IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,116

LEONARDO FRANQUI,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT LEONARDO FRANQUI

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STATEMENT OF THE CASE

The appellant, LEONARD0 FRANQUI, was a defendant in the trial court and the appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appeared in the trial court. The symbol "R" will be used to designate the record on appeal and "TR" will be used in reference to the transcripts of pre-trial, trial, and post-trial proceedings.

The defendant, Leonardo Franqui, along with co-defendants Pablo San Martin and Pablo Abreu, were charged by indictment on February 8, 1992, with first degree murder [Count I], attempted first degree murder with a firearm [Counts II and III], armed robbery with a firearm [Count IV], grand theft third degree [Counts V and VI], and unlawful possession of a firearm while engaged in a criminal offense [Count VII], in violation of Florida Statutes §782.04(1), **5775.087, 5777.04, 5775.0845, 5777.011, S790.07, 5812.13,** and **S812.014. [R** 1-51 Franqui and San Martin were tried together, by jury, on September **20, 1993.** Abreu negotiated a guilty plea prior to trial and avoided the death penalty.

Prior to trial, Franqui filed a motion for severance of defendants due to the fact that San Martin [and Abreu] had made post-conviction statements which directly incriminated him. [R 65 - **70, 183 - 186**] Franqui renewed his motion throughout the trial and, particularly, when San Martin's confessions were offered into evidence against him. [TR **1888, 1905 - 1909, 2074 - 2095, 2120 - 2122**] Franqui's motion, objections, and requests for limiting instructions [TR **2087,** 2093] were consistently denied and San Martin's statements were introduced without deletion of its

references to Franqui upon the trial court's finding that they were "interlocking." [R 213 - 214].

Franqui also filed a motion in limine to exclude from evidence those portions of his own confession referring to the offense of robbery where there was no independent evidence of that crime's corpus delicti. [R 74 - 77] His motion and consistent objections to the introduction of that evidence were denied. [TR 1909]

In addition, Franqui moved to dismiss the indictment returned against him due to the existence of an unexplained, handwritten, interdelineation upon it. [R 63 - 64] That motion was denied, as well. [TR 32 - 33, 444 - 455]

After the filing and litigation of various other motions not germane to this appeal, jury selection commenced on July 7, 1993. Due to the sudden unavailability of San Martin's lead counsel, and the state's objection to severance, the trial court granted the state's motion for continuance over defense objection. [TR 887 - 903]

A trial by jury commenced on September 20, 1993 [TR 928 et seq.] The defendant's timely motions for judgment of acquittal were denied. [TR 22671 The jury ultimately found Franqui guilty as charged. [TR 2464]

Prior to the penalty phase hearing, Franqui unsuccessfully renewed his motion for severance. [TR 2529] The jury recommended death by a vote of nine to three. [R 1125, TR 3501]

The trial court followed the jury's recommendation, finding the existence of four statutory aggravating circumstances - (1)

previous conviction for a capital/violent felony, (2) commission of offense while engaged in attempted robbery, (3) pecuniary gain, and (4) cold, calculated and premeditated, but noting that (2) and (3) merged. [R 1184 - 1185]

The court found as non-statutory mitigating circumstances (1) the defendant's poor family background and deprived childhood and (2) that the defendant was a caring husband, father, brother, and provider. [R 1198, 1200]

The trial court sentenced Franqui to death on count I, life imprisonment on counts II and III, fifteen years imprisonment on counts IV and VI, and five years imprisonment an counts V and VII. Counts 11, 111, and IV included three year minimum mandatory terms. All sentences were ordered to run consecutive. [R 1206 - 1211, TR 3610 - 3611]

Franqui filed a timely motion for new trial and supplemental motion for new trial which the trial court denied. [R 688, 693] He filed a timely notice of appeal on December 2, 1993. [R 1302] This appeal follows.

STATEMENT OF THE FACTS

Danilo Cabanas, Sr. and his son, Danilo Cabanas, Jr., operated a check cashing business in Medley, Florida. [TR 1717-1718, 1994] After Cabanas, Sr. suffered an unrelated robbery in August, 1991, he, his son, and friend Raul Lopez routinely went to the Republic National Bank together, for security reasons, every Friday to get the cash to run the business. [TR 1718-1720, 1994–1996] The Cabanas' carried two 9 millimeter handguns and Lopez carried a .32 caliber. [TR 1751, 1753, 1857]

On December 6, 1991, the Cabanas' and Lopez drove in separate vehicles to the bank. Cabanas, Sr. withdrew approximately 20 to 25 thousand dollars, which he carried in a special bag, and left in a vehicle driven by his son. Lopez fallowed. [TR 1720-1723, 1746, 1997] On the way back to their business, the Cabanas' were boxed in at an intersection by the drivers of two trucks (Chevy Suburbans). The occupants of one of the vehicles, wearing masks, exited and began shooting at them. Cabanas, Sr., returned fire. [TR 1724-1728, 1999]

Neither of the Cabanas saw Lopez during the firefight or the occupants of the second vehicle. [TR 1727-1728, 1744, 2009] Although he thought one person, also masked, exited that vehicle, he did not know if that person was armed. [TR 1744-1745] No demands were made for money and no property was taken. [TR 1745, 1749-1750, 2009] The shooters never approached the Cabanas' vehicle but clearly tried to kill Cabanas, Jr. [TR 1749, 2009] No

one said anything. [TR 1750]

The Cabreras' were unharmed, but Lopez was found lying shot outside his vehicle, his door shut, and with no traces of blood inside. [TR **1730-1732, 1844–1845**] The passenger door was open. [TR **20061**

The Suburbans, subsequently determined to have been stolen, were found abandoned. [TR 1735, **1761,** 1764] Three spent **9** millimeter shell casings were found on the ground outside one of the vehicles. [TR **1765, 17881** Another casing, a projectile, and a stocking were recovered from inside. [TR **1790-1791,** 1796] Both Suburbans suffered bullet damage. [TR **1792, 1805**] One **of** the Suburbans was riddled with thirteen bullet holes. [TR **17731** The **Cabanas' Blazer** had ten bullet holes. [TR 1846] One bullet hole was found in the passenger door of Lopez' pickup. [TR 1881]

No **.32** caliber **casings** were recovered. [TR **1879**] No fingerprints were obtained linking Franqui to the crime. [TR **19731** No witness was able to identify Franqui as **a** participant. [TR **19741** Evidence at the scene suggested that Lopez' pickup had struck the back of Cabanas' Bronco at low speed. [TR **1987–1890**]

The police questioned Franqui on January **18,** 1992 and the Metro-Dade police headquarters. [TR **18901** After executing a written Miranda Waiver Form, Franqui initially denied any involvement in the alleged robbery/homicide but, when confronted with photographs of the bank and the Suburbans, confessed. [TR **1905**] According to Detective Greg Smith, Franqui said something to the effect, "You got me, I'm not going to lie to you, I will do

this like a man, and then proceeded to say that he was involved in this particular case." [TR 1905] Thereafter, according to Detective Albert Nabut, Franqui gave an informal statement followed by a formal, recorded, one. [TR 1916]

Franqui purportedly explained that he had learned through one Fernando Fernandez about the Cabanas' check cashing business and that he and his co-defendants had planned to rob the Cabanas' for three to five months. [TR 1916–1917] He described the use of the stolen Suburbans, the firearms used, and related details of the plan. Abreu, he said, left a getaway vehicle at the site where the Suburbans were abandoned. [TR 1918–1920] He described the gun battle and admitted firing in the direction of the man [Lopez] in the truck behind the Cabanas'. [TR 1921] Over objection, the State introduced into evidence Franqui's recorded statement. [TR 1922-1925; 1930–1963]

Franqui consistently denied any intention of shooting anyone. [TR 1970] He consistently described that Lopez had fired upon him first. [TR 1971] He claimed to have been surprised at Lopez' presence. [TR 1972]

Co-defendant Pablo San Martin also confessed orally to Detective Michael Santos. [TR 2096–2104] He admitted initiating the robbery attempt and shooting his weapon at the Blazer but not the pickup truck. He could not tell if Franqui fired his gun. [TR 2102–2103] San Martin said that the weapons had been thrown off a bridge into the water in Miami Beach. [TR 2104]

Detective Albert Nabut also interviewed San Martin on January

21, 1991 about the whereabouts of the weapons. San Martin confessed that he had thrown them in the river near his home and drew maps describing their location. [TR 2118-2120] The weapons were later found by a police diver. [TR 2123, 2132]

Medical examiner Valerie Rao established that Lopez died from a single gunshot wound to the chest which traveled internally to the abdomen causing fatal internal bleeding. [TR 2044, 2050-51, 2062] The autopsy, however, was conducted by an unlicensed (in the United States at least) resident pathologist from Denmark who reflected in his protocol the existence of a non-existent exit wound. [TR 2060, 2065]

Surgeon Michael Hellinger testified that a bullet was removed from Lopez' abdomen. [TR 2165] Firearms expert Robert Kennington matched as "consistent" the projectile recovered from the victim to the .357 caliber revolver purportedly carried by Franqui which was recovered from the Miami River. [TR 2203-2206] He also matched to the .357 a projectile recovered from the passenger mirror of one of the Suburbans and a projectile found in the hood of the Blazer. [TR 2207-2208, 2212] The three projectiles at issue were also consistent with any of the millions of .38 or .357 caliber handguns Smith & Wesson made over the past fifty years. [TR 2244, 2246]

His analysis of Lopez' .32 caliber weapon revealed that it had not been fired. [TR 2198]

The identification of the victim was established by stipulation. [TR 2063]

Sentencing Phase

Craig Van Nest, a driver/deliveryman for an automobile parts supply business described an armed robbery he suffered in January 1992 committed by Franqui, co-defendant San Martin, and a third party. [TR 2534 - 2546] During that offense, Van Nest was abducted and hit over the head. [TR 2539 -2541] Detective Boris Mantecon related Franqui's confession to the crime and Franqui's recovery and surrender of a ,357 Smith & Wessen used in the crime. [TR 2563 - 2567] The State introduced certified copies of convictions for armed kidnapping and armed robbery in case 92-1680. [TR 2579]

Republic National Bank security guard Pedro Santos described an attempted robbery committed by a lone gunman on November 29, 1991, who demanded his surrender of a money bag and fired at him when he refused to give it up. [TR 2580 -2590] Lead investigator Ralph Nazario subsequently took statements from both Franqui and San Martin and both suspects confessed. [TR 2596 - 2599, 2605 - 2614] Franqui followed San Martin and another perpetrator in a "safe" car to be used for the getaway after the stolen car occupied by San Martin was abandoned. [TR 2615] San Martin admitted being the gunman, using the same weapon used in the Lopez robbery/murder. [TR 2600] The State introduced documentary proof of Franqui's convictions for aggravated assault with a firearm and attempted robbery with a firearm. [TR 2621]

Co-defendant Pablo Abreu, San Martin's cousin, testified for

the State. [TR 2690 et seq.] Abreu attributed the plan to rob the Cabanas' to Franqui, who described the second vehicle containing an armed bodyguard, about whom Franque said, "It would be better for him to be dead first than [me]." Franqui supplied the weapons. [TR 2700] Franqui shot at the bodyguard [Lopez]. [TR 2708]

The court took judicial notice of the defendant's convictions in this case for first degree murder, two counts of attempted first degree murder, and armed robbery. [TR 2750]

Detective Nick Fabrigas testified for the defendant and related that Abreu, in his initial statement, had confessed that the robbery had been planned, but that the shooting of Lopez was unintentional. [TR 2753] He had stated that the pickup truck driven by Lopez had appeared suddenly. [TR 2754]

Alberto Gonzalez, Franqui's father-in-law, described the love Franqui had for his daughter, Vivian. [TR 2777] He described Franqui as "a good kid" who was an "excellent" husband and "marvelous" with their two children. [TR 2777-2779] He described Franqui as a "good worker" who had established a loving relationship with other members of his family. [TR 2780 - 2781] Although he described Franqui as sometimes immature, he never suspected his involvement in any criminal activity. [TR 2781]

Mario Franqui Suarez, Franqui's uncle, described Franqui's mother as "unstable" and "not normal." [TR 2860] He described Franqui as suffering from poor eyesight and as "slow" or "retarded." [TR 2864, 2873] After coming to the United States in 1980, Franqui's brother underwent surgery but died two months

later. [TR 2865] Thereafter, Franqui's father started to drink excessively and use crack cocaine. [TR 2866-2867] He was briefly hospitalized for his substance abuse after he threw himself out a window. [TR 2867] He was no longer able to care for the defendant. [TR 2868]

Franqui was also injured in an automobile accident in which he suffered several fractures of the hip and leg and received a metallic implant. [TR 2869] By the age of fifteen, Franqui's family had disintegrated and he was living on the street. He moved in with Suarez for a short time and then lived with Suarez' sons. [TR 2872] Suarez described Franqui as pleasant, helpful, respectful, and non-violent. [TR 2871 - 2872, 2874] He never used drugs or alcohol, and was devoted to his children. [TR 2872 - 2873]

Psychologist Jethro Toomer interviewed 23 year old Franqui and found him to have come from a dysfunctional family in which nurturing was lacking. [TR 3111-3113] Franqui did poorly in school, dropped out in the 8th grade, and was raised by his uncle whom he thought was his father. [TR 3112-3114, 3117, 3123] His mother abandoned him and was basically missing. [TR 3114, 3117] Franqui was extremely close to his younger brother who died and his death was highly traumatic to him. [TR 3118 - 3119] He was abandoned, not only by his mother, but by his brother and father as well. [TR 3118-3120]

Franqui had difficulty communicating, he suffered a number of deficits, and his insight and judgment were impaired. [TR 3115-

3116, 3131] Toomer confirmed Franqui's involvement in a serious accident which left him hospitalized for six months. [TR 3125 - 3126] He was not a leader. [TR 3214]

Franqui had an IQ less than 60. He was retarded. [TR 3135] Toomer found that Franqui was suffering from an extreme mental or emotional disturbance at the time of the crime. [TR 3138] He believed Franqui's emotional and cognitive age was below his chronological age. [TR 3139] He was a devoted husband and caring parent. [TR 3143] He expressed remorse. [TR 3144]

Dr. Toomer diagnosed Franqui as suffering from borderline personality disorder. [TR 3209]

Psychiatrist Charles Mutter was offered by the State in rebuttal. [TR 3220, et seq.] Franqui told him he had no weapon but was merely present as a "getaway man." [TR 3236 - 3237] After speaking to Franqui on one occasion for approximately an hour and fifteen minutes, Mutter found no evidence of organic impairment or borderline personality disorder, and concluded he was not suffering from extreme mental or emotional disturbance at the time of the offense. [TR 3242 - 3243, 3246, 3283] He agreed Franqui had impaired imtelligence function and might have had mild brain damage. [TR 3291, 3295]

In rebuttal, the State called Robert Barrechio, Franqui's employer at the City of Miami Golf Course where Franqui did maintenance work in 1991. Franqui was a good employee who showed initiative, made his own decisions, and understood his instructions. [TR 3350] He did not appear to Barrechio to be

mentally deficient. [TR 3351] However, his duties were to carry out maintenance assignments and he was not called upon to make decisions. [TR 3355]

SUMMARY OF THE ARGUMENT

I.

The defendant was profoundly and unfairly prejudiced by his compelled joinder with his co-defendant, San Martin, who gave two post-arrest statements which incriminated him. All of the many incriminating references by San Martin to Franqui were as unmistakable and damaging as they were unconfrontable. The trial court erred in failing to grant the defendant's repeated motions for severance and in its determination that the confessions were "interlocking" and, therefore, that San Martin's statements were admissible as substantive evidence against Franqui. Because the statements differed in such important respects as which of the declarants was to blame for the fatal gunshot, the defendant is entitled to a new, separate, trial.

II.

The most damaging evidence against the defendant besides his co-defendant's confessions was his own confession, which supported his conviction and sentence of life imprisonment for robbery, his felony first-degree murder conviction, and aggravating circumstances upon which his death penalty was based. The state, however, presented no other evidence of the underlying robbery besides the confession, and in fact presented evidence which refuted a robbery theory, therefore utterly failing to establish the predicate corpus delicti. The defendant's confession,

therefore, insofar as it related to the crime of robbery, should not have been admitted by the trial court. Franqui is entitled to a new trial.

III.

The trial court summarily denied the defendant access to the jury questionnaire required by Fla. R. Crim. P. 3.281 and refused to allow him specific voir dire on mitigating circumstances he expected to demonstrate. These errors precluded the defendant from effectively and intelligently exercising challenges. They were particularly unfair, and therefore abusive of the court's discretion, where the state was consistently permitted to voir dire the jury on its ability to follow various legal principles leading to conviction and the death penalty but the defendant was not allowed to determine the jury's ability to follow legal principles which might result in a life sentence recommendation.

IV.(A)

The trial court erred in finding the homicide was committed in a cold, calculated and premeditated manner where the state failed to prove this aggravator beyond a reasonable doubt. Although the evidence established that the underlying robbery had been pre-planned, the evidence was not at all clear that the pre-planning characterized the incidental homicide. Co-conspirator Abrea's testimony, upon which the trial court and the state relied, was, at

best, inconsistent and equivocal. Thus, absent proof of the "heightened premeditation required for CCP, the trial court erred.

IV.(B)

The trial court's jury instruction on CCP was unconstitutionally vague, ambiguous, and misleading, especially in light of this Court's recent decision in Jackson v. State. It effectively lowered the state's burden of proof in some respects and misleadingly allowed the jury to find CCP applicable if it found that the robbery, as opposed to the murder, had been carefully planned or prearranged. CCP must not be used here to aggravate the defendant's sentence.

IV.(C)

Despite clear evidence of Franqui's intellectual shortcomings, the trial court refused to credit him with a mitigating factor of low intelligence. It also refused to credit Franqui with mitigating factors relating to his brain damage or impaired capacity despite substantial evidence of them. It also refused to consider, or even instruct the jury on, the mitigating circumstance of age where the defendant was shown to function at an emotional age less than his chronological age of 24. The trial court erred in its rejection of all these mitigating factors and, particularly, in failing to allow the finders of fact to determine the latter.

IV.(D)

Franqui was found to have killed the "bodyguard" during a run-of-the-mill armed robbery by a single gunshot wound inflicted during a running gun battle. As such, as reprehensible and inexcusable as the crime was, it was not the most heinous, most egregious, of crimes. In fact, this Court has generally not affirmed the ultimate penalty in single victim, single gunshot, murders committed during the perpetrations of armed robberies. It should not do so here.

IV.(E)

In reliance on Dixon v. State, the trial court consistently prohibited the defendant from informing the jury of the court's power to impose consecutive sentences of imprisonment as an alternative to execution. It also refused to answer the jury truthfully when it asked essentially the same question. This predicated the defendant's death sentence on the jury's receipt of less than complete information and ignored the enlightened recognitions of the United States Supreme Court in the recent Simmons v. South Carolina case. The defendant is entitled to at least a new penalty phase hearing.

IV.(F)

The death penalty is, and always will be, unconstitutional and wrong.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS FOR SEVERANCE BASED UPON THE INTRODUCTION AT THIS JOINT TRIAL OF HIS NON-TESTIFYING CO-DEFENDANT'S POST-ARREST CONFESSIONS WHICH DIRECTLY INCRIMINATED HIM, THEREBY VIOLATING THE DEFENDANT'S RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The co-defendant with which Leonardo Franqui was jointly tried, Pablo San Martin, confessed after his arrest and directly incriminated Franqui in the first degree murder, attempted first degree murder, armed robbery, and lesser offenses with which he was charged. The state introduced San Martin's two verbal confessions into evidence at trial over Franqui's vociferous objections. [TR 2096 - 2106] It refused all requests for redaction and curative instruction. San Martin never testified, however, and therefore remained unavailable for cross-examination. The defendant repeatedly but unsuccessfully moved for severance, during both the guilt and penalty phases, but the trial court determined that Franqui's "interlocking" confession rendered San Martin's confessions admissible against him. The trial court thereby failed to recognize the confessions were not sufficiently interlocking to justify a departure from the general rule of inadmissibility and that the inability of Franqui to confront his co-defendant accuser was irremediably and unfairly prejudicial. That error constituted

a denial of due process and confrontation under the Fifth, Sixth, and Fourteenth Amendments.

In deciding that a motion for severance is a discretionary matter for a judge, the courts of Florida have nevertheless recognized that severance should be liberally granted whenever a potential prejudice is likely to arise in the course of trial. Menendez v. State, 368 So.2d 1278 (Fla. 1979). "The objective of fairly determining a defendant's innocence or guilt should have priority over other relevant considerations such as expense, efficiency and convenience." Crum v. State, 398 So.2d 810 (Fla. 1981); Green v. State, 408 So.2d 1086, 1087 (Fla. 4th DCA 1982).

Rule 3.152(b)(1)(i), Fla.R.Crim.P., provides for severance before trial:

> [U]pon a showing that such order is necessary to protect the defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of one or more of the defendants.

Moreover, when joinder of defendants or offenses causes an actual or threatened deprivation of the right to a fair trial, severance is no longer discretionary. United States v. Boyd, 595 F.2d 120 (3d Cir. 1978); Baker v. United States, 329 F.2d 786 (10th Cir. 1964). It is mandatory.

It is well recognized that joinder of defendants requires a balancing of the right of the accused to a fair trial and the public's interest in the efficacious administration of justice." United States v. Zicree, 605 F.2d 1381, 1386 (5th Cir. 1980). No defendant should ever be deprived of a fair trial because it is

easier or more economical for the government to try several defendants in one trial rather than in multiple trials. United States v. Boscai, 573 F.2d 827 (3d Cir. 1978). As the Court stated in King v. United States, 355 F.2d 700, 702 (1st Cir. 1966), "[a] joinder of offenses, or of defendants involves a presumptive possibility of prejudice to the defendant . ..". Indeed, it appears that in this case "the only real purpose served by permitting a joint trial . . . may [have been] the convenience of the prosecution in securing a conviction." United States v. Fountz, 540 F.2d 733, 738 (4th Cir. 1976).

Florida's severance rules are consistent with the minimum standards promulgated by the American Bar Association. ABA Standard for Criminal Justice 13-3.1(b) (2d Ed. 1980) suggests that severance should be granted whenever it appears likely that potential prejudice may arise at trial.

Here, the only conceivable justification for the forced joinder of Franqui with San Martin where San Martin's directly incriminating but unconfrontable confessions was introduced into evidence is the narrow exception carved by the Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987); Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) line of cases permitting a co-defendant's "interlocking" confession to directly incriminate an accused because it is thereby demonstrated to be unquestionably "reliable."

In Grossman v. State, 525 So.2d 833, 838 (Fla. 1988), this Court analyzed the holdings of the Cruz Court:

> 1. It is error to admit a non-testifying co-defendant's confession incriminating the defendant notwithstanding an instruction not to consider it against the defendant. This is so even if the defendant's own confession is admitted.
>
> 2. The defendant's confession may be considered as an indicia of reliability in determining whether the co-defendant's confession may be directly admissible against the defendant.
>
> 3. A defendant's confession could be considered on appeal in determining whether admission of the co-defendant's confession was harmless.

The Court in Lee, however, recognized the limitations of the rule:

> [i]f those portions of the co-defendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant' own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies are not insignificant, the co-defendant's staiement may not be admitted. Lee v. Illinois, at 545, 2056.

This Court, in Roundtree v. State, 546 So.2d 1042 (Fla. 1989) reached the same conclusion, finding error in both the guilt and penalty stages of the defendant's capital murder trial. It found, as it might here, that the statements in both confessions correspond in many details, however, they differ regarding which defendant induced the other to commit the crime and which defendant actually committed the murder. [Id. at 1045] It reasoned that although the confessions interlocked in many details, the

discrepancies between the two confessions were significant and that when intent is a crucial element of the charged offenses, co-defendants' statements that implicate each other as the sole murderer cannot be deemed interlocking. This Court concluded:

> Thus, when the discrepancies involve material issues such as the roles played by the defendants and whether the crime was premeditated, a co-defendant's confession is not rendered reliable because it happens to contain facts that interlock with the facts in the defendant's statement. Id. at 1046

This Court held that absent the opportunity for cross-examination, the admission of co-defendant Brown's confession denied Roundtree his right to confront the witness against him in violation of the confrontation clause of the Sixth Amendment. Allowing Roundtree and Brown to be tried jointly forced Roundtree to defend against the accusations made by Brown in both the guilt phase and penalty phase of the trial. By denying the motion for severance, the trial court ostensibly forced Roundtree to stand trial before two accusers: the state and his co-defendant. Id., at 1046, citing Crum v. State, 398 So.2d 810 (Fla. 1981).

The same reasoning and conclusions apply here. The confessions were different in significant respects which belied the reliability of San Martin's statement. In his first statement, San Martin confessed that the robbery was planned for three to four months. [TR 2096] Franqui said it had been discussed six months earlier. San Martin described the "take" as $75,000. [TR 2096] Franqui said it was $25,000.

More important, each placed the blame for the fatal shot on

the other. As the prosecutor told the jury in opening statement, ". . . each of them tried to minimize their role." [TR 1708] In fact, San Martin unequivocally denied shooting at the brown pickup truck of the homicide victim. [TR 2103] Franqui described how San Martin (and Abreu) shot at both the businessmen (Cabanas) and the brown truck. [TR 1957]

The identity of the shooter who killed Lopez was, and remained, one of the central issues in this case throughout the trial. Even the physical evidence tended to refute that it was Franqui. Franqui admitted firing one shot towards the windshield of the pickup but Lopez' body was found on the ground behind the vehicle. No blood was discovered in the cab of the truck so, consistent with Franqui's statement, his shot could not have caused Lopez' death. [TR 1955]

In San Martin's second confession [TR 2117 - 2122], he describes in detail their disposal of the weapons used in the crime and their whereabouts. Franqui's confession contained no statements relating to the discarding or hiding of the weapons at all. As such, Franqui's confession did not interlock, and could not have interlocked, with San Martin's statement in any way. San Martin's second admitted confession, therefore, remained pure, unadulterated hearsay as to Franqui, which should never have been admitted under any theory.

In addition, the reliability of San Martin's statements is compromised by the fact that prior to being questioned about this case, San Martin was told by the police that they had been

implicated by co-defendant's in a separate "North Miami case" (an unrelated homicide in which Franqui was a co-defendant). Accordingly, when he made his statement, San Martin was irrefutably motivated to "distort the facts" to his advantage and, necessarily, to Franqui's detriment. See Lee, supra, 106 S.Ct. at 2064.

In Douglas v. State of Alabama, 380 U.S. 415 (1965), the Supreme court of the United States proclaimed that the Confrontation Clause of the Sixth Amendment is applicable to the states and that an integral right secured by this clause is the right of cross-examination. As the Court said in Mattox v. United States, 156 U.S. 237, 242-243 (1895):

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Thereafter, the landmark decision of Bruton v. United States, 391 U.S. 123 (1968), declared that the admission of a co-defendant's confession which implicates a defendant at a joint trial constitutes reversible, prejudicial error even where the trial court delivers a clear, concise, and understandable cautionary instruction that the confession can only be considered with regard to that co-defendant and must be disregarded with respect to the defendant. The Bruton Court reasoned that, because

of the substantial risk that the jury, despite instructions to the contrary, looked to the inculpatory extra-judicial statements of the co-defendant in determining the defendant's guilt, the admission of the co-defendant's confession at their joint trial violated the defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment to the United States Constitution. Id. at 126. The Court, by so holding, expressly overruled its earlier opinion in Delli Paoli v. United States, 352 U.S. 232 (1957), which held that a curative instruction to the jury could extinguish the potential for prejudice inherent in this situation.

The Court, citing to its earlier opinion in Pointer v. Texas, 380 U.S. 400, 404, 406-407 (1965), premised its ruling on the following elucidation of the Sixth Amendment right of confrontation:

> [T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him . . . a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him. Bruton, 391 U.S. at 126.

Specifically, the Court condemned the introduction of powerfully incriminating extra-judicial statements of a co-defendant who stands accused side-by-side with the defendant since the inherent unreliability of the statements is often not appreciated by jurors:

> Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when

> accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. Id. at 136. (Footnote and citation omitted).

Finally, the Court explicated that, without the opportunity to exercise the constitutional right to cross-examine one's condemnor, an accused suffers a disadvantage so unfair as to be constitutionally intolerable:

> This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. Id. at 132.

A month later, the Supreme Court, in Roberts v. Russell, 392 U.S. 293 (1968), announced that the dictate of Bruton, which exalts the right of cross-examination as secured by the Sixth Amendment Confrontation Clause, is applicable to the states through the Fourteenth Amendment and is to be retroactively applied. In holding that a finding of retroactivity was essential, the Court delineated that fundamental nature of the "serious flaw" which results whenever the Bruton rule is violated:

> [T]he error "went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination" of his guilt or innocence. Id. at 294, quoting Linkletter v. Walker, 381 U.S. 618, 639 n. 20 (1965).

The defendant here was denied a fair trial and his right of confrontation by the introduction of his co-defendant's hearsay

statements. He should be granted a new separate trial at which his co-defendant's inadmissible and unreliable confessions are not used against him in violation of his constitutional rights.

POINT II

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE PORTIONS OF THE DEFENDANT'S ROBBERY CONFESSION FOR WHICH THE STATE FAILED TO PROVE THE CORPUS DELICTI THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

The defendant was convicted of robbery for which he was sentenced to life imprisonment. The robbery also predicated the defendant's conviction for felony first degree murder as well as an aggravating circumstance which resulted in the defendant's sentence of death. The only evidence of the defendant's robbery, however, came from his own mouth in the form of a post-arrest confession for which the State never established a corpus delicti. [TR 1934, 1953] Accordingly, the introduction of the defendant's confession insofar as it described a robbery, was error.

Before a defendant's confession is admissible in evidence the State must prove with substantial evidence the corpus delicti of the offenses charged. State v. Allen, 335 So.2d 823 (Fla. 1976); Hodges v. State, 176 So.2d 91 (Fla. 1965); Rowe v. State, 84 So.2d 709 (Fla. 1955); Allen v. State, 314 So.2d 154 (Fla. 1st DCA 1975); Mikita v. State, 171 So.2d 61 (Fla. 1st DCA 1965); State v. Hepburn, 460 So.2d 422 (Fla. 5th DCA 1984); Knight v. State, 402 So.2d 949 (Fla. 3d DCA 1981); Nelson v. State, 372 So.2d 949 (Fla. 2d DCA 1979), cert. denied, 396 So.2d 1130 (Fla. 1981); Sciortino v. State, 115 So.2d 93 (Fla. 2d DCA 1959); Gray v. State, 152 So.2d 495 (Fla. 3d DCA 1963); McQueen v. State, 304 So.2d 501 (Fla. 4th

DCA 1974), cert. denied, 315 So.2d 193 (Fla. 1975).

As the Court remarked in Farley v. City of Tallahassee, 243 So.2d 161, 162 (Fla. 1st DCA 1971), "[t]he principle under discussion is so fundamental in our law that when such error is committed, a reversal of the conviction is required."

This Court in Rowe, supra, a lottery prosecution, held that evidence submitted by the State, that the defendant purchased a federal gambling stamp, proved only that the defendant engaged in wagering. The court held that it was unreasonable to infer that since some crime was committed, the specific crime charged was also committed. Sciortino and the other cases cited all follow Rowe.

The court in Gray, for example, held that evidence establishing only that a crime **may** have been committed by another would be insufficient, without direct testimony proving the specific crime against the defendant, to allow the introduction of the defendant's confession.

In Allen, a traffic accident resulted in the death of one of the occupants of a vehicle. The undisputed evidence established that the death vehicle was travelling at an estimated speed of 90 MPH, the Allen and the deceased were in the appellant's vehicle at the time of the accident, that the deceased died as a result of the accident, and that the appellant's blood alcohol was .12. There was more than sufficient evidence to prove that a crime was committed. The specific charges however, dealt with the driver, and the only evidence that placed the appellant behind the wheel at the time of the accident was his confession. Pointing out the

difference between Allen and Pedigo, infra., that someone other than the appellant could have been driving the vehicle, the court reversed.

In the case at bar, the defendant filed and argued a timely, pre-trial motion in limine, seeking the redaction of his pre-trial statement to exclude reference to attempted robbery since there existed no independent evidence of that crime. [R 74 - 77; TR 38 - 43]

Danilo Cabanas, Jr., testified that none of the assailants who surrounded his vehicle and started shooting at him either demanded any money, made any movements towards his vehicle, or took anything during the course of the attack. [TR 1745, 1749] When asked whether the perpetrators stayed at their vehicles instead of approaching him, Cabanas, Jr., responded, "Yes. They, they were back there trying to kill me, sir." [TR 1749] Thus, while the corpus for premediated first degree murder was established, neither attempted robbery nor felony murder found support in the evidence. After Cabanas, Jr.'s testimony, the defendant unsuccessfully renewed his motion and moved to strike. [TR 1909 -1910]

Nor was there evidence, as the trial court expressly relied upon [TR 1910] as to the existence of circumstances from which the corpus delicti could be inferred. Cf., County of Dade v. Pedigo, 181 So.2d 720 (Fla. 3d DCA 1966). In fact, the state strenuously (and successfully [R 680]) opposed the defendant's request for a jury instruction on circumstantial evidence. It argued that ". . .[this case] is not a circumstantial evidence

[case], in fact (it is] a direct evidence case. . ." [TR 2273 - 2274, see 2285]

Even during his closing argument, the prosecutor at least tacitly conceded the absence of independent evidence supporting its attempted robbery theory:

> What happened out there that day was nothing short of an ambush. That is right. Detective Nabut had to wonder was it a robbery or was it just an attempted killing, that is, that it was because these guys didn't even ask for anything. There is no demand made, and both counsel get up here in their opening statement, get up here and say that as though in some way is mitigation, that is what makes this crime so much more despicable Folks. [TR 2346]

"[I]n order to convict the defendant of a crime on the basis of his extrajudicial (i.e., out of court) confession or admission, the confession or admission must be corroborated by some evidence . . .of the corpus delicti. . ." Burks v. State, 613 So.2d 441, n.2 (Fla. 1993), citing Wayne R. LeFave & Austin W. Scott, Jr., 1 Substantive Criminal Law section 1.4(b), at 24 (1986)..

The Third District's decision in Knight v. State, 402 So.2d 435 (Fla. 3d DCA 1981) is instructive. Knight was charged with first degree murder and robbery. On appeal, he challenged the sufficiency of the evidence to support his conviction for robbery, alleging that apart from his confession, there was no independent proof that a robbery was committed - i.e., the state had failed to prove the corpus delicti of the robbery. Although the court affirmed Knight's conviction - finding that sufficient corroborative evidence existed - its discussion suggests that the

state was obligated to prove the corpus delicti of robbery in addition to that of the murder. See also State v. Van Hook, 39 Ohio St.3d 256, 530 N.W.2d 883 (1988).

The defendant's conviction for armed robbery and sentence of death should be vacated and he should be granted a new trial where the state, before it admits a confession for robbery, is required to establish the corpus delicti of that offense.

III.

THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING VOIR DIRE EXAMINATION OF THE JURY RELATIVE TO SPECIFIC MITIGATING CIRCUMSTANCES AND IN DENYING THE DEFENDANT ACCESS TO THE JURY QUESTIONNAIRE, THEREBY PRECLUDING THE DEFENDANT FROM EFFECTIVELY EXERCISING HIS CHALLENGES, BOTH FOR CAUSE AND PEREMPTORY AND DENYING THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL JURY.

The purpose of voir dire examination is to safeguard the right to jury trial which "guarantees to the criminally accused a fair trial by a panel of impartial, indifferent, jurors." The Sixth Amendment entitles a defendant to an impartial jury which will render a verdict based exclusively upon the evidence presented in court and not on outside sources. Irvin v. Dowd, 366 U.S. 717, 722 (1961). The requirement of impartiality demands that voir dire examination serve as a filter capable of screening out prospective jurors who are unable to lay aside any opinion as to guilt or innocence and render a verdict based on the evidence presented in court. United States ex rel. Bloeth v. Denno, 313 F.2d 364, 372 (2d Cir. [en banc] 1963); e.g., Pineda v. State, 571 So.2d 105 (Fla. 3d DCA 1990).

Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). Without an adequate voir dire, the trial judge cannot fulfill his duty to remove prospective jurors who will not be able

to impartially follow the court's instructions and evaluate the evidence, Id. Moreover, a careful voir dire is necessary to solicit sufficient information to permit a defendant to intelligently exercise peremptory challenges as well as his challenges for cause. Id. United States v. Cassel, 668 F.2d 969 (8th Cir. 1982); United States v. Barnes, 604 F.2d 121, 142 (2d Cir. 1979), cert. denied, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed. 260 (1980). The court's discretion in this regard must be exercised consistent with "the essential demands of fairness." E.g., Aldridge v. United States, 283 U.S. 308, 310 (1931); United States v. Delval, 600 F.2d 1098, 1102 (5th Cir. 1979).

Examination of jurors on voir dire should be so varied and elaborated as circumstances surrounding the jurors under examination in relation to the case on trial would seem to require in order to obtain fair and impartial jurors. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967).

It is established that a defendant has the right to examine jurors on the voir dire as to the existence of a disqualifying state of mind. Aldridge v. United States, supra, at 313. A defendant has the right to probe for the hidden prejudices of jurors. Lurding v. United States, 179 F.2d 419, 421 (6th Cir. 1950). A defendant is also entitled to be tried by an unprejudiced and legally qualified jury and the range of inquiry in the endeavor to empanel such a jury should be liberal. United States v. Napoleone, 349 F.2d 350, 353 (3rd Cir. 1965).

Adequate questioning must be conducted to provide under the

facts in the particular case some basis for a reasonably knowledgeable exercise of the right of challenge, whether for cause or peremptory. United States v. Jackson, 542 F.2d 403 (7th Cir. 1976). Indeed, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 U.S. 162, 171-172 (1950). As the court held in United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973):

> The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. [citation omitted]. It follows, then, that a requested question should be asked if an anticipated response would afford the basis for a challenge for cause.

The right of peremptory challenge has long been recognized as "one of the most important rights secured to the accused." Pointer v. United States, 151 U.S. 396 (1894). It has been characterized as an essential component of an impartial jury trial as long ago as by Coke and Blackstone, and more recently in Swain v. Alabama, 380 U.S. 202, 219 (1965) wherein the Court held:

> The function of the challenge is not only to eliminate extremes of partiality, on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise.

The Swain Court noted that while nothing in the Constitution required Congress to grant peremptory challenges, they are nevertheless one of the important rights of the accused and the impairment of that right is reversible error without the showing of

prejudice. It is, therefore, clearly established that defendants, especially those on trial for their lives, must be permitted sufficient inquiry into the background and attitudes of prospective jurors to enable them to exercise intelligently their peremptory challenges. United States v. Harris, 542 F.2d 1283, 1295 (7th Cir. 1976).

Here, the trial court denied the defendant's request for individual, sequestered voir dire. [TR 564] It also consistently prohibited defense counsel from exploring the jurors' feelings and preconceptions relative to mitigating circumstances. When Franqui asked prospective jurors about their ability to consider age as a mitigating factor, the State's objection was sustained along with the trial court's admonition to "[d]eal with mitigating circumstances in general." [TR 1270 - 1275] Counsel proffered that he wanted to ask, for example, whether the jurors could consider other potential mitigating circumstances such as low IQ and family history. [TR 1272] In his motion for new trial, the defendant proffered that he would have inquired into each mitigating factor relevant to the case. [R 694]

The unfairness of the trial court's restriction of the defendant is underscored by its contrasting treatment of the prosecution, which relentlessly posed hypothetical questions to the prospective jurors to test their acceptance of various legal principles important to conviction and a death recommendation without the court's impediment. The prosecutor questioned about felony-murder and getaway drivers [TR 1067 -1068, 1508], the death

penalty for a person who "raped and then cut up [the victim]" [TR 1083], the accidental discharge of a gun by a robber [TR 1095, 1516], the law of principals [TR 1235, 1538], and, ironically, whether the jury could find the defendants guilty despite their youthful age. [TR 1538 -15441. The trial court consistently overruled every objection to such hypotheticals made by the defense.

It is error to preclude examination regarding characteristics of an accused which might effect a juror's ability to be fair. In Moses v. State, 535 So.2d 350 (Fla. 4th DCA 1988), for example, the court reversed due to the improper restriction of voir dire relative to the defendant's status as a convicted felon.

Florida Courts have consistently reversed convictions for restrictions of an accused's voir dire relative to anticipated defenses. In Brown v. State, 614 So.2d 12 (Fla. 1st DCA 1993), the improper restriction of voir dire relative to a defendant's anticipated voluntary intoxication defense warranted reversal of the defendant's conviction for battery on a law enforcement officer and resisting arrest with violence. Similarly, this Court in Lavado v. State, 492 So.2d 1322 (Fla. 1986), adopting Judge Pearson's dissent in Lavado v. State, 469 So.2d 917, 919 (Fla. 3rd DCA 1985) in its entirety, held that the trial court erred in refusing the defendant's request to question prospective jurors about their willingness and ability to accept the defense of voluntary intoxication in a trial for armed robbery, thus denying the defendant's right to a fair and impartial jury. See also,

Nicholson v. State, 19 Fla. L. Weekly D1489 (Fla. 2d DCA July 6, 1994) (The scope of voir dire properly includes questions about and references to legal doctrines [Williams rule evidence]).

Quoting from Pinder v. State, 27 Fla. 370, 375, 8 So. 837, 838 (1891), Judge Peason reasoned:

> [i]t is apodictic that a meaningful voir dire is critical to effectuating an accused's constitutional right to a fair and impartial jury. [citations omitted]
>
> What is meaningful voir dire which will satisfy the constitutional imperative of a fair and impartial jury depends on the issues in the case to be tried. The scope of voir dire therefore "should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require. . ."
>
> [Id. at 919]

The same reasoning surely applies in the context of mitigating circumstances in a capital case. Whether or not a prospective juror can accept in principle and consider with an open mind mitigating circumstances such as young age, low IQ, and family trauma is possibly the most important aspect of a defendant's voir dire in a capital case. As Judge Pearson remarked in Lavado under circumstances involving far less serious stakes:

> [i]f he knew nothing else about the prospective jurors, the single thing that defense counsel needed to know was whether the prospective jurors could fairly and impartially consider the defense of voluntary intoxication.
>
> [492 So.2d at 1323; 469 So.2d at 919]

The ability to impartially "consider" anticipated mitigating circumstances in a death case must be, at least, equally important.

In addition, immediately prior to jury selection, pursuant to Fla. R. Crim. P. 3.281 and its predecessor, Florida Statute 540.101 (repealed), Franqui requested that he be furnished any jury questionnaires returned by the prospective jurors. He subsequently supplemented the record with a proffered standard jury questionnaire. [R 705 - 707] The trial court summarily denied Franqui's request. [TR 928] That constituted error.

Rule 3.281 provides, in pertinent part:

> Upon request, any party shall be furnished by the clerk of the court . . .with copies of all jury questionnaires returned by the prospective jurors.

It does not appear that any Florida court has decided the appropriate sanction for that error. However, considering analogous requirements, the federal courts have not hesitated to reverse.

In Bailey v. United States, 53 F.2d 982, 983 (5th Cir. 1931), the court reversed the defendant's convictions because the trial court failed to exercise its discretion in the matter of examining jurors as to the existence of a disqualifying state of mind and deprived the accused of a fair opportunity to exercise intelligently his right of peremptory challenges, where counsel had no opportunity to see a jury list before court convened:

> A result of compliance with the standing order of the court forbidding disclosure to anyone of the list of persons drawn for jury service was that, before the trial was entered upon, the appellants had no means of knowing what names were on the list, and no opportunity to acquire information necessary to enable them to exercise intelligently the right of challenge.

In United States v. Crowell, 442 F.2d 346 (5th Cir. 1971), the court held it to be plain error where the trial court failed to abide by the provisions of 18 U.S.C. §3432 which provided that a person charged with a capital offense shall at least three days before commencement of trial be furnished with a copy of the indictment and list of veniremen and witnesses to be produced on the trial. In reversing a capital defendant's conviction, the court held the benefits of its provisions to be mandatory and failure to allow the defendant the benefit of its provisions would be plain error.

The defendant here suffered a similar lack of access by the trial court's denial of counsel's request, pursuant to Rule 3.281, to review the jury questionnaire. Thus, the same result, the reversal of his conviction, is required.

IV.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

The Trial Court Erred in Finding that the Homicide was Committed in a Cold, Calculated and Premeditated Manner Without any Pretense of Moral or Legal Justification.

The "cold, calculated amd premeditated" aggravating circumstance is unjustified on the merits of this case. Even though the underlying attempted robbery was clearly pre-planned, the incidental homicide was not. Predicated solely on the contradictory and equivocal testimony of cooperating accomplice Pablo Abreu, the "CCP" aggravator was not proved by the state beyond a reasonable doubt.

The CCP factor is reserved for cases showing "a careful plan or prearranged design to kill." Clark v. State, 609 So.2d 513 (Fla. 1992); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). This Court has many times said that §921.141(5)(i) of the Florida Statutes (1987), requires proof beyond a reasonable doubt of "heightened premeditation." Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began. Crump v. State, 18 Fla. L. Weekly S331 (Fla. June 10, 1993); Hamblen v.

State, 527 So.2d 800, 805 (Fla. 1988); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Thompson v. State, 565 So.2d 916 (Fla. 1990); see e.g., Koon v. State, 513 So.2d 1253 (Fla. 1983), cert. denied, 485 U.S. 943 (1988).

The justification for executing a defendant depends on the degree of his culpability - not only what he actions were, but what his intentions and expectations were. American criminal law has long considered a defendant's intention - and therefore his moral guilt - to be critical to "the degree of [his] criminal culpabality." Mullaney v. Wilbur, 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The United States Supreme Court has found the death penalty to be unconstitutionally excessive in the absence of intentional wrongdoing. Enmund v. Florida, 458 U.S. 782, 800, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

Here, the only evidence to suggest premeditation of the homicide came from cooperating accomplice Pablo Abreu who traded his testimony against the defendant for his own. life. [TR 2715, 2731 - 2732]

Abreu described a meeting he had with San Martin and Franqui before the attempted robbery. When asked by the prosecutor specifically "what plan did Franqui have?", Abreu responded that he intended to steal two cars in order to commit a robbery. [TR 2695 - 2696] With regard to the "bodyguard" or "escort" that Franqui expected to be present, Abreu said that Franqui said "[t]hat it would be better for him to be dead first than Franqui." [TR 2698]

However, when asked by the prosecutor specifically what

Franqui told him was going to be done to the bodyguard, Abreu responded:

> A. First he was going to crash against him and throw him down the curb side, and then he would shoot at him, but he didn't do it that way.
>
> [TR 2698]

Accordingly, even Abreu's sentencing phase testimony explicitly refutes the state's contention and the trial court's finding that Franqui preplanned the bodyguard's execution.

Abreu testified that Franqui said just prior to the offense that he would "take care of the escort" [TR 2703] Even this accusation, by its vagueness, fails to establish Franqui's intent to kill. Moreover, even if the leap from "take care of" to assassinate is taken, the comment would, at most, support a finding of the degree of virtually contemporaneous premeditation necessary to support a premeditated first degree murder theory but not the heightened preplanning required for the statutory aggravating circumstance.

Detective Nick Fabrigas testified for the defendant and related that Abreu, in his initial statement, had confessed that the robbery had been planned, but that the shooting of Lopez was unintentional. [TR 2753] He had stated that the pickup truck driven by Lopez had appeared suddenly. [TR 2754]

The trial court's determination of the facts is simply not supported by the record, and certainly not beyond a reasonable doubt:

> The defendant and his co-defendants decided that in order to successfully execute the robbery of the Cabanas the "bodyguard" would have to be murdered. At some point in time the defendants decided that the defendant Franqui would be the one to distract and assassinate the "bodyguard". It was planned that Franqui would drive his car in such a way as to force the "bodyguard's" car off the road and then he would kill him.
>
> [R 1185 - 1186]

In discussing the CCP factor, the trial court expanded upon its analysis of the evidence for a full two pages addressed not to the premeditation of the murder, but instead to the planning of the unsuccessful robbery.

While the evidence clearly established that the robbery was premeditated and pre-planned over a substantial period of time, the same can not be said about the homicide. The trial court's reliance on CCP was clearly erroneous and the remaining two aggavating factors should be deemed balanced by the two mitigating factors the trial court found applicable and the other mitigating facts the trial court errroneously failed to consider. Franqui should at least be resentenced to life imprisonment.

B.

The CCP Instruction Given the Jury was Unconstitutionally Vague, Ambiguous, and Misleading.

The defendant objected to the trial court's intended CCP instruction, not only on the ground that it was inapplicable to the facts, but also that it was "vague and ambiguous." [TR 3330] Although the instruction given was considerably more specific than the standard, in light of this Court's decision in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994), the defendant was right. At the least, a new sentencing proceeding with a new jury is required.

In Jackson, this Court resolved that Florida's standard CCP jury instruction suffered the same constitutional infirmity as the HAC-type instructions the United States Supreme Court recently invalidated - the description of the CCP aggravator is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Id* I at S217.

Here, although the trial court substantially embellished upon the standard instruction, it failed to anticipate all of the Jackson requirements or give what is now considered a constitutionally sufficient instruction. [R 1143, TR 3476 - 3477] Specifically, instead of defining "cold" as the product of calm and cool reflection, it lowered the state's burden by adding "not prompted by wild emotion." [R 1143] Rather than simply explaining that "premeditated" meant the defendant exhibited a higher degree

of premeditation than that which is normally required in a premeditated murder, it confused the CCP instruction with the standard premeditation instruction:

> "Premeditated" means that the killing was committed after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The premeditated intent to kill must be formed before the killing. The period of time must be long enough to allow reflection by the defendant.
>
> Although the law does not fix the exact period of time that must be (sic) pass between the formation of the premeditated intent to kill and the killing, this aggravating factors (sic) requires that the premeditation be of a heightened degree, more than what is necessary to prove first degree premeditated murder.

[R 1143]

Even more important, the trial court consistently failed to describe the elements of "cold" and "calculated" in terms of the murder, as opposed to the robbery resulting in felony murder:

> "Cold" means calm and cool reflection, not prompted by wild emotion.
>
> "Calculated" means a careful plan or prearranged design.

[R 1143]

This undoubtedly led the jury to the same mistake made by the trial court itself - attributing CCP to the homicide because the underlying felony was cold, calculated, and premeditated. Such is precisely the result sought to be avoided by this Court in promulgating Jackson and one of the reasons Franqui's death sentence can not be sustained.

C.

The Trial Court Erred in Failing to Credit the Defendant With the Non-Statutory Mitigating Factors that he was of Marginal if not Retarded Intelligence and that he was Brain-Damaged, and in Rejecting Impaired Capacity and Age as Statutory Mitigating Factors, Refusing Even to Instruct the Jury on the Latter.

Non-Statutory Mitigators

Although Franqui's precise level of intelligence was in dispute, there was no legitimate question that he was either "retarded" or close to it. This is clearly a valid and applicable mitigating factor. Morris v. State, 557 So.2d 27 (Fla. 1990); Mason v. State, 489 So.2d 734 (Fla. 1986); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988).

Psychologist Jethro Toomer found that Franqui had an IQ less than 60. He was retarded. [TR 3135] Unquestionably, Franqui did poorly in school and dropped out in the 8th grade. [TR 3112-3114, 3117, 3123] According to Toomer, Franqui had difficulty communicating, he suffered a number of deficits, and his insight and judgment were impaired. [TR 3115-3116, 3131] Dr. Toomer diagnosed Franqui as suffering from borderline personality disorder. [TR 3209]

Psychiatrist Charles Mutter was offered by the State in rebuttal. [TR 3220, et seq.] Although Mutter found no evidence of organic impairment or borderline personality disorder, and concluded he was not suffering from extreme mental or emotional disturbance at the time of the offense, he agreed Franqui had

impaired intelligence function and might have had mild brain damage. [TR 3242 - 3243, 3246, 3283, 3291, 3295] This conclusion was substantiated by the testimony of Mario Franqui Suarez, Franqui's uncle, who described Franqui as suffering from poor eyesight and as "slow" or "retarded." [TR 2864, 2873] Organic brain damage is a legitimate mitigating factor, in and of itself. Sireci v. State, 502 So.2d 1221 (Fla. 1987).

The trial court's "out-and-out" rejection of these mental mitigators can not be squared with this Court's opinions in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), Campbell v. State, 571 So.2d 415 (Fla. 1990); Santos v. State, 591 So.2d 160 (Fla. 1991); see, Brown v. State, 19 Fla. L. Weekly 5261, 262 (Fla. May 20, 1994) (Kogan, J., concurring in part, dissenting in part).

Furthermore, because the trial court erroneously rejected, rather than weighed, these mitigating circumstances, resentencing is required. Rosers v.State, supra. This Court has made clear that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Knowles v. State, 19 Fla. L. Weekly S103, S105 (Fla. February 24, 1994), quoting Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990).

Statutory Mitigators

The defendant argued that his capacity to appreciate the

criminality of his conduct and his capacity to conform his conduct to the requirements of the law was substantially impaired pursuant to Fla. Stat. §921.141(6)(e). The trial court summarily rejected this mitigator, finding that no evidence, expert or otherwise, established it. [R 1193]

In Campbell v.State, 571 So.2d 415 (Fla. 1990), however, the Court found impaired capacity to apply to a defendant whose IQ was in the retarded range, who had poor reasoning skills, whose reading abilities were on the third grade level, who had a history of chronic drug and alcohol abuse, and was subject to borderline personality disorder, much like the defendant here. [See above]. The only characteristic missing from Franqui's profile is the substance abuse history - a distinction which only the most perverse irony would ever lend support to the argument for Franqui's execution. Surely Franqui is not more susceptible to the ultimate punishment because he did not abuse intoxicants.

In accord, Santos v. State, 591 So.2d 160 (Fla. 1991), in which this Court found the defendant was substantially impaired in his capacity to conform his conduct to the requirements of the law where the perpetrator, like Franqui, had suffered an abusive environment as a child. The trial court should have reached the same conclusion here.

Franqui's chronological age was 21 at the time of the offense. [R 1174] While there is no per se rule as to when age is mitigating, Peek v. State, 395 So.2d 492 (Fla. 1981), the factor has often been considered in cases involving defendants of

Franqui's age. See, Meeks v. State, 336 So.2d 1142 (Fla. 1976) (21 years old); Randolph v. State, 463 So.2d 186 (Fla. 1984) (24 years old); Smith v. State, 492 So.2d 1063 (Fla. 1986) (20 years old); Perry v. State, 522 So.2d 817 (Fla. 1988) (21 years old); Hoy v. State, 353 So.2d 826 (Fla. 1977) (22 years old); King v. State, 390 So.2d 315 (Fla. 1980) (23 years old); Hitchcock v. State, 413 So.2d 741 (Fla. 1982) (20 years old); Adams v. State, 412 So.2d 850 (Fla. 1982) (20 years old); Lightbourne v. State, 438 So.2d 380 (Fla. 1983) (21 years old); Foster v. State, 436 So.2d 56 (Fla. 1983) (21years old); Brown v. State, 381 So.2d 689 (Fla. 1979) (22 years old is of some minor significance).

Here, in addition, Toomer found that Franqui's emotional and cognitive age was below his chronological age. [TR 3139] Alberto Gonzalez, as well, described Franqui as sometimes immature. [TR 2781] See, Fitzpatrick v.State, 527 So.2d 809 (Fla. 1988) (young emotional age).

Franqui was at least entitled to have the jury instructed on the statutory mitigating factor of age. The failure of the trial court to consider age as a mitigating factor, and particularly in precluding the jury from considering it as a mitigating factor, was error.

D.

Death is a Disproportionate Penalty to Impose on Leonardo Franqui in Light of the Circumstances of this Case and Constitutes a Constitutionally Impermissible Application of Capital Punishment.

We are told by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny that the Florida death penalty scheme is constitutional only because it is subject to the doctrine of proportionality.

In this case, to uphold the imposition of the sentence of death would be inconsistent with the penalties meted other defendants committing similar crimes under like circumstances. As such, the defendant's sentence of death cannot be sustained consistent with the promise of equal protection, due process, and freedom from cruel and unusual punishment guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Florida Statute §921.141(5) establishes an automatic review procedure in this Court to ensure against the disproportionate application of the death penalty.

Death must "serve both goals of measured, consistent application and fairness to the accused," Eddings v. Oklahoma, 455 U.S. 104, 111, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982), and must "be imposed fairly, and with reasonable consistency, or not at

all." Id. Accord Hitchcock v. Dugger, U.S. , 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Applying these tests, this is not a death case.

Murders committed during armed robberies such as Leonardo Franqui committed are generally not death cases. Caruthers v. State, 465 So.2d 496 (Fla. 1985). In Cannadv v. State, 427 So.2d 723 (Fla. 1983), the defendant was arrested for the robbery, kidnapping, and first degree murder of a night auditor at a Ramada Inn after having been arrested earlier for an unrelated robbery and kidnapping. The defendant confessed that he stole money from the Ramada Inn, kidnapped the victim, drove him to a remote wooded area, and shot him. This Court affirmed the trial court's findings that the murder was committed during the commission of a felony kidnapping and committed for pecuniary gain. Cannady, although admitting the kidnapping, denied intending to kill the victim who he claimed "jumped at him." Id. at 730. Here, by comparison, no kidnapping was involved. In Cannadv, this Court reversed the trial court's override of the jury's life sentence recommendation. Cannady is serving his mandatory life sentence.

Eddie Rembert entered the victim's bait and tackle shop, hit the elderly victim on the head once or twice with a club, and took forty to sixty dollars from the victim's cash drawer. Rembert v. State, 445 So.2d 337, 338 (Fla. 1984). He was convicted of first degree murder and robbery and sentenced to death pursuant to the

jury's recommendation of death by a trial court which found, as here, two mitigating circumstances. This Court reversed, noting that at oral argument the state conceded 'that in similar circumstances many people receive a less severe sentence and held:

> Given the facts and circumstances of this case, as compared with other first-degree murder cases, however, we find the death penalty to be unwarranted here. [Id. at 340]

The Rembert Court vacated the death sentence and remanded for the imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years. The same result should apply here.

In the consolidated appeals of McCaskill v. State, and Williams v. State, 344 So.2d 1276 (Fla. 1977), both defendants were charged with attempted robbery, robbery, and first degree murder resulting from the robbery of a liquor store and its patrons. During their get-a-way, one of the patrons was shot twice in the neck with a handgun at close range and another patron was killed by a shotgun blast by a third, unnamed, accomplice. The trial judge overruled the jury's life recommendation and imposed the death penalty noting, among other things, that the killing was wanton and unnecessary. Id. at 1278. This Court exercised its final responsibility to review the case in light of other decisions and determine whether or not the punishment was too great:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the

> basis of sex. If a defendant is sentenced to die, this Court can review that case in the light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georuia, supra, can be controlled and channelled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in judgment at all. Dixon v. State, 283 So.2d 1 (Fla. 1973) at 10.
>
> [Id. at 1279]

It is thereby that the system insures that capital punishment is reserved only in "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1 (Fla. 1973). Recognizing that "death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation", Dixon, supra, the ultimate penalty has historically been reserved for homicides which are sadistic, physically torturous, committed execution-style, or committed under circumstances involving kidnapping and/or the prolonged anticipation of death.

Here, the victim was killed by a single gunshot. [TR 2044, 2050 -2051, 2062] Co-defendant San Martin was "the one who's initiating the robbery" according to Detective Santos' description of San Martin's own confession. [TR 2102] Franqui's misconduct, in this and the other cases considered by the trial court, spanned a time period of only 45 days. [TR 1172]

Alberto Gonzalez, Franqui's father-in-law, described the love Franqui had for his daughter, Vivian. [TR 2777] He described Franqui as "a good kid" who was an "excellent" husband and

"marvelous" with their two children. [TR 2777-2779] He described Franqui as a "good worker" who had established a loving relationship with other members of his family. [TR 2780 - 2781] Although he described Franqui as sometime immature, he never suspected his involvement in any criminal activity. [TR 2781]

Mario Franqui Suarez, Franqui's uncle, described Franqui's mother as "unstable" and "not normal." [TR 2864, 2873] After coming to the United States in 1980, Franqui's brother underwent surgery but died two months later. [TR 2865] Thereafter, Franqui's father started to drink excessively and use crack cocaine. [TR 2866-2867] He was briefly hospitalized for his substance abuse after he threw himself out a window. [TR 2867] He was no longer able to care for the defendant. [TR 2868]

Franquiwas also injured in an automobile accident in which he suffered several fractures of the hip and leg and received a metallic implant. [TR 2869] By the age of fifteen, Franqui's family had disintegrated and he was living on the street. He moved in with Suarez for a short time and then lived with Suarez' sons. [TR 2872] Suarez described Franqui as pleasant, helpful, respectful, and non-violent. [TR 2871 - 2872, 2874] He never used drugs or alcohol, and was devoted to his children. [TR 2872 - 2873]

As described supra, Subsection C, there existed strong evidence of Franqui's mental handicaps and intellectual retardation. [TR 3135, 3242 - 3243] There existed irrefutable evidence of his consistent failures in school and the impairment of

his insight and judgment. [R 847 - 921; TR 3112 - 3117, 3123, 3131] The was some evidence, at least, of organic brain damage, impaired eyesight, and the existence of a personality disorder. [TR 3209, 3291, 9295]

The death penalty is reserved for the most heinous of crimes committed by the most depraved of criminals. Hamblen v. State, 527 So.2d 800, 807 (Fla. 1988) (Barkett, J. Dissenting). As Justice Stewart noted:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.
>
> Furman v. Georgia, supra, at 306 (Stewart, J., concurring).

This Court has consistently reversed death penalties in cases, such as this, where, similar mitigating circumstances outweighed even significant aggravating circumstances. Livingstone v. State, 565 So.2d 1288 (Fla. 1988) (death sentence is disproportionate when mitigating circumstances of youth, abusive childhood, inexperience, immaturity, marginal intelligence, and extensive substance abuse effectively outweigh two aggravating circumstances Of previous conviction of violent felony and committed during armed robbery); Nibert v. State, 574 So.2d 1059 (Fla. 1990) (even where victim suffered multiple stab and defensive wounds and death was heinous, atrocious, or cruel, substantial mitigation, including

diminished capacity, may make the death penalty inappropriate).

Even where homicides are determined to be particularly heinous, atrocious,or cruel, a factor clearly not present here, this Court has not hesitated to reverse given substantial mitigation. Smalley v. State, 546 So.2d 720 (Fla. 1989); Morgan V. State, So.2d , 19 Fla. L. Weekly S290 (Fla. June 2, 1994).

We know that "death is different" and is reserved for only the most horrible of offenses. Here, the advisory sentencing verdict was nine to three. Fully one-quarter of the jury disagreed with the recommendation of death. Leonardo Franqui's crime, as inexcusable as it was, was not "the most aggravated, the most indefensible of crimes." The circumstances of this case are not "so clear and convincing that virtually no reasonable person could differ" concerning the appropriate penalty. Indeed, there is nothing in this record to suggest that consecutive life sentences including consecutive minimum mandatory terms of imprisonment is not the appropriate, proportional sentence in this case.

Accordingly, Leonardo Franqui prays this Court to vacate his sentence of death.

E.

The Trial Court Erred in Prohibiting the Defendant From Informing the Jury of the Court's Power to Impose Consecutive Sentences and the Likelihood of Lifelong Imprisonment as an Alternative to Death, as Well as In Failing to So Instruct the Jury Upon Its Own Inquiry.

Franqui sought to tell the jury that the life imprisonment alternative to death could result in a sentence structured to insure he would never be released. The state opposed the defendant in a motion in limine which the trial court granted. [TR 2513] This was unfair and, in light of Simmons v. South Carolina, ___U.S. , 8 Fla. L. Weekly Fed. S277 (January 18, 1994), error.

The defendant's right to present evidence in mitigation in the penalty phase, as well as his right to argue against imposition of the death penalty, is an essential element in Florida's capital sentencing scheme. State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1976). In fact, the right to present evidence of mitigating circumstances, without limitation, is what makes the penalty phase constitutional. Lockett v. Ohio, 438 U.S. 536, 98 S.Ct. 2954 (1978).

Distinguishing Dixon on the ground that it involved jury instructions rather than argument, defense counsel succinctly stated the basis for his request:

> Clearly the jury's decision is one to make between the ultimate penalty which is of course the death penalty and life in prison with a mandatory sentence of 25 years. Central to the jury's decision -- Central to the jury's thinking will be when the defendant will get out.
>
> [TR 2509]

Defense counsel was remarkably prescient - The jury interrupted its penalty phase deliberations to specifically ask:

> "Do the sentences run consecutive or concurrently?"
>
> [TR 3493]

Defense counsel requested that the jury be told the truth - that the court intended to sentence consecutively. [TR 3495] Indeed, Franqui was already serving an unrelated 27 year sentence [TR 2509] and there was no question that any sentences he received would be imposed consecutively. (In fact, the trial court sentenced Franqui to consecutive sentences on all counts in addition to death). Alternatively, counsel requested that the verdicts be taken on the non-capital counts and that sentence be imposed on them prior to the jury's continued deliberation on the homicide. [TR 3495]

Over the defendant's passionate objections, the court denied the defendant all relief and responded to the jury:

> You should not concern yourself with the possible sentences on counts 2 through 7. As concerns those counts, sentencing is exclusively my function.
>
> [TR 3500]

Within a half hour, the jury returned with its recommendation of death by a vote of 9 to 3. [TR 3500 - 3501]

To its credit, the trial court acknowledged the unfairness to the defendant inherent in the constraints he believed had been imposed upon it by this Court's precedent:

> THE COURT: I concur with you in spirit that the jury should know what the alternative to

the death penalty is. But clearly the Supreme Court is telling me I'm not to do that.

[TR 2512 -2513]

* * *

THE COURT: I will be frank with you, I agree with you. I think the jury should be entitled to know . . .

[TR 3499]

The United States Supreme Court has also recently recognized the problem and corrected it by reversing the defendant's death sentence in Simmons. Expanding the concept of truth in sentencing, the Court ruled that defense lawyers seeking to prevent a death penalty generally have the right to inform the jury when the alternative of life imprisonment means no possibility of parole. Specifically, the Court held that the Due Process Clause of the Fourteenth Amendment was violated by the refusal of a state trial court to instruct the jury in the penalty phase of a capital trial that under state law the defendant was ineligible for parole.

Reiterating that the Due Process Clause does not allow the execution of a person "on the basis of information which he had no opportunity to deny or explain," Gardner v. Florida, 430 U.S. 349, 362 (1977), the Court determined, as this Court should here, that "the jury reasonably may have believed that petitioner could be released on parole if he were not executed" and that "to the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration."

Id., at S278.

As Justice Souter explained in his concurring opinion:

> The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. The Court has explained that the Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case. [Citations omitted] Thus, it requires provision ,of "accurate sentencing information [as] an indispensible prerequisite to a reasoned determination of whether a defendant shall live or die, [Citations omitted] and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination. Beck v Alabama, 447 U.S. 625, 638 (1980).
>
> [Id., at S281]

Here, the jury's recommendation was the product of ignorance rather than "accurate sentencing information" and rendered impossible the promise of its "reasoned moral judgment."

That South Carolina prohibited parole to Simmons as a matter of law while Franqui would be denied release by operation of the imposition of lengthy consecutive sentences is a distinction of no consequence and to submit to the fiction that Franqui might ever have hoped for release is intellectually dishonest. To predicate Franqui's death sentence on such a lie is constitutionally intolerable.

In light of Simmons, Franqui's death sentence should be reversed.

F.

The Death Penalty is Unconstitutional on its Face and as Applied to Leonardo Franqui and Violates the fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as the Natural Law.

The death penalty constitutes cruel and unusual punishment under any circumstances.

In Florida, the death penalty is arbitrarily applied. Its application is discriminatory on the basis of the race, sex, and economic status of the victim as well as the offender. It is particularly offensive, as here, in its application to the mentally retarded. Woods v. State, 531 So.2d 79 (Fla. 1988) (dissenting opinion).

The death penalty is morally wrong.

Conclusion

Wherefore, based **upon the foregoing arguments and authorities,** the defendant Leonardo Franqui respectfully prays this Court to reverse his convictions and sentences. He prays for a new, separate, trial at which he is afforded the full scope of voir dire to which he is entitled and the trial court is required to exclude those portions of his confession for which the state is unable to prove the predicate corpus delicti. He prays, too, for the vacation of his disproportionate and misapplied death penalty or, at least, for the grant of a new, fair, penalty preceeding before a jury correctly informed and properly instructed.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed to the Office of the Attorney General, 401 N.W. 2d Avenue, Suite 820, Miami, Florida, 33128 this 29th day of September, 1994.

By: 
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