IN THE SUPREME COURT OF THE STATE OF FLORIDA

LEONARDO FRANQUI,

Appellant,

CASE NO. 04,2380

v.

STATE OF FLORIDA,

Appellee.
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APPELLANT LEONARDO FRANQUI'S INITIAL BRIEF

Lower Tribunal: The Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida

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TABLE OF CONTENTS

STATEMENT OF THE CASE AND THE FACTS

This is Leonardo Franqui's direct appeal from the denial of his motion for post conviction relief.[1] He had been convicted and sentenced to death for a crime in which he did not fire the fatal bullet and which occurred January 3, 1992. R3-290. That sentence was reversed, he was resentenced to death, and unsuccessfully appealed that sentence. R3-293.

Mr. Franqui filed his Motion to Vacate on April 7, 2003 RI 99, *et seq*. directed to issues relevant to trial and to the second sentencing. The State filed its Response June 9, 2003 SRI, 88 *et seq*. Mr. Franqui filed his evidentiary supplementation on April 03,2003. SRI 80-87.

A *Huff* hearing (*State v. Huff*, 622 So.2d 982 (Fla. 1993) was held August 28th 2003. SRII 163 et seq. The Order upon *Huff* Hearing was entered on August 29, 2003. RII-844 et seq.[2] This Order limited the evidentiary hearing to the following issues.

A. The circumstances surrounding defendant's waiver of his right to

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[1] The record will be referenced by "R" followed by the document number if applicable; thence followed by the page number of the reference. The Supplemental Record will be referenced "SR."

[2] Subsequent to the *Huff* hearing, Mr. Franqui withdrew his claim regarding counsel's failure to advise him of his right to testify. RII190

testify show that the waiver was both involuntary and unknowing.

B Counsel made no effort to litigate the suppression of Mr. Franqui's statement despite the ample and compelling basis for suppression on these facts.

C. Counsel failed to present relevant lay and expert witnesses. Two lay witnesses would substantiate Mr. Franqui's request for counsel before his statement; and expert mental health professionals would have presented relevant evidence on the conditions of the interrogation, the mental status of Mr. Franqui, and the interaction of these two factors.

D. Sentencing counsel failed to litigate before the jury the surrounding factors of the taking of the confession in order to challenge its voluntariness.

After motion practice, discussed below, an evidentiary hearing was held on August 26, 2004. SRV- 465 et seq. The Parties submitted written closing legal and factual arguments; Mr. Franqui at SRVI-384 *et seq* and the State at RVI-69 Mr. Franqui filed his Reply Brief July 15, 2003 RII1-65 *et seq*.

The trial court entered its Order Denying Defendant's Motion for Post-conviction Relief Pursuant to Rule 3.851. RIII-290.

This Court has jurisdiction over this appeal by virtue of Art. V.§ 3(b)(1), (9) *Fla. Const*.

B. COURSE OF THE PROCEEDINGS

1. TRIAL AND RESENTENCING

Mr. Franqui was charged in four separate Informations. All were assigned to

the same judge, the same Office of the State Attorney and were defended by the same defense lawyer.

The two cases relevant hereto and on which a death sentence was imposed are the "Hialeah" case[3] and the "North Miami" case. The statements of Mr. Franqui with regard to three separate arrests were taken on a single day. The police witnesses overlapped as to the questioning on the instant case and the Hialeah case.

A suppression hearing on the Hialeah confession was held which included, *inter alia,* evidence of the confession in the instant case. Physical abuse and coercion were the core issues. The Hialeah Suppression Hearing testimony, with small additions, was adopted in toto in this case. The denial of suppression of the instant confession, with this small exception, was not the subject of new evidence nor of appeal.

In order for this Court to evaluate the lower court's findings with regard to

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[3] Mr. Franqui's other death penalty post conviction motion was denied and its appeal is before this Court in case no SC05-830 for which a briefing schedule has not as yet been set. This Court's Docket reflects that there is an inability to complete the record. It is respectfully submitted that because the issues of ineffectiveness with regard to the statement were actually litigated in that case, and relied upon by this post conviction judge that a reading of both briefs simultaneously would assist this Court.

whether an evidentiary hearing was necessary on certain allegations, the issues and respective dispositions of Mr. Franqui's prior litigation is presented herein. Mr. Franqui filed a substantive direct appeal of his conviction. That conviction was affirmed but the matter was remanded for resentencing. Mr. Franqui appealed from the second imposition of the death penalty.

2. APPELLATE

1. Florida Supreme Court Case number 84,701–decided at *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997)

Mr. Franqui raised five issues in his first appeal.[4] Those issues and this Court's disposition of those issues are as follows:

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.

This Court ruled that the trial court did not abuse its discretion in striking Mr. Franqui's peremptory challenge. *Id.* at 1335.

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 a gender-neutral explanation for its exercise of peremptory challenges against

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[4] Issues as stated in Appellant's Initial Brief. Included in the Order Denying Post Conviction Relief in slightly different language. R3-292.

her, thereby violating the Defendant's Fifth Amendment due process and Sixth Amendment impartial jury rights.

This Court found that the above issue was procedurally barred under *Joiner v. State*, 618 So. 2d 174 (Fla. 1993), because defense counsel failed to properly renew his objection to the female juror before accepting the jury and allowing the jury to be sworn. *Id. at* 1334.

III. The trial court abused its discretion in failing to grant the Defendant's repeated motions for severance based upon the unfair prejudice of 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.

This Court found that Mr. Franqui's co-defendant's confession interlocked with Mr. Franqui's confession and was substantially incriminating to Mr. Franqui. Thus, the Court found that the admission of co-defendant Gonzalez' confession was error. *Id. at 1336.* However, with respect to guilt, this Court concluded that the error was harmless beyond a reasonable doubt given the additional evidence against Mr. Franqui. Thus, Mr. Franqui's convictions were not reversed; however, his sentence was reversed. *Id.*

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.

This Court found that this issue was procedurally barred because trial counsel failed to properly preserve the issue for review. *Id. at* 1335.

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.

This Court declined to address the merits of the above issue because the sentencing issues were rendered moot by the Court's decision to remand for a new penalty phase trial. *Id.*

2. Florida Supreme Court Case number 94,269,–decided at *Franqui v. State*, 804 So. 2d 1185 (Fla. 2001).

Mr. Franqui raised six issues in this appeal of the reimposition of the Death Penalty at resentencing. Those issues and the Court's disposition of those issues are as follows:[5]

I. The trial court erred in excusing for cause potential jurors Pereira and Lopez.

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[5] Once again the issues are as originally stated by the Appellant. The issues were included in the Order Denying Post Conviction Relief in slightly different language. R3-293.

This Court found after an examination of the record that the trial court did not abuse its discretion in excusing either of the jurors for cause. *Id*., at 1192.

II. The trial court erred in instructing and allowing the jury to be instructed that its recommendation should be death if the aggravators outweigh the mitigators.

This Court agreed with Mr. Franqui on this issue that the trial court's comment that the law required jurors to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances misstated the law. *Id. at* 1192-1193. However, this Court concluded that Mr. Franqui was not prejudiced by this error. This Court found that the trial court's subsequent comments to the prospective jurors during voir dire were consistent with the standard jury instructions and that the trial court did not repeat the misstatement of law when instructing the jury prior to its deliberations. This Court also held that the trial court did not abuse its discretion in refusing to give the curative instruction requested by defense counsel during voir dire. *Id.*

III. The trial court erred in overruling defense objections to prosecutorial closing argument which denied Franqui a fair trial.

This Court found that as to a comment made by the prosecution pertaining to Mr. Franqui's use of part of the proceeds from the bank robbery, error was committed. Based on the facts presented at trial, the Court concluded that the

State's comment did not constitute an improper attempt to ask the jury to draw a logical inference based upon the evidence. *Id. at* 1195.

This Court did find, however, that the State's comment pertaining to the subsequent robbery of another individual was improper since the State implied that Mr. Franqui and his accomplices would have murdered this person had the police not intervened. This Court concluded that, nonetheless, this comment by itself did not warrant resentencing because it was not so egregious as to taint the validity of the jury's recommendation and require reversal of the entire re-sentencing proceeding. *Id.*

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.

This Court ruled that this issue was without merit because the trial court gave the standard jury instruction on non-statutory mitigating circumstances, which explained in part that the jury may consider any other circumstance of the offense in mitigation. *Id. at* 1196. This Court also found that the trial court read to the jury a stipulation pertaining to the life sentences given to two of the codefendants prior to closing arguments and that the trial court specifically informed defense counsel that he could argue codefendants' life sentences as a mitigating circumstance to the jury. *Id.*

V. The trial court erred in its sentencing order in failing to find and weigh each mitigating circumstance proposed by the defense.

This Court ruled that the trial court did consider and weigh mitigating circumstances presented by the defense. First, this Court concluded that the sentencing order revealed that the trial court expressly considered in great detail whether Mr. Franqui's family history was a mitigating factor. *Id. at* 1196. Second, this Court found that the trial court also considered Mr. Franqui's newfound maturity and found that Mr. Franqui's self-improvement and faith while in custody was established as a mitigating circumstance and entitled to some weight. Lastly, this Court found that the trial court did not err in considering and rejecting the fact that Mr. Franqui did not fire the fatal bullet as a mitigating circumstance. *Id. at* 1196-1197.

VI. The trial court erred in finding that a sentence of death was appropriate on the facts of this case.

This Court first ruled regarding this issue that in its sentencing order, the trial court expressly found that Mr. Franqui was prepared to use lethal force to eliminate any impediment to his robbery plan and did not hesitate to use force during the robbery. *Id. at* 1197. This Court also found that the trial court found three aggravating circumstances in regard to the death sentence and that similar prior case law allowed for death as the appropriate penalty. *Id. at* 1198

3. COURSE OF THE INSTANT POST CONVICTION PROCEEDINGS

Mr. Franqui filed his Motion to Vacate Judgments of Conviction and Sentence which raised, in sum, the following issues: RI 99-161.

SYSTEMIC AND TRIAL COURT ERROR

1. The procedure for assignment of trial judges in Dade County criminal cases is inherently unfair, particularly as applied to this defendant.

2. The circumstances surrounding defendant's waiver of his right to testify show that the waiver was both involuntary and unknowing.

3. Circumstances surrounding the purported confession -- chiefly, the length of questioning, officers' non-responsiveness to defendant's requests for counsel and officers' election not to make an audio or visual recording of any portion of the interrogation -- make the defendant's statement unreliable, illegal and inadmissible.

4. The Court denied the defendant the right to obtain evidence from a material, relevant witness despite the fact that the evidence was not in any way privileged merely because it was the "custom" not to call Assistant State Attorneys to testify.

5. When the second sentencing court permitted the statement of Mr. Franqui to be admitted into evidence but failed to permit the defense to present evidence on the confession issue, it denied Mr. Franqui due process of law.

INEFFECTIVE ASSISTANCE OF COUNSEL

6. Counsel made no effort to litigate the suppression of Mr. Franqui's statement despite the ample and compelling basis for suppression on these facts.

7. Counsel failed to effectively seek the right of Mr. Franqui to obtain evidence from a material, relevant witness despite the fact that the evidence was not in any way privileged merely because it was the "custom" not to call Assistant State Attorneys to testify.

8. Counsel failed to present relevant lay and expert witnesses. two lay witnesses would substantiate Mr. Franqui's request for counsel *before* his statement; and expert mental health professionals would have presented relevant evidence on the conditions of the interrogation, the mental status of Mr. Franqui, and the interaction of these two factors.

9. Sentencing counsel (second sentencing) failed to litigate his filed suppression motion, apparently because both he and the judge mistakenly assumed that the confession issue had been litigated and lost before the Supreme Court of Florida.

10. Sentencing counsel failed to litigate before the jury the surrounding factors of the taking of the confession in order to challenge its voluntariness.

11. Sentencing counsel failed to raise constitutionally valid attacks on the Constitutionality of the Death Penalty per se and specifically the death penalty scheme in Florida where the sentencing jury merely is an "advisor" to a judge who is the ultimate fact finder and decision maker.

12. Counsel failed to make a motion to dismiss based on patent deficiencies in the indictment.

13. In attempting to exercise a peremptory strike against panel

member Diaz, Counsel's delay in presenting neutral reasons beyond his bare dislike of Diaz resulted in the seating of a juror whose ability to be fair should have been the basis on a sustainable defense peremptory challenge.

14. Counsel failed to preserve patent trial court error in disallowing a defense strike against panel member Andani; when the State challenged the strike, defense counsel specifically declined to be heard.

15. Counsel failed to litigate his request for individual requested voir dire and motion to sequester; despite the fact that the victim was a police officer, counsel made no attempt to show that Miami's notoriously sensational press had created adverse pretrial publicity nor did he make any showing of how the defendant was prejudiced.

16. Counsel failed to preserve patent trial court error in allowing the State to peremptorily challenge panel member Pascual; Pascual, like seated juror Pierre-Louis, expressed initial ambivalence about imposing death on a non-triggerman. Counsel accepted the panel without reserving this meritorious objection.

17. During the penalty phase, counsel failed to object to the prosecutor's serious misstatement of law on closing – "If the aggravation is always stronger, always more powerful in your hearts and minds, the Judge is going to tell you it's your obligation that you should vote to recommend for death."

18. Appellate counsel also failed to raise the meritorious issue of prosecutorial misconduct based on this duty-to-recommend-death comment in his brief -- this omission and defense counsel's failure to preserve the issue of court error were noted by on appeal by the Florida Supreme Court. Appellate counsel's ineffectiveness is mentioned here because the fact that the Court mentioned it proves this issue's merit. But Mr. Franqui's claim for relief based on appellate counsel's deficiencies will be made in a separate and appropriate pleading.

A *Huff* hearing was held. After the *Huff* hearing, the case proceeded on the issues permitted for evidentiary exploration. New discovery from the officers on the circumstances surrounding the taking of the statements were forbidden.[6] January 9, 2004, the State moved in limine to determine whether the defense proposed expert testimony on the circumstances of coerced confessions was admissible. RII-207. On that same date, the State asked the court to "prevent further witness deposition" of officers by the defense. RII-213. Mr. Franqui responded thereto. RII-216.

That same date again, the State moved to exclude testimony of an expert legal witness, Melvin Black. RII-220 Mr. Franqui responded. RII-225. Ultimately, Mr. Black and Dr. Meissner testified. Mr. Black's conclusions of ineffectiveness were ignored and it was held that Dr. Meissner's expertise on

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[6] The trial court granted hearing on Claim Two (involuntary nature of Defendant's waiver of right to testify (later withdrawn); Claim Six (counsel's failure to litigate motion to suppress Defendant's confession; Claim Eight (counsel's failure to present relevant law and expert witnesses at a hearing on the motion to suppress Defendant's confession; and Claim Ten (Counsel's failure to litigate before the sentencing jury the involuntary nature of Defendant's confession). R3-297.

coerced confessions was not sufficiently readily available at the time of the resentencing.

During the preparation process for the evidentiary hearing, on March 4, 2004, unbeknownst to Mr. Franqui or counsel, the State issued a State Attorney subpoena for Mr. Franqui's trial and sentencing counsel, Mr. Cohen, without notice to the defense. RII 238. Mr. Cohen retained counsel and filed a motion to quash the subpoena. SR-III 276-280; RII 233, 269. The State responded. SR-III 281-286;240. A hearing was held on the Motion to Quash on March 5, 2004. RII- 239(Notice); RII-281 (transcript). Each of these actions was taken without notice to Mr. Franqui or to his post conviction counsel.

Immediately, upon learning of the State Attorney Subpoena, a hearing the fact that a hearing had been held on same, and the actual compliance with to the subpoena, Mr. Franqui filed an Emergency Motion et seq. SR-VI-69-739; 740 The State responded thereto. RIII-262RVI 750 An Emergency hearing was held on August 20, 2004. SRVI 636 *et seq.*

All issues which were raised in the *Huff* hearing and in the original pleadings were renewed at the beginning of the evidentiary hearing. SR-V-465.

An evidentiary hearing was held on August 28, 2003 before the

Honorable Kevin Emas. SR-V-465.[7] Legal Expert Witness Melvin Black was permitted to be present for the testimony of trial counsel. SR-V-478.

The trial court made clear that it would entertain testimony on trial counsel's failure to litigate the suppression of Mr. Franqui's statement. Counsel's failure to present expert witnesses and lay witnesses and expert health, mental health professionals regarding his mental status and sentencing, counsel's failure to litigate the circumstances surrounding the taking of Mr. Franqui's confession in order to challenge its voluntariness.[8] SRV-481-482.

Trial Counsel, Eric Cohen, was sworn as the first defense witness. SR-V-483. He recollected his first contact with Mr. Franqui, in 1992, was when he was called to represent Mr. Franqui on another charge, and they had made arrangements to retain Mr. Cohen for that matter. SR-V-484.[9] Days later, Mr. Cohen read an article in the *Miami Herald* that Mr. Franqui had been charged in the instant case–the death of Officer Bauer of the North Miami Police

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[7] The contents of the pages which are in the Record beginning at SR-V-465 are slightly different from the contents of the pages in the originally prepared transcript

[8] As noted earlier, the issues of waiver of Mr. Franqui's right to testify had been withdrawn.

[9] Mr. Franqui had appeared in court on this unrelated charge, represented by the Public Defender, and had advised the State in writing that he invoked his attorney-client privilege.

Department. SR-V-485. After discussions with the family had while he was returning to Miami, Mr. Cohen expected to be retained on the originally discussed case and the charges at issue here. SR-V-486.

In Mr. Cohen's interviews with Mr. Franqui after the charge in the North Miami case, he specifically recalled Mr. Franqui telling him that he had been "roughed up" by questioning Officer Crawford. SR-V-487.

Mr. Cohen explained that there were two other charges–all four accusations arose within less than a three month period–and he was appointed by the Court on those matters because the questioning on all but the initial case was had on the same day at the same place. SR-V-488. A "second chair" counsel, William Matthewman, was appointed to assist Mr. Cohen on the North Miami case and the separate first degree murder which took place in Hialeah. Mr. Matthewman was to handle the penalty phase if any while Mr. Cohen was in charge of the guilt phases–with some overlap in duties. SR-V-489. Mr. Matthewman's involvement was limited by his other obligations. SR-V-492.

At the time of Mr. Franqui's representation, Mr. Cohen had tried one other first degree murder case wherein the death penalty was waived and had been counsel on cases which were disposed in a manner other than death. SRV-489-490.

He moved to suppress the statements. He admitted that his "main

concentration" in arguing suppression was the lack of voluntariness of the statement because Mr. Franqui had related the threats and threats and beatings which took place on the day of questioning. SR-V-494. He further admitted that he had never considered mental health issues in terms of suppression in spite of the fact that he and Mr. Matthewman obtained reports from Dr. Jethro Toomer which he seemed to believe would be useful only in the penalty phase only. SR-V-496. On the stand he admitted that this information was important to suppression but that he never thought of it. In other words, he confessed ineffectiveness per se.

He testified that his understanding of the status of the law was that if a person "was mentally retarded or emotionally dysfunctional, that person could not understand his or her rights, "it's a possible issue to raise during the suppression hearing." SRV-497. It was in his mind likely that he did not interview Dr. Toomer before the suppression hearing as that was a mitigation issue. SRV-497.

Mr. Cohen was presented with the evaluation letter of Dr. Toomer dated March 2, 1993 and admitted that it was both addressed to him and that he had sent Dr. Toomer to evaluate Mr. Franqui. SRV-498. This was marked as Defense Exhibit a-1 for identification. SR-V-499.

After reviewing the letter, Mr. Cohen admitted that the evaluation

concluded that Mr. Franqui's thoughts "were not clear, coherent or well-organized[,] that his memory was spotty; that his cognitive understanding was limited to some degree faulty; that Mr. Franqui had [no] insight to motives to his behavior." SR-V-500-501.

He admitted that the report indicated that Mr. Franqui's results from the Bender-Gestalt Test "reflected emotional dysfunction, anxiety and [dis?]organization." SRV-501. The transcript also reflects Mr. Cohen's recollection that the report indicated that Mr. Franqui had low social abilities and low tolerance, that he lacked ego controls, and exhibited emotional lability and dependent behavior. SRV-502. Further the Minnesota Multiphasic Personality Inventory indicated a differential diagnosis and his intelligence was very low, overall a 60. SRV-502. On cross-examination Mr. Cohen stated that he could not personally state that Mr. Franqui was retarded. SR-V-517. He testified that based on the evidence he should have asked for additional experts to evaluate Mr. Franqui for competence, because he was not an expert. SR-V-505 SRV-517. The State asked if because Dr. Toomer reached conclusions that were helpful to both sides rather than solely to Mr. Franqui, Mr. Cohen did not use Dr. Toomer as a witness regarding suppression. SR-V-519 Mr. Cohen believed that this information did not speak to voluntariness of a confession but only to whether there was an intelligent waiver of *Miranda* rights. SR-V-503.

Mr. Cohen admits that he received Dr. Toomer's Report about March 4, 1993; that the Hialeah suppression hearing was held March 12, 1993. SRV-503-504. The Hialeah death case was tried in September and October of 1993 and the instant case was tried in the Spring of 1994. SRV-504-505.

Mr. Cohen admitted that he did not consider the Toomer report when preparing for either the Hialeah Suppression hearing or the North Miami trial; that he did not litigate the state suppression again because he had prepared for the Hialeah suppression hearing and "there was no reason to hold back anything or litigate anything." SRV-505. Because the statement was not suppressed by Judge Sorondo in the Hialeah hearing there would be no purpose to litigate it again, "Getting the statement in this case suppressed and not getting the Hialeah case suppressed is not going to do anything." SRV-505

Mr. Cohen admitted that between the Hialeah suppression Order and conviction and the instant trial he did no further research, investigation nor did he receive any information which contributed to his decision not to raise suppression anew in the instant case. SRV-507. The only issue which he "missed" was whether Mr. Franqui was capable of intelligently waiving his *Miranda* rights, and he could not give an answer as to why he missed the issue, "...More than likely, it was something I didn't think of it." SRV-507-508.

Mr. Cohen frankly stated that in the context of suppression he did

nothing with Dr. Toomer's letter during the year and one-half that preceded the North Miami trial. SR-V-524 He did not rethink the issue of making intelligence an issue during this time. SR-V-525. He did not recall even speaking with Mr. Franqui regarding the Toomer Report. SRV-525

Mr. Cohen believed that the first time that he ever heard of the availability of expert witness testimony and/or research on the voluntariness of confessions was after the instant trial. SR-V-508;521-522.

Mr. Cohen admitted that his decision not to litigate suppression in the instant case was impacted by the fact that it was the same judge who would be hearing the matter; the same witnesses to say the same thing in front of the same judge to get the same ruling. SR-V-509;523.

When the penalty phase sentence was reversed and Mr. Cohen represented Mr. Franqui in 1996 before a new sentencing judge he did not attempt to bring in evidence on the voluntariness of the confession. SRV-510. He believed that the court's ruling on litigation of residual doubt precluded him from relitigating the voluntariness or intelligence of the waiver his right to remain silent. SRV-511

Legal Expert Black's testimony was the subject of State objection because it submitted that the Court's understanding of the case law and Mr. Cohen's testimony was sufficient basis for a decision. Mr. Black was then

called as a defense expert witness. SRV-529. He was tendered as an expert based on his qualifications and the State cross examined him. SRV-533. The State objected on the issues of bias and the fact that the testimony would not assist the trier of fact. SRV-535.

Mr. Black's expert conclusions, after review of documents and live testimony, was that Mr. Cohen's failure to revisit "each and every aspect of the suppression issues before he made the decision to waive the opportunity to litigate the issues in front of Judge Sorando the second time ... [was] deficient, especially given the fact that about ten days after the ruling by Judge Sorondo he received the opinion from Toomer that indicated that there was some mental deficiencies or some indicators of mental deficiency that might call upon a judge to whether or not there was a [knowing] voluntarily [sic] waiver. SR-V-539. His conclusion was that this failure fell below the standards that a lawyer handling these types of SR-V-539 must bring to these "serious and complex matters should be bringing to the task." SR-V-539.

He cited as specific instances of ineffectiveness the importance of the failure to pursue Dr. Toomer's statement that Mr. Franqui had poor judgment and poor ability to reason abstractly. Also he noted that his ability to reason discriminatively was limited. SR-V-540. He cited the fact that a person so disabled could perhaps not understand the abstract concept of having a lawyer

present or that the evidence could be used the defendant in the trial. SRV-540.

Mr. Black testified that Dr. Toomer's conclusion that Mr. Franqui's "cognitive functioning appears limited, to some degree faulty," should have given rise to presentation of that evidence at a suppression hearing in order that the court could learn that Mr. Franqui could not understand and utilize incoming information "in a way that would allow [him] to make good proper judgment." SRV-540. He concluded that when Dr. Toomer's findings were taken as a whole, questions should have emerged about whether Mr. Franqui could have understood his rights' advisement. SRV-541. This was particularly so in light of the finding of an IQ for Mr. Franqui of less than 60 or worse than 93.6% of the population. SRV-541. The expert also based his opinion in part on Dr. Toomer's conclusion that Mr. Franqui was impaired in higher order thinking, hence the projection of consequences of his acts and his ability to reason abstractly and discriminatively to interpret his environment and orient his behavior properly" should have been explored. SRV-541-542

Mr. Black concluded that at the very least the lawyer should have explored Dr. Toomer's Report and reconsidered putting the evidence in front of the court. SRV-542-543. Mr. Black concluded that Dr. Toomer's summary that Mr. Franqui suffered from extreme mental and emotional disturbance; that there was a differential diagnosis rather than organic

impairment raised serious questions about Mr. Franqui's reasoning processes with regard to evaluating and making an intelligent, knowing decision on whether to waive his right to remain silent. SR-V-543.

The expert opined that at a minimum another motion including additional grounds could have been filed. SR-V-543

Expert witness Black opined that since Mr. Cohen stated that if he possessed a negative personal opinion as to retardation he would have been more motivated to explore the issue, he erred using this as a decision-making benchmark.. The standard is not personal opinion but rather what an effective lawyer should do with such information. SRV-544-545 He opined that it would not require innovative thinking to know that new evidence which could impact on Mr. Franqui's ability to knowingly waive should have been explored. SRV-545.

This mental health information was particularly important in light of the fact that Judge Sorondo sitting in the Hialeah case focused on the credibility of Mr. Franqui's testimony at t he suppression hearing when Mr. Franqui stated that he had been subjected to coercion by the police. The mental health information was an entirely new area of consideration. SRV-545

In the Hialeah case, Judge Sorondo failed to grant the mental health mitigator even though Dr. Toomer's testimony supported its imposition. Mr.

Black addressed the fact that another expert was not a necessity–merely because Judge Sorondo in the Hialeah case had failed to grant a mental health mitigator does not speak to whether he would take objective test results into consideration when considering the appropriate mental state to appreciate and to waive one's rights. SRV-546. The Intelligence Quotient findings and the other psychological findings were relevant to Judge Sorondo's consideration of the validity of a waiver. SRV-547

With regard to whether the failure to present expert evidence on the coercive conditions of interrogation and the resultant reliability of statements made therefrom, Mr. Black discussed the matter and concluded that "a lawyer needs to use tools that are available...."SRV-550.

Mr. Black concluded that Mr. Cohen should have litigated suppression of the statement in this matter and his failure to do so was ineffective assistance of counsel. SRV-551.

Mr. Black made clear that his opinions were directed to effectiveness and that the prejudicial effect of that ineffectiveness determination was a legal conclusion to be made by the court. SRV-552

The State questioned Mr. Black about whether Mr. Cohen could present a mental health defense if Mr. Franqui said that he understood his rights. SRV-560 Mr. Black stated that he had heard no such comment from Mr. Cohen

so he could not appropriately answer the hypothetical. SRV-560

The second defense witness was an expert on Coerced Confessions, Dr. Christian Meissner. SR-V-594. The defense made clear that the scope of Dr. Meissner's expert opinion was identifying those factors which go into coercive questioning but that he could not usurp the role of the court in factfinding or whether the facts given by Mr. Franqui to the expert were in fact true. SR-V-594. He defined for the State the scope of his expert opinions: "I render opinions regarding the tactics that may be used that could be coercive and lead to false confessions. SR-V-598 His degree was in cognitive psychology SRV-595. His research included eyewitness memory, jury decision making and interrogations and confessions, and was published in the area. SR-V-596. The Court accepted him as an expert. SR-V-601.

Dr. Meissner testified that he reviewed the status of this type of expert witness testimony acceptance by searching published literature. SRV-602;604-605. The bases of the science were published at least in the 1950's based on research accomplished in Germany in 1908. SR-V-603.

He also ascertained that such testimony was given in the late 1980's and early 1990's. SR-V-603. He stated that experimental work had taken place in universities over the years but in 1996 Sal Casson first conducted a study where they induced students to provide false information. SR-V-607.

His work is intended to provide "objective method of identifying factors that could lead to false confessions, allowing the court to render an ultimate decision as to reliable and probative value. SRV-609. His duty is to explain how, if the Court believes Franqui's testimony, it is that Franqui could have given a false confession. SRV-629

He described two forms of coercion: minimization and maximization. SR-V-610-613. He discussed these concepts also in regard to the written *Miranda waiver*. SRV-614; 616-618. His expert conclusion was that when, "Mr. Franqui's testimony was taken at face value, these psychological techniques that, have been associated with false confessions or reduced voluntariness[]" SRV-618.

Subsequent to the hearing, and after the aforementioned briefings by the parties, Judge Emas denied relief in an order, (RIII-291-329), covering the issues raised and with extensive reference to the Hialeah Suppression hearing testimony, Judge Sorondo's Order and Dr. Toomer's Report.

The trial court ruled that Mr. Franqui's claim as to the denial of due process by the functioning of the judicial selection process in Dade County had to be ruled upon in this Court. RIII-299.

The Postconviction Court further found that trial counsel was not ineffective in his failure to raise the circumstances surrounding the statement and

that trial counsel was not ineffective for failure to raise the issue of failure to record Mr. Franqui's day-long interrogation but that the issue was procedurally barred because it should have been raised on direct appeal. RIII-301.

The post conviction court ruled that the failure of the trial and sentencing courts to permit defense counsel to take evidence from Assistant State Attorney Kevin DiGregory was barred as directed to the trial court. The ineffectiveness claim in the failure to call ASA DiGregory did not change its nature as procedurally barred. Also trial counsel was permitted to cross examine an officer on Mr. DiGregory's role; that it was the burden of defense counsel to establish that he had reasonably exhausted other means to obtain the information. RIII-303. The court found that there was no evidence that Mr. DiGregory met Mr. Franqui or that Mr. DeGregory had knowledge peculiar to him. RIII-303. Also, trial counsel sought to present testimony from Mr. DeGregory that the ASA knew that Mr. Franqui was represented; hence any error is of the trial court and not the defense counsel. RIII-304.

The trial court at the second sentencing permitted evidence relating to the confession but did not permit evidence of voluntariness. The court found that there was no precedent for the proposition that at the penalty phase, evidence of the involuntariness of a confession could be introduced although the confession itself was introduced before the jury by the State. The court found

that this claim was procedurally barred or that it was a prohibited argument about "residual doubt." RIII-305. The court held that principles of *res judicata* prohibited relitigating the suppression issue on the sentencing remand and further that the absence evidence which was at issue did not "create a reasonable probability of a different result." RIII-305.

The sentencing court believed that the voluntariness of the confession had been raised and denied at the Supreme Court. RIII-306.

Mr. Franqui's "Apprendi" claims were foreclosed by rulings in the Florida Supreme Court, wihch included the role of an advisory jury and the fact that the State was required to state with particularity its theory of prosecution, felony-murder v. premeditation. RIII-306.

The court ruled that the failure to timely lodge objection to juror Diaz had been raised in the first appeal could only be treated as an ineffective assistance of counsel claim, but that claim also fails because there is no established probability that the trial court would have entertained the objection had it been made timely. RIII-307-308.

The court ruled that the failure to preserve patent trial error in disallowing a defense strike of juror Andani could not be litigated in an ineffectiveness claim and that there was insufficient allegation as to how the failure would have affected the outcome of the trial because trial counsel did not

respond to t he State's objection to this juror. RIII-308-309.

The trial court found that there was no ineffectiveness in seeking individual voir dire; no showing that it would have affected the selection process, hence no prejudice was established. RIII-309-10.

The trial court found that the failure to preserve objection to State preemptory challenges was barred from an ineffective assistance of counsel claim and an evaluation of the selection process led the court to posit other reasons why the State would have chosen this juror. RIII-311.

The trial court had granted a hearing on the circumstances of the waiver of the right to testify. Mr. Franqui withdrew that claim personally RIII-312.

The court dealt jointly with the claims that counsel failed to call witnesses regarding Mr. Franqui's desire to have counsel; that mental health professionals should have presented evidence on the conditions of interrogation, the mental status of defendant and the interaction of these two. Counsel failed to litigate suppression the statements in this matter. RIII-312. The court noted that both the Hialeah and the instant confession were taken on the same day and that two motions to suppress were filed which raised the issue of his representation at the time of questioning; being coerced t o give a statement; being promised a fifteen year term for the confession rather than the death

penalty. RIII-313. The court concluded that the circumstance of the taking of the statements was "virtually identical." RIII-313.

The court recognized that the Sorondo/Hialeah case was the site of the suppression hearing. The court believed that the report of the psychologist, summarized by the court, arrived subsequent to the Hialeah evidentiary-suppression hearing. RIII-314. The court then revisited the Hialeah suppression testimony, crediting as did Judge Sorondo, police testimony RIII-314-316. The defendant's Hialeah testimony was also summarized. The court placed emphasis on t he fact that Mr. Franqui–IQ of 60–testified that he understood his rights when they were read to him. He testified that he had been hit by a detective; and was promised a shorter sentence if he cooperated. This was all done In the atmosphere of 100 officers who would beat him. RIII-317.

Mr. Franqui said that when his wife came to the police station he told her to call his lawyer or his family to call his lawyer. RIII-316-318.

The court notes that there was brief testimony taken in the instant case about what was overheard by the police when they listened in on parts of the converstation between Franqui and his wife at the police station. RIII-318. The court found that since no witness had presented evidence of t he conversation at the instant post conviction case the claim was abandoned.

RIII-319. The court found that Mr. Franqui's assertions established what these witnesses would have said, the testimony would have been cumulative, the failure to present them was strategic, a presumption not rebutted. RIII-320 The court noted that Judge Sorondo made credibility determinations and credited the police, and Detective Nabut stated that he overheard the conversation and didn't remember Mr. Franqui asking for the police.[10]

The court noted that trial counsel admitted that he failed to consider using the psychological evidence at the motion to suppress in the Hialeah case or in the instant case. RIII-321. The court found that it would have been unreasonable for Mr. Cohen to use the Toomer report in the instant case RIII-321, giving several reasons why Mr. Franqui was familiar with the phrase "Miranda rights." RIII-322. Not only that Mr. Cohen knew Mr. Franqui and when Dr. Toomer testified at the Hialeah death phase and since Judge Sorondo found that he could not "verify the accuracy or validity" of the IQ result of 60, and that other facts known to the court made it conclude that Mr. Franqui was not retarded and to believe Dr. Toomer's report would be to refute the "clear and irrefutable logic of the facts in this case." RIII-323-324. The facts as analyzed

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[10] Although Mr. Franqui recognizes that argument is not appropriate in this portion of his presentation, to be complete the detective stated that he had not heard all of the conversation and in fact did not know that the room was bugged

by the trial court concluded that Mr. Franqui could not have utilized Dr. Toomer's report or the timing of his invocation of rights because he was already "married" to the testimony. RIII-325.

The court gave little weight to Expert Witness Black's testiony regarding competency to waive *Miranda* in part because this is a "relatively hot topic in today's legal circles" which had "garnered relatively little notice in 1994. RIII-326.

With regard to the coerced confession expert the court concluded that the expertise was not "sufficiently well-established" at the relevant time for trial counsel to be deficient for not utilizing it. Since Dr. Toomer did not testify at the evidentiary hearing and there was not established in the court's mind the interrogation expertise availability, led to the conclusion that neither prong of *Strickland* had been met.

C. DISPOSITION IN THE LOWER TRIBUNAL

Under attack are Mr. Franqui's convictions for: First Degree Murder of a Law Enforcement Officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm, grand theft, and burglary as well as his second sentence of death.

His codefendants received the following dispositions: Abreau

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until told after the Franquis were together.

negotiated a life sentence for this and a second case; San Martin's death sentence was vacated because of a jury override issue and a life sentence was imposed; Gonzalez' death sentence was vacated but he was resentenced to death and that sentence has been affirmed. R3-293.

D. SUMMARY OF THE ARGUMENT

The system has failed Mr. Franqui and only a fair system and one which is presumed to be fair may withstand the scrutiny of our citizenry who are uncomfortable with executing a fellow human being unless the proof is of such a character and certainty that it cannot be fairly questioned. Mr. Franqui's case does not meet this standard.

He was tried before one judge in four matters, two of them resulting in imposition of the death penalty; he was resentenced because of grevious error of that judge in permitting introduction of interlocking confessions11 This conviction is built on a house of cards:there was the suppression hearing which was totally absent in this case but present in the Hialeah case; the trial and sentencing in the Hialeah case where Judge Sorondo did not accept the evidence of medical testing or medical expert testimony as persuasive; t he reversal of the sentencing; the reliance of the new judge, Robert Scola, on the "completeness"

of the previous proceedings; the error of Judge Scola and defense counsel in "finding" or "believing" erroneously that the "confession" in this case had been litigated, appealed and affirmed when in fact it was not; the failure of defense counsel to introduce evidence of severe mental disturbance and IQ of 60 of Mr. Franqui; the reliance of post conviction Judge Kevin Emas on the testimony from the Hialeah case, and Judge Sorondo's observations and findings of credibility. Judge Sorondo's belief that the statement was voluntary became etched in stone.

Serious error of interlocked confessions infected his trial and the matter was remanded for a new sentencing. His statement and the way that it was handled by the police, the court, and defense counsel are at the heart of this case.

Because the two death penalty statements were taken with overlapping casts of characters, the suppression issue was litigated in the first case to go to trial. It was litigated solely before the trial and voluntariness, mental illness, intelligence were not even introduced in the trial of this case.

What is even more stark is that when this case followed the conviction in the first case by over one year, there was no attempt to litigate

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11 Other actions were clearly recognized as error but the conviction was not reversed in spite of the errors.

suppression again because the same judge was presiding, the trial lawyer said that he did a complete job the first time and to have one statement suppressed and the other not would not benefit Mr. Franqui.

Expert legal testimony at the post conviction hearing, expert coerced confession testimony presented at the hearing, and the candid admission of trial counsel that he *failed to even consider the mental health issues* of which he was aware in considering the voluntariness of the confession—IQ of 60 or less, major mental illness were ignored. He knew that it was a legal reason to confront a confession, but he just did not recognize the issue in this case. He testified that his understanding of the status of the law was that if a person "was mentally retarded or emotionally dysfunctional, that person could not understand his or her rights, "it's a possible issue to raise during the suppression hearing." SRV-497. It was in his mind likely that he did not interview Dr. Toomer before the suppression hearing in the other case as that was a mitigation issue. SRV-497. He admitted that this information was important to suppression but that he never thought of it. He never even spoke to the error of failure to raise t he mental health challenges before the trial jury or the resentencing jury. In other words, he confessed ineffectiveness per se.

The post conviction court was presented with three facts: an expert witness who stated that if the facts were as Mr. Franqui stated (including

physical abuse) and if the tactics of minimization and maximation were utilized, the confession was taken in a coercive manner; an expert legal witness who said that this lawyer in his first penalty phase and in the resentencing in that case failed to render effective assistance of counsel; and a trial lawyer who confesses complete ignorance of this important universe of facts. It was only with the supplementation by the post conviction court of reasons why trial counsel "might" have made such a terrible error, that he was found ineffective. In other words, the justifications for the errors were not presented by the trial lawyer but supplied in order to sustain the conviction.

Add to that the facts that the statements were extracted over a period of twenty hours' time[12] and were never the subject of litigation at the resentencing court—rather there was an adoption of the adverse finding in the first litigation. He was tried before the same judge on four separate cases, with the involvement of the same Office of the State Attorney and the same defense counsel–an issue which he submits greatly impacted the outcome of the matters.

Along with other legal and factual challenges, Mr. Franqui submits that the Florida system cannot with stand clearly stated federal

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[12] Only one of the death matters is the subject of this appeal, however the suppression hearing attacking the marathon interrogation was fully litigated in another case.

Constitutional law concerning elements of a "crime," their presentation to the jury and inclusion in the charging document.

D. ARGUMENT

ISSUE I: THE LAW REQUIRES THAT ANY CITIZEN AGAINST WHOSE OWN WORDS WILL BE USED TO INCULPATE HIM WAIVE HIS CONSTITUTIONAL PROTECTIONS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY, POSSESSING THE CAPACITY TO DO SO. WHEN A STATEMENT IS TAKEN WITHOUT THESE CONSTITUTIONAL PROTECTIONS IT IS INADMISSIBLE.

In order to effectuate that black letter law, the defendant has the right to be represented by effective counsel in (a) making the determination as to the propriety of the taking of the statement;(b) litigation suppression of the statement before the trial court; (c) if that is unsuccessful, litigating the circumstances of the taking of the statement before his trial jury in order that they may give the appropriate weight, if any, (d) and introducing appropriate evidence before the sentencing jury in order to have it give proper weight to the statement and proper rebuttal to the introduction of the ignored statement.[13]

[13] An important consideration must be kept in mind during the consideration of what if any decision-making process went into the use of the mental health evidence. Mr. Cohen doubts that he even spoke with Mr. Franqui about the report. If that is so, and even setting aside Mr. Franqui's low IQ and other mental illness, how could Mr. Franqui have made the decision *not to use the mental health evidence.* This is not the type of decision which the lawyer controls. If this evidence is not to be used, the waiver of such substantial and potentially dispositive evidence presentation must be made by a competent and informed Mr. Franqui.

Although the circumstances of statement/suppression are lengthy and complex , Mr. Franqui recognizes that the issue is of the greatest importance and that it must be presented in a more or less real-time presentation, broken into its appropriate subparts.

1. Taking of two statements to two separate homicides, for no apparent consideration, from the man who did not fire the fatal bullet in an unorthodox, nearly full day questioning marathon warranted suppression and should have been the subject of meaningful suppression litigation..14
2. The death penalty was being sought in the Hialeah shooting and the instant, North Miami Beach, shooting.
3. The two death cases were charged separately but were assigned to the same sitting judge.
4. Report by defense-retained Psychologist defining very low IQ of 60 and major mental illness of Mr. Franqui.

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14 Mr. Franqui had declined to speak with the police about the crime on which he was arrested. He was taken to the police station and allegedly given his rights and when he exercised them was coerced into confessing. Uncontroverted evidence establishes that his IQ was 60, yet Mr. Franqui is expected to understand the nuances in waiver of Sixth Amendment v. waiver of Fifth Amendment rights. It is fair to say that very few lawyers could articulate or act upon this difference.

5. Hialeah Suppression hearing at which only issues of physical and mental coercion were litigated with no evidence of mental deficiencies, including the 60 IQ.15
6. Order from Judge Sorondo denying suppression and expression at this early stage with defense counsel who insisted that he keep in mind the fact that the defendants are innocent in the instant case.
7. One-plus years later, after suppression, trial and sentencing to death in Hialeah, the instant case came on for trial
8. Trial counsel did not integrate Dr. Toomer's fimdings into his suppression, trial or sentencing plans.
9. When it came time to suppress the statement in the instant case, the full testimony from the losing hearing was readily adopted. It was only a co-counsel who said that he would stipulate to the testimony but not to the result.

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15 The state of the Record from Mr. Cohen's testimony at the post conviction hearing persuades that the Toomer Report was in his hands *before* the Hialeah Suppression Hearing. At any rate, he conceded that he received the Report and doesn't even recall speaking with Franqui about it, perhaps because it was his observation that Mr. Franqui was not low-functioning. He further conceded that this was not his area of expertise; that he knew that there were mental components to voluntariness of a confession, but that he missed the issue.

10. Because of the stipulation no suppression hearing was held at which the mental health issues provided in Dr. Toomer's report were brought before the trial court (Sorondo,J.).

11. Dr.Toomer'stestimony was not presented to the North Miami Beach (instant) trial jury.

12. The denial of suppression in this case was not raised on appeal; therefore this Court has never had an opportunity to rule on its voluntariness after receiving the fullness of the mental health evidence.

13. This Court reversed the sentence of death because of judicial error in failing to recognize and act upon interlocking confessions.

14. At resentencing, before a different trial judge, trial counsel did not renew his suppression request.

15. At the resentencing, the State introduced the statement as evidence against Mr. Franqui. His counsel did not controvert this evidence nor present the surrounding facts of the taking

of the statement, including the mental challenges which Mr. Franqui faced.16

The taking of the statements.

Briefly, the following facts demonstrate the egregiousness of the taking of his statement: On January 18, 1992, police removed Mr. Franqui from his place of pre-trial detention and transported him to their offices where dozens of police and other Task Force officers were assembled on a Saturday. The first questioning regarding the instant case began by the team of Smith and Crawford and was to turn into an approximately twenty hour marathon interrogation. The questioning began from early Saturday morning of the 18th lasted until the wee hours of the morning January 19th, 1992.

16 This becomes crucially important when thinksthrough the logical anomaly: Mr. Franqui had an IQ of sixty and severe mental functioning problems. His statement was found to be voluntary; and no one evaluated the circumstances of the taking of the statement, and how his mental health problems affected any purported "waiver" of the right to remain silent.

These officers were in the presence of an Assistant State Attorney who remained in the main office. They allegedly read Mr. Franqui his "rights." They took as Bible the validity of the waiver; yet they, particularly the ASA knew that mental health challenges can render "waivers" null and void.

At some point, both officers left the building because Mr. Franqui had refused to provide them with a statement, although executing a form purporting to waive his right to counsel. However, follow-up officers Nabut and Nazario began questioning Mr. Franqui immediately about a shooting death which had occurred in Hialeah.

At some point, the Hialeah police allowed him to visit with his wife, Vivian, at which time-- he testified in the Hialeah case--that he asked her to please get his lawyer or have his family get him a lawyer at once. The Saturday marathon interrogation session consisted of dozens of officers and agents and ASA DeGregory. Despite the unusual and unhealthful length of questioning, the police did not make any attempt to contact counsel for the defendant nor to preserve the questioning by tape or other recording. When the police "had what they wanted" in the form of statements they *then and only then* called in a court reporter, attempting to cloak the entire questioning process with a mantle of respectability.

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Mr. Franqui raised the question of memorialization of the entire confession process. He cited to recent cases and changes in police policies now

mandating such recordation. This was found not to be a requirement o f due process nor did it comprise ineffectiveness.

Compounding the problems inherent in this questioning and necessity to present these facts at the resentencing or a second suppression hearing prior to this trial or prior to this resentencing, is the fact that expert testimony existed concerning what constitutes coercive questioning tactics. the State chose not to memoralize any portion of the questioning even though it apparently had a court reporter at the ready when the statements comported with its preferences.

At resentencing, trial counsel failed to present to the penalty phase jury the full contextual circumstances surrounding Mr. Franqui's statements, although it was available in at least three forms: impeachment, explanation, completion.

Mr. Franqui was before a new jury. The State, as its centerpiece of presentation, presented and argued the importance of the statement given by Mr. Franqui, discussed herein.

The death penalty was being sought in the Hialeah shooting and the instant, North Miami Beach, shooting. The two death cases were charged separately but were assigned to the same sitting judge.

The judicial assignment process in place in Dade County denied Mr. Franqui Due Process.

Leonardo Franqui was denied due process of law when the same trial judge presided over two of his death cases. Mr. Franqui argued that he should be permitted an evidentiary presentation. In support thereof, Mr. Franqui, was prepared to offer expert testimony that would support his claim that one jurist finder of fact in the death penalty context--would be unable to divorce facts learned in one context from relevant facts and that this would have a severe, cumulative impact on the court=s ability to make decisions which were untainted by irrelevant and extremely prejudicial information. An evidentiary hearing was denied thereon at the *Huff* hearing.

Facts compelling relief

More or less simultaneously, the State prosecuted four cases against Mr. Franqui, issuing four separate charging documents, each alleging a series of felonies. They did this presumably because the joinder of these four matters into a single case was insupportable.[17] They made the determination that these were separate, unrelated incidents such that Mr. Franqui should be put in jeopardy before four different trial court juries. But this separateness was undone by the judge-selection process in place in Miami-Dade County. Rather than following the random, blind procedures laid out by every court where rule-makers record an assignment procedure, the 11th Judicial Circuit assigned all of Mr. Franqui's cases to a single judge B Judge Sorondo. The record is unclear but apparently one of Mr. Franqui=s alleged co-defendants had a probation revocation matter pending before Judge Sorondo. As a result of that single probation hearing, all of the defendant=s cases and those of his co-defendants came to Judge Sorondo.

Judge Sorondo heard evidence of robbery, shooting, and other crimes and it would have been *human* for him, having been overwhelmed by prior and

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The State is to be heard that the cases here are distinct and should not be tried together. Whether a motion to consolidate should have been filed is an issue, which speaks to whether the defense counsel was ineffective in not so filing. See, for instance, *Smithers v. State*, 826 So. 2d 916 (Fla. 2002) where the defendant=s motion to sever the two murder accusations there. Here the victims were both prostitutes, the facts of the murders were similar and the Court noted that the defendant *confessed to both murders in the same interview*. These facts supported joinder.

> subsequent bad acts evidence to give much less credence to the presentation of the defense: if there is smoke there is fire, or worse yet, Abeen there, done that.@ Two of the matters before Judge SorondoBincluding this case --were First Degree Murder cases where the death penalty was sought and obtained. Significantly, in death cases the judge sits both as the arbiter of the law and as the *finder of fact. The imposition of the sentence of life or death was within his sole discretion.*

This appears to be an issue of first impression. The cases cited by the trial court refer to general principles of power of courts, this Court=s jurisdiction regarding challenges to Administrative Orders. [18]

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> The Florida Constitution, Article. V,' 2(d) provides that the chief judge in each circuit shall be responsible for the administrative supervision of the circuit courts and county courts in his circuit. These administrative supervision duties are implemented by Fla. R. Jud. Admin. 2.050. This administrative responsibility includes exercising administrative supervision over all courts within the judicial circuit in the exercise of judicial powers and over the judges and officers of the courts. Fla. R. Jud. Admin. 2.050(b)(2). As the chief judicial officer of the circuit, the chief judge has the responsibility to develop an administrative plan for the efficient and proper administration of all courts within that circuit. Fla. R. Jud. Admin. 2.050(b)(3). This administrative plan includes an administrative organization capable of effecting the prompt resolution of cases; assignment of judges, other court officers, and executive assistants; control of dockets; regulation and use of courtrooms; and mandatory periodic review of the status of inmates of the county jail. Fla. R. Jud. Admin. 2.050(b)(3).

The Florida Supreme Court has exclusive jurisdiction to review judicial assignments; authority that derives from article V, sections 2(a) and (b) of the

Report by defense-retained Psychologist defining very low IQ of 60 and major mental illness of Mr. Franqui.

Hialeah Suppression hearing at which only issues of physical and mental coercion were litigated with no evidence of mental deficiencies, including the 60 IQ.[19]

Order from Judge Sorondo denying suppression and expression of his frustration at this early stage with defense counsel who insisted that he keep in mind the fact that the defendants are innocent in the instant case.

There is no question but that Mr. Franqui's Hialeah case resulted in a suppression hearing. There is no question but that Mr. Franqui's North Miami Beach statement was not meaningfully questioned at the trial nor was it presented at the appellate level.

Further, there is no question but that trial counsel, faced with the same police officers, the same prosecutor's office, the same judge and the same day of

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Florida Constitution. Article V, Section 2(a) gives that Court authority to adopt rules for the administrative supervision of all court. Mr. Franqui sought an evidentiary hearing on such because a transcript of the evidentiary hearing would assist this Court=s review. Wild v. Dozier, 672 So. 2d 16 (Fla. 1996).

[19] The state of the Record from Mr. Cohen's testimony at the post conviction hearing persuades that the Toomer Report was in his hands *before* the Hialeah Suppression Hearing. At any rate, he conceded that he received the Report and doesn't even recall speaking with Franqui about it, perhaps because it was his observation that Mr. Franqui was not low-functioning. He further conceded that this was not his area of expertise; that he knew that there were mental components to voluntariness of a confession, but that he missed the issue.

questioning, folded his cards and accepted what he believed to be the inevitable—the North Miami confession would be brought before the North Miami trial jury and the resentencing jury.

Interestingly, although the evidence of Mr. Franqui's IQ of 60 and his severe mental illness, apparently was in the hands of defense counsel before the litigation of the Hialeah suppression, he failed to use it. As proof positive that he was ineffective in recognizing the importance of that evidence, he failed to use it at the North Miami Beach suppression opportunity or before the resentencing judge.

This error has been compounded by the post conviction court's acceptance of the premise that relitigation was not called for or at least that Mr. Cohen was not ineffective for not litigating it.

One plus years after the denial of suppression in Hialeah, after the trial and sentencing to death, and in possession of Dr. Toomer's findings of IQ of 60 and major mental illness, counsel did nothing to present this information to the trial court jury nor to the resentencing jury.

The instant trial is totally devoid of any evidence of mental illness or low IQ, yet the "confession" became a feature of the case at the trial and at the resentencing. To bring out the old saw that failure to present this compelling mental health evidence because he had done as good a job as possible and still lost in Hialeah—although he did not present the IQ or mental health evidence—can

hardly be heard to be strategy, although that appears to be the justification contained in the post conviction order.

To permit this most realistically compelling evidence to remain unrebutted by the truth was ineffective assistance in both the trial stage and at the resentecing.

At the time of this resentencing, sentencing counsel had in his possession a report from a respected psychologist which called into question the mental health status—IQ and severe mental illness—which he had not presented at the suppression hearing. It must be once again stressed: *there was no suppression hearing held in this case, the evidence from the losing Hialeah suppression hearing was adopted in its entirety with one apparent miniscule addition.*

Compounding the problems inherent in this questioning and necessity to present these facts at the resentencing or a second suppression hearing prior to this trial or prior to this resentencing, is the fact that expert testimony existed concerning what constitutes coercive questioning tactics. the State chose not to memoralize any portion of the questioning even though it apparently had a court reporter at the ready when the statements comported with its preferences.

The penalty phase jury never heard this testimony. Mr. Franqui should have been permitted to introduce the completeness of the circumstances surrounding hisstatement, as this evidence is not akin to making a "lingering doubt" or "residual doubt" argument" which Florida courts prohibit. Rather, Mr.

Franqui submits that the penalty phase jury should have heard that his statement was extracted as a result of mentally and physically coercive tactics.[20] If for no other reason, the tried and true concept of completeness would dictate that the jury hear this evidence. This is akin to reading only one portion of a document and forbidding the opponent to explain its import by introducing the remainder of the document. Mr. Franqui was offering his statements to the penalty phase jury for purposes of having the jury hear the entire context under which "the alleged confession" arose. This is analogous to the rule of completeness.

He was not offering the statements to use as "residual doubt" or "lingering doubt" but to show the jury the circumstances of his mental health issues, as well as, the egregiousness of the two-day questioning that took place. Had the jury heard these facts, perhaps a different outcome would have taken place.

Additionally, Mr. Franqui wanted to present evidence establishing that his representation was Constitutionally deficient, particularly but not limited to, the total failure of his trial counsel to contest the admission of a statement given by

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1 .Everyone concedes that there was no suppression litigated in the North Miami trial, rather the testimony from the Hialeah suppression hearing was accepted as given in this case. The post-conviction order in great part relies upon the Hialeah testimony. Mr. Franqui urges two errors concerning this confession: (1) The failure to newly litigate pre North Miami Trial ; (2) The failure to litigate the voluntariness of the confession before the trial jury; and (3) The failure to provide relevant contextual information at the resentencing.

Mr. Franqui against him at his trial and at his resentencing[21] in spite of the fact that that counsel had persuasive, definitive evidence of the mental state of Mr. Franqui[22] which impacted on his ability to understand or to waive his right to remain silent which in turn impacted on the voluntariness of the confession.

The post-conviction court improperly concluded that counsel was effective when he failed to introduce the circumstances surrounding Mr. Franqui's statement and relied on the following cases to support his position. *Duest v. State,* 855 So. 2d 33 (Fla. 2003); *Darling v. State*, 808 So. 2d 145 (Fla. 2002); *Waterhouse v. State,* 596 So. 1008 (Fla. 1992). These cases stand for the

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[21] In fact, no evidence was adduced as to the statutory mitigator of the capacity of Mr. Franqui to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the resentencing. (Sentencing hearing, Sept. 18, 1998 Judge Robert N. Scola, at p. 16).

[22] Additionally it appears that the report of Dr. Toomer was misplaced as late as the Spencer Hearing in the 1998 resentencing. At that hearing the Court noted that counsel had indicated that he was intending to present former testimony of one of the doctors. Mr. Cohen replied: "Unfortunately, Judge, the situation is that we have not been able to find a report. But based on our conversations previously, I don't think that there's anything in that report that we would be submitting to the Court." (Spencer hearing, Sept. 10, 1998 Judge Robert N. Scola, at p. 6). Mr. Cohen continued that although he didn't have the report "present now" he had reviewed the report "and the doctor did testify at the sentencing phase of what we refer to as the Hialeah case. So we're well aware of the contents and the findings of the doctor and it's our decision not to present that evidence to the jury and I don't see any reason why that decision would change in presenting any evidence to the Court." Mr. Franqui agreed with Mr. Cohen's decision. *Id*., at 7.

proposition that Florida courts prohibit the making of the "lingering doubt" or the "residual doubt" argument before the jury at a sentencing, thus, the post-conviction court likened this to a "residual doubt" argument, when in fact it was the most powerful evidence the State had against Mr. Franqui and because of a mere procedural rule was forbidden from introduction. This is in spite of the legion of State and US Supreme Court cases which speak to the ability of a convicted death defendant to present virtually any evidence which he believes is mitigating and would inform the jury more fully of him, his nature, and his circumstances.

Hence, the post-conviction court erred when it determined that defense counsel was effective for failing to raise such an issue at resentencing. Accordingly, because defense counsel failed to argue suppression in the trial-in-chief; failed to in any way counter it at this resentencing, this case must be remanded for a new trial, or, in the lesser alternative, for a new penalty phase resentencing.

II. SENTENCING COUNSEL FAILED TO PRODUCE RELEVANT PSYCHOLOGICAL EVIDENCE TO EITHER THE SENTENCING JURY OR THE SENTENCING COURT. IN FACT HE LOST DR. TOOMER'S REPORTANDTHEREFORE COULD NOT DISCUSS IT MEANINGFULLY WITH THE RESENTENCING COURT. THESE FAILURES VIOLATE THE SIXTH AMENDMENT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, INCLUDING EFFECTIVE PREPARATION FOR A DEATH SENTENCING.

Counsel Cohen was an experienced lawyer but had never represented

anyone in a death penalty phase trial.

Here defense counsel had in his possession a report from a licensed Psychologist which included that Mr. Franqui's judgment was poor and he had a limited ability to reason abstractly and discriminatively. Dr. Toomer's report also presented the medical history that Mr. Franqui had been rendered unconscious I n an automobile accident and was wheelchair bound from that accident for seven months' time.

Dr. Toomer continued that objective testing indicated that Mr. Franqui was mentally deficient with a Beta IQ of less than 60, that is worse than approximately 97.8% of the population.

Dr. Toomer also reported that objective testing yielded conclusions that Mr. Franqui's behavior was symptomatic of schizophrenia, paranoid type.

Dr. Toomer also included that Mr. Franqui was easily influenced. He concluded that Mr.Franqui's impaired level of overall functioning, with its attendant poor reality testing, inability to reason abstractly and discriminitively would effect at all levels.

RIII-290 Attachment

The United States Supreme Court as has this Court required that sentencing counsel investigate and prepare for sentencing. Of course, in a death case, every act is magnified.

In *Wiggins v. Smith*, 359 U.S. (2003) the defense was relying on a

Presentence Report as well as a Social Services report, both of which contained background information on Wiggins. The Supreme Court noted that because counsel were aware of some aspects of the defendant's background, that knowledge did not excuse them from further investigation but *rather triggered* an obligation to look further.

As *Wiggins*, coupled with the jurisprudence of this Court, teach, finding out "some" does not absolve counsel's obligation, it increases it.

Here not only did Mr. Cohen do no further investigation, he lost the most important piece of evidence which could and would have convinced the sentencing judge that Mr. Franqui deserved a life rather than a death sentence.

Even early on, this Court's jurisprudence supported the proposition that if substantial mitigating evidence existed and was not presented to the sentencing jury, through error of trial counsel, a new penalty phase sentencing was mandated. See, for instance, *State v. Lara*, 581 So.2d 1288 (Fla.1991).

The issue decided by *Wiggins* is not whether a mitigation case should have been put on but, "[R]ather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself unreasonable. Wiggins.*

The *Wiggins'* Court cited to *Williams v. Taylor*, 529 U.S. 362 (2000) as illustrative. There, also, that "counsel's failure to present voluminous

mitigating evidence at sentencing could not be justified as the tactical decision to focus on Williams' voluntary confession, because counsel had not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background.'" *Id.*, at 413.

Likewise, here the failure to bring to the court the important information available from Dr. Toomer or at least to proffer the report was not a strategy, rather simple ineffectiveness of counsel.

III. THE POST-CONVICTION COURT MISCHARACTIZED AS A BATSON-NEIL CLAIM WHAT WAS IN FACT AN INSTANCE OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND AFTER MISCHARACTERIZING IT, DENIED RELIEF. THE POST CONVICTION COURT BELIEVED THAT TRIAL COUNSEL WAS REQUIRED TO PRESENT RACE NEUTRAL REASONS BEYOND HIS BARE DISLIKE OF JUROR DIAZ. WHEN, UNDER THE FACTS OF THIS CASE, A CUBAN MALE DEFENDANT, MR. FRANQUI, AND A CUBAN MALE JUROR, MR. DIAZ, DID NOT FALL UNDER THE ANALYTICAL UNDERPINNINGS OF BATSON. HENCE, WAS NOT REQUIRED TO GIVE A RACE NEUTRAL REASON FOR HIS PEREMPTORY STRIKE.

At the outset, it most be noted that the post-conviction court's analysis rests on the flawed assumption that the peremptory challenge had to have a "race neutral reason" when applied to Juror Diaz. In fact, there was no need for a

"race-neutral" test because both the Defendant, Mr. Franqui, is Hispanic, and the Juror Diaz, was Hispanic. Hence, the rule as proscribed in the *Batson-Neil* cases, *Batson v. Kentucky*, 476 U.S. 79, 106, S. CT. 1712, 90 L. Ed. 2d 69 (1986); *State v. Neil*, 457 So. 2d 481 (Fla. 1984), is inapplicable to the issue as raised in this case.

Justice Anstead in the dissent in *Franqui I*, correctly concluded that the reasoning announced by The Third District Court of Appeal *Betancourt v. State*, 650 So. 2d 1021 (Fla. 1021) (Fla. 3rd DCA 1995), hones the true issue for this Court to decide: Does a race-neutral reason have to be given by a Defendant when he wishes to strike a juror of his own race, gender and ethnicity. (Hispanic Male). We think not in light of the fact that defense counsel made it clear that "he did not like the man and that coupled with the fact that Mr. Franqui is a Cuban male, and the juror was also Hispanic, should have been sufficient enough of a response for the peremptory to have been granted. This error was not harmless and Mr. Franqui deserves a new trial.

Likewise, Mr. Franqui's counsel, failed to preserve patent error in striking juror Andani. During the trial, Mr. Cohen, defense counsel, moved to strike panel member Andani because she "appeared to be in love with the prosecutor," R-309; however, when the State objected to the challenge, defense counsel declined to respond. Upon a careful review of the record, Mr. Franqui's post-conviction counsel discovered that, this juror had been a victim of auto theft.

Consequently, defense counsel declined to respond to the State's objection, and the juror was seated. This failure rendered trial counsel's performance deficient. As the record abundantly demonstrates, these two juror errors combined to support the necessary prejudice under *Strickland*: "that is, a showing that the actions of trial counsel resulted in the seating of a biased, partial juror." RIII-309. For this reason, this case be remanded for a new trial.

IV.THE ADVERSARIAL JUSTICE SYSTEM PROVIDES FOR STATE ATTORNEY INVESTIGATIVE *SUBPOENAS ONLY WHEN THE STATE IS INVESTIGATING A CRIME*. OTHERWISE, THE DEPOSITION PROCESS ALLOWS BOTH PARTIES TO COMPEL THE PRESENCE OF TRUTHFUL TESTIMONY FROM WITNESSES. IS IT A DENIAL OF MR. FRANQUI=S RIGHTS, FOR THE STATE, UNDER THE GUISE OF A CRIMINAL INVESTIGATORY SUBPOENA, TO CIRCUMVENT THE PROCESS AND GAIN IMPROPER ACCESS TO FORMER TRIAL DEFENSE COUNSEL?

An overarching feature of Mr. Franqui=s Motion for Post-conviction Relief is his argument that Trial Counsel Cohen was ineffective for failing to raise and litigate -- through a motion to suppress -- whether Mr. Franqui=s confession was coerced and whether Mr. Franqui was able to meaningfully waive his *Miranda* rights. Both the State and Mr. Franqui took steps to prepare for an evidentiary hearing on this and related matters. The defense unsuccessfully sought to fully depose police officers, having direct knowledge of the interrogation

procedures and techniques and conditions surrounding Mr. Franqui=s Aconfession.@[23]

Simultaneous to the litigation concerning officer depositions -- but unknown to defense counselB the State sought to interview Trial Counsel Eric Cohen. When Mr. Cohen declined to voluntarily appear for an interview, the State subpoenaed him to compel his cooperation, stating that its authority rested in Florida Statute 27.04 B which empowers the State to subpoena witnesses Ato testify . . . as to any violation of the criminal law.@

Interestingly, trial counsel sought to quash the subpoena, there was an open court hearing, and a ruling denying the request to quash, all without notice to or the presence of post conviction counsel or Mr. Franqui.

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23 Questions were permitted solely on the training of and procedural requirements under which the officers operated.

Although the post conviction court upheld the subpoena, the law commands that it should have been quashed and now demands reversal of the hearing results because of this egregious violation of Mr. Franqui=s rights.[24] In *Able Builders Sanitation v. State*, 368 So.2d 1340 (3rd DCA 1979), a restraint of trade case, the State sought to enforce a subpoena duces tecum pursuant to its powers under section 27.04. On appeal the court quashed the subpoena finding,

> This investigative power, however, may not be exercised in such a way as to defeat the discovery provisions of the Florida Rules of Criminal Procedure. It is therefore clear that under Fla.R.Crim.P 3.220(b)(3) a state attorney must (1) **give reasonable notice to defense counsel as to the time and place a subpoenaed witness is to be examined** under the above statute [27.04] and (2) allow defense counsel to be present and to examine the subpoenaed witness.[1]

In this case, the State declined to give any notice B reasonable or otherwise B to defense counsel of its intention to subpoena Mr. Cohen. On March 3, 2004, *the same week* that the State received a pleading from the undersigned concerning the defense need to depose police officers, the State filed a response to

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24 Counsel asked the trial court to permit him to take an interlocutory appeal on this matter, and to delay the hearing until this Court=s ruling, but the trial court ruled that the hearing would proceed.

1 *Able Builders* 368 So.2d 1342-2 [Emphasis supplied]

Mr. Cohen=s Motion to Quash. At issue was the State=s method of preparation for Mr. Franqui=s 3.851 petition B that is, deposition of some witnesses (defense expert witnesses Attorney Melvin Black and Dr. Christian Meissner) and informal, private interview of others (Trial Counsel Cohen). Obviously, both the State Attorney and undersigned counsel represent *parties* to the 3.851 litigation. But the StateB opposing counsel in this death case B elected not to serve the State=s response to Mr. Cohen=s Motion to Quash on Mr. Franqui=s attorney. Neither did the State notice the undersigned when the hearing was held on March 5, 2005 in open court on the Motion to Quash. It is important to note here that the pleadings, letters and transcript all reference Mr. Franqui=s case number.

The Assistant State Attorney would later offer this casual explanation for his failure inform undersigned counsel of the Cohen litigation: A[we were] surprised to hear that Mr. Cohen who is a well known respectable attorney did not contact Ms. Bonner, that she didn=t know anything about it.@[2] Whereupon the court then accepted blame, AUltimately it is the Court=s fault and take (sic) responsibility for not making sure that you [Attorney Bonner] and if your client was not present or the fact that your client was present, it is not the State=s

[2] RVI-661.

fault ultimately . . . I take full responsibility for not having you notify here (sic) for the hearing.@[3]

The requirements for service of pleadings and notice of hearings are well known and easily understood. Florida Rule of Criminal Procedure, Rule 3.030 delineates duties in this regard with unequivocal clarity --

> Rule 3.030. Service of Pleadings and Papers
>
> (a) Service; When Required. Every pleading subsequent to the initial indictment or information on which a defendant is to be tried unless the court otherwise orders, and every order not entered in open court, e**very written motion unless it is one about which a hearing ex parte is authorized, and every written notice, demand, and similar paper shall be served on *each party*** . . . [emphasis supplied]

The State cannot shift its duty to comply with the requirements of this law to Mr. Cohen, his counsel, the trial court or anyone else. The State produced and litigated motions *ex parte* and elected not to serve opposing counsel -- a party to this case. Among other remedies listed in detail below, Mr. Franqui asks this Court to demand, under oath, an explanation of this serious and harmful breach from the experienced Assistant State Attorney who committed it and further that he disclose or deny any other ex parte State actions in this case.

Prerequisite to a full appreciation the prejudice to the defendant Mr. Franqui, is an understanding of what the State tried and succeeded in doing without regard for case law or statutes proscribing its actions. Because he objected to the State=s request for a private, secret interview, Mr. Cohen refused to appear. The State then served Mr. Cohen with a document purporting to be subpoena.

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[3] RVI-664,65

Through his counsel, Mr. Cohen moved to quash the subpoena, arguing that the State lacked authority to insist on a private interview and pointed out

> The Court=s resolution of Mr. Franqui=s 3.851 petition may determine whether Mr. Franqui will live or die. . . . Mr. Cohen is prepared to do his civic duty and testify, pursuant to a proper subpoena, at a hearing held in open court on Mr. Franqui=s 3.851 motion. But there is something unseemly about the prosecution seeking to compel Mr. Cohen to assist it in preparing its presentation at the 3.851 hearing, the better to argue for Leonardo Franqui=s death.

In its response to Mr. Cohen=s Motion to Quash, the State made several arguments. Each of these arguments undermines, complicates and contradicts other arguments in the State=s terse, six-page pleading. First, it argued that attorney-client privilege ceased to exist because Mr. Franqui argued ineffective assistance of counsel. But on the next page, the State conceded that there might be remaining areas where the privilege still applies stating, ACertainly, if there were any areas that Mr. Cohen believed were still covered by the attorney-client privilege, he could assert that privilege, and the State, if appropriate, would then ask this court to compel the answers.@ The State describes the procedure that would follow in a formal deposition with all parties noticed and present. Mr.

Cohen isn=t the only person who could assert the privilege[4] B Mr. Franqui could have asserted attorney-client privilege as well, depending on the State=s line of questioning, if his counsel had been noticed and present.

Second the State points out that it has authority to compel Mr. Cohen to answer questions in an informal, ex parte interview because Section 27.04, Fla. Stat. (2003) applies to post conviction motions. Section 27.04, Florida Statutes (1997), provides:

> The state attorney shall have summoned all witnesses required on behalf of the state; and he or she is allowed the process of his or her court to summon witnesses from throughout the state to appear before the state attorney in or out of term time at such convenient places in the state attorney's judicial circuit and at such convenient times as may be designated in the summons, **to testify before him or her as to any violation of the criminal law** upon which they may be interrogated, and he or she is empowered to administer oaths to all witnesses summoned to testify by the process of his or her court or who may voluntarily appear before the state attorney to testify as to any violation or violations of the criminal law. [Emphasis supplied]

[4] In fact the privilege does *not* belong to Mr. Cohen at all. It belongs to Mr. Franqui and it is only Mr. Franqui who can waive it.

What is the violation of law being investigated here? The State is emphatic and indignant B Athe homicide of Officer Steven Bauer.@[5] That Mr. Cohen could assist in solving the murder of Officer Bauer is a dubious proposition, one openly questioned by Mr. Cohen=s attorney during the hearing on the subpoena, AThere is a serious suggestion here that the state needs Mr. Cohen=s assistance as a witness to determine who shall be charged with the tragic death of Steven Bauer. The state is entirely confident it knows who killed Steven Bauer[6] . . . They are not asking Mr. Cohen to help them investigate anything. They are ordering Mr. Cohen to come in and help them prepare the defense of a conviction, not an investigation[7] . . . They=re not going to litigate whether the confession was true or false. They=re going to litigate whether . . . Mr. Cohen rendered effective assistance of counsel.@[8]

The trial court also questioned the State=s purpose in requiring Mr. Cohen to submit to a private interrogation. The court asked what would happen if he permitted the subpoena to be issued:

Do you have to try to develop that you are investigating the murder of Steven Bauer and ask questions that are directed towards that?

-- ask about the post conviction B and the content of the post conviction motion that has nothing to do with the violation of law, does it?

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[5] RIII-266
[6] RVI-640
[7] RVI-653
[8] RVI-654

What is contained in [Mr. Franqui=s] post conviction relief, how is that a B investigation of law? (sic)[9]

The State responded with a number of hypothetical scenarios concerning newly discovered evidence and perjury -- not related to the facts of this case. The court ultimately and abruptly ruled in favor of the State=s position based on Alegislative intent and the court=s interpretation that the statute [section 27.04] should be broadly applied. . . .@[10]

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9 RVI-649

10 RVI-654

On the issue of the appropriateness of the subpoena B setting aside for now the lack of service to the defense[11] B the dispositive case is *Morgan v. State*, where the State sought to compel the cooperation of a reporter regarding her source for an article. The State Attorney subpoenaed the reporter under 27.04 requiring her to appear before him. When the reporter refused to answer the State Attorney=s questions about her source, he sought and obtained an order requiring her response. She yet resisted and was jailed for contempt. On appeal the court concluded that the State had no authority under 27.04 to compel the report=s cooperation B explaining that because the interrogation was directed to determine possible violations of grand jury secrecy statute and the violation of the statute does not constitute a crime, Aone cannot be held in contempt for refusing to answer questions propounded by a State Attorney in an unauthorized investigation.@[12]

Here the State protested that it was investigating a murder but failed to articulate in what manner the interrogation of trial counsel would assist in that investigation. Had defense counsel been present, among other things, she would have insisted before the subpoena was upheld that the State clarify its

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[11] And, of course, setting aside the State=s vehement arguments to protect *its counsel DeGregory*, as well.

[12] *Morgan v. State*, 309 So.2d 552, 554 (Fla. App. 1975)

position. The State wanted to have it both ways B arguing that substantive issues of guilt and innocence are still viable and also that there is no attorney-client privilege between Mr. Franqui and his trial counsel because this is a post conviction matter concerning ineffectiveness of counsel. The *Morgan* case is law that should have prevented Mr. Cohen=s interrogation for the patently obvious purpose of assisting the State in preparing its presentation at the 3.851 hearing, the better to argue for Leonardo Franqui=s death.

What relief is there now that the interview has already been conducted in secret without a court reporter or opposing counsel? To understand possible avenues for remedy we should review *Mordenti v. State*, 894 So.2d 161 (Fla. 2004). In *Mordenti*, a murder case, the State sought and obtained the right to question the victim=s husband=s attorney, Trevena, in an ex parte interview. This Court wrote,

> It is troublesome for this Court to conceive why a trial court would have signed an ex parte order compelling Trevena to disclose information to the State, without affording the defense counsel the same opportunity. Certainly, due process and fairness dictate that this information judicially ordered to be revealed to the State should have been provided to both sides.

Id.,at 173

Here the State has argued since the defense and its experts spoke with Mr. Cohen informally in preparation for the 3.851 hearing that it had the same right to do so and that there is no prejudice since whatever Mr. Cohen did or didn=t

say during the interview AAt **NO TIME** (capitals and bold in the original) did Mr. Cohen admit or concede that he was ineffective.@ This is the State=s unreviewable, unverifiable interpretation of Mr. Cohen=s interview statements. And the State=s opinion does not in any way establish whether Mr. Cohen=s statements might be fairly construed (by Mr. Cohen, defense counsel or this Court) as containing such an admission of ineffectiveness.

Does the State genuinely have a *right* to a secret, ex parte interview on these facts? Even within the broad latitude of 27.04 questions have been raised. In *In Re Amendments To The Florida Rules of Criminal Procedure-Conform Rules To 2004 Legislation*, 900 So. 2d 528 (April 2005), the reviewing committee commented on the State Attorney=s practice:

> A view was expressed that some limitation should be placed on the state's rights under sections 27.04 and 32.20, Florida Statutes, which allow the prosecutor to take all depositions unilaterally at any time. It was agreed by all members of the subcommittee that this right should not be curtailed until some specific time after the filing of an indictment, information, or affidavit, because circumstances sometimes require the filing of the charge and a studied marshaling of evidence thereafter. Criticism of the present practice lies in the fact that ***any time up to and during the course of the trial the prosecutor can subpoena any person to the privacy of the prosecutor's office without notice to the defense and there take a statement of such person under oath***. The subcommittee was divided, however, on the method of altering this situation and the end result was that this subcommittee itself should not undertake to change the existing practice, but should make the Supreme Court aware of this apparent imbalance.

We hope this Court will take this opportunity to clarify the rights and limitations of the State and further that it will comment on the specific application

of 27.04 investigative power to privately interrogate trial counsel in preparation for post conviction proceedings where the issue is trial counsel=s performance. The committee reviewing this rule was unable even to imagine an attempt to extend the practice of private interrogations past the trial.

About relief: the exclusionary rule is properly applied where there has been an improper intrusion into a privileged relationship.[13] In *State v. Johnson*, 814 So.2d 390 (Fla. 2002), a case where the court concluded that the State attorney's 27.04 subpoena power could not override the notice requirement of statute governing release of patient medical records, Justice Pariente observed in her concurrence,

Without the threat of the exclusion of evidence, the incentive for a prosecutor to comply with section 395.3025(4)(d) is minimal. The statute does not create any other remedy for a violation of its procedures. The experience of an earlier generation was that alternative remedies to the exclusionary rule were Aworthless and futile.@ [citations omitted]. Prosecutors enjoy absolute immunity from lawsuits for damages in the performance of their quasi-judicial functions of initiating or maintaining a prosecution. [citations omitted]. If, as the state argues, a statutory violation could be erased by a later evidentiary showing of relevance,

[13] See *State v. Caballero*, 510 So.2d 922 (Fla. 4th DCA 1987) (evidence obtained in violation of attorney-client privilege).

then convenience and expediency might overwhelm the privacy interests that the statute seeks to protect.

Id. at 395.

Here, the State Attorney declined to serve or notice defense counsel in a death penalty case where all of the pleadings and the hearing calendaring were styled to reflect the parties to the case from which the tangential witness subpoena issue arose. This is not a matter of Ano harm no foul.@ The defense asks for this Court to fashion a remedy that resembles exclusion as closely as possible.

Claim No.:V: THE POST-CONVICTION COURT ERRED WHEN IT DENIED MR. FRANQUI RELIEF AND DECLARED THAT THE PROSECUTORS CLOSING IMPROPER ARGUMENTS TO THE PENALTY PHASE JURY WERE PROCEDURALLY BARRED.

Relying on *Robinson v. State*, 707 So. 2d 688 (Fla. 1998), the post-conviction court held that the prosecutor's argument during closing—"if the aggravation is always stronger, always more powerful in your hearts and minds, the Judge is going to tell you it's your obligation that you should vote to recommend for death," was procedurally barred. R-311. Further, the court determined that if the error was properly preserved during the jury selection process, the court claimed Mr. Franqui had failed to establish "reasonable probability that, but for the comment, the result of the penalty phase proceeding would have been different." R.-311. Mr. Franqui disagrees.

In *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985), this Court held that in order to vacate a sentence of death the prosecutorial misconduct must be "egregious". In this case, the prosecutor's misconduct, was tantamount to egregious conduct when it instructed the jury as follows: "if the aggravation is always stronger, always more powerful in your hearts and minds,

the Judge is going to tell you it's your obligation that you should vote to recommend for death." R-311. This is not the law in Florida. Accordingly, the jury was misinformed on the law and in essence the prosecutor's misconduct amounted to a rewriting of the jury instructions and a reweighing of the evidence for the jury. Thus, Mr. Franqui was denied due process of law and fairness demands that he be given a new penalty phase sentencing phase proceeding. On this claim Mr. Franqui has met his burden.

> THE INDICTMENT AND PROSECUTION FAIL. THE DEATH PENALTY IS UNCONSTITUTIONAL PER SE AND AS APPLIED BECAUSE THE ELEMENTS WHICH INCREASED THE PUNISHMENT FROM LIFE TO DEATH WERE NOT FOUND BY A JURY. WHEN COUPLED WITH FAULTY CHARGING DOCUMENTS AND FAULTY JURY INSTRUCTIONS. THE FAILURE TO RAISE THESE OBJECTIONS BY COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

Although Mr. Franqui is aware of the state of the law both at the United States Supreme Court and before this Court on the issue of elements of a crime, elements of a charging document, issues upon which the jury must unanimously agree, and the retroactive nature of those decisions, he believes that Florida's process, as applied to him, is Constitutionally defective.

DEFECTIVE INFORMATION

When a citizen is charged with a capital offense in Florida, the Indictment returned against him or her is permitted to be fatally flawed by current decisional

law. The Florida Death Penalty scheme fails to give adequate notice to a charged defendant of (1) the elements of the charge upon which he must defend– specifically whether the accusation is one of felony murder or premeditated murder and (2) whether any circumstances codified as approved statutory aggravating circumstances are alleged.

Of course, such lack of notice fails to permit the defendant to know and consequently to defend against the most important of accusations and the consequent charges to which jeopardy has attached or may attach. . In fact, the most important element of the offense is also omitted from the charging document: whether in fact the death penalty will be sought.

FAILURE TO DISTINGUISH BETWEEN CAPITAL MURDER AND PREMEDITATED MURDER

It is clear that there exists both federal and state decisional authority to the contrary of the proposition that the state errs when it fails to distinguish between the charge of first degree premeditated murder and the charge of first degree felony murder. In spite of this authority, Mr. Franqui would respectfully submit that a change was wrought in allegation and proof presentation after *Apprendi v. New Jersey,* 530, U.S. 466 (2000) and *Ring v. Arizona, Ring v. Arizona,* 536 U.S. 584 (2002).

Under this elements' analysis, the Indictment failed and trial counsel rendered ineffective assistance of counsel because he failed to object to an Indictment which lists no aggravating circumstances for the jury to consider

Although Mr. Franqui concedes that the weight of precedent is not in his favor, he would respectfully suggest that this Court consider the following proposition because it is only through growth and change that new principles of law emerge. We are an Anglo-Saxon system not a Roman one. It denies a defendant due process when the State is permitted to charge a defendant in the disjunctive or a conjunctive, not be required to elect on which theory it is proceeding, nor for the jury to be provided with verdict forms which would assure that there was unanimity in the decision-making process.

In other words, when the issues are not joined properly before the jury, it is impossible to know whether jurors found the defendant guilty of first degree murder or of felony murder. Certainly this distinction is one which should be of interest to the sentencing judge. Here it appears clear that Franqui was not the mastermind and that he did not fire the fatal bullet, hence the non-killer, Franqui, cannot be executed because he was not the moving force or the mastermind of the death. He *did not fire the fatal bullet.*

A charging document as framed here is facially invalid because of duplicity.

Mr. Franqui would respectfully suggest that the crimes of first degree premeditated murder and first degree felony murder are separate and distinct crimes. To charge them in the same count and purportedly in the conjunctive or the disjunctive is to cause the Indictment to fail.

The instant Indictment charged both premeditated and felony murder, the facts as elicited through the deposition and investigative process failed to demonstrate one scintilla of premeditation, yet the combined ineffectiveness of counsel and the unconstitutional application of Florida law permitted the State to proceed on these alternative theories.

In the Florida Death Penalty scheme, it is particularly important that the sentencing court and particularly the Supreme Court of Florida know which theory was "found" to underlay the conviction and the sentence–premeditation or not. The reason for this important distinction in our scheme is that no meaningful proportionality review can be had without this information. If, for instance, this jury had found that a co-defendant premeditated the death of the officer, for instance the actual shooter, and the same jury found that Mr. Franqui did not premeditate but rather did not have the intention to kill nor the time in which to form such an intent, the Supreme Court would and should give great weight to that finding when deciding whether death or life was the appropriate remedy. It cannot on this Record.

Since it is incumbent on the State to establish at least one statutory aggravating factor before it *may* seek the death penalty because no one was on notice during the substantive trial as to which aggravating circumstances it was pursuing, the same universe of facts can double counted,–even without a unanimous verdict--thereby assuring that each and every conviction for felony murder have one automatic aggravating circumstance established: the underlying felony.

Florida decisional law further has failed to recognize the import of *Apprendi* and *Ring* and the unacceptable situation which the current law creates: juries now find aggravating circumstances (or should) as part of their deliberations. Although those issues are temporarily by this Court in the *Botteson* line of cases, [25] including but not limited to *Perez v. State*, 2005 WL 2782589 (Fla. 2005). Mr. Franqui submits that the latter two cases were incorrectly decided.

Florida does not require either unanimity or even findings by the sentencing jury, rather permits the actual "sentencer" –the trial judge–to totally ignore the jury's findings. Their "recommendation" does not comport with the

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[25] *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2000).

Constitutionally mandated principle that all elements of a crime must be found unanimously and by the jury.

The Florida Death Penalty scheme fails to require the trier of fact to reach a unanimous verdict. It is respectfully submitted that this coincides with the fatal flaw in the Florida Death Penalty System whereby the jury is merely an "advisor" to the fact finder. This fact is hammered home, we submit incorrectly, in jury selection, and carried through to argument and final instructions. Each instance is an error.

The Florida Death Penalty scheme and its attendant authorized jury instructions not only permit or encourage the denigration of the role of a jury, but actually take from the jury the role of trier of fact.

VII. Both the Florida Rules of Criminal Procedure and Decisional Law require that an evidentiary hearing be granted on all factual issues. Mr. Franqui was wrongfully denied such hearing on relevant issues.

The trial court utilized the procedures set forth in *State v. Huff*, 622 So. 2d 982, (Fla. 1993), granting hearing on four issues and denying all other issues

presented.[26] These issues will be discussed herein as a denial of evidentiary hearing and/or in the substantive context which they presented to the court.

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(1) Sentencing counsel failed to litigate before the jury the surrounding factors of the taking of the confession in order to challenge its voluntariness; (2) Sentencing counsel failed to raise the Constitutionality valid attacks on the Death Penalty per se and specifically the Death Penalty scheme in Florida where the sentencing jury merely is an Aadvisory@ to a judge who is the ultimate fact finder and decision maker; (3) Counsel failed to make a motion to dismiss based on patent deficiencies in the indictment; (4) In attempting to exercise a peremptory strike against panel member Diaz, Counsel= delay in presenting neural reasons beyond his bare dislike of Diaz resulted in the seating of a juror whose ability to be fair should have been the basis on a sustainable defense preemptory challenge; (5) Counsel failed to preserve patent trial court error in disallowing a defense strike against member Andani; when the State challenged the strike, defense counsel specifically declined to be heard; (6) Counsel failed to litigate his request for individual requested voir dire motion to sequester; despite the fact that the victim was a police officer, counsel made no attempt to show that Miami=s notoriously sensational press had created adverse pretrial publicity nor did he make any showing of how the defendant was prejudiced (7) Counsel failed to preserve patent trial court error in allowing the State to peremptorily challenge panel member Pascual; Pascual, like seated juror Pierre-Louis, expressed initial ambivalence about imposing death on a non-triggerman. Counsel accepted the panel without reserving this meritorious objection; (8) During the penalty phase, counsel failed to object to the prosecutor=s serious misstatement of law on closing-AIf the aggravation is always stronger, always more powerful in your hearts and minds, the Judge is going to tell you it=s your obligation that you should vote to recommend for death.@ (9) Appellate counsel also failed to raise the meritorious issue of prosecutorial misconduct based on this duty-to-recommend-death comment in his briefCthis omission and deense counsel=s failure to preserve the issue of court error were noted by on appeal by the Florida Supreme Court. The trial court erred in denying Leonardo Franqui a *Huff* hearing on evidentiary hearing pursuant to A judicial selection system must be free from even the

appearance of forum shopping. The procedures in place in Dade County at the time of the initial assignment of a jurist to Mr. Franqui=s case denied him due process and lent themselves to the fatal flaw of forum shopping.

There is no published decision which directly, Constitutionally challenges the method of judicial selection even if that method is flawed and may be utilized to the advantage of the State in a judge shopping.[27]

The trial court's order denying 3.851 relief, RI-290 *et se,* concluded that, the claim was barred because it is only this Court which can review such administrative orders, citing to *Wild v. Dozier*, 672 So. 2d 16 (Fla. 1996). The trial court stated that assignments of judges is an internal matter and election of a

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[27] It must be remembered that the trial court forbade the deposition of the assistant state attorney who was on the scene at the time of the questioning directing the task force. It would have been this gentleman who would have known of the benefits to the State of certain charging decisions and the timing thereof.

judge to the position of Circuit Court judge, for instance, vests him or her with jurisdiction. RI-300. Of course it was not jurisdiction which was attacked, rather the due process violation of this particular factual scenario.

The trial court order continued that ruling on suppression motions does not in itself disqualify a judge even though he learns facts in that hearing or in a previous trial, with appropriate citation to case law. RI-301. Of course, it does not speak to the fact that the suppression is directly related to the case which the jurist will try. Here, since the State contrived a marathon questioning session at which three statements were taken, it was easy to fall into the trap that a suppression was over with when it was denied once because the cast of characters was similar or identical. Hence the decisional law cited by the trial court does not speak to a judge hearing evidence of multiple questionings in one suppression hearing. Completely litigating a case before a single judge is understandable; a process which places all defendants before the same judge if one of the defendants has any matter pending is a denial of due process. To say that there is no decisional law is merely to note that no litigant has brought this deficit to the Court=s attention.

Although the Court correctly cites the law, the law which it cites is not related to the request by Mr. Franqui for an evidentiary hearing in order to establish that

the judicial assignment regimen in Dade County was flawed and subject to manipulation.[28]

Two things must be kept in mind: this is a death case so the judge is the finder of fact on the life/death decision; and the Dade County judicial

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[28] Of course because the trial court at the trial and the post-conviction levels denied the request to depose the on-duty prosecutor, and full deposition of the detectives in the post trial matter was forbidden, there can be no specific evidence as to whether the prosecution team took into account the identities of the defendants who were to be charged, then checked their criminal prosecution status, and only then selected the appropriate charging time in order that the matter would fall before the judge of their choosing.

assignment structure provides that all cases of all codefendants, if one is pending against any one of them, be assigned to the judge who is hearing any matter on any of the codefendants. This is not merely a low number rule but also a judicial selection system, which forces multiple joinder.

The Eleventh Judicial Circuit has been operating under the current system for nearly twenty-seven years, with the latest republication of the rule nearly twelve years ago. SRI-83, 86. The relevant provision is:

> 2. In cases wherein multiple defendants are charged, such cases shall be assigned to that Section in which any defendant has pending a previously filed case; and, should more than one of such defendants have pending a previously filed case, the Section of Court wherein the lowest numbered case is pending shall be the Section of Court to which the entire case shall be assigned.

The order follows that, if any defendant is on probation that is appending case. S-RI-83; 86

Let us consider for a moment why Anglo-Saxon law abandoned the requirement that jurors know the facts of a case in order to serve. Of course our system has evolved to the point where if a juror has even tangential knowledge of the facts of a case, he or she is disabled as a juror. The simple reason is that jurors are human and their pre-knowledge and prejudices can impact on a fair trial.

> When jurors charged with finding facts related to one crime are exposed to lengthy, detailed presentations about the accused=s other bad acts, unrelated to the crime at hand, courts agree that principles of unfair prejudice require a new trial. This is invariably true except in this instance B when the accused stands trial in Dade County *in spite of the fact that the* fact finderBthe one juror--is also the judge.

This practice makes as much sense and imparts as much prejudice as trying all of the defendants= cases before the same jury. Unfair prejudice results when one person hears all of the evidence the State has amassed against a single defendant, accused in several unrelated cases. This proposition, supported by logic and jurisprudence, compels courts to reverse convictions in trials tainted by excessive 90.402 other crimes evidence.

Expert testimony will be introduced on what elements are required in a random selection process, whether this system meets those criteria. Expert testimony will be introduced as to the psychological impact on a single decision-maker of being bombarded with allegations from four separate universes of facts. It is respectfully suggested that the cumulative impact on the decision-maker is one of the underpinnings of the policy of random selection of judges, of separate juries for different unrelated crimes, as well as the due

process requirement that no entity be able to pre-select the sitting judge, whether to obtain a pre-determined outcome or not. Questions of the fundamental unfairness of the current Miami-Dade County case assignment system raise issues of fact that require evidentiary presentation and ultimate determination by this Court.

Why does Dade County use a non-random case assignment method? Judicial economy certainly cannot be the reason, particularly when the cases are to be investigated, deposed, and tried separately by separate juries, as were these cases. Nor do the different roles of judge and jury determine this question, particularly where, as here, the court is both the arbiter of legal questions and the finder of fact. Nor do legal training and sophistication form the fulcrum on which this question turns.

Rule 90.402 and other evidence rules protecting the trial process from the taint of unfair prejudice exist in large part as an acknowledgment of and remedy for traits we all share, the limited ability to set aside what we have heard even though we know that it isn't relevant to the instant decision.[29] People, all people, even

[29]By discussing this in the context of evidentiary errors, Mr. Franqui does not in any way minimize what he believes to be the full import of this

sophisticated, legally-trained people such as judges, are susceptible to an insidious algebra that compels people to reach the conclusion *that if fact one is true and fact two is true, then this Aconclusion@ is probably true too.*

The practical effect of the Dade County system is that the judge hears all of the defendant=s bad acts, admissible and inadmissible, regarding different crimes and co-defendants and then must partition evidence and argument relating to one crime when adjudicating a wholly different and separately charged crime. Whatever benefit may exist in Dade County=s fly-paper administrative plan for case assignment, the disadvantage to the system, the judge and the defendant clearly outweigh any benefit.

Undersigned counsel suspects without knowing that the benefit in fly-paper case assignment is the same as the detraction B it speeds up cases because the judge Aknows all about this fellow already. While we correctly rely on our judges= impartiality as a general matter, where non-random assignment creates no advantage but rather an opportunity for unfairness, the system should be abandoned.

Random assignment of judges goes to the heart of the judicial system and is so fundamental to the administration of justice that consideration of

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evidence: the State using this Aevidence@ to establish illegal non-statutory aggravators.

Aprejudice@ should not be utilized as a standard of review. Absent such random assignment, the system=s inherent flaws and human factors prejudicial to the defendant can overwhelm the decision maker. That is what occurred here.

These are some examples of what went wrong. One suppression hearing did the job of two. In one death case, Judge Sorondo took testimony and heard argument on suppression of the defendants= confessions. Later when it came time for a suppression hearing in this separately charged death case, the transcript and rulings from the other death case suppression hearing were wholly adopted in their entirety into this case. Death was imposed in both cases; this situation of hearing-sharing across separately filed cases can seriously and accurately be characterized as killing two birds with one stone.

Among the cases Judge Sorondo heard related to this defendant was a Hialeah death case. A comparison of the emotional language in the Hialeah sentencing order and the sentencing order in this case illustrate the cumulative impact of the successive prosecutions on the judge. In his order on the Hialeah case, Judge Sorondo expressed exasperation with the Athe defense@ for continually reminding the Court of Franqui=s innocence in this case as of the date of the Hialeah sentencing. (RIII- 290,Attachments, at 15) The Court states that it knows little about the facts of this case other than the fact that defendants are

presumed innocent. (RIII- 290,Attachments, at 15) But in fact, by the time Judge Sorondo wrote the Hialeah order, he had held the suppression hearing, which covered a great deal of evidence about the instant case. When comparing the defendant=s Hialeah sentence to a co-defendant=s sentence in that case, the court noted that it was alleged that Franqui Ais the actual alleged killer@ of the officer victim in this case. (RIII- 290,Attachments, at 16).

Of course that is patently wrong. All evidence adduced demonstrated that Mr. Franqui's bullet was not the lethal bullet. Judge Sorondo should have known this because it was he who presided at the suppression hearing and it was at this hearing that evidence was adduced that Mr. Franqui asked his interrogators if his was the fatal bullet and when told that it was not, he cried in happiness. Judge Sorondo discredited this evidence, apparently.

Later, in the sentencing order for this case, Judge Sorondo characterized Franqui as A cold blooded and ruthless assassin,@ finding that testimony of Franqui's tranquil nature bordered Aon being insulting. RIII-290,Attachments, at 9). Here, the prosecution's versions of events is completely credited -- during a clumsy bank robbery Franqui and a codefendant fired at an officer, and the co-defendant=s bullet killed the officer. The question is whether these facts alone brought Judge Sorondo to

his assassin conclusion or whether, as the defendant here maintains, the court was inevitably influenced by an earlier, unrelated trial. If bad luck had brought all of the defendant=s and his co-defendants= cases before one judge, he would bear the result without complaint or cause for complaint. But design not random chance engineered Franqui=s case-assignment lot.

Finally, this question of internal court policy appears to be one of first impression. The facts of this case are distinguishable from the only other case in the Florida that touches on this question -- *Kruckenberg v. Powell*, 422 So. 2d 994 (4th DCA 1982). Kruckenberg tried to compel the court to follow its internal policy of random selection. The Court held that a litigant does not have standing to *enforce* internal court policy. In contrast, Franqui seeks relief from a judgment obtained under an internal court policy that should be *abandoned* as patently unfair.

For legal, practical and protective reasons, random assignment of judges is required by due process. The Miami-Dade judicial assignment- of-cases system is not random , does not comport with due process, is per se prejudicial. This error coupled with the resultant prejudice, requires vacation of the conviction and the sentence. Wherefore, the Defendant challenges the internal case assignment policy of Dade County Courts as unfair as applied to the facts of this case and asks for a new trial on the basis of this inherent, systemic and fundamental unfairness.

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 has been sent via United States mail this 23rd day of December, 2005.
BY:_____
MARY CATHERINE BONNER, ESQ.

CERTIFICATE OF COMPLIANCE

Mr. Franqui's Initial Appellant's Brief is submitted in Times New Roman 14 typeface in compliance with the requirements of this Court.

BY:_____
MARY CATHERINE BONNER, ESQ.