IN THE **SUPREME** COURT OF FLORIDA

CASE NO.: SC94269

LEONARDO FRANQUI,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN **AND**
FOR DADE COUNTY, FLORIDA
UPON SENTENCE OF DEATH

REPLY BRIEF OF APPELLANT LEONARDO FRANQUI

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NOTICE OF ADOPTION

The Appellant would respectfully adopt the Statement of Case and Facts, Questions Presented, Summary of the Argument and Argument as stated in his initial brief. As to the State's recitation of the case and facts, the appellant would argue:

At (T. 31), the defense objected to the trial court's comment that "if they find the aggravating circumstances outweigh the mitigating circumstances, the law applies that death is the appropriate sentence," citing Henyard (T. **31).** The State argued the instruction was correct (T. 31). The court overruled the defense objection stating:

> That's what the instruction says. That doesn't allow for a jury pardon. So the fact that it recognizes that, and the fact you can tell the jury that are two different things. But I'll certainly, show me the case and I'll reconsider that if the case says that.
>
> (T. **32)**

At (T. 90), the defense handed the court a copy of Henyard and requested an instruction of Henyard (T. 90-91), to which the court replied:

> Here. I'm not going to do that. **As** I repeat my questions to the jurors, in my final instructions, I will tell them they should. I'm not going to tell them to ignore the law. All right, bring in the jury.
>
> (T. 91)

In overruling the defense objection (T. 301) to the State's anti-

Henyard comments (T. 301), the court stated that "if you do the weighing, the aggravating, outweigh the mitigating by any amount, then you should recommended a sentence for the death penalty (T. 302).

When asked if she would be able to recommend the death penalty, Ms. Pereira stated "I think yes" (T. 59-60). She also stated " if the circumstances are telling me that this is the right thing, I won't hesitate and do it" (T. **296,** 297,298). She agreed with the State that to recommend death "you've got to do a whole lot more than just fifty-fifty" (T. **299).** Mrs. Pereira was nodding her head (T. **3**13) when prospective juror Bush said "I would prefer for him to spend his life in prison" (T. **3**12).

When the State argued "there's nothing improper by telling them that they should in fact follow the instructions that say if the aggravating circumstances outweigh the mitigating circumstances, then their vote should be for the death penalty" (T. 506), the Court agreed stating "I think that is consistent with what I have said since the objection was raised" (T. 507).

This appeal follows.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN EXCUSING

FOR **CAUSE** POTENTIAL JURORS PEREIRA

AND LOPEZ

Ms. Pereira consistently stated that she would be able to recommend the death penalty (T. 59, 60,296,297,298, 320).

There was no verbal response or response on the Record from Ms. Pereira at (T. 274-275).

Ms. Pereira never spoke at (T. **312).** At best, the Record reflects that she nodded her head when Ms. Bush said "I would prefer for him to spend his life in prison" (T. **3**12).

Ms. Pereira never came close to expressing the unyielding conviction **and** rigidity regarding the death penalty that would allow for her excusal for cause under the witherspoon standard. Her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instruction and oath. ***See,*** *Farina v. State*, 680 So.2d 392 (Fla. 1996). In exercising its discretion, the trial court must be jealous to protect the rights of an accused. See, *Wainright v. Witt*, 105 **S.** Ct. 844, 855 (1985). Ms. Pereira was not so irrevocably committed to vote against the death penalty, regardless of the facts and circumstances, that her dismissal can be upheld. See, *Davis v. Georgia*, 429 U.S. 122 (1976). The

Record in this case does not support Ms. Pereira's dismissal. Compare, *Trotter v. State, 576* **So.** 2d 691, 694 (Fla. 1990), unequivocal answers 10 times to death penalty questions; *Taylor v. State*, 638 **So.** 2d 30, 32 (Fla. 1994), juror's response indicated feelings against death penalty would impair her ability to serve as a juror; *Smith v. State*, 699 **So.** 2d 629, ***636*** (Fla. 1997), juror stated he might not follow instructions; *Fernandez v. State,* 730 **So.** 2d 277, 281 (Fla. 1999), prospective jurors gave equivocal responses to prosecutor, defense counsel and court; *Kearse v. State,* 25 Fla. Law Weekly **S.** 507, 509 (Fla. 2000), potential juror "stated that her feeling about the Death penalty would impair her ability to follow the law and that she just could not see herself voting for death when she knew that a true life sentence was an alternative.

Ms. Pereira's answers that she could imposed the death penalty if justified, and would follow the Court's instructions required that she not be excused for cause. See, *Waterhouse v. State,* **596** So. 2d 1008, 1016 (Fla. 1992); *Bryant v. State,* 656 So. 2d 426, 428 (Fla. 1995); *Johnson v. State, 660* So. 2d 637, 644 (Fla. 1995); *Gore v. State,* 706 So. 2d 1328, 1332 (Fla. 1997).

Ms. Lopez stated that she could vote for death (T. 341). The reason that she was excused as the Court said "I think on a number of occasions,

said she couldn't do it; (T. 349), is not supported be the Record.

The simple act of a juror, in unfamiliar surroundings, solidifying his reasoning through the course of questioning, cannot be labeled equivocation. See, *Johnson v. State,* **696 So.** 2d 326,332 (Fla. 1997).

In *Byers v. State,* 26 Fla. Law Weekly D 277, 278 (Fla. 5th DCA 2001), a potential juror's answers "I don't think so," when asked if a prior incident would affect his ability to be impartial, and, "I will certainly try," when asked if he could put that out of his mind and consider the evidence in this case, "does not rise to the level of being equivocal."

Neither Ms. Pereira nor Ms. Lopez was equivocal. They could have voted for death, said so, and were improperly dismissed for cause.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN INSTRUCTION **AND** ALLOWING THE JURY TO BE INSTRUCTED THAT ITS RECOMMENDATION SHOULD BE DEATH IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS

The State has not denied that the improper comments were made.

The State has agreed that it commented "of the aggravation is always more that the mitigation, then you vote to recommend for the death penalty. (T.301, P.46 State Brief).

The State has not denied that the Court instructed the potential jurors that if the aggravating circumstances outweighed the mitigation circumstances:

The law requires that you recommend a sentence of death.

(T. 17)

You should recommend **a** sentence of death (T. 39)

The law would require that you make a recommendation in favor of the death penalty (T. 42).

You should recommend the sentence of death (T. 59)

(After being advised of Henyard) then you should recommend a sentence for the death penalty (T. 302).

Then you should recommend that appropriate sentence is the death penalty (T. ***367)*.**

Then you should recommend a sentence of the death penalty (T. 367).

Then you should recommend a sentence of death (T. **380).**

You should recommend a sentence of the death penalty (T. **387).**

I know that I should recommend a sentence of death (T. 484).

So therefore I'm not going to recommend the death penalty, even though I should (T. 484).

The State has not denied that it commented that if the aggravation is greater "then you vote to recommend for the death penalty" (T. 301).

When a Court instructs12 people off the street, 12 lay people as to what they "should do" or what they are "required" to do, that is a command from the Court telling the Jury what to do.

In *Henyard v. State*, 689 **So.** 2d 239,249 (Fla. 1996), this Court stated that "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors" (p. 249-250).

In this case the trial court required the jury to vote for death and instructed/compelled them to so vote contrary to Henyard. In addition, the court ignored Henyard.

In *Garron v. State*, 528 ***So.*** 2d 353, **359** (Fla. 1988), this Court held that the comment "The law is such that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty" was a misstatement of the law.

According to Garron all the quoted comments are, thus, misstatements of the law.

In *Brooks v. State*, 762 **So.** 2d 879, 902 (Fla. 2000), this court

affirmed Henyard but found harmless error because "Defense counsel objected to this misstatement, and in response the trial court correctly informed the jury concerning the law relating to the weighing of aggravating and mitigating circumstances". (P. 902). In this case the trial court ignored Henyard. The court refused to correct the misstatements and continued with them!!! There was nothing more defense counsel could do!!!

The burden is on the State to show that error was harmless. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict then the error is by definition harmful. See, *State v. Di Duilio*, 491 So. 2d 1129 (Fla. 1986). It cannot be said beyond a reasonable doubt that the above misstatements of the law by both the Court and State did not affect the advisory verdict of death.

ARGUMENT

POINT III

THE TRIAL COURT ERRED IN OVERRULING DEFENSE OBJECTIONS TO PROSECUTONAL CLOSING ARGUMENT WHICH DENIED FRANQUI A FAIR TRIAL

The State does not deny the comments.

The State does not deny that there was no evidence that Franqui used robbery proceeds to buy a gun. This comment was made even though the State knew that "Defendant also informed Detective Smith that the group had purchased the .9 mm semiautomatic the previous summer form a person on the street" (T. 915, P; 25 State Brief). The State's appeal to bias, prejudice, and sympathy with no evidence to support its comments was error. ***See,*** *Urbin v. State,* 714 **So.** 2d 411,421 (Fla. 1998).

The state has not denied that its comment implied Franqui would have murdered Van Nest if not arrested. The state explains its comment as "poorly worded" (P. ***52,*** State Brief). The Defense did not attempt to discredit Van Nest, Compare, *Johnson v. State*, **696** ***So.*** 2d **326, 334** (Fla 1997). The State has not distinguished *Gleason v. State*, 591 ***So.*** 2d 278 (Fla. 5th DCA 1991) which requires Reversal in this case.

ARGUMENT

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IT COULD TAKE INTO CONSIDERATION THE LIFE

SENTENCES GIVEN TO THE CO-DEFENDANTS AS A MITIGATING FACTOR

The trial court refused Franqui's requested jury instruction on this issue. The issue was, thus, preserved.

In *O'Callaghan v. State,* 542 **So.** 2d **1324,** 1326, this Court granted a new sentencing hearing because the jury did not know that it could take into consideration, as nonstatutory mitigating evidence, the disparate treatment and punishment given the other participants. In this case, the jury was not instructed that it could take into consideration, as nonstatutory mitigating evidence, the disparate treatment and punishment given the other participants/co-defendants.

An instruction is required on all mitigating circumstances for which evidence has been presented and a request had been made. ***See,*** *Stewart v. State,* 558 So.2d *416,* 420 (Fla. 1990). The life sentences of Co-Defendants Abreu and San Martin had been presented to the jury by stipulation (T. 1043-4). The defense's requested instructions was denied. The requested instruction was required. The disparate treatment given Co-Defendants are facts reasonable to be considered by a jury. ***See,*** *Brooking v. State,* 495 *So.* 2d 435 (Fla. 1986).

The error is particularly prejudicial as Co-Defendant San Martin (who

ultimately received a life sentence) was given the instruction requested by Franqui as found by this Court in *San Martin v. State*, *705* **So.** 2d 1337 (Fla. 1997):

> Moreover, the court did instruct the jury that Abreu's life sentence may be a mitigating factor that could be considered and specifically informed defense counsel that they had "free range to argue all of their proposed no statutory mitigations to the jury, which counsel did during closing argument. **(P.** 1349-50).

To deny Mr. Franqui the requested jury instruction that was given in Co-Defendant San Martin's case is not only in erroneous in itself but also raises serious Equal Protection questions as these similarly situated Co-Defendant have been treated differently on this same issue.

ARGUMENT

POINT V

THE TRIAL COURT ERRED IN ITS SENTENCING ORDER IN FAILING TO FIND **AND** WEIGH EACH MITIGATING CIRCUMSTANCE PROPOSED BY THE DEFENSE

The state admits that the trial court failed to find that **Mr.** Franqui's

family situation was a mitigator. The state does not deny that there was evidence that Mr. Franqui was abandoned by both his parents, his stepbrother died, his stepfather became a crack addict living on the streets, and Franqui lived with on elderly lady until he was 16. This is not a normal upbringing!! It is again submitted that this dysfunctional history during Mr. Franqui's formative years should have been found to have been a nonstatutory mitigator. See, *Campell v. State*, 571 **So.** 2d 415 (Fla. 1977); *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990)

The State does not deny that the sentencing order does not mention Franqui's "new found maturity", which was argued to the jury, as a mitigating factor. Trial courts must expressly evaluate in writing each proposed mitigating circumstances and determine whether each factor is supported by the greater weight of the evidence and, if so, whether it's truly mitigating. See, *Miller v. State*, 770 **So.** 2d 1144 (Fla. 2000).

The State does not deny that Franqui did not fire the fatal bullet. The trial court's order fails to note that Franqui fired his single shot (a nonfatal bullet which ricocheted off a pillar to strike officer Bauer) after another shot had been fired. The order fails to note that Franqui's bullet ricocheted to strike officer Bauer. Under that facts in this case, the trial court erred in not finding as a mitigator that Franqui was not the actual killer. See, *Van Poyck*

v. State, 564 **So.** 2d 1066, 1069 (Fla. 1990); *Heath v. State*, 648 **So.** 2d **660,** 665-6 (Fla. 1994).

Again, Mr. Franqui must submit that the mitigating factors of "abandonment by parents", "dysfunctional family history", "new found maturity" and " did not fire the fatal bullet" should have been found and considered by the trial court. The failure of that Court to do so requires a new sentencing hearing.

ARGUMENT

POINT VI

THE TRIAL COURT ERRED IN FINDING THAT **A** SENTENCE OF DEATH **WAS** APPROAPRIATE ON THE FACTS OF THIS **CASE.**

The State has indicated that Franqui did not plan the robbery and that Franqui was one of several participants (P. ***22-25*** State Brief), that Franqui heard a shot before he fired (P. 24 State Brief), that the bullet fired by Franqui struck a pillar then officer Bauer not causing any permanent injuries. (P. **27** State brief), that the second bullet was the fatal wound (P. 28 State Brief) and that Co-Defendants Abreu and **San** Martin had received life

sentences (P. 35 State Brief).

The State has not denied that this case is a robbery gone wrong in which a police officer was killed by a Co-Defendant. Franqui was not the dominating force behind the homicide. Franqui was not the instigator and the primary participant in this crime.

Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved.

In ***Curtis v.*** *State*, ***685*** **So.** 2d 1234 (Fla. 1996), Curtis did not kill the victim, his bullet struck the victim in the foot. This Court Vacated Curtis' death sentence for the imposition of a life sentence.

Counsel does not know of any other case with these facts where a non-killer's death sentence was upheld. The State has not cited any case, with similar circumstances, where a non-killer's death sentence has been upheld.

If the penalty of death is truly available for only the most aggravated, the most indefensible of murders, Leonardo Franqui's death penalty must be Vacated.

CONCLUSION

The totality and cumulative effect of the errors argued herein show that Mr. Franqui was not afforded a Fair Capital Penalty Hearing. If this Court does not impose a Life Sentence upon the foregoing facts, arguments and authorities, this cause must be Remanded for a New Sentencing / Penalty Phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Sandra Jaggard, **Esq.** at the Attorney General's Office, 444 Brickell Avenue, Suite # 950, Miami, Florida **33131,** on this 9 day of March 2001.

JOHN H. LIPINSKI, ESQ.

CERTIFICATE OF TYPE SIZE

I HEREBY CERTIFY that a 14 Times New Roman size was utilized to **prepare** this Brief.

JOHN H. LIPINSKI, ESQ.