IN THE SUPREME COURT OF THE STATE OF FLORIDA

LEONARDO FRANQUI,

Appellant,

CASE NO. 04,2380

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT LEONARDO FRANQUI'S REPLY BRIEF

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

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STATEMENT OF THE CASE AND THE FACTS

This is Leonardo Franqui's direct appeal from the denial of his motion for post conviction relief. Mr. Franqui, in his Initial Appellant's Brief, set forth in detail the facts and incorporates them by reference herein. He believes that the State has been incomplete in its recitation. Those omissions will be addressed with more particularity in the argument presentation.

SUMMARY OF THE ARGUMENT

This is a case where the State wants it–and has had it--both ways: charge Mr. Franqui with two death penalty cases; select two death-qualified juries; receive two death sentences. On the other hand, it wishes to treat these two prosecutions as 'one big case.' This is merely a continuation of the prejudicial route instigated by the police–guided by senior prosecutor DeGregory. The police questioned Mr. Franqui in a marathon interrogation session and extracted confessions to each of the two death cases and one more prosecution.

This State advantage continued. Because of a low number-type rule, the four accusations–two non-death cases–were merged under the same trial judge, a fact which Mr. Franqui raised as improper and violative of due process, at least as applied in this matter. Mr. Franqui was represented in all four prosecutions by Eric

Cohen. The marathon interrogation session where this statement was taken yielded three statements. Mr. Cohen attacked the taking of the confession in the *other* death case only (Hialeah case) and threw in the towel, in spite of new, important mental health evidence, when the instant case came to the issue of suppression. He admitted under oath that he conducted absolutely no investigation nor legal research and failed to integrate into his preparation for this case the fact that he had evidence that Mr. Franqui was retarded; was mentally ill; and perhaps had mental incapacity which could and did impact on the voluntariness of his purported waiver of his right to remain silent and the fact that Mr. Franqui gave a statement in the coercive twenty-hour marathon questioning where the questioners were switched–perhaps because *they* were tired, but Mr. Franqui was continuously questioned.

The case is riddled with errors such that this conviction and sentence must be reversed. For instance, Mr. Franqui was charged with committing four criminal episodes, all of which occurred over a three month period. No one apparently questioned why he morphed from a law-abiding citizen to one who could be and was convicted of multiple crimes, including two murders in this short period of time. Not even the State has propounded an explanation because it sees no benefit to itself from doing so. Mr. Cohen never asked the question, however, through happenstance, he received a partial answer–one he ignored and which gave him not

a clue about how to direct his work. The explanation became available from expert witness Jethro Toomer who found that this man whose IQ was so low that he was smarter than a mere three percent of the citizenry, suffered from an array of mental health problems, ranging from Mr. Franqui's inability to form clear, coherent or well-organized thoughts; that his cognitive understanding was limited and to some degree faulty; that his memory was spotty and that he had no insight into the motives for his own behavior. Objective testing yielded that Mr. Franqui reflected emotional dysfunction, anxiety. Mr. Franqui had low social abilities, low tolerance, lacked ego controls and exhibited emotional lability and dependent behavior. This was compounded with very low intelligence. SR-V-500-502.

In the face of this evidence, his trial counsel failed to raise the issue of suppression in this case. Instead he relied on the transcript of his failed suppression hearing in the Hialeah Case--*in spite of the fact that the trial court made careful efforts* ***not to hear evidence*** *about this case.*

No suppression hearing was held; no lawyer representing Mr. Franqui raised the taking of the incriminating statement against him in trial and sentencing on direct appeal *to this Court*. This is the first time that this Court has had an opportunity to address this statement.

Compounding this error is the incredible and erroneous belief of the

resentencing court and trial counsel that this Court had denied relief on this very issue. When this Court ordered resentencing, *both the re-sentencing court and appointed trial counsel agreed that the statement made by Mr. Franqui had been litigated so they set it aside at the resentencing–permitting the State to introduce the statement and forbidding Mr. Franqui from presenting psychological evidence of Mr. Franqui's IQ, mental illness, suggestibility, etc.*

As if those errors were not substantial enough to draw into question this conviction and sentencing, the mental health evidence was once again ignored through ineptitude at the resentencing.

Not only was no mental health evidence introduced at the resentencing nor at the trial, there was no request for the statutory mitigator of failure to appreciate the criminality of his conduct or to conform his conduct. Adding insult to injury, the State argues that when trial counsel appeared at the Spencer Hearing, and stated that he "lost" Dr. Toomer's report, that this was *strategy.*

Other egregious irregularities in this case include the post conviction court's reliance on a flawed analysis from the trial court *in another case* where the trial judge found, after a sentencing hearing, that it would not give credence to Dr. Toomer's evidence and expert opinion because there was no objective evidence presented–in other words, Dr. Toomer did not test Mr. Franqui, merely opined.

However, the trial court was wrong, and basing its decision in the post conviction matter on this factually false premise was an error of the post conviction court, which renders its analysis unreliable. This analysis was also based upon the adopted testimony of a hearing at which the suppression court made *absolutely clear in unequivocal terms* that it was not receiving evidence on this case, but only on the Hialeah case. In other words, it received insufficient or no evidence to make a ruling on this case.

The trial court also justified its lack of reliance on Mr. Franqui's legal expert witness by stating that using medical/psychological/psychiatric evidence was not a "hot topic" when the trial and resentencing took place. Decisional law from the United States Supreme Court, this Court and myriad other cases prove that this is inaccurate.

On another issue, one which is a further example of the State completing its agenda of prosecuting these cases as one but asking for multiple punishments, is the way that the State used an *investigative subpoena* to force testimony from a Defense and State Witness, former trial counsel. The State justifies its heavy handed use of a secret, ex parte, unrecorded, coercive investigative subpoena to reach its goal of speaking with its own witness-- trial defense counsel.

The State chose to subpoena trial counsel rather than use discovery methods,

after they successfully argued to limit discovery by the defendant–including objecting to permit State's counsel to sit for deposition.

For reasons which only it knows, the State chose to *sub silentio* subpoena trial counsel to its office. Trial counsel moved to quash the subpoena, but no party nor the trial court notified Mr. Franqui or his counsel. Neither was present when this stranger to the case–a witness, former trial counsel–was litigating whether he had to comply with an investigative subpoena. Why?

What reasons were given for using a compulsory process intended to investigate crime being used to secure a mere discussion with trial counsel? Well, the State complained that it was "unfair" for trial counsel to speak with a defense expert witness and post conviction counsel and not want to talk with them.

Another excuse: maybe they were really "investigating a crime"--as the charges upon which Mr. Franqui was tried ten years before. There was no pretense that any new information was in the State's possession which triggered their desire to "investigate." This was merely a power grab: we are doing this because we can and we are going to either ignore or rationalize the "mere" statutory requirement that the subpoenas can be used only to investigate crime. What we say "might" be a crime is a crime and who can challenge our rationale?

Even if we were to accept the rationalizations as to why this most powerful

weapon of prosecutors in securing witnesses was used, why were Mr. Franqui and his counsel left out of the process?

Well, the former trial counsel did not serve his motion to quash on post conviction counsel. The State would have us believe that the *four separate* counsel representing the State failed to notify post conviction counsel because "the certificate of service" from former trial counsel didn't list post conviction counsel's name.[1] All that establishes is that the former trial counsel; counsel for the State; and the trial court itself, ignored Mr. Franqui.

Mr. Franqui was excluded from this hearing and the "tone" of the State's response would falsely lead a reader to believe that because former trial counsel is a defense lawyer he *must have* notified Mr. Franqui's current counsel.[2] Nothing could be further from the truth. If so, why didn't trial counsel spend another few

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[1] The State asserted in its pleading below "that it had not served its response to the motion to quash on Defendant because [defense counsel] had not served the motion to quash on the Defendant but it *believed* that [defense counsel] had told Defendant of the proceedings and pleadings..." State Brief at 19. The Certificate of Service did not show undersigned counsel and at another point in the argument, the State used the fact that Mr. Cohen had notified undersigned counsel as its justification for not notifying undersigned counsel.

[2] "Defendant *claimed* that he only recently became aware that the State had spoken to, and subpoenaed [trial counsel]." State Brief at 18. Not only is that true, the State relies on *nothing* to support its insinuation.

pennies to serve a copy on post conviction counsel?

This obvious contortion of the law enforcement process cannot be sanctioned.

ARGUMENT[3]

ISSUE I: THE LAW REQUIRES THAT ANY CITIZEN 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. DO THE FACTS SURROUNDING THIS STATEMENT AND ITS FAILURE TO BE MEANINGFULLY CHALLENGED CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL?

Mr. Franqui would like to complete the factual scenario as recited by the

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[3] The remaining issues–II, III (discussed herein in the context of the suppression presentation) IV, VI, VII, and VIII presented by Mr. Franqui in his Initial Appellant's Brief are not addressed herein due to page limitations. However, Mr. Franqui does not in any way abandon them, and, in fact, continues to assert that each issue presented in and of itself justifies reversal.

State. The State quoted at length from this Court's decision in *Franqui v. State*, 699 So. 2d 1332 (1997), repeating a literally true statement but one which is false in its substance. The recitation could leave this Court with the false impression that Defendant Gonzalez did not kill Officer Bauer because the State brief initially repeated that Gonzalez, while placing blame on Mr. Franqui, confessed that he had shot at Officer Bauer but that he shot low and *believed he had only wounded* Mr. Bauer in the leg. State Brief at 5. The State *does not inform this Court* that in fact Gonzalez was the killer and that Mr. Franqui's bullet wounded the officer but was not fatal (Hialeah suppression at 115) until three pages down, when the State obliquely acknowledged the truth: Mr. Franqui did not fire the fatal bullet and the sentencing court ignored this fact as mitigation. State Brief at 8. Mr. Franqui did not kill Officer Bauer–unequivocal, established fact.

Although Mr. Franqui suffered through a twenty-hour, marathon questioning session and refused to make a formal statement until after twelve hours of non-stop questioning, counsel in this case absolutely and completely failed to litigate the statement relevant to this case. He did stipulate to the irrelevant testimony from the Hialeah suppression hearing and add a few notes from the officer who overheard parts of the meeting between Mr. Franqui and his wife.

The State's Brief reduced this entire travesty to the overview given by this

Court in its opinion that, being confronted by codefendants' statements, he confessed. State Brief at 5. This was much more complex factually than is acknowledged by the State.

The State accurately portrays the issues argued in the Hialeah suppression hearing–physical violence, undue promised reward, Mr. Franqui's expression of request for a lawyer. It of course does not mention that the trial court announced that it was absolutely not hearing evidence on this case. HS 63, 35-36. It does not point out that there were *absolutely no details about this case testified to at the Hialeah Suppression Hearing*. In point of fact, testimony was that Mr. Franqui asked for and received confirmation that he had not killed Officer Bauer and reiterated that that had never been his intention. Hence, all testimony about the contents of the statement in the Bauer case made in the trial or resentencing hearing were *never subject to a suppression hearing*.

However, the State may misapprehend Mr. Franqui's position: Mr. Cohen conducted no evidentiary hearing in this case and confessed to missing the importance of the mental health evidence which he received. The State admits that Mr. Cohen had Dr. Toomer's mental health report at least as early as sentencing in the Hialeah case and certainly before the instant trial, sentencing, and resentencing in this matter. It further concedes:

That report made the following observations about Defendant:

— Judgment is poor and ability to reason abstractly and discriminatively is limited.

— Cognitive functioning appears limited and to some degree, faulty.

— He has little insight into the motives for h is [sic] behavior and overall reasoning appears concrete.

— His response to objective testing are characteristic of emotional dysfunction, anxiety and depression, reflective of insufficient emotional and impulse control.

— His level of intellectual functioning is in the mentally deficient range with a Beta IQ of less than 60. This is reflective of very serious deficits in overall psychological functioning and cognitive processing skills. A person scoring at this level would have deficits that would combine to severely impair his ability to engage in higher order thinking, i.e., project consequences, reason abstractly and discriminatively and engage in long—range planning or to interpret his environment and orient his behavior appropriately.

This report, Defendant contends, should have been presented to Judge Sorondo in litigating the motion to suppress, and should have been supplemented with additional mental health experts in seeking to establish the mental inability of Defendant to understand and waive *Miranda* and thus, the involuntary nature of Defendant's confession.

State Brief at 41-42

The State takes as substantial and true only those statements which it wishes. For instance, it states: "Defendant testified at the evidentiary hearing that he

understood those [Miranda] rights when they were read to him. (H.T. 361-62)". State Brief at 45. It can be only one way: either Mr. Franqui was accurate in his perceptions and his testimony which included that his confession had been physically coerced and purchased with an offer of minimal jail time, or Mr. Franqui was not accurate in his perceptions and his testimony. The State would have this Court believe that this mentally challenged person, who they state was not telling the truth about the beatings, *understood his Miranda rights* and the full parameters and import of a waiver of those rights. To him the word "waived" had similar import to the word "rundcl"–a word that the police wanted him to say and would do anything to get him to say/sign. Yet the post conviction court relied on these words, without factoring in the medical expertise, to find that trial counsel was effective when he ignored the evidence before him.

The post conviction court upheld what it perceived as the effectiveness of Mr. Cohen's representation, stating that the defense was "married" to the Hialeah testimony of Mr. Franqui. This presumption ignores the importance of medical evidence and objective testing. No, with new information and perhaps a second evaluation, effective counsel could have *addressed the trial court* with this new evidence.

The State makes much of the fact that the word processor of the trial counsel

was in working order. Yes, a motion to suppress was filed, but it was not until the words of the trial counsel put into context the "motion" that the issue can be understood.[4]

Mr. Cohen admitted under oath that he never even considered using mental health evidence to persuade the trial court that the motion to suppress should be granted. Mr. Cohen acknowledged that he did not *think* about Defendant' s mental health in terms of the suppression issue. (E.H. 32).

If he never thought of the concept of mental ability impacting on intelligent, knowing, voluntary waiver of a known (understood) right, how could he have adequately prepared Mr. Franqui for his Hialeah testimony? If he thought that there was enough evidence to ask the Court to permit court-paid Dr. Toomer to evaluate Mr. Franqui, why did he not check with Dr. Toomer in preparation for the Suppression hearing, particularly in light of the fact that Dr. Toomer had already evaluated Mr. Franqui but had not as yet generated a written report? The simple

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[4] The State makes much of this form motion which, by the admission of trial counsel was a hollow gesture indeed. "A separate hearing was held before Judge Sorondo on that motion to suppress, although trial counsel did stipulate to the admission of the testimony from the previous Hialeah suppression hearing. (T. 100—05). The defendant presented additional testimony in the form of Detective Nabut, to question him further about the conversation he allegedly overheard between Defendant and his wife, Vivian Gonzalez. (T. 849-60). Judge Sorondo denied the motion to suppress in this case as well."

answer is that he did not think of it, but in this case his failure not to think of it may cost Mr. Franqui his life.

Yet the post conviction court once again, like the State, seemed to believe that this Hialeah testimony, uninformed as it was by the true mental state of the defendant, coupled with the misplacement of trial counsel's own perceptions of "mental health"–prejudgments clung to in spite of expert medical evidence to the contrary–somehow justified trial counsel's failure to investigate and litigate the totality of the case.

How can the Hialeah Suppression Hearing be used to fully explore the facts of the Bauer case? This presumption and argument fly in the face of Judge Sorondo's comments, when hearing the Hialeah suppression motion, clearly stated that he was not receiving evidence on the instant confession *at all*. HS 63.

Are we to believe that all parties and now the post trial court believes that no fact could have changed Judge Sorondo's mind? If that subtext were to be true, Mr. Franqui's complaint regarding assignment of all cases for all defendants to one judge takes on new force, effect, and itself establishes prejudice.

The post conviction court also relied on the erroneous statement made *in the separate Hialeah case* ***at the Hialeah sentencing***, that Judge Sorondo was

justified because he *did not* understand the evidence and believed that Dr. Toomer had not verified the validity of mental health by use of objective testing tests.[5] This results once again in a lawyer/judge (1) being wrong and (2) acting on his own "medical" opinion.[6] There were verifiable tests administered to Mr. Franqui which were the basis for the mental diagnoses. The post conviction court then justified Mr. Cohen's ineffectiveness based on the flawed logic of the prior court.

For this reason alone, the post conviction court's Order must be reversed: the post conviction court believed that (1) Dr. Toomer's opinions were unsupported when in fact they were supported by objective testing and (2) the post conviction court's belief that admissibility of expert testimony regarding a defendant's competency to waive *Miranda,"* while a relatively hot topic in today' s legal circles, garnered relatively little notice in 1994".

The post conviction court cited to pages 87-88 of the evidentiary hearing

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Once again, the State's tactic of putting the cases together for questioning; separating them for prosecution and seeking separate sentences; and using evidence from Hialeah in the Bauer case, has created this chaos where only the State benefits. Now we are to look to the Hialeah case for justification of denial of suppression and for that court's take on the viability of Dr. Toomer's testing and expertise.

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Trial counsel stated that one of the reasons that he gave no attention to Dr. Toomer's Report was that he, himself, did not perceive any mental disabilities of Mr. Franqui. Lawyers substituting for doctors; ineffectiveness and medical malpractice.

while Mr. Black was testifying as a legal expert witness. However, a careful reading of those portions of the transcript reveals that Mr. Black was speaking of the expert testimony *on coercion of confessions* while he made clear that mental health evidence to establish voluntariness of a confession was in plentiful use. Although intelligence, mental health, competency, physical health, etc. were not in themselves entirely dispositive in all cases, it is clear that Florida and Federal law at this time was replete with cases which addressed, singly and in conjunction with other factors, mental health and intelligence in relationship to voluntariness of confessions.[7]

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[7] As early as 1989, this Court was extensively citing to caselaw standing for the proposition that mental impairments are a factor in the voluntariness of confessions. There can be no argument that this was "novel" four to nine years earlier, but rather was an integral component of suppression litigation. See, for instance, *Thompson v. State* 548 So.2d 198,203. (1989):

> A number of courts have considered this problem in analogous situations in which the *Miranda* warnings may have been misunderstood by a mentally retarded or otherwise impaired defendant. The United States Supreme Court, for instance, has held that permanent or temporary mental subnormality is a factor that must be considered in the totality of the circumstances to determine the voluntariness of a confession. *Sims v. Georgia*, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967) (confession suppressed when defendant who was illiterate, with third-grade education and "decidedly limited" intellectual abilities, had been interrogated for eight hours). *Accord Townsend v. Sain*, 372 U.S.

293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) (pre-*Miranda* case in which confession was suppressed when drug-addicted defendant had been administered a medication that had properties of "truth serum"). This is in keeping with the "totality of the circumstances" test used in cases involving the alleged waiver of constitutional rights. *North Carolina v. Butler,* 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *Henry v. Dees,* 658 F.2d 406 (5th Cir.1981).

It appears that a majority of American jurisdictions expressly adhere to the totality of the circumstances approach. *See* Annotation, *Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession,* 8 A.L.R.4th 16, 24-28 (1981) & 3-4 (Supp.1988) (citing cases). This includes Florida. *Kight v. State*, 512 So.2d 922 (Fla.1987), *cert. denied,* 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); *Ross; Myles v. State,* 399 So.2d 481 (Fla. 3d DCA 1981).

The question of voluntariness is, in the first instance, a question to be determined by state law, subject to the minimum requirements of the fourteenth amendment's due process clause. *Jackson v. Denno*, 378 U.S. 368, 393, 84 S.Ct. 1774, 1789, 12 L.Ed.2d 908 (1964). While the United States Supreme Court has not explicitly provided a standard for determining voluntariness, *see* Martens, *The Standard of Proof for Preliminary Questions of Fact under the Fourth and Fifth Amendments,* 30 Ariz.L.Rev. 119, 119 (1988), other federal courts have held that

[i]n considering the voluntariness of a confession, this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will.

Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir.1980), *cert. denied,* 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). One of the central concerns in this inquiry is "a mentally deficient accused's vulnerability to suggestion." *Henry,* 658 F.2d at 409.

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Mr. Cohen made some startling admissions under oath from the witness stand which should have led to the inescapable conclusion that he was ineffective and that Mr. Franqui should not die for this ineffectiveness. Mr. Cohen admitted that he had never considered mental health issues in terms of suppression in spite of the fact that he and co-counsel 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 even interview Dr.

> Document2zzF121989112809Document2zzF131989112809 We agree with this assessment. Florida case law holds that mental weakness of the accused is a factor in the determination, and that the courts also should consider comprehension of the rights described to him, ... a full awareness of the nature of the rights being abandoned and the consequences of the abandonment.
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> *Kight,* 512 So.2d at 926. *See* art. I, § 9, Fla. Const. To this end, the burden is on the state to show by a preponderance of the evidence that the confession was freely and voluntarily given and that the rights of the accused were knowingly and intelligently waived.[FN5] *Henry,* 658 F.2d at 409; *Ross,* 386 So.2d at 1194. *Accord Doerr v. State,* 383 So.2d 905 (Fla.1980); *Fields v. State,*

Toomer before the suppression hearing as that was a mitigation issue. SRV-497.

Mr. Cohen was presented with the evaluation report of Dr. Toomer at the post conviction hearing. That Report was dated March 2, 1993. Mr. Cohen 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-I 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

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402 So.2d 46 (Fla. 1st DCA 1981).

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-517. Mr. Cohen believed that this information did not speak to voluntariness of a confession due to mental defect, but only voluntariness in the context of physical abuse and promises of leniency.

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 trial; the North Miami suppression hearing (not held); 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. It was this short sighted view of these prosecutions which was occasioned by the State's manner of charging and conducting the prosecutions. When the same judge is assigned to all four cases and when the cast of characters, including the police officers who extracted the

confessions and prosecutor De Gregory who directed them on that fateful Saturday, remains substantially the same, shortcuts apparently become the norm– shortcut references to this suppression hearing when it is really just the Hialeah hearing adopted virtually in total; shortcut references to Dr. Toomer as if he testified in this case; shortcut references by trial counsel and resentencing court that the confession here had been litigated fully and upheld by this Court when it had not been.[8]

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-5O7-5O8.

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

[8] It speaks to the state of the confusion that appellate counsel failed to apparently even recognize that a "suppression hearing" was at issue. That does not absolve him of his own ineffectiveness but it speaks volumes about the State's success in confusing and compounding that confusion by its choices, coupled with the judicial assignment system in place.

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-5O8; 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. SR-V- 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. SR-V-511.

The State cites this Court to *Oregon v. Guzek*, 126 S.Ct. 1226 (2006), in which the Supreme Court analyzed a case in which it determined that introduction of an additional alibi witness at the fourth resentencing could be defended against a *per se* Eighth Amendment challenge. The thrust of the opinion was that the lower

court misinterpreted prior caselaw.

The Oregon court believed that the sentencing court must hear all evidence presented by the defendant, even this new alibi evidence which it classified under mitigating evidence, citing to *Lockett v. Ohio,* 438 U.S. 586, 604, (1978) and *Eddings v. Oklahoma,* 455 U.S. 104 (1982). The *Guzek* court noted that the Oregon court interpreted this Court's holding in *Green v. Georgia*, 442 U.S. 95 (1979) *(per curiam),* as including, within that federal admissibility requirement, evidence which, like the proffered alibi testimony, tends to show that the defendant did not commit the crime for which he has been convicted. Thus, it held that state law demanded "'admissibility' solely for a federal reason." *Guzek* at 1230.

The Court cited to *Franklin v. Lynaugh,* 487 U.S. 164, (1988) (plurality opinion), for the proposition that the Eighth Amendment did not require presentation of residual doubt evidence at sentencing.

In this case, the Court specifically noted that it faced once again the residual doubt *issue but it did not resolve* it. "We need not resolve whether such a right exists, for, even if it does, it could not extend so far as to provide this defendant with a right to introduce the evidence at issue. See, *e.g.*, *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 461-462, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945)." *Id.* It continued, "The Eighth Amendment insists upon " 'reliability

in the determination that death is the appropriate punishment in a specific case.' " *Penry v. Lynaugh*, 492 U.S. 302, 328 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion). The Eighth Amendment also insists that a sentencing jury be able "to consider and give effect to mitigating evidence" about the defendant's "character or record or the circumstances of the offense." *Penry, supra*, at 327-328. *Id.*

Hence, it is clear that the Supreme Court has left open the issue of residual doubt while also clarifying that if the state makes rational rules regarding this and other situations, it will respect those rules, if not automatically adopt them.http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1989094482*http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1989094482*

WHEREFORE, the trial court erred when it denied relief for Mr. Franqui based on ineffectiveness of counsel.

V. THE ADVERSARIAL JUSTICE SYSTEM PROVIDES FOR STATE ATTORNEY INVESTIGATIVE SUBPOENAS TO BE USED 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?[9]

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[9] As an initial concern, the State has posited that *because* depositions are not *automatically permitted* in post conviction settings, they apparently *could not* use the deposition process. However, it is clear that they used the process to depose the defense's two expert witnesses, so that argument is totally without merit. The State struggles to convince this Court not that depositions require leave of the trial court, but *that it had a legitimate law enforcement investigative purpose in interrogating a*

defense trial counsel ***about the crime for which the defendant stood convicted.***

The State admits that when it learned that Defendant's trial counsel, Eric Cohen, had voluntarily met with a defense expert, it approached Mr. Cohen who refused to meet with the State voluntarily. (PCR. 241) It further admits that because of this refusal, it did not make the logical choice of a deposition at which Mr. Franqui's counsel could be present, as it had done with the two defense expert witnesses, rather it served Mr. Cohen with an investigative subpoena.

The State has yet to explain *why* it chose interrogation over deposition. Why did it choose to proceed under the guise of an "investigation" *into Mr. Franqui's ten year old crime.* It does not forthrightly answer this question because it cannot offer a logically justifiable reason. However, it does throw many red herrings into the mix rather than analyze whether the subpoena was pretextual and abusive. The post conviction court posed the direct question of whether the State had to develop that it was investigating the murder of Steven Bauer..."what is contained in [Mr.Franqui's] motion, how is that an investigation of law?" Appellant's Initial Brief at 73 (Emailed brief, Page 66). See, *Reed. v. State*, 640 So.2d 1094,1097 (Fla. 1994). Once again, it loses a golden opportunity to explain *what legitimate law*

enforcement purpose led to this subpoena. Mr. Franqui's privilege lay unprotected. Only his former trial counsel, who had been attacked in the motion to vacate, was left in the room with *any* motive to protect Mr. Franqui. Mr. Franqui was not present at the questioning nor was his counsel. It is *Mr. Franqui's privilege to waive or not.* Since the State recognizes that the waiver presumed by the raising of certain issues in the motion to vacate is limited, it yet persists that no one should have been present to speak for Mr. Franqui. Mr. Franqui can never know the scope of the questioning because the State chose to perform its interrogation in secret. Mr. Franqui had been represented by Mr. Cohen for at least the four cases involved in 1991-1992, and there is a suggestion that he had represented Mr. Franqui prior to that time. Without Mr. Franqui present, how can he assert that a question is outside of the attorney-client waiver? He cannot. The State next asserts that Mr. Cohen could have asserted the privilege at any time in the interrogation. It is not his privilege, it belongs only to Mr. Franqui. It was he who was denied the opportunity to assert it.

The State falls back on the absurd proposition that Mr. Franqui did not demonstrate how a deposition would have assisted him. State Brief at 87. He cannot cite to specific instances because *of the actions of the State who chose not to notice defendant or counsel for its interrogation.* It is not a question of benefit

but rather a question of Constitutional dimensions where the State abused its power just because it could.

The State then mischaracterizes Mr. Franqui's position as arguing a limitation of the State's ability to meet with any witnesses. In point of fact this was raised in the hearing on this matter and Mr. Franqui conceded readily that the State and the Defense had a right to speak to anyone they wished privately or publicly, it was the compelled secret interrogation and the misuse of the State's subpoena power which he complained of.

The State states that it intended to present Mr. Cohen "as its own fact witness." State Brief at 86. It appeared, in spite of Mr. Cohen's being listed on the State witness list, that the State had to subpoena him. State Brief at 86. It then justifies this March subpoena by a statement made by Mr. Franqui's counsel five months later in August that Mr. Franqui might not call Mr. Cohen as a witness. Unless the State was prescient, it cannot use this particular excuse.

Of course it is proper for a party to speak with a witness. The difference which escaped the State is that it is not just a party, but a party with a large weapon–a state attorney investigative subpoena which was being misused. Apparently, it created or perceived a sudden "need" to investigate Mr. Franqui's 1992 crime.

Although the State cited to *Barnes v. State*, 50 So.2d 157 (Fla. 1952), it failed to highlight the words of this Court:

> Therefore, it is the State Attorney's duty, as far as humanly possible, to examine, under oath, any witnesses whom he has good reason to belief *may possess facts concerning the violation of the criminal laws, and which would be brought to trial.*

Id., at 159. (Emphasis supplied).

Equally the citation to *Collier v. Baker*, 20 So.2d 652 (Fla. 1945), misses Mr. Franqui's point. Collier argued that she couldn't be subpoenaed because an Indictment had already been returned and she was a defense witness. Mr. Franqui is not attacking the power to investigate post-indictment; merely that it was not investigating a crime here, merely harassing a defense witness and hiding the exchange from Mr. Franqui. *Collier* found only one limitation on the State's power: "the subject matter of the interrogation be confined to the question of the violation of any criminal law." *Id, at 428.* Here there was no violation of law being examined.

The State does not address the violation of Rule 3.030 when the "Cohen" papers were not served on Mr. Franqui, a requirement in all except *ex parte* motions to be served on each party. Appellant's Initial Brief at 69 (Page 62 of Emailed brief).

Mr. Franqui's discussion of *Mordenti v. State*, 894 So.2d 161 (Fla. 2004) Appellant's Initial Brief at 75-76 (Page 68 Emailed brief) and of *State v. Johnson*, 814 So.2d 390 (Fla. 2002) have not been controverted by the State. Appellant's Initial Brief at 77-78 (Page 70 Emailed brief).

Next we examine some of the factual assertions of the State.

A. Was or was not Mr. Franqui present at the "Cohen Hearing"?

The State has told this Court that the lower court reviewed court and jail records that indicated that Defendant was personally present during the hearing on the motion to quash. (PCR—SR. 652—53). That is patently untrue. The courtroom personnel advised the Court that the "jail card" was not a true reflection of whether Mr. Franqui was present. In fact, the Court had no recollection, the records did not reflect that Mr. Franqui was present in court, and the trial court recognized that, even if he were there, unrepresented, it was error.

The State filed certain pleadings which it references mere memorializations of what it stated below --not proof--to ask this Court to believe that Mr. Franqui was present at the Cohen hearing. Its counsel was surprised that a respectable lawyer such as Mr. Cohen had not notified current counsel for Mr. Franqui. State's counsel had a "recollection that he [Mr. Franqui] was there, we walked in and I said, look, Franqui is there, to ourselves–among ourselves." It

omits other pertinent references in the transcript of August 20, 2004. RVI.

It fails to cite this Court to post conviction counsel's statement to the trial court that trial counsel and Mr. Franqui both stated that Mr. Franqui was not present. RVI-649. The trial court had no recollection; the jail card reflected that Mr. Franqui–who was not present as yet that day–was not in custody. RVI-650. The jail card, examined by the trial court, yielded that March 4 and March 5 were shown on the card. The cards do not show whether a prisoner is actually brought before the court. RVI-653. The trial court acknowledged that, though it had no present recollection of Mr. Franqui's presence or absence, it *was clear that his counsel was not there* to make argument, but quickly framed the issue as one of whether it had been a good hearing. The trial court noted that, in its opinion, it was a fair and full litigation session. RVI-678.

_____ Rather than address Mr. Franqui's presence or absence, the trial court recollected that there was a full hearing in open court where the State and Mr. Cohen with his counsel were all present. RVI-641. Mr. Cohen did not represent Mr. Franqui. The trial court was justifying why it did what it did and why it did it without explanation from the State as to the investigative goal of the interrogation.

B. If it cannot be established that this subpoena was issued for a proper investigative purpose, perhaps, the Court posits, after his unsuccessful motion to

quash, trial counsel "voluntarily" met with the State.

In its continuing justification for permitting the subpoena, the trial court tried to frame scenarios where the actions were acceptable. The trial court, in addressing post conviction counsel, asked why Mr. Franqui believed that the compelled statement was involuntary. RVI-644 Of course, it did not factor into this question the fact that trial counsel fought the subpoena and was ordered by the trial court to submit to the interrogation. The State followed by asking, in essence, whether the State could speak with anyone who voluntarily assented. RVI-654 This is far afield from whether the State had the power under the statute to issue the subpoena or whether it was improper. The only evidence we have of Mr. Cohen's "assent" is that he hired a lawyer and fought the subpoena.

C. What is the "real" reason why Mr. Cohen resisted the investigative subpoena?

The State produced no evidence from Mr. Cohen, rather it "surmised" what must have been going on in his mind. This is in spite of his written motion and the arguments which were had to quash the subpoena.

The State purported to ascribe a motive to why Mr. Cohen resisted the investigative subpoena: "I believe to cover himself with the Bar...." RVI-658 He certainly did not present this fact to the trial court when he hired a lawyer and

fought the subpoena.

Mr. Franqui would suggest that the "real" reason for the use of this tactic was to assure itself that there would be no interlocutory appeal to this Court.

D. Is "fairness to the State" a prime component of criminal law?

No. The Constitution was written to keep the government–state and federal–off of the backs of citizens. It is a restrictive document, not a document intended to grant power.

The State argued that it was only fair to the State to be able to issue an investigative subpoena to its own witness because he had spoken with expert legal witness Black and Mr. Franqui's counsel. In other words, it can pre-try any witness by pretending to investigate a crime. Again, the issue of why a deposition–with appropriate notice–was not scheduled. Power. They took two other depositions.

E. Are there conceivable instances where actual investigation could be undertaken even at the post-conviction stage?

Of course there are conceivable instances, but just because there is a conceivable instance, and this case does not fall into that category, the use of the investigative subpoena is not justifiable.

The State attempted another justification in the Cohen hearing: maybe

they could investigate perjury. RVI-666 Surely they could investigate perjury but they weren't, they were just spinning yarns to attempt to justify their actions. They refused to clearly answer the trial court's question as to what they were investigating. It is hoped that this Court will receive the answer.

The clear position of the State here is that the case was over, that the detectives had been deposed and had testified before, and that they should be protected from being subjected to deposition. Free ranging, unmonitored interrogation for Mr. Cohen, carefully circumscribed questions for the officers. Is the investigation done or not?

E. If the State can use an "investigative subpoena" to secure an intentionally-unrecorded interrogation, why is one of the two participants in this interrogation sacrosanct from deposition subpoena?

There were only two people in the room when the debriefing of Mr. Cohen took place: Mr. Cohen and experienced prosecutor Laeser. No notes exist; no transcript exists; no recording exists. Because it was the State who set the ground rules for the interrogation, it bears responsibility for failing to preserve the conversation.

Mr. Franqui asked for leave to depose both Mr. Cohen and Prosecutor Laeser on the same day to ascertain the facts recollected by each from

their debriefing. RVI-676. The trial court agreed that Mr. Cohen could be deposed but, without reason, refused to permit deposition of the lead prosecutor. RVI-681.

CONCLUSION

Clear proof of the issues and argument presented by Mr. Franqui in this Reply Brief as well as in his Initial Appellant's Brief, compel reversal of the post conviction court's Order denying relief and remand for a new trial; in the lesser alternative reversal of the sentence of death and remand for a new resentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was sent this ___ day of August, 2006, to Sandra S. Jaggard, Assistant Attorney General, Office of the Attorney General, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, Florida, 33131.

By:_____
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CERTIFICATION OF FONT REQUIREMENTS

The undersigned counsel certifies that the type used in this brief is 14 point Times New Roman.

By:_____
MARY CATHERINE BONNER, ESQ.