IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-830

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Mr. Franqui, along with co-defendants Pablo San Martin and Pablo Abreu, was charged by Indictment issued in January, 1992, with one count of first-degree murder and related offenses arising from the death of Raul Lopez in a shooting occurring in Miami, Florida, on December 6, 1991. Along with co-defendant Pablo San Martin, Mr. Franqui proceeded to trial in September, 1993, and the jury returned guilty verdicts for one count of first-degree murder, two counts of attempted first-degree murder, attempted robbery, two counts of grand theft, and unlawful possession of a firearm while engaged in a criminal offense. At a joint penalty phase, the jury returned a death recommendation for the murder of Raul Lopez by a vote of 9-3.

On November 4, 1993, the trial court imposed the death penalty on Count I, consecutive terms of life imprisonment as to Counts II and III, a consecutive 15 years term of imprisonment on Count IV, a consecutive 5 year term of imprisonment on Counts V and VI, and a 15 year consecutive term of imprisonment on Count VII.

On direct appeal, this Court affirmed Mr. Franqui's convictions and sentences, with the exception of the convictions for attempted first-degree murder.

Franqui v. State, 699 So. 2d 1312 (Fla. 1997), *cert. denied*, 118 S. Ct. 1337 (1998), *and* 118 S.Ct. 1582 (1998).[1]

[1]Both Mr. Franqui and the State sought certiorari review of this Court's disposition on direct appeal.

On January 15, 1999, Mr. Franqui, through registry-appointed counsel, filed a verified motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850 (PCR37-129).[2] A verified amended motion was filed on April 18, 2000 (PCR136-179), and alleged various claims for relief: (1) the cumulative impact of trial counsel's failure to object to prosecution comments and closing argument at both the guilt and penalty phases (PCR138-151); (2) failure to call experts at the penalty phase and violations of *Ake v. Oklahoma* at both the guilt and penalty phases (PCR151-152); (3) the failure to move for a change of venue (PCR152-156); (4) the deprivation of an adequate adversarial testing at the penalty phase due to various failings by defense counsel (PCR156-160); (5) the failure to call Mr. Franqui's wife at the motion to suppress and at trial on the issue of his putative confession (PCR160-164); (6) a violation of *Brady v. Maryland*, 373 U.S. 83

[2]The proceedings below were handled first by a succession of Miami-Dade County judges who ultimately recused themselves because the trial prosecutor, Marilyn Milian, was personal friends with various of the judges. *See* PCT115 (recusal of Judge Robert Scola); PCT126-27 (reassignment of case to Judge Michael Chavies, who transfers case to Judge Alex Ferrer). A motion to recuse Judge Ferrer was initially denied (PCT139-148). However, a subsequent motion was filed after Mr. Franqui filed his amended Rule 3.850 motion, and, after a hearing on the motion, Judge Ferrer recused himself and the case was ultimately re-assigned by the Chief Justice of this Court to Broward County Circuit Judge Paul Backman to avoid further recusals from Miami-Dade judges (PCR176-77; 212). Judge Backman handled the litigation from this point on, until the most recent proceedings, which were handled by Miami-Dade Circuit Court Judge Stanford Blake.

(1963), regarding State witness Pablo Abreu (PCR164-169); (7) his right to interview jurors (PCR167-169); (8) non-compliance by state agencies with public records demands (PCR169-173); (9) the failure to object to the diminution of the jurors' sense of responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (PCR173-174); (10) the jury received unconstitutional instructions on aggravating circumstances (PCR174-175); and (11) failure to grant severance at both the guilt and penalty phases (PCR175-176). As an exhibit to the amended motion, Mr. Franqui filed an affidavit from Fernando Fernandez (PCR357-359). Mr. Franqui also adopted as part of his motion an affidavit of co-defendant Pablo Abreu, filed in connection with co-defendant Pablo San Martin's Rule 3.850 proceeding, in which Abreu purported to recant part of his penalty phase testimony in Mr. Franqui's case (PCR-357). On July 6, 2000, the State filed its response to the amended motion (PCR180-348).

A hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993), was conducted on January 8, 2001 (PCT244-274). At the *Huff* hearing, Mr. Franqui's counsel adopted the claim raised by San Martin with regard to the recantation by Abreu and prosecutorial misconduct related to Abreu; the State acknowledged that because it had conceded the need for an evidentiary hearing on San Martin's claim, it had "no objection to Mr. Franqui joining that evidentiary hearing" (PCT256).

See also PCT268 ("basically we've agreed to have an evidentiary hearing on that claim [of Abreu's recantation of his penalty phase testimony] for both Mr. San Martin and Mr. Franqui").

On January 7, 2002, the trial court issued its order following the *Huff* hearing (PCR478-487). The court summarily denied all of the claims, save the claim relating to Abreu and Mr. Franqui on which the State had conceded the necessity for an evidentiary hearing.

On October 18, 2002, Mr. Franqui filed a supplement to his amended Rule 3.850 motion, alleging a claim based on *Ring v. Arizona*, 122 S. Ct. 2428 (2002), and one based on *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (PCT316-17). On October 30, 2002, the State filed a response to these claims.

On March 31, 2005, the lower court entered an order denying relief to Mr. Franqui (PCR754-759); by separate order, the court denied the *Ring* claim raised in a supplemental pleading (PCR752-753). Because the lower court had not entered a written order disposing of Mr. Franqui's *Atkins* claim, the undersigned moved this Court for a relinquishment so that such a written order could be entered. The Court relinquished jurisdiction and, on February 21, 2008, the lower court entered its order summarily denying the *Atkins* claim.

On April 29, 2005, a Notice of Appeal was filed (PCR764),[3] and briefing

was submitted. Following oral argument in this Court, the Court entered an order dated July 16, 2009, reversing the summary denial of Mr. Franqui's *Atkins* claim and remanding for an evidentiary hearing (Supp. R. P373). Following the formal relinquishment, a series of motions were filed and ruled on by the trial court: the State filed a motion to set procedures for mental health evaluations (Supp. R. P377-79), a motion for order for Defendant's Medical Records (Supp. R. P380-82), and a Motion to Compel Production of Materials, including any reports of prior mental health examinations performed on Mr. Franqui (Supp. R. P383-85). Mr. Franqui submitted a consolidated response to these motions (Supp. R. P386-90). At that time, Mr. Franqui's counsel informed the court and the State that he was attempting to ascertain whether any mental health examinations had been performed on Mr. Franqui during the initial Rule 3.851 proceedings and, if so, whether any report from any such evaluation had been generated (Supp. R. P388).[4] The trial court granted the motion to obtain copies of Mr. Franqui's medical records (Supp.

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[3]Following the denial by the lower court, prior registry counsel moved to withdraw from their representation of Mr. Franqui and the undersigned was appointed to handle the instant appeal (PCR761-62; 769).

[4]As noted earlier and as he informed the lower court, Mr. Franqui's present counsel was not involved in the earlier Rule 3.850 litigation in this case, and was only appointed to handle the appeal from the denial of Rule 3.850 relief (Supp. R. P388).

R. P392), and entered an order appointing the State's preferred expert, Dr. Enrique Suarez, to conduct mental retardation testing on Mr. Franqui (Supp. R. P394-95).

Mr. Franqui's counsel subsequently confirmed that Mr. Franqui had been evaluated by Dr. Trudy Block-Garfield, at the behest of prior collateral counsel, and that a report had been generated as a result of that evaluation (Supp. R. P396). That testing revealed that Mr. Franqui had a full scale IQ score of 75 utilizing the WAIS-R testing instrument (Supp. R. P397, 404). Dr. Block-Garfield's report, filed in the lower court, also noted that Dr. Block-Garfield was "aware that current thinking is to raise the IQ level for mental retardation to approximately 75" but that at the current time, a full scale IQ score of 75 is not considered to fall within the range of mental retardation (Supp. R. P408-09). Dr. Suarez, the State's mental health expert, conducted his evaluation of Mr. Franqui utilizing the WAIS-IV testing instrument, and also concluded, like Dr. Block-Garfield, a full scale IQ score of 75 which, as Dr. Suarez noted in his report, was "not sufficient for him to be deemed mentally retarded" under Florida law (Supp. R. P429).

Based on the reports of both Dr. Block-Garfield and Dr. Suarez, Mr. Franqui's counsel filed a Notice to Court with Accompanying Motion to Declare as Unconstitutional the Florida Supreme Court's Interpretation of Mental Retardation (Supp. R. P396-400), acknowledging that, in this Court's view as stated in *Cherry v.*

State, 959 So. 2d 702 (Fla. 2007), Mr. Franqui "cannot make out a prima facie case showing mental retardation as a matter of law under Florida's definition of same" (Supp. R. P397). He also conceded that the only way that the court could entertain Mr. Franqui's claim of mental retardation was to conclude that this Court's interpretation of mental retardation as setting a cutoff score of 70 was unconstitutional and moved the court to declare that *Cherry* violated the Eighth Amendment right as announced in *Atkins* (Supp. R. P399). At a hearing on this motion, the trial court entertained argument on Mr. Franqui's motion and denied the motion to declare *Cherry* unconstitutional under *Atkins*, ruling:

> THE COURT: Well, I think, then, the logical question is, if we don't meet the first prong, if there's nothing to indicate that the first prong can be met, assuming for argument's sake, which – I will deny your motion as unconstitutional Florida Supreme Court's interpretation of mental retardation as decided in Cherry, C-H-E-R-R-Y, and Nixon, N-I-X-O-N, because there doesn't seem to be anything to indicate Mr. Franqui would even qualify for further hearing under Atkins.

(Supp. R. P462-63).

At the final hearing on this matter on September 17, 2009, the State and the defense stipulated to the introduction of the reports of Dr. Block-Garfield and Dr. Suarez and that the experts would testify consistent with their reports (Supp. R. P481-82). The court orally ruled that Mr. Franqui does not meet the requirements as set forth in this Court's decision in *Cherry*, that the claim of mental retardation

was denied, and again made clear that Mr. Franqui's prior request to declare *Cherry* unconstitutional under *Atkins* was also denied (Supp. R. P483). The trial court subsequently entered a written order (Supp. R. P442). This supplemental brief follows.

SUMMARY OF THE ARGUMENTS

The lower court erred in denying Mr. Franqui's challenges to the constitutionality of this Court's interpretation of *Atkins v. Virginia* as set forth in the Court's decisions in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), and *Nixon v. State*, 2 So. 3d 137 (Fla. 2009). Based on these decisions, Mr. Franqui acknowledged below that he could not make out a prima facie showing, as a matter of law, of mental retardation due to his full scale IQ score of 75, which exceeds the 70 score set out in *Cherry* and *Nixon* as the cut-off score. Mr. Franqui urges the Court to reconsider its decisions in *Cherry* and *Nixon* and conclude that a steadfast rule requiring a score of 70 or below violates the Eighth Amendment and *Atkins*. In the alternative, should the Court decline to revisit and reverse *Cherry* and *Nixon*, Mr. Franqui preserves this issue should the Court later reverse these decisions.

ARGUMENT

THE COURT'S INTERPRETATION OF MENTAL RETARDATION PURSUANT TO *ATKINS V. VIRGINIA* IS CONTRARY TO *ATKINS* ITSELF AND THE EIGHTH AMENDMENT.

Because the testing submitted for the lower court's consideration established that Mr. Franqui's full scale IQ was 75, he acknowledged below that, under this Court's decision in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), he could not make out a prima facie case of the first prong of mental retardation because his full scale IQ score was 75, above the cut-off score of 70 that the Court set forth in *Cherry*. *Cherry*, 959 So. 2d at 711-14. In *Cherry*, the Court, interpreting Fla. Stat. §921.137(1), determined that the defendant failed to meet the first prong of the mental retardation test because his full scale score of 72 "does not fall within the statutory range for mental retardation." *Id*. at 714. He also acknowledged below that the only way he could make out a prima facie showing of mental retardation would be to declare unconstitutional the Court's decision in *Cherry,* while simultaneously conceding that a similar challenge had been made and rejected by this Court in *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009) (rejecting challenge to *Cherry* as violative of *Atkins* and reaffirming that the Court has "consistently interpreted this definition to require a defendant seeking exemption

from execution to establish that he has an IQ of 70 or below"). The lower court rejected Mr. Franqui's challenges and subsequently denied his claim of mental retardation.

Mr. Franqui urges the Court to reconsider its rulings in *Cherry* and *Nixon*, rulings which he must acknowledge stand in his way of establishing the first prong of mental retardation due to his IQ score of 75. In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the United States Supreme Court held that the execution of mentally retarded offenders is an excessive punishment which violates the eighth amendment. In so holding, the Court recognized that the mentally retarded "often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Atkins*, 536 U.S. at 318. Because this is so, the Court also outlined how the execution of mentally retarded offenders does not advance the penological purposes of the death penalty. *Id.*

As to the definition of mental retardation, the Court approvingly cited the clinical definitions set forth by the American Association of Mental Retardation and the American Psychiatric Association. *See Atkins*, 536 U.S. at 309, n.3 (quoting the definition of the AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) and the definition of the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL

DISORDERS 41 (4th ed. 2000)). And, as found by the Court in *Atkins*, the consensus in the scientific community recognizes that an "IQ score between 70 and 75 or lower" is "typically considered the cutoff score for the intellectual function prong." *See Atkins*, 536 U.S. at 309, n.5 (quoting 2 B. SADOCK & V. SADOCK, COMPREHENSIVE TEXT BOOK OF PSYCHIATRY 2952 (7th ed. 2000)). Thus, it is clear that an IQ score above 70 does not preclude a finding of mental retardation. *Id.*

Mr. Franqui submits that this Court's interpretation of *Atkins* is contrary to the Eighth Amendment as set forth in *Atkins* itself. Despite the United States Supreme Court's reference to the accepted clinical definitions of mental retardation, this Court ignored those definitions, deriving succor from the United States Supreme Court's comment that it leaves to the "states the task of developing appropriate ways to enforce the constitutional restriction upon execution of sentences." *Atkins*, 536 U.S. at 317. However, while the United States Supreme Court provided some discretion to the states in establishing procedures to decide who is mentally retarded, the Court noted that "[t]he statutory definitions of mental retardation are not identical, **but generally conform to the clinical definitions** . . ." *Id.* (Emphasis added).

Mr. Franqui acknowledges that the lower court was bound by *Cherry*, and

that this Court has rejected a similar challenge to the constitutionality of the *Cherry* decision in *Nixon v. State,* 2 So. 3d 137 (Fla. 2009). In *Nixon*, the defendant claimed, as does Mr. Franqui, that this Court's requirement that a defendant have an IQ score of 70 or below violates *Atkins*, a claim that this Court rejected. *Nixon*, 2 So. 3d at 142-43. Mr. Franqui respectfully requests that the Court reconsider both *Cherry* and *Nixon*, and reasserts his challenges to both of these decisions at this time in the event that the Court, at a later time, does reverse itself on this issue. *See Sireci v. State*, 773 So. 2d 34, 41 n.14 (Fla. 2000) ("we take this opportunity to suggest that issues which are being raised solely for the purposes of preserving an error should be so designated. We will consider the issues preserved for review in the event of a change in the law if counsel so indicates by grouping these claims under an appropriately entitled heading and providing a description of the substance").

CONCLUSION

Based on the foregoing arguments and those contained in his previously-filed briefs, Mr. Franqui requests that the Court grant a new trial, a new penalty phase, and/or reverse for further evidentiary development on those claims which were summarily denied by the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Brief was furnished by U.S. Mail to Sandra Jaggard, Assistant Attorney General, 444 Brickell Avenue, 6th Floor, Miami, Florida 3313, on this 9th day of

April, 2010.

TODD G. SCHER
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CERTIFICATE OF TYPE SIZE AND FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font,

a font that is not proportionately spaced.

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