that Franqui had procured the two stolen Chevrolets, driven one of the cars, and supplied him with the gun he used during the robbery. Gonzalez further stated that Franqui was the first shooter and had fired at the victim three or four times, while Gonzalez had shot only once. Gonzalez stated that he had shot low and believed that he had only wounded the victim in the leg. During a subsequent re-interview, Gonzalez described how Franqui had shouted at the victim not to move before shooting him.
>
> San Martin and Franqui, who were being held on other charges, were taken from the Dade County Jail to the Homicide Headquarters on January 18, 1992. They were questioned separately about their involvement in the Bauer killing and another attempted robbery in Hialeah where Raul Lopez was killed. After a detective told San Martin that co-defendant Fernandez had implicated him in the Bauer case, San Martin told the detective that Gonzalez, Fernandez, Franqui,

> and Abreu were also involved, with Abreu driving a getaway car parked several blocks away from the bank. San Martin could not say who carried guns or did the shooting. He admitted that he took the money tray. During a January 21, 1992, interview with a Hialeah detective investigating the Lopez killing, San Martin also drew a diagram detailing where the weapons could be found, but he refused to sign the drawing.
>
> > FN2. At the time that the detective questioned San Martin about the weapons, the police did not know that the same weapons had been used in both the Lopez and Bauer incidents. The police learned that the weapons were used in the Bauer shooting only after the weapons were recovered and ballistic tests were conducted.
>
> Franqui initially denied any involvement in the crimes, but confessed after a detective told him that the others were in custody and naming him as a participant. He recounted essentially the same story as the others. He also stated that only he and Gonzalez were armed. He stated that Gonzalez yelled "freeze" to Bauer after they saw his weapon. He denied firing the first shot and admitted firing only one shot.
>
> The co-defendants filed pretrial motions to suppress their confessions and to sever their trials. San Martin's motion to sever was based upon the co-defendants' statements that incriminated him. San Martin requested either a severance from the other defendants or that their statements be excluded. He also filed a motion to suppress his own confession on the basis that it was obtained in violation of his right to counsel and privilege against self-incrimination, and that it was not freely and voluntarily given. After hearings on the various motions, the court denied all of the co-defendants' motions, with the exception of Fernandez's motion to sever his trial. Dual juries were selected, with Jury A hearing Fernandez's case and Jury B rendering a guilty verdict on San Martin, Franqui and Gonzalez. San Martin, 717 So. 2d at 465.

According to the Florida Supreme Court, Franqui and San Martin's confessions were as follows:

> FN2. San Martin also made a confession to police, in which he stated that the robbery was planned by a black friend of the co-defendant Fernandez and that the planning occurred at Fernandez's apartment. San Martin admitted that he had grabbed the money tray during the robbery, but could not say who carried guns or did the shooting.
>
> Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars, but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez, and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez and not himself who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.
>
> Gonzalez, 700 So. 2d at 1218.

Assessing any error in the context of the entire case, the Florida Supreme Court did not err in applying the harmless error test. Spears v. Mullin, 343 F. 3d 1215, 1232-34 (10th Cir. 2003) cert. denied, 541 U.S. 909 (2004). The Florida Supreme Court's decision[8] that the confessions were reliable was neither "contrary to" nor an "unreasonable application of" governing United States Supreme Court case law. Grossman v. McDonough, 466 F. 3d 1325, 1340 n. 12 (11th Cir. 2006) cert. denied, 550 U.S. 958 (2007). It did not have a "substantial and injurious effect or influence

[8]After re-sentencing, Gonzalez again unsuccessfully raised the admissibility of the co-defendant confessions before the Florida Supreme Court. Gonzalez v. State, 786 So. 2d 559, 564 n. 2 (Fla. 2001).

in determining the jury's verdict. Grossman, 466 F. 3d at 1339 citing Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).[9]

17. Second, Gonzalez contends that it was error to deny his peremptory challenges against jurors Auerlio Diaz and Adriana Adani.

A. Mr. Diaz was 51 years old and lived in the Westchester Area. (Volume 11, Appx. N, p. 429]. He had immigrated from Cuba at 19. (Volume 12, Appx N, p. 254-55). He has been in Dade County for 27 years and was employed as a chief of maintenance for the County. (Volume 11, Appx. N, pp. 420-30). He had two daughters, a clerk typist and an after school program supervisor, who had never given him any trouble. (Volume 12, Appx. N, p. 756). He had served on a civil jury before. He had no experience with police officers, being arrested or the victim of a crime, owing a gun or serving in the military. He had no problems with the death penalty, and he could be fair. (Volume 11, Appx. N, pp. 430-431). Juror Diaz indicated that he could follow the law. (Volume 11, Appx. N, pp. 546, 578-79) (Volume. 12, Appx. N, p. 698, 752-55). Gonzalez's trial counsel attempted to strike Diaz because he didn't like him. (Volume 12, Appx. N, p. 793). The trial court disallowed the challenge. The objection was later renewed and denied. (Volume 13, Appx. N, p. 824).

B. Juror Adriana Andani was 29 years old and lived all of her life in Dade County, currently in Pine Crest. She was single and had no experience with jury duty, police officers, being arrested, owning a firearm or serving in the military. (Volume 11, Appx. N, p. 441). Her

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[9]On April 20, 2009 U.S. District Judge Michael Moore denied Franqui's habeas petition agreeing with the Florida Supreme Court that the admission of the co-defendants' confessions was harmless error. [DE-26 in 07-22384-CIV]. Franqui's appeal is pending before the Eleventh Circuit (Case No.08-16389 and 09-12626).

car had been stolen three years earlier by a twelve (12) year old juvenile. She could be fair. (Volume 11, Appx. N, p. 442). She could follow the law. (Volume 11, Appx. N., pp. 534-35, 547, 569, 575) (Volume 12, Appx. N, pp. 619, 664-65, 767-769). Gonzalez attempted to exercise a peremptory challenge against Andani (Volume 12, Appx. N, p. 787). When the state objected, Gonzalez's counsel proffered that she loved the prosecutor; she was hesitant; she made no eye contact with him, that she had developed an affinity with the prosecutor, and that she looked toward the prosecution table. Id at 788. The Court commented that the law in the area was outrageous, that peremptory challenges no longer existed and that neutral reasons must be given. Id at 789. However, the Court made none of the observations that defense counsel had relied on. Co-counsel also proffered another reason to strike Andani, it was denied. Id at 790.

C. The Florida Supreme Court held that the trial court had not abused its discretion in denying the peremptory challenges. Gonzalez v. State, 700 So. 2d 1217, 1218 (Fla. 1997) citing Franqui v. State, 690 So. 2d 1332 (Fla. 1997). Whether this Court would have sustained the objection to the defendant's peremptory strike is not germane to this petition.[10] The trial judge was in the best position to ascertain the demeanor of Gonzalez's trial attorney in an effort to determine discriminatory intent. Snyder v. Lousiana, 128 S. Ct. 1203, 1208 (2008). The trial court is in the best position to evaluate the lawyer's credibility. U.S. v. Maxwell, 473 F. 3d 868, 872 (8th Cir.) cert. denied, 550 U.S. 952 (2007).

D. Criminal defendants are prohibited from using peremptory challenges to engage in purposeful discrimination on the basis of race, Georgia v. McCollum, 505 U.S. 42, 59

[10]Body language and demeanor can be appropriate non-discriminatory reasons to strike jurors. U.S. v. Davidson, 449 F. 3d 849, 852-53 (8th Cir.) cert. denied, 549 U.S. 1044 (2006).

(1992) or gender, J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994). However, peremptory challenges are not constitutionally protected fundamental rights. McCollum, 505 U.S. at 57; U.S. v. Allen-Brown, 243 F. 3d 1293, 1299 (11th Cir.) cert. denied, 534 U.S. 1010 (2001); Garcia v. Graham, 2008 WL 2949383*7 (E.D.N.Y. July 31, 2008); Brown v. McKee, 2009 WL 331601*5 (E.D. Mich. Feb. 11, 2009); Haywood v. Portuando, 288 F. Supp. 2d 446, 463 (S.D.N.Y. 2003). Here, there was no constitutional violation. Rivera v. Illinois, 129 S. Ct. 1446, 1454 (2009). Judge Moore denied a similar complaint in Leonardo Franqui's habeas petition. [DE-12, pp. 31-33 in 07-22384CV]. Finally, no error has been shown where no biased juror sat on the case.

18. Third, Gonzalez complains that trial counsel was ineffective in not objecting to the prosecutor's opening statement that the victim was a good natured guy, (Volume 13, Appx. N, p. 873), that people liked him (Volume 13, Appx. N., p. 873) and that bullets ripped through his body, exploding his heart. (Volume 13, Appx. N. p. 878). These comments in opening statement were not improper; they were accurate and not inflammatory. Any objection would have been overruled. In fact, objections were overruled. (Volume 13, Appx. N, pp. 858-59, 866-67). Finally, there is no prejudice where the jury was instructed that the statements of the attorneys were not evidence. (Volume 13, Appx. N., p. 870; Volume 18, Appx. N, p. 1988). U.S. v. Campbell, 317 F. 3d 597, 607 (6th Cir. 2003). The Florida Supreme Court decided that the comments were not improper. Gonzalez v. State, 990 So. 2d 1017, 1025 (Fla. 2008). The statements were later supported by the evidence. Id. at n. 5. This Court agrees. Finally, Gonzalez was represented by experienced trial counsel. There is a strong presumption that counsel's conduct was proper. Stewart v. Sec'y for D.O.C., 476 F. 3d 1193, 1209 (11th Cir. 2007). The co-defendants also were represented by experienced counsel: Eric Cohen for

Leonardo Franqui and Louis Casuso for Pablo San Martin, and they also had the same strategy during opening statements.

19. Fourth, Gonzalez contends trial counsel should have objected to teller LaSonya Hadley's relationship with the victim[11] or that the victim was singing a little song, "Jesus, Jesus, it's going to be a busy day for you guys." (Volume 13, Appx. N, p. 939). The state conceded that this testimony was objectionable. [DE-4, p. 76]. The Florida Supreme Court concluded that Gonzalez was not prejudiced because of the benign nature of the testimony. Gonzalez, 990 So. 2d at 1025. Moreover, counsel for co-defendant Fernandez, Ron Guralnick, had unsuccessfully moved for a mistrial earlier because of the Christian song, but it had been denied. (Volume 13, Appx. N, p. 858-59). Finally, the Court concludes that, if the comments were objectionable, they did not affect the outcome of the case.

20. Fifth, Gonzalez contends that trial counsel should have called Detective La Porte to testify about an inoperable gun found blocks away from the bank. Trial counsel attempted to elicit the testimony during cross-examination, but the state's objection was sustained. (Volume 14, Appx. p. 1070). Trial counsel indicated that he might call the witnesses on the defense side of the case. (Volume 14, Appx N. p. 1084). However, trial counsel rested, without calling any witnesses. (Volume 18, Appx. N. p. 1930]. By not calling any witnesses, trial counsel was able to secure a rebuttal closing argument after the state's closing.[12] Counsel can not be faulted for

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[11]She testified that it was a great relationship. He was the kind of person that you can talk to; he was funny. He was a jokester. He made Fridays fun to work, because it was such a long day. (Volume 13, Appx. p. 936).

[12]Effective May 3, 2007, the rule has now changed in Florida so that a prosecutor now enjoys the final closing argument in all non-capital cases. In re: Amendments, 957 So. 2d 1164 (Fla. 2007).

utilizing such a strategy. Dingle v. Sec'y D.O.C., 480 F. 3d 1092, 1100 (11th Cir.) cert. denied, 128 S. Ct. 530 (2007). Finally, Gonzalez has not shown how this inoperable gun would have affected the verdict in this case. The police recovered two guns from a location in a river, as described by co-defendant San Martin. (Volume 17 Appx. N, p. 1759; Volume 18, Appx. N, p. 1806). Those guns were matched ballistically to the murder scene. (Volume 18, Appx. N, pp. 1881-1886). No error has been shown. The Florida Supreme Court concluded that there was no prejudice to Gonzalez. Gonzalez, 990 So. 2d at 1025. This Court agrees.

21. Sixth, Gonzalez contends that counsel at his re-sentencing was ineffective for failing to object both to the trial court's comments about the weighing process (Volume. 29, Appx. O, p. 26, Volume 32, Appx. O, p. 790) and to the prosecutor's comments (Volume 31, Appx. O, p. 537). The Florida Supreme Court found these comments to be isolated and did not undermine confidence in the outcome, particularly since proper standard instructions were later given to the jury. Gonzalez, 990 So. 2d at 1026-27. This Court agrees: the re-sentencing lasted four (4) days, and the transcript is more than 1800 pages long. These isolated comments did not affect the verdict. Johnson v. Alabama, 256 F. 3d 1156, 1185 (11th Cir. 2001) cert. denied, 535 U. S. 926 (2002).

22. Seventh, Gonzalez complains about comments diluting the jury's responsibility in the sentencing process.

A. Gonzalez complains that the trial court told the jury that their role was merely advisory:

> You do not sentence the Defendant.
> I am the person who ultimately imposes the sentence.
> What you do is make a recommendation to me as to what

> the sentence should be ..... But I want to emphasize to you, although my decision may be different from your recommendation, I must give your recommendation great weight. And it's only under unusual circumstances that I would give a sentence that is different from your recommendation. So your recommendation is extremely important to me. (Volume 29, Appx. O, pp. 27-28).

Later the trial court told the selected jury:

> Now, it's my responsibility to decide which laws apply to this case. And it is your responsibility to determine the facts that are going to be presented during this hearing. You and I have totally separate responsibilities. (Volume 33, Appx. O, p. 922).

In his final instructions, the trial court told the jury:

> The final decision as to what punishment shall be imposed is the responsibility of the judge, however, it is your duty to follow the law that will now be given to you by the court and render to the court an advisory sentence..... (Volume 38, Appx. O, p. 1828).

B. Gonzalez complains that the prosecutor misspoke during voir dire when he told the jury that the judge would make the final decision in the case. (Volume 29, Appx. O, p. 803). However, the prosecutor also told the jury that the Judge had to give their recommendation "great weight or importance". Id.

C. Gonzalez complains that the verdict should not have been labeled "Advisory Sentence." (Volume 37, Appx. O, p. 1663).

The Florida Supreme Court agreed with the state trial judge that counsel had not been ineffective in that the statements were accurate and consistent with the existing law. Gonzalez, 990 So. 2d at 1027. This Court agrees.

23. Eighth, Gonzalez complains that counsel's failure to object to jury instructions on the burden of proof. Gonzalez points to the final instructions that told the jury that they should

determine "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (Volume 38, Appx. O, p. 1828). The Florida Supreme Court found no fault with the instructions on the burden of proof. Gonzalez, 990 So. 2d at 1027. This Court agrees.

24. Ninth, Gonzalez contends trial counsel should have objected to victim impact evidence at re-sentencing.

A. LaSonya Hadley testified that she saw the victim at weddings, basketball games and community events. She considered the victim a friend, knew his wife and children, ate lunch with him, considered him funny and her favorite officer who worked at the bank. (Volume 33, Appx. O, pp. 957-959).

B. Michelle Watson testified that the victim was friendly, sweet and nice. He had a good sense of humor and would tease her. (Volume 33, Appx. O, pp. 982-983).

C. Trial counsel failed to request a limiting instruction on the "victim impact" evidence. The Florida Supreme Court found that the evidence was properly elicited to demonstrate the victim's uniqueness as a human being. Gonzalez, 990 So. 2d 1017, 1027-28 (Fla. 2008). Fla. Statute 921.141(7) provides for the introduction of victim impact evidence at the penalty phase, if at least one aggravator has been shown. Cole v. Crosby, 2006 WL 1169536*9 (M.D. Fla. May 3, 2006). Moreover, the Florida Supreme Court did not fault re-sentencing counsel for not requesting a special instruction. Id. at 1028. This Court agrees.

25. Tenth, Gonzalez complains about the prosecutor's closing argument and counsel's failure to object or to adequately object:

A. The prosecutor mocked and criticized a defense expert as a hired gun who had just accepted Gonzalez's excuse for committing the crime. (Volume 38, Appx. O, p. 1779).

B. The prosecutor said that the instructions had nothing to do with the case, but the objection was just to the form of the argument.

C. The prosecutor called defense experts Dr. Eisentein and Dr. Fisher gullible. (Volume 37, Appx. O, p. 1751).

D. The prosecutor referred to the victim's badge. (Volume 37, Appx. O, pp. 1746-49).

E. The prosecutor used a quote from George Bernard Shaw. (Volume 37, Appx. O, p. 1798).

F. The prosecutor quoted the victim, after being shot, as asking if the other people were okay. (Volume 37, Appx., p. 1799).

G. The prosecutor told the jury that it was their responsibility, "based upon all the evidence on this case", to return a recommendation for the death penalty. (Volume 37, Appx. O, p. 1756).

The Florida Supreme Court recognized that the prosecutor was emphasizing that the victim was a police officer, killed while performing his duties. Gonzalez, 990 So. 2d at 1029. This was a proper argument. Jones v. Dugger, 928 F. 2d 1020, 1029 (11th Cir.) cert. denied, 502 U.S. 875 (1991). Moreover, the Florida Supreme Court found the George Bernard Shaw quote, when read in its context, to be proper. The "are you okay? comment was a proper review of the evidence. Finally, the request to return a death recommendation, when coupled with the key phrase "based upon all the evidence in this case," was not improper. Gonzalez, 990 So. 2d at 1029; U.S. v.

Smith, 441 F. 3d 254, 264 (4th Cir.) cert. denied, 549 U.S. 903 (2006). This Court agrees; none of the comments so affected the trial so as to render it unfair.

26. Eleventh, Gonzalez complains that trial counsel failed to request a jury instruction on victim impact evidence. As indicated above in paragraph 24(c), such a failure does not equate to ineffectiveness. See, Elliott v. Kelly, 2009 WL 855796*19 (E.D. Va. March 31, 2009).

27. Twelfth, Gonzalez complains that trial counsel, at re-sentencing, called defense mental health experts that contradicted each other. Gonzalez concludes that just Dr. Eisenstein should have been called. The trial court held an evidentiary hearing on this issue. The Florida Supreme Court found that Dr. Eisenstein's lack of credibility was not based on contradictory opinions from other defense experts, but was due to other aspects of the record: defendant's lies, defendant's confession, defendant's holding different jobs. Moreover, Dr. Wagshul and Dr. Fisher testified to other mitigating factors. The Florida Supreme Court concluded that counsel's strategic decision could not be deemed ineffective. Gonzalez, 990 So. 2d at 1030-31. Here, counsel felt that they had come within one vote in the first trial of getting a life recommendation and that they should again put on multiple mental health experts in the re-sentencing in an attempt to achieve that life recommendation. [Volume 42, Appx. P, p. 556]. Counsel further testified that when a police officer is killed, it is better to have all the mitigation that can be mustered. [Volume 42, Appx. P, p. 557]. This Court agrees that this strategy was not ineffective. Moreover, re-sentencing counsel, Bruce Fleischer, was an experienced criminal defense attorney, who had been a public defender, practiced criminal defense for over twenty (20) years, and handled 75-100 homicide cases. (Volume 42, Appx. P, pp. 551-52,564). As an experienced trial counsel, there is a strong presumption that his conduct was reasonable. Stewart v. Sec'y for D.O.C., 476 F. 3d 1193, 1209

(11th Cir. 2007). At the re-sentencing, he was assisted by Reemberto Diaz, who had practiced mostly criminal law for almost twenty (20) years and had handled forty (40) capital cases. (Volume 42, Appx. P, pp. 592-95).

28. Thirteenth, Gonzalez contends that he is insane and can not be executed. Gonzalez has conceded that this claim was not ripe, and the Florida Supreme Court agreed. Gonzalez, 990 So. 2d 1035. This Court agrees. No execution date has been set; the issue is not ripe. Shisinday v. Quarterman, 511 F. 3d 514, 521-22 (5th Cir. 2007) cert. denied, 129 S. Ct. 62 (2008).

Wherefore, Gonzalez's Petition For Writ of Habeas Corpus [DE-1] is Dismissed as time-barred. His request for additional time to file a reply is Denied.

His request for an evidentiary hearing is Denied. Even if Gonzalez's factual allegations were proven, he would not be entitled to any relief; no evidentiary hearing is necessary. Breedlove v. Moore, 279 F. 3d 952, 964 (11th Cir. 2002) cert. denied, 537 U.S. 1204 (2003). Additionally, Gonzalez's allegations do not establish circumstances so extraordinary, conduct so diligent, and misconduct so far outside his control, so as to merit an evidentiary hearing on equitable tolling. Downs, 520 F. 3d at 1325.

The Clerk shall close this case and deny any pending motions as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 28th day of September, 2009.

Copies furnished to:

Todd Scher, Esquire

Sandra Jaggard, AAG

WILLIAM P. DIMITROULEAS
United States District Judge

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 3, 2011
JOHN LEY
CLERK

No. 09-15599

D. C. Docket No. 08-22909-CV-WPD

RICARDO GONZALEZ,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(January 3, 2011)

Before EDMONDSON, BARKETT and PRYOR, Circuit Judges.

PER CURIAM:

Ricardo Gonzalez, a Florida prisoner on death row, appeals from the district court's denial of his petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. In 1994, a jury found Gonzalez guilty of first-degree murder of a law enforcement officer and lesser offenses in connection with an armed bank robbery. The Florida Supreme Court affirmed Gonzalez's convictions on direct appeal, but vacated his death sentence and remanded for a new sentencing hearing. Gonzalez v. State, 700 So. 2d 1217 (Fla. 1997) ("Gonzalez I"), cert. denied, Gonzalez v. Florida, 523 U.S. 1062 (1998). On remand, the trial court re-imposed the death penalty, and the Florida Supreme Court affirmed. Gonzalez v. State, 786 So. 2d 559 (Fla. 2001).

Twenty days before the one-year federal habeas statute of limitations was set to expire, see 28 U.S.C. § 2244(d)(1), Gonzalez filed an incomplete "shell" motion for post-conviction relief in state court, pursuant to Fla. R. Crim. P. 3.850. Gonzalez acknowledged that he filed this motion in order to toll the federal limitations period under 28 U.S.C. § 2244(d)(2). Although the trial court struck the "shell" motion, the Florida Supreme Court granted Gonzalez leave to amend, and he subsequently filed an amended Rule 3.850 motion after the expiration of the federal limitations period. The trial court ultimately denied Gonzalez's

amended motion on the merits, and the Florida Supreme Court affirmed. Gonzalez v. State, 990 So. 2d 1017 (Fla. 2008).

Shortly thereafter, Gonzalez filed the instant federal habeas petition. The district court denied the petition, but granted a certificate of appealability on three issues: 1) whether Gonzalez's federal habeas petition was timely; 2) whether the admission of Gonzalez's co-defendants' confessions at his trial was harmful with respect to his guilt; and 3) whether the trial court erroneously denied two of his peremptory challenges. Upon review of the record and the parties' briefs, and having the benefit of oral argument, we affirm the district court's denial of Gonzalez's federal habeas petition.

"When examining a district court's denial of a § 2254 habeas petition, we review questions of law and mixed questions of law and fact de novo, and findings of fact for clear error." Rhode v. Hall, 582 F.3d 1273, 1279 (11th Cir. 2009) (citation omitted), cert. denied, 130 S. Ct. 3399 (2010). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), we may grant habeas relief to a state prisoner on any claim adjudicated on the merits in state court if that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U.S.C. § 2254(d)(1).

The first issue of whether Gonzalez's federal habeas petition was timely turns on whether his "shell" motion was "properly filed" so as to toll the federal limitations period under § 2244(d)(2). Gonzalez argues that, although his "shell" motion was stricken by the trial court, his amended Rule 3.850 motion was deemed to have "related back" and thus rendered his "shell" motion "properly filed." Gonzalez relies on Gore v. State, where the Florida Supreme Court indicated that the relation back doctrine rendered an initially-stricken state post-conviction motion "properly filed" under Florida law for purposes of § 2244(d)(2). 24 So. 3d 1, 15-16 (Fla. 2009). The state responds that this argument is foreclosed by our case law. See Melson v. Allen, 548 F.3d 993, 998 (11th Cir. 2008), vacated on other grounds, 130 S. Ct. 3491 (2010); Sibley v. Culliver, 377 F.3d 1196, 1204 (11th Cir. 2004). Gonzalez suggests that our cases are inapplicable because none of them involved a situation where the state's own filing rules incorporated the relation back doctrine. We need not address this issue here, however, because we find Gonzalez's two substantive claims to be without merit. See Holland v. Florida, 130 S. Ct. 2549, 2560 (2010) ("[T]he AEDPA statute of limitations defense is not jurisdictional.") (alteration, citation, and quotation marks omitted). Thus, even if Gonzalez's federal habeas petition was timely filed, he is not entitled to relief.

Gonzalez's first substantive claim is that the Florida Supreme Court erred by concluding on direct appeal that the admission of Gonzalez's co-defendants' confessions was harmless with respect to his guilt. Specifically, the Florida Supreme Court found that the admission of the confessions of Leonardo Franqui and Pablo San Martin—two of Gonzalez's non-testifying co-defendants—violated Gonzalez's rights under the Confrontation Clause of the Sixth Amendment.[1] See Gonzalez I, 700 So. 2d at 1218-19. The Court concluded that, although this error was harmful with respect to Gonzalez's sentence, it was harmless with respect to his guilt:

> [W]ith respect to guilt, we conclude that the error was harmless beyond a reasonable doubt. Not only did Gonzalez confess to participating in the robbery, he also admitted shooting the victim. He does not contest the legality of his confession in this appeal. In addition, it was determined that the fatal bullet came from the gun that Gonzalez was carrying. Gonzalez admitted being with Franqui, and an eyewitness identified Franqui as the driver of one of the stolen cars leaving the scene of the crime. Further, Franqui's fingerprints were found on one of the stolen vehicles. Moreover, Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. Thus, we conclude that there is no reasonable possibility that the erroneous admission of the confessions of Franqui and San Martin contributed to Gonzalez's conviction for felony murder.
>
> . . . .

[1] Only Franqui's confession is relevant here.

> We agree, however, that Gonzalez's sentence must be reversed. In Franqui's confession, he said that upon approaching the bank, Gonzalez pulled out a gun and told the security guard not to move. Thereafter, he heard a shot, so he also shot his gun. He said he did not know if the shot he heard was fired by Gonzalez or the security guard, but the evidence later developed that the security guard never fired his gun. On the other hand, Gonzalez said it was Franqui who told the security guard not to move and that Franqui shot the security guard before Gonzalez shot him. He said Franqui fired three or four shots and that he only shot once. Consequently, in determining whether or not Gonzalez should be sentenced to death, we cannot say that the erroneous admission of Franqui's confession which portrayed Gonzalez as the aggressor who had precipitated the shooting was harmless beyond a reasonable doubt. Accordingly, we affirm Gonzalez's convictions but vacate the sentence of death and remand for a new penalty phase proceeding consistent with this opinion.

Id. at 1219 (emphasis in original).

Gonzalez has not shown that the Florida Supreme Court's harmless error analysis was contrary to, or an unreasonable application of, Supreme Court precedent.[2] He argues that the admission of Franqui's confession was harmful with respect to his guilt for the same reason it was harmful with respect to his sentence. But as the Florida Supreme Court explained, whether or not Gonzalez was the "aggressor who had precipitated the shooting" was legally irrelevant to his first-degree murder conviction. So long as Gonzalez participated in the

[2] Our conclusion is unaffected by whether we apply Chapman v. California, 386 U.S. 18, 24 (1967) (imposing a "harmless beyond a reasonable doubt" standard), or Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) (imposing an "actual prejudice" standard).

robbery—which, in this case, directly resulted in the officer's death—he would remain liable for first-degree murder under the felony murder doctrine. See Fla. Stat. § 782.04(1)(a)2.d; Lovette v. State, 636 So. 2d 1304, 1307 (Fla. 1994). And the evidence properly admitted at trial—including Gonzalez's own confession, in which he admitted to shooting the victim—established his participation in the robbery. Thus, we find no error in the district court's denial of this claim.

Gonzalez's second substantive claim is that the state courts erroneously disallowed two of his peremptory challenges on the ground that he failed to justify them with a non-discriminatory reason. Gonzalez I, 700 So. 2d at 1218. Gonzalez's claim fails at the threshold, however, because the Supreme Court has held that the erroneous denial of a defendant's peremptory challenge presents only an issue of state law:

> If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.
>
> . . . [T]his Court has consistently held that there is no freestanding constitutional right to peremptory challenges. We have characterized peremptory challenges as a creature of statute, and have made clear that a State may decline to offer them at all. When States provide peremptory challenges (as all do in some form), they confer a benefit beyond the minimum requirements of fair jury selection, and thus retain discretion to design and implement their own systems.

> Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution.

Rivera v. Illinois, 129 S. Ct. 1446, 1453-54 (2009) (alterations, footnote, citations, and quotation marks omitted). At oral argument, counsel for Gonzalez acknowledged Rivera, but suggested that it was inconsistent with Batson v. Kentucky, 476 U.S. 79 (1986). Even if that were true, we are bound by decisions of the Supreme Court, and Gonzalez's claim falls squarely under Rivera. As a result, we find no error in the district court's denial of this claim. See Pulley v. Harris, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."). Accordingly, we affirm the district court's denial of Gonzalez's federal habeas corpus petition.

AFFIRMED.