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## STATEMENT OF THE CASE AND FACTS

The Appellant, LEONARDO FRANQUI, relies upon the Statement of the Case **and** Statement of **the** Facts as recited in his initial brief.

## SUMMARY OF THE ARGUMENT

Counts II **and** III of the instant Indictment charged Appellant Leonardo Franqui with attempted first degree murder. In light of the evidence below, the jury very likely convicted him of those charges based on the “legally insupportable theory” of attempted felony murder, which this Court has found to be a non-existent crime in this jurisdiction. Franqui’s convictions on those counts must thus **be** reversed.

THE APPELLANT'S CONVICTIONS ON COUNTS II  
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MURDER

In State v. Gray, 654 So.2d 52 (Fla. 1995), this Court held that the crime of attempted felony murder does not exist in this State. The Court there specifically stated that its opinion was applicable to all cases which were not yet final. Undeniably, that decision mandates that Appellant Leonardo Franqui's conviction on Counts II and III of the instant Indictment be reversed.

Count II charged **the** Appellant with the attempted first degree murder of Danilo Cabanas, **Sr.** Count III charged the attempted first degree murder of Danilo Cabanas, Jr. On each count, the **jury** was instructed on both attempted premeditated murder and attempted felony murder. Franqui was convicted of both charges.

In short, the evidence at trial reflected that on December 6, 1991, the Cabanases were confronted by three gunmen shortly after Mr. Cabanas, Sr. had withdrawn \$25,000 from the bank. (TR:1725) During the ensuing gunfight, Raul Lopez

was mortally wounded.’ The evidence further indicated that the Appellant subsequently admitted to being one of the gunman involved in this incident. In his post-arrest statement, Franqui claimed that the gunfight evolved from a bungled plan to rob the Cabanases of the money they had withdrawn from the bank. (TR:1917) Codefendant Pablo San Martin’s statement, **which** was also introduced against Franqui at trial, was to the same effect. Undoubtedly, the jury credited both of the defendant’s statements as those statements were the only evidence linking them to the charged offenses. Accordingly, the **jury** likely based its guilty verdicts on Counts II and III -at least in part- on the theory of attempted felony murder.

In Valentine v. State, 688 So.2d 313 (Fla. 1996), this Court considered a similar situation. The jury there -as here- was instructed on both attempted first degree felony murder and attempted first degree premeditated murder. This Court found that “[b]ecause the jury may have relied on [the] legally insupportable theory [of attempted felony murder], the conviction for attempted first-degree murder must be reversed.” *Id.* at 317 (emphasis supplied). The same result is warranted here.

Certainly, in light of Franqui and **San** Martin’s post-arrest statements, the **jury** below may have found the Appellant guilty of Counts II and II on the “legally

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<sup>1</sup>. Lopez’ death was the basis for Count I of the instant Indictment.

insupportable theory” of attempted felony murder. Franqui’s convictions on those counts must thus **be reversed.**<sup>2</sup>

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<sup>2</sup>. The reversal of the Appellant’s convictions on these Counts also mandates that his death penalty be vacated as that penalty is clearly disproportionate in light of the record below.

## CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, Appellant Leonardo Franqui requests this Court to reverse his convictions on Counts II and III of the instant Indictment.

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 N 921, P.O. Box 013241, Miami, Florida, 33101 this 1<sup>st</sup> day of **May**, 1997.



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