IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,701

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, Ricardo Gonzalez, Fernando Fernandez, and Pablo Abreu, were charged by indictment on February 4, 1992, with first degree murder of a law enforcement officer [Count I], armed robbery with a firearm (Count II), aggravated assault [Counts III - IV], unlawful possession of a firearm while engaged in a criminal offense [Count V], grand theft third degree [Counts VI and VIII], and burglary [Counts VII and IX], in violation of Florida Statutes §782.04(1), §775.087, §777.04, §775.0823, §777.011, §784.021(1)(a), §790.07, §810.02, §812.13, and §812.014(1)(2)(c). [R 15-20] Franqui, Gonzalez, and San Martin were tried together, by jury, on May 23, 1993. Fernandez was tried by a separate jury at the same time. Abreu negotiated a guilty plea prior to trial and avoided the death penalty.

Prior to trial, co-defendant Fernandez filed a motion for severance of defendants (joined by all defendants) due to the fact that San Martin and Gonzalez had made post-conviction statements

which directly incriminated him. [R 115] Franqui renewed his motion throughout the trial and, particularly, when his codefendants' confessions were offered into evidence against him prior to the penalty phase, [TR 17 - 33, 57 - 58, 80 - 88, 1347, 1375 - 76, 1398 - 1400, 1408, 1419 - 1420, 1544, 1564, 1773, 1776, 11959, 2348, 2908, 2917, 3101] San Martin's and Gonzalez's statements were introduced without deletion of its references to Franqui upon the trial court's finding that they were "interlocking." [R 122-128].

A trial by jury commenced on May 23, 1994. The defendant's timely motions for judgment of acquittal were denied. [TR 1942 - 1944, 1976] The jury ultimately found Franqui guilty as charged. [R 390; TR 2322 - 2324] Counts III and V were nol prossed by the state after its opening statement. [TR 884]

Prior to the penalty phase hearing, Franqui unsuccessfully renewed his motion for severance. [TR 2348] The jury recommended death by a vote of nine to three. [R 480, TR 3105]

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, (4) committed for purpose of avoiding arrest, and (5) law enforcement officer victim, but appropriately noted that (2) and

(3) as well as (4) and (5) merged. [R 588 - 590]

The court found as non-statutory mitigating circumstances (1) the defendant's capability to form loving relationships and (2) that the defendant had suffered a troubled youth. [R 596 - 598]

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 on counts V and VII. Counts II, III, and IV included three year minimum mandatory terms. All sentences were ordered to run consecutive. [R 601 - 606, TR 3154 - 31703

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 720] This appeal follows.

STATEMENT OF THE FACTS

The Kislak National Bank in North Miami, Florida was robbed by four armed gunmen on January 3, 1992. [TR 956 - 960] The perpetrators made their getaway in two stolen grey Chevrolet Caprice automobiles after taking a cash box from one of the drive-in tellers. [TR 969, 991, 1074, 1108, 1112] During the robbery, police officer Steven Bauer was shot and killed. The vehicles were found abandoned a short distance away. [TR 992]

Codefendant Gonzalez was stopped by the police on January 18, 1992 after leaving his residence. [TR 1336] He said, "I got bad luck. I knew I would get stopped driving that car." [TR 1378] He subsequently made unrecorded and recorded confessions. [TR 1409 - 1415, 1421 - 1456] He described Franqui as the mastermind who planned the robbery, involved the other participants and himself, and chose the location and the date. [TR 1427 - 1429] He described Franqui as procurer of the stolen cars, the driver of one of the vehicles, and the supplier of his weapon. [TR 1431 - 1440] He descibed Franqui as the first shooter who shot Officer Bauer three to four times while he only shot once. [TR 1444] Gonzalez indicated that he shot low and believed he shot the officer in the leg with a ricochet. [TR 1461] In fact, ballistics evidence proved it was Gonzalez, not Franqui, who fired the fatal bullet into Officer Bauer's neck. [TR 1900 - 1903]

Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. [TR 1534 - 1542] Gonzalez was reinterviewed. He explained how he and the others divided the money after the robbery. He described how Franqui told Officer Bauer not to move before he shot him and how they fled in Franqui's car. [TR 1551 - 1570]

San Martin also confessed. [TR 1604 - 1610, 1616 - 1644] He said that the robbery was planned by a black friend of codefendant Fernandez who did not participate and that the planning occurred at Fernandez' apartment. [TR 1604 - 1605, 1623 - 1625] He explained that Pablo Abreu drove Franqui's Buick which remained several blocks away and was used as a getaway car. [TR 1608] They expected a man with a shirt and tie, not a police officer, to accompany the clerks. He could not say who carried guns or did the shooting. [TR 1608, 1638] He did not see Franqui with a gun. [TR 1638] Franqui did not tell him he had fired a gun. [TR 1643] San Martin admitted taking the money tray. [TR 1609] He recieved $3000. [TR 1610, 1642] He later admitted having disposed of the weapons in the river off the Dolphin Expressway where they were later recovered. [TR 1774 - 1775, 1820]

Twenty-one year old Leonardo Franqui was questioned by the police on January 18, 1992 in a series of recorded and unrecorded sessions. [TR 1739, 1744] During his preinterview, he initially denied any knowledge of his codefendants (except San Martin [TR

1709]) and any involvement in the Kislak Bank robbery. [TR 1683 - 1684] When confronted by the fact his accomplices were in custody and had implicated him, he ultimately confessed. [TR 1684]

Franqui admitted that he and Gonzalez were armed and that Fernandez had originated the idea for the robbery after talking to a black male (Gary Cromer). [TR 1685 - 1686] He and Fernandez had accompanied the black male to the bank a week before the robbery. [TR 1714, 1750] He returned to the bank again the day before the robbery. [TR 1714, 1753] At that time, Franqui observed an unarmed civilian accompany the tellers to their booths rather than a police officer. [TR 1754] They intended to commit the robbery then, but there were too many customers at the bank. [TR 1755]

He explained that the .9 millimeter which he carried had been purchased the summer before by all five of the people involved. [TR 1693, 1762] He claimed that the black male suggested the use of the two stolen cars, but denied any involvement in the thefts of the vehicles. [TR 1687 -1688] According to Franqui, San Martin, Fernandez, and Abreu stole the cars. [TR 1751] Franqui said he drove a stolen Buick Regal before parking it and driving one of the stolen Chevrolets to the bank. [TR 1691 - 1692] Franqui denied that the Buick was his even when confronted by his interrogating officer's knowledge that it was his. [TR 1699] Later, however, he admitted to another officer that it was his and that it had been painted a different color after the offense. [TR 1730] San Martin

and Fernandez were to accost the tellers and take the money. [TR 1697]

Franqui related that Gonzalez, not he, yelled "Freeze" to Officer Bauer after his firearm was seen. Franqui denied having fired the first shot, and admitted firing only one shot later. [TR 1696, 1760] He said Abreu kept the guns subsequently and that San Martin and Abreu later told him that the weapons had been thrown in the water somewhere. [TR 1729, 1732]

Franqui did not know the total take from the robbery but admitted having received $2,400 afterwards at Abreu's house. [TR 1698, 1765] He was unable to describe the route taken away from the bank or how the money was transported. [TR 1716] He did not know that Bauer was a police officer - he saw no badges or uniform. [TR 1759]

Franqui was very concerned about who had actually killed Officer Bauer. He asked whether he had been responsible for firing the fatal shot, but the answer, at the time, was unknown. [TR 1700] Subsequent ballistics evidence demonstrated that codefendant Ricardo Gonzalez fired the fatal shot from his .38 Smith & Wesson Model 19 revolver and Franqui shot Bauer in the leg with his .9 mm Smith & Wesson semi-automatic handgun. [TR 1900 - 1903]

A fingerprint of Franqui's was found on the outside of one of

the Chevrolets. [TR 1852 - 1853] Seven were found on the Buick. [TR 1854]

A bystander in a bus identified Franqui as the driver of one of the Chevrolets leaving the bank after the robbery. [TR 1869]

Penalty Phase

Craig Vannez described the armed carjacking/kidnapping Franqui and San Martin, along with Carlos Vasquez, committed against him on January 14, 1992. [TR 2378 - 2390] The state introduced certified copies of Franqui's convictions for armed robbery and armed kidnapping. [TR 2410]

Security officer Pedro Santos described the armed robbery of the Republic National Bank in November, 1991. [TR 2416 - 2420] San Martin and Franqui subsequently admitted committing it. [TR 2424 - 2435] The state introduced certified copies of the judgment adjudicating Franqui guilty of attempted robbery and aggravated assault with a firearm. [TR 2436]

The state also established the facts of the attempted robbery and murder of Raul Lopez in Hialeah on December 6, 1991. [TR 2440 - 2451] It related Franqui's confession to that crime. [TR 2452 -

2461] The weapons used were the same used in the Bauer homicide. [TR 2462] The state introduced the judgment for first degree murder, two counts of attempted first degree murder with a firearm, and attempted robbery with a firearm. [TR 2466 - 2467]

Alberto Gonzalez, Franqui's father-in-law, testified that Franqui was a hard worker and a "beautiful" person. [TR 2492] He was an excellent worker. [TR 2497] He was a "good young man" and very much in love with his daughter. [TR 2493, 2495] He considered Franqui a "marvelous" husband to his daughter even though they had not married. [TR 2494] Franqui did not drink, smoke, or use illegal drugs. [TR 2495]

Gonzalez described Franqui as an "excellent" father to his three and four year old daughters. [TR 2496] He cared for them before his incarceration and worried about their care afterwards. [TR 2498 - 2504]

Mario Franqui, the defendant's uncle, testified that Franqui's mother left him when he was less than two years old. [TR 2509] He believed always that Franqui was not normal - he appeared to have a problem and was a slow learner. [TR 2512] At the age of ten, Franqui came to the United States but was separated from the aunt who had raised him in his mother's absence. [TR 2512 - 2513] Shortly thereafter, Franqui's younger brother died. [TR 2514] Franqui's adoptive father started drinking and abusing drugs. [TR

2516] The family broke apart and the responsibility of his upbringing fell to an elderly great aunt. [TR 2518]

Franqui was subsequently involved in a serious accident requiring multiple operations. [TR 2519] He was schuffled from one family member's care to the other but was without any supervision for a long time. [TR 2520 - 2521] He was a good worker and a good father. [TR 2521 - 2522] He was tranquil, respectful, and did not use drugs or alcohol. [TR 2523]

Michael Barrechio, a City of Miami golf course maintenance supervisor, worked with Franqui for approximately five months in 1991. [TR 2532 - 2533] He characterized Franqui as a "very conscientious worker." [TR 2533]

The trial court, at the request of the state, took judicial notice of the judgment entered against codefendant Pablo Abreu in this case [Case No. 92-2141] and instructed the jury that Abreu pled guilty to various charges including first degree murder and was sentenced to consecutive terms of life imprisonment with a 25 year minimum mandatory. [TR 2976 -2982)

SUMMARY OF THE ARGUMENT

I.

Affirmance of this case could sound the death knell for peremptory challenges. The trial court precluded the defendant's exercise of two perfectly legitimate peremptory challenges and forced the defendant to accept these unsatisfactory jurors to literally decide whether he lived or died despite the defendant's expression of legitimate, race and gender neutral reasons. To affirm the trial court here would be to abolish peremptory challenges by a criminal accuseds, which, especially in death cases, would be to do immeasurable violence to venerable precedent and the most core elements of the right to a fair and impartial jury of one's peers. In addition, reversal is compelled where the state failed to base its objection on any claim of discrimination and where the record is silent as to what discrimination, if any, was claimed.

II.

The State failed to offer race-neutral explanations for its exercise of a peremptory challenges against a female juror. Instead, the reasons it gave upon the defendant's "Neil" objection were not reasonable in light of the juror's clear demonstration of impartiality, willingness and ability to follow the law, and competence in general. The fact that the trial court either failed to recognize that the defendant's "threshold" burden of proof had

been met or summarily overruled the defendant's objections reflects its indiscriminate acceptance of the State's rationalizations without the required determinations of reasonableness and record support. Accordingly, the trial court erred and a new trial should be granted where the State is not permitted to exclude prospective jurors because of their gender.

III.

The defendant was unfairly prejudiced by his compelled joinder with his co-defendants San Martin and Gonzalez, who gave post-arrest, custodial confessions which were as damaging to him 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 the statements of Franqui's codefendants 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, forced joinder denied the defendant his Sixth Amendment right of confrontation and he is entitled to a new, separate, trial.

IV.

The State repeatedly and deliberately appealed to the jury's sympathy by commenting on and eliciting testimony of the victim's good character, charismatic personality, selflessless and courage.

There existed no issue in this lawsuit, however, for which such comments and evidence were relevant or admissible. Because, by design and effect, they unfairly inflamed the jury against the defendant, reversal is compelled for the grant of a new, fairer, trial.

V.(A)

Despite clear and unrefuted evidence of various non-statutory mitigating factors, including Franqui's good prison conduct, mental problems, and being a good worker and employee, the trial court refused to give any weight at all to factors which should, at least, have been weighed. It also refused to consider, or even instruct the jury on, the mitigating circumstance of age where the defendant was shown to have been only 21 at the time of the offense. The trial court erred in its rejection of all these mitigating factors and, particularly, in failing to allow the finders of fact to consider the latter.

V.(B)

Franqui was found to have participated (but not fired the fatal shot) in a run-of-the-mill bank robbery where death resulted from a gunshot wound. As such, as inexcusable as the crime was, it was not the most heinous, most egregious, of crimes and the death penalty should be deemed disproportionate. In fact, this Court has generally not affirmed the ultimate penalty in single victim, gunshot murders committed during the perpetrations of armed

robberies. It should not do so here.

V.(C)

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

ARGUMENT

POINT I

THE TRIAL COURT'S PRECLUSION OF THE DEFENDANT'S EXERCISE OF PEREMPTORY CHALLENGES ON TWO JURORS CONSTITUTED REVERSIBLE ERROR AND VIOLATED THE FIFTH AND SIXTH AMENDMENTS AND ITS FAILURE TO ACCEPT THE RACE-NEUTRAL REASONS GIVEN BY THE DEFENDANT WAS MANIFESTLY ERRONEOUS, ESPECIALLY WHERE NO DISCRIMINATION CLAIM HAS BEEN PRESERVED BY THE STATE.

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 to exercise peremptory challenges so long as their strikes are not motivated (or even colored) by racial, ethnic, or gender-based

discrimination. See, State v. Neil, 457 So.2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So.2d 565 (Fla. 1986); State v. Alen, 616 So.2d 452 (Fla. 1993), approving 596 So.2d 1083 (Fla. 3d DCA 1992)(en banc).

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." 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). 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). Without peremptory challenges, voir dire is meaningless except to uncover only the most blatantly unfit jurors.

Here, the trial court denied the defendant's (adopted) request for individual, sequestered voir dire. [TR 250 - 253] It also denied the defendant's motion to sequester the jury and for

additional peremptory challenges. [TR 249 - 253, 256] More important, though, it denied, on two separate occasions, the defendant's right to strike unwanted jurors with his peremptory challenges.

Juror Aurelio Diaz was equivocal about his ability to give the parties a fair trial ("I believe so."). [TR 435] He was equivocal about his ability to look at the evidence impartially and use his common sense ("I think I will be able to do that"). [TR 7573 He "basically" had the same maintenance job for thirty years. [TR 757] He was a chief of maintenance for [Dade] County. [TR 434] He had two daughters who, he said, never gave him any problems. [TR 760]

The defense (through attorney Diaz), attempted to strike juror Diaz because "I don't like him." [TR 797] The trial court denied the strike on the ground "...it is not a race neutral reason." [TR 797] Subsequently, however, the defense renewed its objection to juror Diaz for additional reasons including his apparent lack of life experience, his idyllic and obedient daughters which suggested intolerance for the behavior of the defendants, and his possible bias favoring Dade County and the prosecution witnesses employed by Dade County:

> MR. CASUSO: Judge, with regards to Mr. Diaz, we would renew our peremptory based upon the fact that Mr. Diaz has had the same job basically for the last thirty years and we feel that he lacks the life experience and variety of occupations that we are looking for

on this jury.

He also stated that he has two daughters, he has never had a problem with the daughters and he may not sympathize with our defendants who I am sure have given their parents many many problems in the past, so based on that, we would try to excuse Mr. Diaz.

MR. FLEISCHER: In addition to that Judge, many of the witnesses who are expected to testify for the state in this case are employed by Metropolitan Dade County. Which he has an allegiance with them for over thirty years in the County.

THE COURT: No he didn't. I don't believe that's --.

MR. CASUSO: Not 30 but he has worked for the County. For a number of years.

THE COURT: Okay. You have preserved your record on that one. But I have ruled. I see no reason to change that rul[ing].

[TR 827]

None of the reasons advanced by the defense had anything to do with race or ethnicity. As this Court reasoned in Reaves v. State, 639 So.2d 1 (Fla. 1994), in affirming the trial court's failure to condemn the prosecutor's exercise of a peremptory challenge against the panel's sole Jewish member:

> "Nothing in the record indicates, nor proves that the state used [the juror's] racial or religious background as grounds for challenge."

In Desroches v. State, 645 So.2d 1084 (Fla. 3d DCA 1994), upon the state's objection, defense counsel asserted (like defense counsel here), that the prospective juror would be unable to relate

to defendant's situation and articulated several specific facts contained in the record in support of that reason. The court reversed, finding that the defense had offered a race-neutral, non-pretextual reason for striking the juror. Cf. Files v. State, 613 So.2d 1301, 1304 (Fla. 1992).

The trial court's determination here that the reason(s) were not race neutral is patently wrong. There is no evidence or even suggestion that the defense reasons were pretextual, i.e., lies designed to hide a racially discriminatory agenda. Cf., Fulton v. State, 642 So.2d 1163 (Fla. 3d DCA 1994); see State v. Slappy, 522 So.2d 18 (Fla. 1988), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). No motive for such discrimination was suggested by the state or trial court. No claim was ever made, or relied upon by the trial court, that the defense's recollection of the record was faulty or that its allegations were untrue (except for the court's accurate challenge to the defense claim that Diaz had said he worked for the county for "over thirty years." [TR 827]

This trial court's "misguided application of Batson [v. Kentucky, 476 U.S. 79 (1986)]- Neil principles is exactly the same as that recognized by the court in Betancourt v. State, 20 Fla. L. Weekly D212 (Fla. 3d DCA January 18, 1995) and articulated by Chief Judge Schwartz, where the trial court erroneously refused to permit, as here, the exercise of a defense peremptory challenge

against an Hispanic male juror.

The court, citing its consistent decision in Portu v. State, 20 Fla. L. Weekly D211c (Fla. 3rd DCA January 18, 1995), explained that not every complaint by the state justifies a Neil inquiry of the defense:

> . . .[C]ontrary to what was assumed and occurred below, . . .the mere fact that a prospective juror is a member of one of the groups protected from intentional discrimination by one of the Batson-Neil decisions... is not enough to allow the opposing litigant or the trial court to usurp the challenging party's discretion in exercising a peremptory challenge or even to require a "reasonable" basis for the strike.
>
> [Id., at D213, n.4]

In other words, absent a basis for concluding that the challenge involved the evil proscribed by the Batson-Neil rule; that is, that it was based on a "constitutionally impermissible prejudice", overruling an attempted strike is reversible error. Betancourt, supra, at D212.

In Betancourt, as here, the Hispanic defendant challenged a Hispanic prospective juror. "On the face of it, and there is nothing in the record to suggest otherwise – there would seem no basis for even implying a racial reason for [the defendant's] not wanting [another Hispanic male] to serve on his jury." Id., at D212, citing Portu v. State, supra.

Asd Judge Schwartz observed, "[i]n this respect, the case is

decisively unlike the overwhelming majority - if not every case - in which a peremptory challenge has been disallowed under Batson and Neil. Typically - if not invariably - they involve situations in which the prospective juror belongs to a group whose general characteristics would seem to be adverse to the position of the challenger." Id. at D212.

In addition, nothing was offered by the state to suggest that other jurors of similar characteristics escaped defense peremptory challenge. In fact, the state failed to object at all to any of the reasons given by the defense for its challenge. This constitutes a waiver. "If [a party] fails to object to the reasons given by [the other party] for excusing a particular juror, the opportunity to exercise a Neil challenge is waived." Miller v. State, 636 So.2d 144 (Fla. 1st DCA 1994); accord Joiner v. State, 618 So.2d 174, 176 (Fla. 1993).

Moreover, there is nothing in this record to identify Diaz as a member of any suspect or constitutionally protected class or to describe the basis of the state's objection. The state did not even voice a "Neil" or discrimination claim. All the prosecutor said was, "Wait a minute, Judge, they are striking Aurelio Diaz? State would challenge that strike." [TR 797] Notwithstanding Diaz's surname and his Cuban birth, nothing in this record describes Diaz to be Black, Hispanic, or of any other identifiable ethnic or racial group.

This is exactly the same situation the Third District Court of Appeals faced in Portu v. State, supra, except that the state there was more articulate than here. In Portu, the state, as here, failed to make any specific objection to the defense's peremptory challenge, but at least noted on the record that the juror was "of Hispanic descent" and later commented that the juror had spoken with a heavy Hispanic accent. Following the presumption that peremptories will be exercised in a nondiscriminatory manner, the court held that the state had failed to meet its threshhold burden of establishing a specific inference that defense counsel's peremptory challenge was made for racially discriminatory reasons. The same applies here.

In addition, the court held, as should this Court, that because the state did nothing to specifically demonstrate on the record that there was a strong likelihood the juror was challenged because of her race, that the state had failed to follow the requirements for objecting to a peremptory challenge plainly set forth in Neil, and reiterated in Slappy and State v. Johans, 613 So.2d 1319 (Fla. 1993).

Assuming, arquendo, the state intended a "Neil" objection, there is no way to know if the unarticulated claim of discrimination was related to race, ethnicity, gender, or some other distinction. If a party is to be accused of discrimination, and if this Court is asked to uphold a finding of discrimination

based on that accusation, it must be necessary for the trial record (through the complaining party or the judge, at least) to describe the nature of that discrimination. Absent such a description and finding, Neil is not implicated, the burden does not shift to the striking party, and the trial court errs if it disallows a peremptory strike.

The trial court resolved a similar issue involving juror Adriana Andani the same way relative to the state's claim of gender bias. Andani, a 29 year old, single, manager of a photography studio had been the victim of an auto theft in which she went to court as a witness "but nothing ever happened." [TR 445] When asked if she had any religious, moral, or conscientious scruples against the imposition of the death penalty in a proper case, she responded, "Absolutely not." [TR 446] On at least one occasion during defense voir dire, she included in her response a reference to the prosecutor, Rosenberg. [TR 669]

Attorney Diaz, speaking for the other defendants as well, sought to exercise a peremptory challenge against Andani because "She loves Mr. Rosenberg." [TR 791] She was "very hesitant to answer my questions". "She made no eye contact with me." Diaz further explained, "She kept reminding me of things that she had heard from Mr. Rosenberg. I think she has developed an affinity with the prosecution that I could not break and I don't think she'd be fair to the defense in this case." [TR 792]

The trial court remarked that it had "not observed any of these things. . .", opined that Ms. Andani appeared bright, fair, and responsive, and concluded that the reasons given were not gender neutral. [TR 793] Again, the trial court failed to apply the established presumption of validity of peremptory challenges. Neil, supra; Slappy, supra.

Diaz protested any claim of gender bias and substantiated his fear of her pro-prosecution stance with additional evidence of her conduct:

> MR. DIAZ: Whether she be male or female I just feel very uncomfortable with the way she answered my questions and the way that she walked past this table and purposely looks away from the defense table and looks towards the prosecution and makes it a point to get as close to that prosecution table as she can. I don't see how, what is wrong with my excersizing (sic) of my challenge.
>
> [TR 793]

All the reasons given for juror Andani's excusal were gender neutral and had nothing whatever to do with her gender.

This Court has recognized that a party's peremptory challenge may be legitimately based on that party's perception of the juror, so long as there is no indication of improper bias (...the State's challenge was based on what it perceived...). Reaves v. State, supra, at S174.

Nevertheless, the trial court denied the defense peremptory

challenge and begged the question that this Court now faces:

> THE COURT: Personally I think that the entire body of law in this area is outrageous, but it is clear that peremptory challenges no longer exist, and that neutral reasons must be given and you have not given me any.
>
> [TR 793]

The trial court was wrong. Peremptory challenges still do (and should) exist, consistent with the goal of "insur[ing] equality of treatment and evenhanded justice." Slappy, supra, at 20. Trial courts must, however, indulge the presumption of validity of peremptory challenges and not respond automatically while using common sense. Neutral reasons should not have to be given, and should not be demanded, absent at least some indication of improper discriminatory motive.

Where atria1 judge erroneously disallows a defense peremptory challenge reversal is compelled. Pollock v. State, 634 So.2d 327 (Fla. 3rd DCA 1994). Reversal, therefore, is compelled here.

POINT II

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S CHALLENGE TO THE STATE'S UNJUSTIFIABLE EXCLUSION OF A FEMALE JUROR WHERE THE STATE FAILED TO OFFER GENDER-NEUTRAL EXPLANATIONS FOR ITS EXERCISE OF A PEREMPTORY CHALLENGE AGAINST HER, THEREBY VIOLATING THE DEFENDANT'S FIFTH AMENDMENT DUE PROCESS AND SIXTH AMENDMENT IMPARTIAL JURY RIGHTS

The State exercised a peremptory challenge against a potential female juror for no apparent good reason and failed to offer, upon defense objection, neutral explanations for its conduct and thereby failed to satisfy its burden. The misconduct of the State and the trial court's error should be corrected by the grant of a new trial where jurors are selected from a cross section of the community and not excluded because of their gender.

The fundamental holding of this Court in State v. Neil, supra is simple. Peremptory challenges cannot be exercised solely on the basis of race. To challenge an opposing party's peremptory excusals, a party must object in a timely matter and demonstrate on the record both that those persons challenged are members of a distinct racial group and that there is a strong likelihood that they are being challenged solely because of their race. Id. at 486; King v. State, 514 So.2d 354 (Fla. 1987).

Of course, the Neil doctrine now extends to other protected groups, as well, including hispanics and women. See, State v.

Alen, supra, approving 596 So.2d 1083 (Fla. 3d DCA 1992)(en banc); Abshire v. State, 642 So.2d 542 (Fla. 1994).

This Court has acknowledged that the peremptory challenge is "uniquely suited as a tool to mask true motives; . . .". Reynolds v. State, 576 So.2d 1300, 1301 (Fla. 1991). "Florida law [does] not require the improper use of peremptory challenges to be 'systematic' in order to establish a prima facie case of racial discrimination." Hall v. Daee, 602 So.2d 512, 515 (Fla. 1992), quoting Reynolds v. State, supra, at 1302, see State v. Johans, supra.

In State v. Slappy, supra, the Court "reaffirm[ed] this state's continuing commitment to a vigorously impartial system of selecting jurors . . ." and held that:

> "... when the state engages in a pattern of excluding a minority without apparent reason, the state must be prepared to support his explanations with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself.

Thus, the Slappy Court found reversible error even though the final jury panel contained one black, for the simple reason:

> Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other. This is so because 'the striking of a single black juror for a racial reason violates the equal protection clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some jurors.' [Citations omitted]

Moreover, this Court explained in Tillman v. State, 522 So.2d 14 (Fla. 1988), and further defined in Slappy, supra, and Blackshear v. State, 521 So.2d 1083 (Fla. 1988), the procedure to be utilized when a challenge of racial discrimination in the use of peremptory strikes is made. The Court held that "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor." Id. Moreover, the trial judge must "evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons." Id. In other words, "a judge cannot merely accept the reasons proffered at face value." Id. As the Court concluded:

> In essence, the proffered reasons must be not only neutral and reasonable, but they must be supported by the record. It is incumbent upon the trial judge to determine whether the proffered reasons if they are neutral and reasonable, are indeed supported by the record. Tillman at 15.

"[T]he appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being - to insure equality of treatment and evenhanded justice." State v. Slappy, supra. In the case at bar, neither prong of the Tillman test was met.

The State excused juror Raquel Pascual. Pasqual was a single, female, accounting assistant who had no religious, moral or conscientious scruples against the imposition of the death penalty in a proper case. [TR 421 - 422] She believed the system was

honest but slow. [TR 662] She could be impartial. [TR 750]

Before the jurors were given any instruction on the law of principles, the prosecutor began asking the jurors if they could vote for death for a non-shooter. [TR 580 - 588] Several of the jurors, including Pascual, responded that they could not, under any circumstances, vote for the death of a non-shooter. [TR 587] [Pierre-Louis: TR 580 - 581; Valdes: TR 585 - 586; Smith: TR 586]

However, when the prosecutor subsequently began to explain that the law required a comparison of aggravating and mitigating factors without regard to actually did the shooting, jurors Valdes, Smith, and Pascual [TR 589] unequivocally responded that they could recommend death for a non-shooter if the aggravating circumstances outweighted the mitigating.

Remarkably, the prosecutor never asked the question again of male juror Pierre-Louise (thereby leaving intact his refusal to vote for the death of a non-shooter) but never exercised a peremptory challenge against him.

The only reason given by the state for its exercise of a peremptory challenge against Pascual was her initial expression of inability to recommend death for a non-shooter. [TR 803] The defense responded that Pascual's initial response to the prosecutor was invited by his inartful voir dire and that several other jurors

had been similarly baited by the prosecutor's question:

> MR. DIAZ: Judge, I think that that response came about as a result of the inability of Mr. Rosenberg to properly communicate or explain in the beginning of his voir dire the felony murder rule. And she was not the only one. I recall distictively that Mr. Rosenberg had a great deal of problem with a great deal of number of jurors. Some of whom have already been accepted by the State because they simply did not understand the the (sic) law of principals and the law of felony murder.
>
> I think once he was able to finally convey an explanation that they could understand, he received the responses that are to be expected. So the answers that they gave, were more out of confusion on the law that it was about her attitude about the death penalty and he is simply using it as an excuse to get rid of a juror.
>
> [TR 804]

Franqui's counsel also argued that juror Pierre Louis (as well as Smith) remained on the jury unchallenged by the state despite their identical responses. [TR 804 - 805] In fact, as shown above, Pierre Louis was never requestioned by the prosecutor and remained unchallenged despite his unequivocal opposition to the application of the death penalty to non-shooters.

Accordingly, juror Pasqual offered no indication that she could not follow the law or that he was in any way otherwise unfit to sit as a juror in this case. The state's purported reason for challenging her was not, and could not have been, gender-neutral and was in fact shown to be pretextual where a male juror, suffering the same alleged infirmity except to a higher degree, was accepted by the state.

In order to meet its burden, the state must forward "a 'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' for [its] use of its peremptory challenge." State v. Slappy, supra at 22 (Fla. 1988). It is not enough that the proffered reason itself is reasonably specific and racially neutral, the trial court must ensure that the reason offered finds support in the record and is not merely a pretext for racial motivations. Gibson v. State, 603 So.2d 711 (Fla. 4th DCA 1992) citing Slappv. Here, because several identifiable "Slappy" factors were present, not only did the trial court abuse its discretion, it erred as a matter of law. Files v. State, supra.

As the Court held in Batson v. Kentucky, 476 U.S. 79, 96-98 & n.20 (1986):

> While the reasons need not rise to the level justifying a challenge for cause, they nevertheless must consist of more than the assumption that [the veniremen] would be partial to the defendant because of their shared race... nor may the [party exercising the challenge] rebut the defendant's case merely by denying that he had a discriminatory motive or "affirming his good faith in individual selections." . ..if these general assertions were accepted as rebutting a . . . prima facia case, the Equal Protection Clause "would be but a vain and illusory requirement."

In addition, it is incumbent upon the trial court to make "a conscientious evaluation of [a defendant's] Neil claim by critically considering the reason given by the state for the strike." Gooch v. State, 605 So.2d 570 (Fla. 1st DCA 1992). A

judge cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact. In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext. These two requirements are necessary to demonstrate "clear and reasonably specific... legitimate reasons." Batson at 98 n.20.

Here, the state failed to satisfy its burden of proof and the trial court failed to perform its duty. The court's failure to recognize the State's shallow rationalization for what it was, and its failure to grant the defendant relief, constituted error. Reversal is required.

POINT III

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-DEFENDANTS' POST-ARREST CONFESSIONS WHICH DIRECTLY INCRIMINATED HIM, THEREBY VIOLATING THE DEFENDANT'S CONFRONTATION AND DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Leonardo Franquiwas jointly tried with codefendants Pablo San Martin and Ricardo Gonzalez. Each confessed to the police while in custody after their arrests and directly incriminated Franqui in the first degree murder, armed robbery, and lesser offenses with which he was charged. The state introduced San Martin's and Gonzalez's confessions into evidence at trial over Franqui's vociferous objections. [TR 1409 - 1415, 1421 - 1461, 1604 - 1610, 1616 - 1644] At least as to Gonzalez, it was error to admit the non-testifying codefendant's post-arrest statements as substantive evidence against Franqui.

San Martin and Gonzalez never testified and therefore remained unavailable for cross-examination. The defendant repeatedly but unsuccessfully moved for severance from Gonzalez, during both the guilt and penalty phases, but the trial court determined that Franqui's "interlocking" confession rendered Gonzalez's confession admissible against him, [R 122 - 128; TR 1347, 1375 - 6, 1398 - 1400, 1408, 1419 - 1420, 1544, 1564, 1773, 1776, 2348, 2908, 2917,

2959] 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. Bovd, 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 and Gonzalez where both

Codefendants' directlyincriminatingbutunconfrontable confessions were 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 statement 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, supra.

The same reasoning and conclusions apply here. The confessions were different in significant respects which belied the reliability of Gonzalez's statement. Most important, eachplaced the blame for the fatal shot on the other. Defense counsel explained the prejudice inherent in Franqui's compelled joinder:

> Not only are we going to have to withstand the accusations by the state, we are going to have to withstand the accusations of Mr. Diaz on behalf of Mr. Gonzalez who fired the .38 caliber weapon . . .
>
> [TR 303

To the trial court's suggestion that the issue related only to the penalty phase and not the guilt phase of the trial, counsel for Gonzalez made clear his tactical decision to put blame squarely on Franqui and direct it away from his client:

> MR. DIAZ: No. I will raise it now. I will make an issue as to who fired that .38.
>
> [TR 30]

Gonzalez made unrecorded and recorded confessions. [TR 1409 - 1415, 1421 - 1456] He described Franqui as the mastermind who planned the robbery, involved the other participants and himself, and chose the location and the date. [TR 1427 - 1429] He described Franqui as procurer of the stolen cars, the driver of one of the vehicles, and the supplier of his weapon. [TR 1431 - 1440]

He descibed Franqui as the first shooter who shot Officer Bauer three to four times while he only shot once. [TR 1444] Gonzalez indicated that he shot low and believed he shot the officer in the leg with a ricochet. [TR 1461]

Franqui claimed that Fernandez had originated the idea for the robbery after talking to a black male (Gary Cromer). [TR 1685 - 1686] Franqui related that Gonzalez, not he, yelled "Freeze" to Officer Bauer after his firearm was seen. Franqui denied having fired the first shot, and admitted firing only one shot later. [TR 1696, 1760]

The identity of the shooter who killed Officer Bauer was, and remained, one of the central issues in this case throughout the trial and especially at the penalty phase. In fact, it was proven by ballistics evidence to have been Gonzalez, not Franqui, who fired the fatal bullet into Officer Bauer's neck. [TR 1900 - 1903]

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 IV

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT RELIEF FROM THE PROSECUTORS' RELENTLESS APPEALS TO THE JURY'S SYMPATHY BY THEIR INJECTION OF IRRELEVANT AND UNFAIRLY INFLAMMATORY EVIDENCE OF THE VICTIM'S PERSONALITY AND CHARACTER INTO THIS LAWSUIT, THEREBY DENYING THE DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

From opening statement to closing argument, the prosecution infected this trial with utterly improper and gratuitously inflammatory comments and tactics. It made shameless appeals to the jury's sympathy for no apparent reason but to inflame it, contrary to the law, to convict the defendant and vote for his death. The prosecutor's comments, sanctioned consistently by the trial court, improperly highlighted the victim's stellar personality and character, and the evidence it presented constituted irrelevant and inadmissible hearsay. Because Leonardo Franqui's trial was rendered fundamentally unfair, and was corrupted by the conduct of the state, he is entitled to a new trial.

The courts have long recognized the duty of a trial judge to protect an accused carefully and zealously, so that he shall receive a fair and impartial trial, free from improper or harmful statements by a prosecuting attorney. Deas v. State, 839 Fla. 139, 161 So. 729 (Fla. 1935); Tribue v. State, 106 So.2d 630 (Fla. 2d

DCA 1958). It is now firmly established that a prosecuting attorney should always confine his argument to facts which are established by the record and those which may be reasonably inferred from the facts established, and when he goes beyond that range he takes the chance that he may thereby cause the necessity of reversal of a favorable judgment. Frenette v. State, 158 Fla. 675, 29 So.2d 869, 870 (1947).

In Berger v. United States, 295 U.S. 78, 88-89, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935), the Supreme Court reversed a conviction when the prosecutor through questioning and argument compromised the defendant's due process rights. The Court noted the government's unique burden of justice and heightened responsibility:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . .

It is therefore established beyond question that remarks calculated to arouse the passions, sympathies, or prejudices of juries, especially remarks outside the evidence and without relation to the issues are to be condemned. Wernokoff v. State, 121 Fla. 62, 163 so. 225 (Fla. 1935); Clinton v. State, 53 Fla. 98, 43 So. 312 (1907); Pitts v. State, 333 So.2d 109 (Fla. 1st DCA 1976).

From the very beginning of its opening statement, albeit

without objection, the prosecution demonstrated its intent to exploit the jury's sympathy by emphasizing Officer Bauer's character and personality:

> Each Friday began the same for Officer Steven Bauer, a 39 year old man that had some 13 years earlier taken a sworn oath to serve and protect the people of North Miami and Dade County. He was a good natured guy. He liked his job and people liked him.
>
> [TR 889]
>
> * * *
>
> And Steve, who had moments before been wrestling and teasing, reached for his gun to serve, to protect, and then bang, bang, bang, echo of the shots ringing in Michelle and Sonya's ears as the bullets ripped through the body of Steven Bauer.
>
> [TR 893]

More important, the defendant moved, in limine, to exclude Officer Bauer's post-shooting statements and the state's use of them to evoke the jury's sympathy for the victim's selflessness and courage. Prior to opening statement, the defendant renewed his motion, correctly arguing that the victim's statements were (1) hearsay statements that did not fall into the dying declaration exception to the hearsay rule, (2) irrelevant and (3), to the extent they might have been marginally relevant, their relevance was clearly outweighed by their capacity for unfair sympathy and prejudice. [TR 875]

The trial court denied the defendant's motion, accepting the state's argument that the post-shooting statements were relevant to

prove Bauer was a law enforcement officer. [TR 883] As a result, the prosecutor continued during opening statement:

> She looked down at him and he immediately said to her, "Are you guys all right? A police officer, a caring friend in the last moments of his life. And she said, "Are you okay?" And he said to LaSonya, "Yes, I have only been shot in the leg." And LaSonya knelt down and cradled Steve's head in her lap, the blood pooling in her skirt, his life's blood seeping from his body. . .
>
> [TR 894]

The defendant renewed his objection when the state elicited similar testimony from the bank tellers. LaSonya Hadley was asked twice, and testified twice, that Officer Bauer first asked if she was all right and only then complained of the gunshot to the leg. [TR 957 - 958] When the prosecutor asked how [Officer Bauer's concern for her] made her feel, Hadley replied, "It made me feel good." [TR 957]

Also over objection, teller Michelle Chin Watson was allowed to respond to the prosecutor's question, "What kind of relationship did you have with [Officer Bauer]?" to which she replied, "It was very friendly. We joked around a lot. We had fun." [TR 966]

Whether or not Officer Bauer was friendly, fun, or joked around a lot was irrelevant to any issue in this case. That he was a good, caring, selfless police officer as opposed to a poor, insensitive, selfish one, was equally irrelevant. That officer Bauer was a law enforcement officer was not a contested issue in

this trial. [TR 879] The state's unrestrained appeal to the jury's prejudices and its successful attempt to curry its favor in support of a guity verdict was wrong. Franqui should be granted a new trial.

POINT V

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 Rejecting altogether the Non-Statutory Mitigating Factors that Franqui was a good employee, that he had demonstrated good conduct and rehabilitation in prison, and that he suffered mental problems, as well as Rejecting and Refusing to Instruct the Jury on Age as Either a Statutory or non-Statutory Mitigating Factor.

The trial court's "out-and-out" rejection of various uncontroverted 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)I Campbell v. State, 571 So.2d 415 (Fla. 1990); Santos v. State, 591 So.2d 160 (Fla. 1991); see, Brown v. State, 644 So.2d 52 (Fla. 1994) (Kogan, J., concurring in part, dissenting in part). [R 594, 597]

Furthermore, because the trial court erroneously rejected, rather than weighed, these mitigating circumstances, resentencing is required. Rogers 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).

Franqui's chronological age was 21 at the time of the offense. [R 485] 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) (21 years old); Brown v. State, 381 So.2d 689 (Fla. 1979) (22 years old is of some minor significance).

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.

Three witnesses presented uncontradicted testimony that Franqui was a good worker. Alberto Gonzalez, Franqui's father-in-law, testified that Franqui was a "hard worker" and an "excellent", "marvelous" worker. [TR 2492, 2497] Mario Franqui, the defendant's uncle, described his nephew as "a good worker" during the time he worked with him at his shop. [TR 2520] Michael Barrechio, a City of Miami golf course maintenance supervisor, worked with Franqui for approximately five months in 1991. [TR 2532 - 2533] He characterized Franqui as a "very conscientious worker." [TR 2533]

Accordingly, the trial court should have found that this mitigating factor was proved and should have given it at least some weight, as did this Court in Holsworth v. State, 522 So.2d 348 (Fla. 1988) and Maxwell v. State, 603 So.2d 490 (Fla. 1992). A defendant's employment history and positive character traits as showing the potential for rehabilitation are valid mitigating factors. Fead v. State, 512 So.2d 176 (Fla. 1987); Thompson v. State, 456 So.2d 444 (Fla. 1984); McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

By the same token, the trial court ignored Franqui's good conduct in prison, since he had not been involved in "extraordinary activity" and had been held for part of the time in a safety cell.

[R 597] The "capacity for rehabilitation as demonstrated by [the defendant's] good prison conduct before and after the offense..." is clearly a legitimate mitigating factor relevant to the character of the accused and the propriety of his or her execution. Holsworth, supra, at 353; see also, Maxwell, supra, at 492.

Here, Franqui presented letters from two corrections officers who knew Franqui and spoke highly of his conduct and rehabilitation. Officer C. Wright indicated he had known Franqui for two and a half years ("...positive attitude...deserves a second chance . ..really been rehabilitated... positive asset"). [R 488] Officer M. Williams expressed similar sentiments after two and a half years ("...I feel if anyone deserves a second chance it would be Leonardo, he really isn't a bad person.") [R 489]

Accordingly, the trial court held the defendant to too high a burden in light of the unrefuted evidence. While the trial court was free to give what weight to this mitigating factor it saw fit, it was not, as a matter of law, free to discount it altogether.

Similarly, the trial court declined to find that Franqui suffered from mental problems. Mario Franqui, the defendant's uncle, testified that he always believed that Franqui was not normal - he "was slow to learn, to understand." [TR 2512] This evidence was unrebutted and, so, should have been weighed by the trial court. Because it was not, a remand for resentencing is required. Campbell v. State, supra.

B.

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.

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 have resolved 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 Cannady 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 and reversed the imposition of the death penalty:

> 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. Georsia, 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, not even fired by the defendant, but by his codefendant. [TR 1900 - 1903]

Alberto Gonzalez, Franqui's father-in-law, testified that

Franqui was a hard worker and a "beautiful" person. [TR 2492] He was an excellent worker. [TR 2497] He was a "good young man" and very much in love with his daughter. [TR 2493, 2495] He considered Franqui a "marvelous" husband to his daughter even though they had not married. [TR 2494] Franqui did not drink, smoke, or use illegal drugs. [TR 2495]

Gonzalez described Franqui as an "excellent" father to his three and four year old daughters. [TR 2496] He cared for them before his incarceration and worried about their care afterwards. [TR 2498 - 2504]

Mario Franqui, the defendant's uncle, testified that Franqui's mother left him when he was less than two years old. [TR 2509) He believed always that Franqui was not normal - he appeared to have a problem and was a slow learner. [TR 2512] At the age of ten, Franqui came to the United States but was separated from the aunt who had raised him in his mother's absence. [TR 2512 - 2513] Shortly thereafter, Franqui's younger brother died. [TR 2514] Franqui's adoptive father started drinking and abusing drugs. [TR 2516] The family broke apart and the responsibility of his upbringing fell to an elderly great aunt. [TR 2518]

Franqui was subsequently involved in a serious accident requiring multiple operations. [TR 2519] He was schuffled from one family member's care to the other but was without any

supervision for a long time. [TR 2520 - 2521] He was a good worker and a good father. [TR 2521 - 2522] He was tranquil, respectful, and did not use drugs or alcohol. [TR 2523]

Michael Barrechio, a City of Miami golf course maintenance supervisor, worked with Franqui for approximately five months in 1991. [TR 2532 - 2533] He characterized Franqui as a "very conscientious worker." [TR 2533]

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, supra, (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.

C.

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.

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 the he is afforded the right to exercise peremptory challenges and the jury is not contaminated by improper prosecutorial comments and irrelevant inflammatory evidence. 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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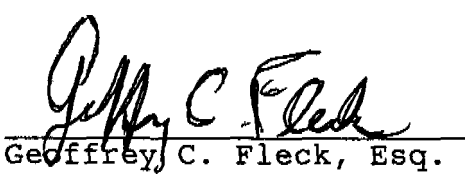
By: 
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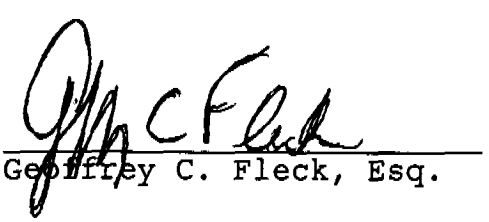
Certificate of Service

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 9th day of May, 1995.

By: 
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