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

REPLY BRIEF OF APPELLANT LEONARDO FRANQUI

GEOFFREY C. FLECK, ESQ.
Fla. Bar No. 199001
5115 N.W. 53rd Street
Gainesville, Florida 32653
(904)335-8816

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STATEMENT OF THE CASE AND FACTS

The appellant, LEONARD0 FRANQUI, respectfully relies upon the Statement of the Case and Statement of the Facts as recited in his initial brief.

ARGUMENT

I.

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

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees the right of a criminal defendant to confront the witnesses against him. The Confrontation Clause applies to the states through the Fourteenth Amendment. Pointer v. State, **380** U.S. 400, **403-406**, 85 S.Ct. **1065**, **1068-1069**, **13** L.Ed.2d **923 (1965)**.

Thus, **in** a joint trial, the Confrontation Clause prevents a party from introducing a nontestifying codefendant's statement that inculpates a defendant, because that defendant is denied the opportunity to confront, and cross-examine, the nontestifying codefendant. Cruz v. New York, 481 U.S. **186**, 189, **109** S.Ct. **1714**, 1717, **95** L.Ed.2d **162** (1987)(citing Pointer v. State, **380** U.S. 400, **404**, 85 S.Ct. **1965**, 1068, 13 L.Ed.2d 923 (1965). Moreover, a violation of the Confrontation Clause cannot be cured by instructing the jury to consider the statement only in assessing

the guilt of the codefendant who made it. Bruton v. United States, 391 U.S. 123, 135-136, 88 S.Ct. 1620, 1627-1628, 20 L.Ed.2d 476 (1968).

In Cruz, however, the Court held that the introduction of a defendant's own confession that corroborates, or 'interlocks"with, the nontestifying codefendant's statement "might, in some cases render the violation of the Confrontation Clause harmless, but could not cause introduction of the nontestifying codefendant's confession not to constitute a violation." Id. 481 U.S. at 191, 107 S.Ct. at 1718 (adopting reasoning of concurring opinion in Parker v. Randolph, 442 U.S. 62, 77-80, 99 S.Ct. 2132, 2141-2142, 60 L.Ed.2d 713 (1979)(Blackmun, J., concurring in part and concurring in judgment).

Thus, in a joint trial, a nontestifying codefendant's statement, to the extent it implicates another defendant, violates Bruton even though that statement interlocks with the statement of the implicated defendant. Id. Accordingly, the only real question is whether the state has met its burden of proving that error "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). For all the reasons described in appellant's initial brief, it has not.

Moreover, the state's Answer Brief of Appellee ignores recent United States Supreme Court authority.

In Williamson v. United States, U.S. ___, 114 S.Ct. 2431, **2437,** 129 L.Ed.2d **476 (1994),** the High Court held that the "statement against penal interest" exception to the hearsay rule does not apply to statements that are non-self-inculpatory, even if they are made within a broader narrative that is generally self-inculpatory. The Court reiterated that:

> [t]he question under 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.' and this question can only be answered in light of all the surrounding circumstances.

Id. at ___, 114 S.Ct at **2437,** as cited **by** United States v. Costa, ___U.S.___, 8 Fla. L. Weekly Fed. C55, C56 (11th Cir. Sept. 13, **1994).**

Thus, the Costa Court rejected the notion that simply because a codefendant's custodial statement is against his own penal interest and probative of his own guilt it is necessarily admissible against a defendant who is also implicated by the statement. Noting that such a superficial analysis "...does not adequately take into account the circumstance that the confession was made while in custody", the Costa Court reversed. It reasoned, citing Lee v. Illinois, 476 U.S. 530, 545, 106 S.Ct. at **2064 (1986)**

that "...a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another."

Citing its predecessor circuit in United States v. Sarmiento-Perez, **633 F.2d 1092, 1101-1102 (5th** Cir Unit A Jan. 1991), the Costa Court concluded that because a custodial "...statement would have probative value against the declarant does not necessarily indicate that, insofar as it implicates the accused, it is sufficiently against the declarant's interest **so** as to be reliable." Perez at C656.

The Court also cited the Advisory Committee Notes to Rule 804(b)(3) for the accepted proposition that custodial confessions that implicate other codefendants often are not genuinely against the penal interest of the declarant:

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest.... On the other hand, the same words spoken under different circumstance, e.g., to an acquaintance, would have no difficulty in qualifying.
>
> * * *

Fed. R. Evid. 804 advisory committee's note.

Applying these tenets here, where San Martin's custodial hearsay statements were not really self-inculpatory, they were not admissible against Franqui no matter whether they were interlocking, as the state argues, or not.

Citing Lee v. Illinois, 476 U.S. 530, 541 (1986), the Court correctly observed, not only that "[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion...", but also that:

> The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
>
> [Williamson, at S392]

In every case, the issue being particularly fact-intensive, the trial court is obligated to undertake a careful examination of all the circumstances surrounding the criminal activity involved. Williamson, supra, at S393. Here, absent the benefit of the Supreme Court's decision and its progeny, the trial court did not focus on the internal reliability of the codefendant's statements, satisfied as it was that it was rendered reliable by its similarity to Franqui's statement. This, we now know, is not sufficient to

protect an accused's Sixth and Fourteenth Amendment rights. Costa, at C656.

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

11.

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE PORTIONS OF THE DEFENDANT'SROBBERY 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 state claims it established the corpus delicti of attempted robbery so that it justified the admission of portions of the defendant's confession which related to that charge. It is incorrect.

The state correctly argues that intent may be proved by considering the accused's conduct before, during, and after the alleged attempt along with any other relevant circumstances. Appellee Brief at 47; citing Cooper v. Wainright, 308 So.2d 182, 185 (Fla. 4th DCA 1975). Ipso facto, the conduct of the victims, as opposed to the defendants, does not bear on the intent of the perpetrator. Thus, absent independent evidence that the defendant knew the Cabanases had in their possession a large sum of money, the state's evidence that "...both Cabanases testified that they exited the bank, as they did every Friday, with a large sum of money, $25,000 in cash", is irrelevant and the state's reliance upon such evidence is misplaced.

The only other circumstances the state relies upon are the fact that the Cabanas' vehicle was boxed in by the defendants' two

Suburban vehicles less than a mile from the bank, two masked men immediately opened fire, the victims returned fire and the attackers fled, and the stolen Suburbans were abandoned nearby "suggesting a prearranged getaway plan". [Appellee Brief at 47]

Nothing in the state's scenerio, which it contends could not be anything "but a preplanned robbery", is inconsistent with an ambush/assault for any other reason, the most likely being a homicide, itself.

The state conspicuously ignores Danilo Cabanas, Jr.'s testimony that none of the assailants 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, Js., responded, "Yes. They, they were back there trying to kill me, sir." [TR. 1749]

Thus, if anything, the defendants' conduct and the surrounding circumstances established the corpus delicti for first degree premeditated homicide but not attempted robbery.

Relying upon Jefferson v. State, 128 So.2d 132 (Fla. 1961), the state contends that it is absolved from the traditional corpus delicti requirements by establishing any criminal agency homicide without regard to the degree of murder supported by the evidence.

In State v. Allen, 335 So.2d 823 (Fla. 1976), this Court rejected the defendant's argument that the state must prove the corpus delicti beyond a reasonable doubt but upheld the long-standing rule that "it must at least show the existence of each element of the crime." Id., at 825. Here, an element of the crime of felony first-degree murder is an underlying felony.

Thus, absent any proof of an underlying felony, i.e., attempted robbery, the state's fallback position that its proof of the corpus delicti of murder allowed the introduction of the attempted robbery confession is similarly misplaced.

The jury should never have received evidence of Franqui's confession so far as it related to an attempted robbery of which there was no independent evidence. Franqui should be granted a new trial by this Court on appeal.

111.

THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING VOIR DIRE EXAMINATION OF THE JURY RELATIVE TO SPECIFIC MITIGATING CIRCUMSTANCES AND IN DENYING 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.

Contrary to the state's contention that this record contains no evidence of the existence of a jury questionnaire [Appellee Brief at 55], it in fact contains just such a questionnaire. In support of his "Motion for New Trial, For Arrest of Judgment, And for Judgment of Acquittal Notwithstanding the Verdict," the defendant filed a written "...Notice of Filing Standard Juror Questionnaire and Proffer Related Thereto" [R. 705 - 706] to which he appended a sample jury questionnaire such as "is sent to all prospective jurors in Dade County, Florida prior to their jury service and which is filled out by the prospective jurors and returned to the Clerk's office by the prospective jurors." [R. 707]

In addition, the state faults the defendant for not making his request for the jury questionnaires from the clerk of the court. It neglects the fact that the clerk of the court was exempted from its obligation under Rule 3.821 by the ruling of the trial court which denied the defendant access. Nothing in the Rule requires

the defendant to make his request in the first instance to the clerk of the court. There is no good reason, and no authority offered by the state, why such a request for production cannot and should not be made to the trial court. As a matter of practice, requests for copies of charging documents, witness lists, discovery, and reports are routinely made to the trial court as early as arraignment despite the fact that the rules provide for production by other parties, such as the clerk and/or State Attorney's Office. Moreover, where the rules require the demand be made to other than the trial court, the rules say so. Fla. R. Crim. P. 3.140(m); 3.220(a).

In addition, the state faults appellant for "curiously mak[ing] no cite to the record" where the defense was refused a hypothetical question similar to that allowed the state. [Appellee Brief at 54, n.11] To the contrary, appellant illustrated how the state was permitted to question the jury 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 <u>quilty</u> despite their youthful age. [TR 1538 -1544]. The trial court consistently overruled every objection to such hypotheticals made by the defense.

Contrarily, the trial court 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 trial court restricted the defendant more than it restricted the state and to a degree inconsistent with the guarantee of a fair trial by an impartial jury and due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

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 state's entire theory of CCP is apparently predicated on codefendant Pablo Abreu's testimony recounting that Franqui purportedly said "[t]hat it would be better for him [the bodyguard] to be dead first rather than Franqui." [Appellee Brief at 59; TR 2696 -97] By the same token, since there is no other even arguable evidence of homicidal premeditation, it must be that the trial court's unexplained findings of heightened premeditation are based on the same isolated alleged statement:

> "The defendant and his codefendants 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 the Franqui would drive his car in such a way as to force the bodyguard's car off the road anfd then he would kill him."
>
> [R. 1185 - 1186]

The only problem is that there was no such evidence presented. In fact, Abreu's immediate explanation of Franqui's alleged statement demonstrates that Lopez's killing was not planned and that no "assassination" was contemplated at all:

> Q. What did Franqui tell you that they were going to do with the bodyguard during the crime?
>
> A. First he was going to crash against him and throw him down the curbside, and then he would shoot at him, but he didn't do it that way.
>
> [TR. 2696 - 2697]

It is apparent that the state's best and only witness for CCP, Abreu, was himself surprised when the handling of the bodyguard did not occur as planned. Accordingly, even in a light most favorable to the state, the most that was proved was felony-murder or the premeditation required to support the charge of first degree murder, but not the heightened, planned, intent to murder erroneously determined by the trial court and argued by the state.

Proof of the cold, calculated, and premeditated aggravating factor requires evidence of calculation prior to the murder, i.e., a careful plan or prearranged design to kill. Wyatt v. State, 641 So.2d 1336 (Fla. 1994), Valdes v. State, 626 So.2d 1316 (Fla. 1993), cert. denied, 114 S.Ct. 2725, 129 L.Ed.2d 849 (1994); Sweet v. State, 624 So.2d 1138 (Fla. 1993), cert. denied, 114 S.Ct 1206, 127 L.Ed.2d 553 (1994).

In addition of course, even ignoring Abreu's explanation of Franqui's statement, the state's reading of the defendant's "better him than me" comment does not prove CCP beyond a reasonable doubt. Whatever evidence of intent it might support is made highly conditional upon the threat of death to Franqui. Thus, a fairer reading of Franqui's statement would support a finding of intent to shoot the bodyguard if the bodyguard were going to shoot him. CCP is not established by evidence of a conditional threat.

In any event, what clearly remains is a confusion between the evidence supporting the planning of the robbery compared to the evidence of heightened premeditation to commit first degree murder. This Court, in Castro v. State, 19 Fla. L. Weekly S435, S437 (Fla. September 8, 1994) addressed precisely the situation here:

> While the record reflects that Castro planned to rob Scott, it does not show the premeditation necessary to find that the murder was committed in a cold, calculated, and premeditated manner.

The same conclusion applies here.

B.

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

The state first claims that this issue is not preserved for appeal. We respectfully disagree.

As the state acknowledges, the defendant consistently objected at the initial charge conference to the trial court giving the "shorter", "standard" version of the CCP instruction until the state expressed its lack of objection to the giving of the "longer version" which was ultimately given. Then, defense counsel commented, without retracting his previous objections of vagueness and ambiguity, "Judge, I think the longer one is certainly better than the shorter one." [TR. 2650 -2652]

If defense counsel's comment remained the last word from him on the issue, the state might have a better argument for waiver. However, at a subsequent charge conference, when the only instruction under consideration was the "longer one", Franqui's attorney stated:

> Judge, if I could add to that, I restate all my general objections. I believe it is vague and ambiguous.
>
> [TR. 3330]

Defense counsel could hardly have been more explicit. The state's

contention that counsel was merely "restating his prior objections" to the standard CCP instruction and not the long form, is not reasonable in context or time-frame.

The state also contends that the trial court's "long form" was so similar to the instruction approved by this Court in Jackson v. State, 19 Fla. L. Weekly S215, S218 at n. 8 (Fla. April 21, 1994), that no error exists in any event. The state misses the point.

The only issue here regarding CCP was whether the state proved CCP beyond a reasonable doubt viv-a-vis the murder of Lopez rather than merely as to the robbery of the Cabanas'. [See, Point IV A, supra.] The instruction given by the trial court, unlike that endorsed by Jackson, allowed the jury to find CCP too easily, lessened the state's burden of proof, and was, at least, vague and ambiguous as to this issue.

The Jackson instruction commands the fact-finder to find "the murder" was cold, calculated, and premeditated. The trial court's instruction here allowed the jury to find CCP if "[t]he crime" was cold, calculated, and premeditated. This crucial contradiction, unaddressed by the state in its brief, invited the jury to find CCP and recommend death misguidedly. Franqui is entitled to a new sentencing hearing.

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.

The state contends that the trial court acted within its discretion to reject altogether all of Franqui's mental status evidence and the non-statutory mitigating factors based upon it. To the contrary, the trial court was obliged to give Franqui's mental condition at least some weight and to categorically reject it was error.

"[A]ny [mental or] emotional disturbance relevant to the crime must be considered and weighed by the sentencer" as a nonstatutory mitigating circumstance." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). Mitigating evidence must be considered when contained anywhere in the record. Farr v. State, 621 So.2d 1368 (Fla. 1993). "Our law does establish that all evidence of mental disturbance or impairment is relevant if it may have some bearing on the crime or the defendant's character." Walls v. State, 641 So.2d 381, 383 (Fla. 1994), citing Cheshire, supra, [emphasis in original].

This is especially true regarding the mitigating circumstance

of mental retardation. This Court, following the approach suggested by the United States Supreme Court in Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), treats low intelligence as a "significant" mitigating factor "with the lower scores indicating the greater mitigating influence." Thompson v. State, 19 Fla. L. Weekly S632, 634 (Fla. November 23, 1994). Here, the trial court failed to consider Franqui's evidence of mental retardation at all. This was clearly error.

Because the trial court erroneously rejected, rather than weighed, these mitigating circumstances, resentencing is required. 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). This Court has made clear that "whenever a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance has been presented, the trial court must find that the mitigating circumstance has been proved." Spencer v. State, 19 Fla. L. Weekly 5460, 463 (Fla. September 22, 1994); Knowles v. State, 19 Fla. L. Weekly S103, S105 (Fla. February 24, 1994), quoting Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990).

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.

Here, two aggravating circumstances (pecuniary gain/robbery) should be stricken because the only evidence supporting them was erroneously admitted. [Point II, supra.] Another aggravating circumstance (CCP) should be stricken because it is unsupported by the evidence. [Point IV(A), supra.] The only valid aggravating circumstance remaining is "previous conviction for a capital/violent felony."

Even if the defendant is not credited for "brain-damage", "mental retardation", "impaired capacity", or "age" [Point IV (C), supra.], he remains credited with (1) poor family background and deprived childhood and (2) caring husband, father, brother, and provider. [R. 1198, 1200]

This Court has consistently reversed death sentences where, as here, one valid aggravating circumstance is balanced by significant mitigation. Cf., Thompson v. State, 19 Fla. L. Weekly S655, S6.56 (Fla. December 15, 1994). This Court should do the same here.

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.

This Court's decision in Jones v. State, 569 So.2d 1234 (Fla. 1990) controls. Like here, Jones contended that the trial court improperly prevented him from arguing that he could be sentenced to consecutive prison terms if the jury recommended life sentences on the two homicides of which he as convicted. Rejecting the state's contention that the defendant's claim was speculative and the actual sentencing decision was the court's and not the jury's, this Court, in reliance upon Lockett v. Ohio, 438 U.S. 586, 98 S.Ct.2954, 57 L.Ed.2d 973 (1978), held that the sentencer may not be precluded from considering as a mitigating factor "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id., at 1239, quoting Lockett at U.S. 604, 98 S.Ct. at 2965.

This Court acknowledged that the state may not narrow a sentencer's discretion to consider relevant evidence "that might cause it to decline to impose the death sentence", citing McCleskey

v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987)(emphasis in original; footnote omitted). Id., at 1239.

This Court further held that counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of his two murders. It appropriately concluded:

> The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering. [Id., at 1240]

The same conclusion is compelled here. The state may not bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial. Hitchcock v. State, 578 So.2d 685, 689 (Fla. 1990), vacated on other grounds, 112 S. ct. 3020, 120 L.Ed.2d 892 (1992); Griffin v. State, 639 So.2d 966 (Fla. 1994). Franqui is at least entitled to a new sentencing hearing.

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.

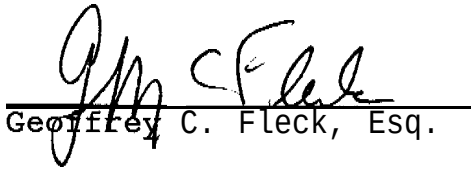
In Penry v. Lynaugh, supra, 92 U.S. 302, at 340, 109 S. Ct. 2934, 106 L.Ed.2d 256 (1989, the United States Supreme Court endorsed the execution of the mentally retarded, rejecting claims (such as that made by the defendant here) that such barbarism violated the cruel and unusual punishment prohibition of the Eighth Amendment to the United States Constitution. This Court has "elected to follow" Penry. Thompson v. State, supra, 19 Fla. L. Weekly S632, S634 (Fla. November 23, 1994). It need not, and should not, do so.

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.

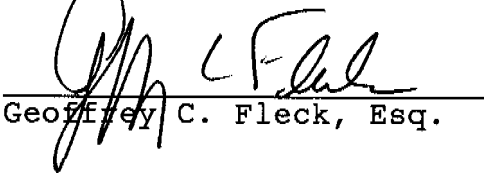
Respectfully submitted,

Geoffrey C. Fleck, Esq.
Fla. Bar No. 199001
5115 N.W. 53rd Street
Gainesville, FL. 32653-4353
(904)335-8816

By: 
Geoffrey C. Fleck, Esq.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was mailed to the Office of the Attorney General, 401 N.W. 2d Avenue, Suite 820, Miami, Florida, 33128 this 6th of February, 1995.

By: 
Geoffrey C. Fleck, Esq.