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

SUPPLEMENTAL BRIEF OF APPELLANT LEONARDO FRANQUI

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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.

SUMMARY OF THE ARGUMENT

The trial court allowed the state to inculpate the defendant with his confession but refused to allow the defendant to cross-examine regarding a second, related, exculpatory statement made by the defendant two days later. This abuse of discretion was enormously unfair, denied the defendant effective cross-examination, and entirely vitiated the completeness doctrine as codified by the evidence code **and** recognized by case law. The defendant is entitled to a new trial where the jury is presented the whole picture.

ARGUMENT

I.

THE TRIAL COURT ERRONEOUSLY GRANTED THE STATE'S MOTION IN LIMINE AND DENIED FRANQUI THE RIGHT TO CROSS-EXAMINE ABOUT THE SUBSTANCE OF AN EXCULPATORY STATEMENT MADE SUBSEQUENT TO THE CONFESSION THE STATE INTRODUCED IN ITS CASE-IN-CHIEF WHERE THE DEFENSE ARGUED THAT FAIRNESS AND "COMPLETENESS" COMPELLED ITS ADMISSION, THEREBY VIOLATING FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

The trial court abused its discretion in prohibiting the defense from cross-examination regarding the second of a series of statements made by the defendant after the state introduced the first. Because the statement kept from the jury was exculpatory, its suppression was harmful error as to both the guilt and penalty phases of this capital case.

If Johnson v. State, 20 Fla. L. Weekly D910 (Fla. 3rd DCA April 12, 1995) is correct, Franqui's conviction and death sentence cannot be sustained. It is materially indistinguishable from the case at bar.

Here, the state, pre-trial, moved in limine to preclude:

> "Any reference in any form to the following statements made by Leonardo Franqui to any informants or officers, to wit:
>
> January 20, 1992, that Fernando Fernandez and Pablo San Martin were the leaders and planners of this robbery, that Fernando Fernandez was actually in the Suburban with him, and that it was Fernando Fernandez who had fired the .357 at the deceased and not Franqui. Note this allegation was subsequently recanted as to that."
>
> [TR 556]

The defense argued the admissibility of Franqui's statements, through the cross-examination of Detective Nabut, on two alternate bases - impeachment based on the omission of reference to the second statement from the detective's police report and under the doctrine of "completeness." [TR 557] This issue involves the latter. As defense counsel explained, the second statement was undeniably related to and a continuation of the first taken only two days earlier, and it involved a crucial issue regarding the true identity of the killer:

> MR. COHEN: In our preparation of this case for trial, the issue as to who was the gunman--issue as to the number of assailants or suspects involvement is a crucial issue to our defense, ...
>
> I also feel under the facts of completeness,... because the statements are related, because they are all made, although not on the same day, in fairly close proximity time-wise, that we feel that the latter statement in which Mr. Franqui says that it was Mr. Fernandez being involved, explains his earlier confession and his earlier statement to the effect that therefore under the doctrine of completeness, it should be admitted.
>
> * * *
>
> The rule of completeness generally allows admissions of the balance of the conversation, as well as other related conversation. This is certainly other related conversation. The temporal proximity is relatively close, the passage of two days, and I again would tell the Court that this is a crucial issue for the defense, and if the Court grants this motion, we are denied our oppoestunity to present a full and fair defense in this case.
>
> [TR 557 - 560]

The state argued that the completeness doctrine applied only to writings and recordings. [TR 559] The defense offered an in camera proffer to the court to demonstrate the statement's significance to the defense. [TR 912-913] The trial court ultimately granted the state's motion and the exculpatory and explanatory January 20 statement of the defendant was never offered to the jury, through cross-examination or otherwise. [TR 916-917]

In Johnson, supra, the defendant, upon arrest, confessed that he had been in a fight with the victim over a broken watch, **and** that he had hit the victim with a stick. Later at the police station, Johnson gave a formal exculpatory statement that he had hit the victim only after the victim had threatened to have **dogs** attack him, **and** after the victim had first hit him. The trial court refused to allow defense counsel to cross-examine the detective concerning the second formal statement after the state introduced Johnson's first, informal statement.

The Third District Court held that the trial court abused its discretion and committed reversible error, citing 890.108, Fla. Stat. (1993):

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously.

The fact that Johnson's first statement was informal and apparently unrecorded was no bar to Johnson's relief. Ipso facto, the fact that Franqui's statements were oral should likewise not control

this Court's decision. There is no question concerning the reliability or accuracy of Franqui's second statement and no logical reason to disqualify the otherwise applicable doctrine of completeness and promote the interests of fairness.

While recognizing the general rule against the admission of a defendant's out-of-court, self-serving statements as hearsay, the court acknowledged the exception to the rule applicable here where the state has "opened the door":

> [W]here the state has opened the door by eliciting testimony as to part of the conversation, defendant is entitled to cross-examine the witness about other relevant statements made during the conversation. [Citation omitted].

Further, the court made clear that the completeness doctrine in not limited in it application to parts of the <u>same</u> conversation:

> This rule is not limited to segments of <u>one</u> conversation, but also allows admission of "other relevant conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired betweeen the two." [Citations omitted, emphasis in original].

The court concluded, as this Court should here, that the defendant should have been allowed to cross-examine the offices regarding the second statement, as that statement served to amplify or explain the earlier statement. It reasoned that "[s]tanding alone, the earlier statement left the jury without a complete picture of the defendant's behavior." It also concluded that there could be no "reasonable possibility that the error did not affect the verdict." <u>State v. DiGuilio</u>, 491 So.2d 1129 (Fla. 1986).

The same conclusions, for exactly the same reasons, are compelled here. Franqui is entitled to a new trial

Conclusion

Wherefore, based upon the foregoing arguments and authorities, the defendant Leonardo Franqui respectfully prays this Court to reverse his convictions and sentences.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief of Appellant was mailed to Randall Sutton, Esquire, the Office of the Attorney General, **401** N.W. 2d Avenue, Suite N921, P.O. Box 013241, Miami, Florida, **33101** this 28th **day** of July, 1995.

By: _____
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