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

INITIAL BRIEF OF APPELLANT

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or, in the Alternative, to a Relinquishment to File a Proper Motion

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REQUEST FOR ORAL ARGUMENT

Mr. Franqui, who has been sentenced to death, requests oral argument in this case.

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]

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

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

[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.

(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 (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) (Attachment A to Motion to Supplement the Record) (PCT316-17). On October 30, 2002, the State filed a response to these claims (Attachment B to Motion to Supplement the Record).

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).[3]

On April 29, 2005, a Notice of Appeal was filed (PCR764),[4] and this Initial Brief follows.

[3]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 or, in the alternative, for a relinquishment to . On February 21, 2008, the lower court entered its order denying the *Atkins* claim. By separate motion, Mr. Franqui is asking that the record be supplemented with this order (and other documents not included in the record on appeal.

[4]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).

SUMMARY OF THE ARGUMENTS

1. The lower court erred in summarily denying Mr. Franqui's claim pursuant to *Atkins v. Virginia.* The lower court's premise for denying the claim was that Mr. Franqui's mental retardation had been litigated at his penalty phase, and the trial court and this Court rejected mental retardation as a non-statutory mitigating circumstance. However, in numerous other cases, this Court has held that a capital defendant is entitled to an evidentiary hearing on an *Atkins* claim irrespective of whether mental retardation had been raised in the context of mitigation at the penalty phase. Because Mr. Franqui's pleadings below more than sufficiently set out a facially sufficient *Atkins* claim, the lower court should be reversed. In the alternative, the Court should remand this matter to the circuit court so that Mr. Franqui can be afforded the opportunity to file a motion pursuant to Fla. R. Crim. P. 3.203 and plead and prove the elements for a claim of mental retardation as a bar to execution under the Eighth Amendment.

2. The lower court erred in summarily denying Mr. Franqui's claim that he was denied the effective assistance of counsel at the guilt and penalty phases of his capital trial due to counsel's failure to object to repeated improper, inflammatory, and unduly prejudicial argument and comments by the prosecutor. Contrary to the ruling by the lower court, this claim is not procedurally barred; this

claim could not have been raised on direct appeal due to the lack of objections by counsel and therefore Mr. Franqui's ineffectiveness allegations are cognizable in this Rule 3.850 proceeding.

3. The lower court erred in summarily denying Mr. Franqui's claim of ineffective assistance of counsel due to trial counsel's failure to present the testimony of Dr. Brad Fisher at the penalty phase. The lower court's ruling that counsel made a "reasonable choice" not to call Dr. Fisher cannot be squared with this record, given that the court did not afford an evidentiary hearing. A strategy reason cannot be presumed absent an evidentiary hearing.

4. The lower court erred in summarily denying Mr. Franqui's claim of ineffective assistance of counsel due to trial counsel's failure to call Vivian Gonzalez to testify at the motion to suppress or at trial/penalty phase. Ms. Gonzalez would have had important information to present with regard to suppression issues and trial counsel, without a tactical or strategic reason, failed to do so. Moreover, the lower court's reasoning for its denial – that Ms. Gonzalez did in fact testify at the suppression hearing, is not supported by the record.

5. The lower court erred in denying, after an evidentiary hearing, Mr. Franqui's claim of entitlement to a new penalty phase proceeding in light of the recantation by co-defendant Abreu of his penalty phase testimony in which Abreu

testified that Mr. Franqui had a pre-arranged plan to murder the victim in a premeditated fashion. Abreu's testimony establishes that the State presented false testimony to the jury, testimony which established the serious CCP aggravating factor. Reversal for a new penalty phase is warranted.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FRANQUI'S CLAIM OF MENTAL RETARDATION PURSUANT TO *ATKINS V. VIRGINIA*, AND THIS COURT SHOULD REVERSE AND REMAND FOR AN EVIDENTIARY HEARING OR, IN THE ALTERNATIVE, REVERSE TO PERMIT MR. FRANQUI TO FILE AN APPROPRIATE MOTION PURSUANT TO FLA. R. CRIM. P. 3.203.

A. Standard of Review.

In considering whether a Rule 3.850 movant is entitled to present evidence in support of his constitutional claims, his factual allegations "must" be accepted as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000).

B. Proceedings Below.

While Mr. Franqui's Rule 3.850 motion was pending in the lower court, the Supreme Court issued its decision in *Atkins v. Viginia*, 536 U.S. 304 (2002), in which the Court held that the execution of a mentally retarded person violated the Eighth Amendment. On October 18, 2002, Mr. Franqui first filed a supplemental

claim alleging, *inter alia*, that he was mentally retarded within the meaning of *Atkins*. In part, the supplemental claim alleged:

> 1. Mr. Franqui suffers from substantial limitation in present functioning. In particular, [Mr. Franqui] has functional impairment to the extent and to a degree that establishes he suffers from substantial limitations of present functioning and/or has significant subaverage general intellectual functioning. Mr. Franqui has been diagnoses by Dr. Jethro Toomer who forward [sic] Franqui's history of learning disabilities, academic failure, and retardation. Dr. Toomer has concluded that Mr. Franqui has demonstrated borderline intellectual abilities and neuropsychological deficits, particularly in memory and executive functioning.
>
> * * *
>
> Psychologist Jethro Toomer found that Mr. Franqui had an IQ of less than 60. He was retarded (TR3135). Unquestionably, Mr. Franqui did poorly in school and dropped out in the 8th grade (Tr. 3112-3114, 3117, 3123). According to Toomer, Mr. Franqui had difficulty communicating, he suffered a number of deficits, and his insight and judgment were impaired (Tr. 3115-3116, 3131). Dr. Toomer diagnosed Franqui as suffering from borderline personality disorder (Tr.3209).
>
> 2. In *Atkins v. Virginia*, ___ U.S. ___, 122 S. Ct. 2242 (2002), the United States Supreme Court considered whether mentally retarded individuals are constitutionally subject to execution. The Court ruled as follows:
>
> > "We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in light of our `evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution `places a substantive restriction on the State's power to take the life' of a mentally retarded

> offender." *Id*. at 2252 (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).
>
> * * *
>
> 4. As a result of new developments in the law, and in light of Defendant's substantial limitations of present functioning and/or significantly subaverage general intellectual functioning, Mr. Franqui raises this second supplemental claim to his motion to vacate and set aside the judgments of convictions and sentences, including his sentence of death, imposed upon him by this Court, on grounds that his right to protection against cruel and/or unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution, were violated. Mr. Franqui's death sentences should be vacated.

(Attachment A to Motion to Supplement the Record). The State filed a response to the supplemental claim, contending that it was facially insufficient, "has already been raised and rejected," and otherwise without merit (Attachment B to Motion to Supplement the Record).

Mr. Franqui re-iterated his claim of mental retardation in another supplemental pleading filed in March, 2003, following the limited evidentiary hearing on unrelated issues. In this supplemental claim, Mr. Franqui alleged his entitlement to relief and, at a minimum, to an evidentiary hearing:

> Petitioner, Leonardo Franqui, restates his claim pursuant to his original supplemental claim pursuant to *Atkins v. Virginia,* 122 S. Ct. 2242 (2002) in that an evidentiary hearing must be required to determine the degree of retardation of Mr. Franqui. The trial transcript clearly established that Mr. Franqui's IQ was less than 60, which would place him into the retarded category (see Trial transcript

Tr. 3112-3138). The diagnosis at trial was that Mr. Franqui suffered from a severe personality disorder impairing judgment and insight to the degree that the retardation impaired insight and judgment (Tr. 3115).

However, the applicability of *Atkins* and the constitutionality of Fla. Stat. §921.137 are before the Florida Supreme Court at the present time. Consequently, since that statute dealt with the execution as applied to defendants with mental retardation, this Court should hold judgment until decisions are reached in the matters of *Burns v. State,* SC01-166, *Miller v. State*, SC01-837, and *Floyd et. al. v. Butterworth*, SC02-2295 (which the Florida Supreme Court has accepted jurisdiction) are reconciled by that Court. The consequence of Abreu's testimony, as the State argued at the February 4, 2002 hearing, is that the trial court rejected the mitigating finding of retardation elicited at the second phase proceeding. However, the *Atkins* mandate does not rely on a preemption of that issue by the trial court. There are primarily two reasons for the failure of any preemption, resjudication [sic] or collateral estoppel argument: First, there may be subsequent or additional testimony to supplement the mental health diagnosis, which may or may not have been originally pursued (either by ineffectiveness or non-availability of those tests); and Second, a degenerative condition may impact on a separate diagnosis not available before due to a psychiatric/physiological degenerative change and/or subsequent advancements in medical testing not available in 1992. For example, blood testing at the time cannot be seriously compared to advanced DNA testing now available. Also, mental axial testing and graphic computer methods were in relative infancy at the time of these offenses. Thus, the imperative of an *Atkins* hearing not only is recognition that recent methods of medically testing mental states may reveal completely separate results (For example, the various M.R.I. testing and other tests presently being administered to both Mr. Franqui and Mr. San Martin).

In Mr. Franqui's case, the state expert, Dr. Mutter (at Tr. 3220-3295) agreed that Mr. Franqui had impaired insight and intelligence and mild brain damage. However, there was no opinion

> as to the degenerative aspect by experts of Mr. Franqui's mental impairment or retardation (which is herein alleged to have occurred over the last decade of incarceration). Therefore, not only would a hearing pursuant to *Atkins* be required as to Mr. Franqui's condition at the time of the offense, but also as to the degenerative effects to the present time of mental defects, since the *Atkins* standard applies to the immediate time.
>
> Since this Court has thus not ruled upon Mr. Franqui's claim pursuant to *Atkins v. Virginia*, it is respectfully requested that this Court incorporate in this Claim the Supplemental Claim (and memorandum) filed by Mr. Franqui, which was filed on October 18, 2002.

(PRC723-24).

In response, the State again contended, as it did when Mr. Franqui first raised the claim, that the claim was facially insufficient, procedurally barred, and meritless (PCR740-743). At a hearing where the parties were allowed to argue their positions on the *Atkins* claim, the State elaborated its position that the issue of Mr. Franqui's mental retardation was presented at the penalty phase, and the trial court and this Court rejected these claims so therefore "the claims should be barred under collateral estoppel" (PCT586-88). Mr. Franqui argued that *Atkins* was not in existence at the time of his penalty phase and, under *Atkins*, the issue of mental retardation is different than it is when considered as mitigating evidence; therefore, the fact that mental retardation was not found in mitigation does not obviate the need for a hearing pursuant to *Atkins* (PCT585-86). Mr. Franqui further stressed

that there was testimony from the penalty phase that his IQ was less than 60, and that the State's expert "did no testing of him period" to determine if he was mentally retarded (PCT586).

Although it denied Mr. Franqui's Rule 3.850 motion, the lower court did not enter a written order disposing of the *Atkins* claim until present collateral counsel, after reviewing the record and determining that there was no such order, requested this Court to relinquish jurisdiction for the purposes of the entry of a written order.[5] On February 21, 2008, the lower court entered an order denying the *Atkins* claim, ruling, in pertinent part:

> In his second supplemental claim, the Defendant contends that, in light of his substantial limitations of present functioning and/or significant subaverage general intellectual functioning, his death sentence is cruel and unusual punishment under *Atkins*. This Court disagrees.
>
> In *Atkins*, the United States Supreme Court held that execution of a mentally retarded criminal is excessive and violates the Eighth Amendment prohibition of cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). However, the Florida Supreme Court found *Atkins* to be inapplicable when the defendant was "already afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim." *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070, 123

[5]Mr. Franqui also requested that the Court abate the instant appeal to permit him to file a motion pursuant to Fla. R. Crim. P. 3.203, but the Court only relinquished jurisdiction to permit the lower court to enter a written order on the *Atkins* issue.

S. Ct. 662 (2002).

In the instant case, the Defendant presented substantial evidence during trial on his mental capacity. Based on the evidence presented, the trial judge did not find the Defendant to be mentally retarded. The Florida Supreme Court affirmed the trial court's rejection of the Defendant's low level of intelligence as a mitigator. The Florida Supreme Court discussed this issue and the trial judge' sentencing order:

> The trial court's sentencing order rejected low intelligence as a mitigator in the following fashion:
>
> The court has considered the results of Dr. Toomer's test as concerns the defendant's IQ. Since it is impossible for the court to verify the accuracy or validity of such a test, the court must consider it in light of the facts known to the court. In making this analysis the Court is conscious of the fact that although an individual's performance on such a test may be unable to exceed his true abilities it may easily reflect less than his best efforts.
>
> The defense suggests that this court should accept, as a non-statutory mitigating factor the fact that, according to Dr. Toomer, Mr. Franqui is mentally retarded. Every piece of evidence presented in this trial, penalty phase, an sentencing hearings, with the exception of Dr. Toomer's testimony, definitively establishes that Mr. Franqui is not mentally retarded. The crimes he has committed, as described above, reflect an unshakable pattern of premeditation, calculation, and shrewd planning that are totally inconsistent with mental retardation. Mr. Franqui's "good employment background" (one of the asserted non-statutory mitigating circumstances) as established by witness Michael Barecchio shows that he was not only a good employee but that on many occasions he displayed

> initiative and a capacity to finish his assigned tasks and move on to others without direction or supervision. His ability to establish a meaningful relationship with a woman, to have an raise children with her and to support a family further suggest that he is not mentally retarded.
>
> In order to find that this defendant is mentally retarded the court would have to accept Dr. Toomer's test result and ignore the clear and irrefutable logic of the facts of this case. The court is unwilling to do this and therefore rejects the existence of this non-statutory mitigating circumstance.
>
> In addition, the State's expert witness, Dr. Mutter, expressly rejected Dr. Toomer's findings and opined that Franqui was not mentally retarded. Dr. Mutter also found that Dr. Toomer's reliance on the Beta IQ test result was questionable, since it was inconsistent with both the Wechsler test and with the mental status examination which he conducted.
>
> * * *
>
> As set out above, we find that there was competent, substantial evidence to support the trial court's conclusion that the non-statutory mitigators of low intelligence and organic brain damage were not established.

Franqui v. State, 699 So. 2d 1312, 1325-26 (Fla. 1997). This Court finds that the trial judge in this case found the defendant not to have been mentally retarded. The Florida Supreme Court affirmed and the United States Supreme Court denied certiorari. *Franqui v. Florida*, 523 U.S. 1040, 118 S.Ct. 1337 (1998), and *Franqui v. Florida*, 523 U.S. 1097, 118 S.Ct. 1582 (1998). During the evidentiary hearing, the Defendant has failed to provide this Court with any additional evidence to establish retardation of the Defendant.

Florida Statute §921.137 defines retardation as:

> significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly sub-average general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior" for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility of his or her age, cultural group, and community.

The Defendant's motion stated that Dr. Jethro Toomer tested the Defendant and found that the Defendant had an IQ of 60. However, the State pointed out that the Beta IQ test employed by Dr. Toomer was not qualified under Fla. R. Crim. P. 3.203 (DAT3133-35). The State further indicated, based on the Legislative history of the statute, that the Department of Children and Family Services uses the Sanford-Binet and Wechsler Adult Intelligence Scale tests to determine I.Q. (DAT3137). The Defendant's expert, Dr. Toomer, also administered a Weschler Intelligence test. The Defendant scored a full scale IQ of 83 and a performance IQ of 92 on the Weschler Intelligence Test (DAT3198-99). The Defendant has failed to allege two standard deviations below the norm or a 70 IQ determined by a qualified test. Likewise, the Defendant failed to allege that he has deficits in adaptive functioning. Besides his allegation that he did poorly in school and dropped out in the eighth grade, the Defendant has not presented any evidence of his mental capacity from the time he was 18 or younger. For these reasons, the defendant's motion fails to properly allege retardation and is insufficient. The court finds that, during his trial, the Defendant was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence

did not support his claim.

(Attachment C to Motion to Supplement the Record).

C. Mr. Franqui is Entitled to Reversal for an Evidentiary Hearing or, in the Alternative, to a Relinquishment to File a Proper Motion for Relief Pursuant to Fla. R. Crim. P. 3.203.

On June 12, 2001, while Mr. Franqui's Rule 3.850 motion was pending in the circuit court, then-Governor Bush signed into law a new statute prohibiting the execution of the mentally retarded in Florida. *See* Fla. Stat. §921.137. The statute provided for the following definition of mental retardation:

> As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for purposes of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

The statute, however, provided for no retroactive application, although it extended to mentally retarded individuals a substantive right not to be executed. Hence, from October 1, 2001, the effective date of the new statute, until May, 2004, no procedures were in place on which trial courts could rely in deciding how

to apply the new statute. As a result, a number of cases, such as Mr. Franqui's, went forward with differing standards and differing opinions based on what each judge perceived the standards to be. Moreover, when a defendant had raised mental retardation at the penalty phase of his or her trial, the State, and many trial courts, were concluding that any claim based on the mental retardation as a bar to execution, having already been "litigated," was procedurally barred.

After the enactment of Florida's statutory bar on executing the mentally retarded, the United States Supreme Court, reversing its prior decision in *Penry v. Lynaugh*, 492 U.S. 300 (1989), held that the execution of a mentally retarded person did violate the Eighth Amendment. *Atkins*, 536 U.S. at 321. The Supreme Court adopted the definitions of mental retardation of the American Association of Mental Retardation (AAMR) and a similar definition by the American Psychiatric Association (APA):

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
>
> The American Psychiatric Association's definition is similar: "The

> essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental retardation as many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th Ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id*. at 42-43.

Atkins, 536 U.S. at 309 n.3.

In 2004, this Court *sua sponte* promulgated a procedure to raise mental retardation as a bar to the death sentence in the form of new Fla. R. Crim. P. 3.203 and Fla. R. App. P. 9.142 (c). *See Amendments to Florida Rules of Criminal Procedure. And Florida Rules of Appellate Procedure*, 875 So. 2d 563 (Fla. 2004). The new Rule 3.203 extended the benefits of the *Atkins* ruling retroactively to all death row inmates, even where the direct appeal was final prior to enactment of the rule. *Walls v. State*, 926 So. 2d 1156, 1174 (Fla. 2006).

The effective date of the rule was October 1, 2004, and the rule defined mental retardation as follows:

> As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during

> the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in Rule 65B-4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Fla. R. Crim. P. 3.203(b).

The context of the change in Florida law having been set forth above, Mr. Franqui now turns to the errors with the lower court's disposition of his claim of mental retardation. The lower court's denial rests on the fact that Mr. Franqui litigated his claim of mental retardation at the penalty phase, and thus the claim has been fully litigated and decided adversely to him. The lower court then chastised Mr. Franqui for failing to provide it, during the evidentiary hearing, with "any additional evidence to establish retardation of the Defendant" (Attachment C to Motion to Supplement the Record at 3). Mr. Franqui addresses these conclusions below.

First, as to the lower court's primary reason for denying Mr. Franqui's claim –that he presented evidence at the penalty phase of his mental capacity which was rejected by the jury, the trial court, and this Court on appeal – Mr. Franqui submits

that the lower court essentially concluded that his *Atkins* claim was procedurally barred (a bar urged by the State). The premise for the lower court's finding of a procedural bar, or a bar based on the fact that the mental retardation issue had been previously presented at the penalty phase and rejected by the trial court, has been squarely rejected by this Court. For example, in *Phillips v. State*, 894 So. 2d 28 (Fla. 2004), this Court rejected Phillips's claim of ineffective assistance of counsel due to the alleged failure to present evidence of mental retardation at his resentencing phase. In so ruling, the Court detailed the extensive nature of the testing and testimony that was presented at the resentencing on the issue of Phillip's mental retardation. *Id*. at 38-39. However, when discussing whether Phillips was entitled to an *Atkins* determination of his mental retardation notwithstanding the evidence presented at the resentencing phase, the Court held that the presentation of such evidence at the resentencing did "not preclude Phillips from raising the retroactive application of section 921.137 in a subsequent proceeding" and that Phillips was free to file a motion under Rule 3.203 because neither the statute nor *Atkins* were in existence at the time of Phillips's sentencing. The Court's determination in *Phillips* has been followed in other cases in similar postures not only to Phillips, but also to Mr. Franqui. *See, e.g. Connor v. State*, 32 Fla. L. Weekly S709 (Fla. Nov. 15, 2007, as revised on April 10, 2008) (despite

presentation of mental health mitigation at penalty phase, Court affirms denial of Rule 3.850 relief without prejudice for defendant to file a proper motion under Rule 3.203); *Rodriguez v. State*, 919 So. 2d 1252, 1267 (Fla. 2005) (same) *Thompson v. State*, No. SC05-279 (Order, July 9, 2007) (Attachment A) ("The trial court determined that Thompson's claim was procedurally barred because the issue of mental retardation was raised as mitigation and litigated in Thompson's 1989 resentencing proceeding. We conclude this determination was error because the evidence in this case was presented for mitigation, not as evidence of mental retardation as a bar to execution.").

In light of the foregoing authorities, it was error for the lower court to reject Mr. Franqui's *Atkins* claim because the issue of his mental retardation had been presented at the penalty phase and was rejected by this Court on direct appeal in the context of non-statutory mitigation. *Franqui*, 699 So. 2d at 1325-26. All this Court held on direct appeal was that there was "competent, substantial evidence to support the trial court's conclusion that the non-statutory mitigators of low intelligence and organic brain damage were not established." *Id*. As in *Phillips*, the issue of mental retardation presented at Mr. Franqui's penalty phase differed from that which would be evaluated under *Atkins*; it should go without saying that, because *Atkins* was not even in existence at the time of Mr. Franqui's penalty

phase, he was not evaluate for purposes of meeting the criteria for mental retardation as a bar to execution under the Eighth Amendment. Thus, it was improper for the lower court to rely on the penalty phase presentation and this Court's direct appeal disposition to essentially conclude that this claim is procedurally barred. Given that the Court has permitted similarly-situated defendants to file Rule 3.203 motions even when mental retardation was presented at a penalty phase, denial of the same process to Mr. Franqui would violate due process and equal protection.[6]

Next, the lower court faulted Mr. Franqui for failing to provide it with any additional evidence of retardation "[d]uring the evidentiary hearing" (Attachment C to Motion to Supplement the Record at 3). However, Mr. Franqui was not afforded an evidentiary hearing on his *Atkins* claim; rather, the court summarily denied his Rule 3.850 motion except for the claims relating to the recantation by

[6]The lower court cited *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), in support of denying Mr. Franqui a hearing on his *Atkins* claim. In *Bottoson*, a death warrant case, the Court was faced with a claim that the defendant was entitled to an evidentiary hearing under *Atkins*; however, the Court determined that the defendant's mental retardation had already been fully litigated in a successive Rule 3.850 motion brought pursuant to the new Florida statute prohibiting the execution of the mentally retarded. *See Bottoson v. State*, 813 So. 2d 31, 33 (Fla. 2002). Hence, because the mental retardation issue had been litigated under the statutory scheme, the Court declined to afford a new hearing in light of *Atkins*, which had not yet issued at the time of the filing of Bottoson's successive motion. *Id*. at 33 & n.2; *Bottoson*, 833 So. 2d at 695.

Pablo Abreu (PCR478-487). Mr. Franqui's collateral counsel repeatedly urged the Court to grant a hearing on the *Atkins* claim, but the court, at the State's urging, declined to do so. Indeed, the lower court did not even enter a written order disposing of the *Atkins* claim until present collateral counsel requested he do so for purposes of completing the appellate record. To fault Mr. Franqui for failing to present evidence of his mental retardation at an evidentiary hearing he was never afforded is manifestly erroneous, and the lower court's reasoning cannot be squared with the record.

The lower court's order also concludes, at the end, that Mr. Franqui's pleadings "failed to properly allege retardation" and were "insufficient" (Attachment C to Motion to Supplement the Record at 4). However, Mr. Franqui submits that he alleged more than sufficient information to give rise to an evidentiary hearing; at a minimum, he should be now be afforded the opportunity, by way of a remand, to "plead and prove the elements necessary to establish mental retardation" (*Thompson v. State*, Order, July 9, 2007) (Attachment A).

In his pleadings below, which were filed as supplemental pleadings given that *Atkins* had only recently issued and this Court had yet to determine that it applied retroactively, Mr. Franqui alleged that an IQ test revealed a score of 60, that he had a poor academic background and dropped out of school in the 8th grade,

had difficulty communicating, suffered from a number of deficits, and his insight and judgment were impaired (Attachment A to Motion to Supplement the Record). While perhaps not a model of precision, Mr. Franqui submits that the allegations below were more than facially sufficient to apprise the court of the nature of the claim and the relief sought, which is all that Rule 3.580 requires. Moreover, Mr. Franqui's pleadings referenced the testimony of Dr. Toomer adduced at the penalty phase to support his entitlement to an *Atkins* determination; and, in addition to Dr. Toomer's testimony, Mr. Franqui's uncle, Mario Franqui Suarez, testified at the penalty phase that Mr. Franqui was "slow" or "retarded" and was not a leader (Tr. 2864, 2873, 3214).

In sum, Mr. Franqui submits that the allegations set forth below more than sufficiently apprised the court of the nature of the claim, and that the court erred in summarily rejecting the *Atkins* claim. Moreover, in light of the afore-cited authorities, because there is a facially sufficient claim of mental retardation presented at this time, Mr. Franqui submits that the Court should reverse and remand either for an evidentiary hearing, or, at a minimum, to permit Mr. Franqui to "plead and prove the elements necessary to establish mental retardation" (*Thompson v. State*, Order, July 9, 2007) (Attachment A).

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING VARIOUS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO THE PROSECUTOR'S IMPROPER, INFLAMMATORY, AND UNDULY PREJUDICIAL COMMENTS AND ARGUMENTS AT THE GUILT AND PENALTY PHASES PHASES OF MR. FRANQUI'S CAPITAL TRIAL.

A. Standard of Review.

In considering whether a Rule 3.850 movant is entitled to present evidence in support of his constitutional claims, his factual allegations "must" be accepted as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000).

1. Failure to Object to the Prosecutor's Inflammatory, Improper, and Unduly Prejudicial Comments.

In his amended Rule 3.850 motion, Mr. Franqui alleged that trial counsel failed to object to inflammatory argument, evidence, and other inappropriate and prejudicial comments by the prosecutor, in violation of the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984) (PCR139-150). The lower court

summarily denied this claim as procedurally barred, concluding as follows:

> The Defendant's allegations that the prosecutor made improper comments throughout the guilt and penalty phases of the trial could have or should have been raised on direct appeal. This claim is procedurally barred. See Koon v. Dugger, 619 So. 2d 246, 247 (Fla.. 1993); Wood v. State, 531 So. 2d 79, 83 (Fla. 1988). Further, the Defendant's allegations that his counsel was ineffective for failing to object to these same comments cannot now be considered in a motion for postconviction relief and are denied. See Robinson v. State, 707 So. 2d 688, 697-699 (Fla. 1988).

(PCR478-79).

Mr. Franqui submits that the lower court's conclusion that this claim was procedurally barred because it could and should have been raised on direct appeal is error. The claim alleged that trial counsel failed to object to what Mr. Franqui contended were improper, inflammatory, and unduly prejudicial comments and arguments from the prosecutor at both the guilt and penalty phases. Allegations of ineffective assistance of counsel for the failure to object *is* a cognizable claim for collateral relief, notwithstanding the lower court's conclusion. As this Court has explained:

> The trial court concluded that this claim was procedurally barred because it either was, or could have been, raised on direct appeal. This was error. Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and–of necessity–have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion,

> and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that Bruno's claim was procedurally barred.

Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001) (footnotes omitted). Under this reasoning, although the same underlying facts (*i.e.* the fact that the prosecutor made inflammatory, improper, and unduly prejudicial comments and argument) could have supported a claim of error on direct appeal, there was no objection to such error, and thus the claim could not have been raised on appeal because it was not preserved by objection. Hence, Mr. Franqui alleged ineffective assistance of counsel. Under *Bruno*, the lower court's finding of procedural bar is clearly incorrect, and neither firmly established nor regularly followed by this Court. Because the lower court erred in finding this claim procedurally barred, reversal on that basis alone is warranted.

Based on the allegations made by Mr. Franqui in his amended Rule 3.850 motion, he submits that an evidentiary hearing is warranted to assess both the deficient performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Franqui cited numerous instances of objectionable comments and arguments made by the prosecutor which, singularly and cumulatively, deprived

him of a fair trial and penalty phase.

For example, Mr. Franqui alleged that in her remarks at the closing, the prosecutor denigrated defense counsel, gave personal opinions, were sarcastic, and vouched for the honesty of the police:

> "Now they [the victims] have to suffer the indignity of the accusations that [defense counsel] is making in this closing argument to you" (R2347);
>
> "I think this is a good law because the legislation has decided that when criminals get together . . ." (R2349);
>
> "If I hear one more time that these people were not identified, I don't know what I'm going to do" (R2361);
>
> "Do we have [manslaughter] in this case? No. This case has nothing to do with manslaughter. Don't kid yourselves, folks, that would be a big win for the defense on the evidence in this case" (R2373);
>
> "The lessers are a joke in this case . . but they have to be read to you by law" (R2374);
>
> "Let's see, Detective Santos is lying, for one case he's going to come in here and risk his reputation. He is going to come in here and risk his reputation. He is going to come in here and commit perjury, and he's going to lie about one case?" (R2385);
>
> "I mean, these [policemen], just like he said, they are the best in the business. The homicide cops scrupulously honor these Defendants' rights . . . I am marveled that they confesssed" (T2386).

(PCR140). As Mr. Franqui alleged, the "sarcasm, personal opinions, and cheap

shots toward other counsel were outrageous and improper. There were no objections by defense counsel" (PCR140).[7] The types of comments made by the prosecutor have been condemned by Florida courts. *See, e.g. Lopez v. State*, 555 So. 2d 1298 (Fla. 3d DCA 1990); *Jones v. State*, 666 SO. 2d 995 (Fla. 5th DCA 1996); *Walker v. State*, 710 So. 2d 1029 (Fla. 3d DCA 1998); *Lewis v. State*, 711 SO. 2d 205 (Fla. 3d DCA 1998); *Cohen v. Pollack*, 674 So. 2d 805 (Fla. 3d DCA 1996); *Fryer v. State*, 693 So. 2d 1046 (Fla. 3d DCA 1997); *Cisneros v. State*, 678 So. 2d 888 (Fla. 4th DCA 1996); *Clark v. State*, 632 So. 2d 88 (Fla. 4th DCA 1994); *Cooper v. State*, 711 So. 2d 1216 (Fla. 3d DCA 1998).

The motion further alleged additional improper arguments at the penalty phase closing to which counsel raised no objection nor requested a mistrial or a curative instruction. For example:

> "Now you know the shocking unbelievable nature of their criminal records" (Tr.3361);
>
> "You know now that this was not an isolated incident, you know now that this was the middle incident of an unbelievable crime spree that terrorized five separate human beings in a little over a month between November 29, 1991 and January 14, 1992 (Tr. 3361);

[7]The prosecutor who made these arguments, Marilyn Milian, was subsequently elevated to the circuit bench in Miami-Dade County, and then left that position to become the judge on the television show "People's Court." While these comments, including the sarcasm, might be appropriate for a reality courtroom television show, Mr. Franqui contends they are not proper in a real courtroom with a man's life at stake.

"You now know why the State of Florida stood before you in voir dire and asked and told you that this was a case in which they were seeking the death penalty" (Tr. 3361);

"Don't let anybody in this case in any argument given to you blame me, the judge or the system for the position that these defendants find themselves in now" (Tr. 3362);

"If the aggravating circumstances outweigh, are stronger than the mitigating arguments, then your lawful legal duty is to recommend to Judge Sorondo the death penalty" (Tr. 3363);

"But for the grace of God Danillo Cabanas Senior might be dead, but for the Grace of God" (Tr. 3367-68);

"Remorseful? Sorry, sorry I tried to kill Mr. Santos, now I will try to kill Mr. Cabanas, Junior, and Senior. And what's worse I will agree to a plan tht has been around to eliminate another human being for sure. A Raul Lopez. A follower who uses masks, carries gloves" (Tr. 3368);

"Remorse so consumed Leonardo, so consumed these people, Leonardo Franqui that they got another gun, six inch Smith and Wesson, look at this gun, this is a mean weapon. This is a business weapon. This is not something that is meant to be concealed for self-defense, this is a business weapon. This is a huge gun" (Tr. 3369);

"Yes it is much easier Mr. Franqui to put a gun to somebody's head and demand their money, you don't have to work as hard to get the money, that's Franqui's way" (Tr. 3370);

"It's a little easier to put a gun to somebody's head and pistol whip them and terrorize them and take their hard earned money" (Tr. 3370);

"They were remorseful about one thing, that they are here

facing you, that you are sitting in judgment of them. They are very sorry about that" (Tr. 3372);

"Yet he wants you to believe he's remorseful when he tells Doctor Mutter weeks ago that he was shooting in the air. Come on" (Tr. 3378);

"Why? Because to kill somebody for money is probably the most basic, the most vile of all motives" (Tr. 3382);

"There is no more vile motive than to kill somebody for money" (Tr. 3383);

"He tried to kill Danillo Cabanas Senior and Danillo Cabanas Junior but for the Grace of God I didn't, and you should cut him a break" (Tr. 3388-89);

"I don't know why they argued remorse because the exact opposite is true in this case, this is brazenness of a crime spree that only stopped because they got caught" (Tr. 3395);

"Well, I suppose if she had whipped him we would have heard that as a mitigating circumstance. I mean, folks, everything is mitigating. You don't hit me, it's mitigating, You hit me too much, it is mitigating" (Tr. 3399);

"That's the world of Dr. Toomer, folks. Through the looking glass at Disney World. Make believe. Use your common sense" (Tr. 3405);

"Franqui argues to you that he is remorseful for this. That is ridiculous. He told his uncle that he didn't even do it. He told Mutter just a week ago that he didn't even have this gun. That's remorse? Real sorry" (Tr. 3407);

"He lies to cops about what he did. Use your common sense, folks. That is not remorse by Leonardo Franqui" (Tr. 3407);

"The lawyers that are arguing here before you this afternoon are

> the same lawyers in the other phase of the trial who told you that their clients confessed to a crime they didn't commit" (Tr. 3408).

(PCR145-50).

The overall tenor and content of the prosecutor's closing argument at the penalty phase deprived Mr. Franqui of a fair penalty phase proceeding because it was so inflammatory that it not but have influenced some of the jurors to recommend death. For example, the prosecutor employed invectives to attack Mr. Franqui's character; despite the fact that Mr. Franqui had already been found guilty of murder, this did not give the prosecutor license to engage in improper name-calling. *See Walker v. State*, 710 So. 2d 1029 (Fla. 3d DCA 1998); *McPherson v. State*, 576 So. 2d 1357 (Fla. 3d DCA 1991); *Green v. State*, 427 So. 2d 1036 (Fla. 3d DCA 1983). The prosecutor also blatantly attacked Mr. Franqui's defense counsel, a practice long condemned by courts. *See Cooper v. State*, 711 So. 2d 1126 (Fla. 3d DCA 1998). In *Briggs v. State*, 455 So. 2d 519 (Fla. 1st DCA 1984), the prosecutor suggested that defense counsel "has created a theory which is misleading and dishonest" and that defense counsel was "insulting." In Mr. Franqui's case, the similarities are striking as the prosecutor also engaged in inappropriate and improper attacks on the integrity of defense counsel. Defense counsel, however, unreasonably failed to object to the

prosecutor's improper attacks. Finally, arguments which "denigrate" the testimony of a defense mental health expert, as the State did in its attacks on Dr. Toomer, are entirely improper, and counsel unreasonably failed to object. *See Campbell v. State*, 679 So. 2d 720, 724 (Fla. 1996).

The prosecutor also improperly argued to the jury that it was the jurors' "lawful duty" to impose the death penalty if the aggravation outweighed the mitigation. Statements by the prosecutor that the law "required jurors to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances misstate[] the law." *Franqui v. State*, 804 So. 2d 1185, 1193 (Fla. 2001). *See also Henyard v. State*, 689 So. 2d 239 (Fla. 1996); *Urbin v. State*, 714 So. 2d 411, 421 n.12 (Fla. 1998); *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000); *Garron v. State*, 528 So. 2d 353, 359 & n.7 (Fla. 1988). Indeed, these statements are "serious misstatement[s] of the law and guaranteed a death sentence if in the jury's opinion the aggravators outweighed the mitigators and the jurors, in obedience to their oath, followed the judge's advice." *Franqui*, 804 So. 2d at 1199 (Shaw, J., concurring in part and dissenting in part). Under Florida law and the Eighth Amendment, a jury is neither compelled nor required to recommend the death penalty even where the aggravating factors outweigh the mitigation:

> Certain factual situations may warrant the infliction of capital punishment, but nevertheless, would not prevent either the trial jury,

> the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

Alvord v. State, 322 So. 2d 533, 549 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976). *See also Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (a capital jury can constitutionally dispense mercy in a case otherwise deserving of the death penalty).

The failure by counsel to object to these clear misstatements of law constituted prejudicially deficient performance. An attorney in a capital case as the responsibility to know the law attendant to capital sentencing issues. *Garcia v. State*, 622 So. 2d 1325, 1329 (Fla. 1993) ("Counsel's failure to comprehend the most fundamental requirement governing the admissibility of evidence in capital sentencing proceedings was clearly unreasonable . . . "). Moreover, no reasonable tactical decision can be borne from a misunderstanding of the law. *See, e.g. Hardwick v. Crosby*, 320 F. 3d 1127, 1163 (11th Cir. 2003) ("a tactical or strategic decision is unreasonable if it is based on a failure to understand the law"). One of counsel's highest duties as an advocate is to object to improper argument and preserve issues for the appellate record, and the failure to do so is a cognizable ground for Rule 3.850 relief. *See Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001). *See also Davis v. State*, 648 So. 2d 1249 (Fla. 4th DCA 1995) ("trial counsel's

failure to object to reversible error, while waiving the point on direct appeal, does not bar a subsequent, collateral challenge based on a claim of ineffective assistance of counsel").

Based on the foregoing arguments and authorities, Mr. Franqui submits that reversal for an evidentiary hearing on this claim is warranted at this time.

ARGUMENT III

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FRANQUI'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING THE FAILURE TO PRESENT AVAILABLE EXPERT TESTIMONY AT THE PENALTY PHASE.

A. Standard of Review.

In considering whether a Rule 3.850 movant is entitled to present evidence in support of his constitutional claims, his factual allegations "must" be accepted as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000).

B. Mr. Franqui's Allegations.

In his amended Rule 3.850 motion, Mr. Franqui alleged that despite the fact that trial counsel had an available expert to testify at the penalty phase, Dr. Brad Fisher, trial counsel unreasonably failed to present this testimony at the penalty phase. As the motion alleged in relevant part:

> A key contention in the State's penalty phase case was that although Mr. Franqui was an abuser or multiple substances, he was actually a methodical sociopath who could not be rehabilitated. The failure of the defense to refute this contention by the State was

> unreasonable and could have been remedied if the defense had followed up by presenting an expert dealing with that issue. The Court approved the appointment of such an expert, but there is no indication that such an expert was present nor that this matter was discussed with Mr. Franqui. Clearly, the presentation of dispassionate psychological evidence was to Mr. Franqui's ability to adjust to a prison setting was necessary to defend the incendiary matters presented by the State in the penalty phase. The State took the deposition of proposed penalty phase witness Dr. Brad Fisher on October 21, 1993, at which time Dr. Fisher opined that Leonardo Franqui would "adjust well to the general population in a prison setting" (See p.73 of Deposition of October 21, 1993). Further, Dr. Fisher found that Leonardo Franqui "has not shown any indication of violence since incarceration, and I would expect that to continue" (See p. 17 of Deposition of Brad Fisher of October 21, 1993).

(PCR151-52).

The lower court summarily denied this claim, concluding that the allegations were "conclusory and legally insufficient" (PCR479). However, in a contradictory ruling, the court, addressing the specific allegation regarding counsel's failure to present the testimony of Dr. Fisher, the court apparently found the allegations specific enough to surmise that trial counsel must have had a strategic reason for not presenting this testimony at the penalty phase:

> Dr. Toomer conducted tests on the Defendant, which allowed him to draw opinions regarding his mental health, which were properly presented by defense counsel to the judge and jury during the penalty phase as mitigating factors. The trial judge and jury heard testimony from several witnesses that the Defendant did not use drugs or alcohol. Doctor Toomer opined that the Defendant was mentally retarded. The trial attorney's choice not to have Dr. Fisher testify regarding a good adjustment to prison life is reasonable. Dr. Fisher

> also would have testified that the Defendant was not mentally retarded.

(PCR480-81).

Mr. Franqui submits that the lower court's order must be reversed because the files and records did not conclusively refute his allegations, nor does the record support that trial counsel made a "choice" not to present Dr. Fisher because his testimony might have been, in some fashion, contradictory to that of Dr. Toomer. This type of fact-based determination cannot be properly made absent an evidentiary hearing. *See, e.g. Thomas v. State*, 634 So. 2d 1157 (Fla. 1st DCA 1994) (inappropriate to find that defense counsel's actions were tactical absent an evidentiary hearing); *Davis v. State*, 608 So. 2d 540 (Fla. 2d DCA 1992) (same). As this Court has held in similar circumstances:

> Because the record does not conclusively refute some of Patton's allegations of ineffective assistance of counsel, the court should have held an evidentiary hearing. Specifically, the court should have held a hearing to determine if counsel was ineffective in failing to investigate and present evidence that Patton was intoxicated or insane at the time of the shooting. Instead, the court summarily denied this claim stating a strategy must be presumed. If this were the standard, a strategy could be presumed in every case and an evidentiary hearing would never be required on claims of ineffective assistance of counsel.

Patton v. State, 784 So. 2d 380, 386-87 (Fla. 2000). Here, as in *Patton*, it was improper for the lower court to assume that Mr. Franqui's trial counsel had made a

"choice," much less a "reasonable" one, absent affording Mr. Franqui an opportunity to present his claim at an evidentiary hearing with the benefit of trial counsel's testimony on the subject.

On the face of Mr. Franqui's allegations, it is clear that he more than sufficiently pled the facts of his claim; certainly, the lower court had no problem ascertaining the exact nature of the factual allegations underlying the claim. He alleged that trial counsel unreasonably failed to present the testimony of Dr. Fisher at the penalty phase, despite having had Dr. Fisher appointed. Dr. Fisher was even listed as a potential penalty phase witness, and the State took his deposition. Moreover, the deposition is not as conclusive as the lower court would have it regarding Dr. Fisher's views on Mr. Franqui's mental state. Importantly, he made it clear that he was only asked to review the case for purposes of reaching an opinion as to Mr. Franqui's prison adjustment (PCR263) ("I was not asked to speak regarding his condition at the time of the commission of the crime"). When pressed by the State later in the deposition, Dr. Fisher did say that he had a "gut feeling" that Mr. Franqui was of average intelligence (PCR309). However, given that Dr. Fisher was not even tasked to evaluate Mr. Franqui's mental condition, much less conduct a full-blown evaluation for mental retardation, his "gut feeling" hardly suffices to conclusively refute Mr. Franqui's allegations. It is also highly

unlikely that a "gut feeling" would have been admissible as opinion testimony at the penalty phase even if Dr. Fisher had been presented and the State had decided to broach this subject with Dr. Fisher. In other words, Dr. Fisher's "gut feeling" would have been no more relevant or admissible than if Mr. Franqui's lawyer had testified that he had a "gut feeling" that Mr. Franqui was, indeed, mentally retarded. By referencing Dr. Fisher's deposition, the lower court simply raised more questions that require evidentiary development.

Given that the jury returned a recommendation by a vote of 9-3, the fact that Dr. Fisher would have been able to effectively dilute the State's position at the penalty phase that Mr. Franqui was nothing more than an unrepentant sociopath, and the other errors which this Court has already found to have permeated Mr. Franqui's case (errors which were found harmless based on the record at that time), Mr. Franqui submits that it was error for the lower court to summarily deny this claim by assuming that counsel made a reasonable choice not to present Dr. Fisher's testimony at the penalty phase. Reversal for an evidentiary hearing is required.

ARGUMENT IV

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FRANQUI'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESENT THE TESTIMONY OF MR. FRANQUI'S WIFE AT THE HEARING ON THE MOTION TO SUPPRESS OR AT THE GUILT AND/OR PENALTY PHASES.

A. Standard of Review.

In considering whether a Rule 3.850 movant is entitled to present evidence in support of his constitutional claims, his factual allegations "must" be accepted as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000).

B. Mr. Franqui's Allegations.

In his amended Rule 3.850 motion, Mr. Franqui alleged that he was denied the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), when counsel failed to present the testimony of his wife, Vivian Gonzalez, at the hearing on the motion to suppress, at the guilt phase, and/or at the penalty phase (PCR160). The motion alleged the following specific facts in support of

Mr. Franqui's entitlement to an evidentiary hearing:

> At the hearing on the Motion to Suppress Mr. Franqui's statement[,] [i]t was brought out during the cross-examination of Detective Nabut that Mr. Franqui met with his wife prior to the confession admitted at trial:
>
> > Q And for a period of time, you overheard a conversation between [Mr. Franqui] and his wife; is that correct?
> >
> > A That's correct.
> >
> > Q Her name is Vivian?
> >
> > A Vivian.
>
> (R204).
>
> The remainder of that portion of the Detective's testimony dealt with the monitoring equipment watching this meeting:
>
> > Q And what you did was you left Mr. Franqui and Vivian [Gonzalez] is a room by themselves?
> >
> > A Right.
> >
> > Q And that room had monitoring equipment where you could see and hear what was going on?
> >
> > A That's correct.
> >
> > Q Did you advise Mr. Franqui that you would be surreptitiously listening to his conversation with Vivian?
> >
> > A No, Sir.
> >
> > Q So this was totally unknown to him?

A It was unknown to me, too, that there was a monitor in the room. I found out after he went into the room with Vivian.

Q And you availed yourself of the monitor?

A As soon as I was told there was a monitoring device I went and listened and watched them.

Q And you listened to that device you heard talking with Vivian, correct?

A Right.

Q And, in fact, do you recall Mr. Franqui telling Vivian to contact a lawyer?

A No, wrong, wrong.

Q Do you recall a conversation between Mr. Franqui and Vivian to contact a person by the name of Mr. Cohen?

A No, there was no such statement made by Mr. Franqui or Vivian (R204-05).

Once the denial of requesting counsel by Detective Nabut in the Vivian-Franqui conversations was made, the testimony swung to the two and a half (2 ½) hour conversation that Nabut had with Franqui before the stenographic statement (See R206). It is clear that the Court had a Detective/Defendant credibility question with the testimony adduced at this hearing. Trial counsel did not present Vivian Gonzalez at that hearing even though she was available, and remains so available. It is relatively inconceivable that Vivian Gonzalez was not presented to assert the claims put forth by Mr. Franqui at the suppression hearing.

Evidence of Vivian Gonzalez's testimony was not only [not] adduced at the suppression hearing, but was never presented in the trial's final phase or penalty phase. It was of utmost relevance to the suppression claim since the testimony of Ms. Gonzalez would support Mr. Franqui's claims of abuse and threats.

Vivian Gonzalez's testimony becomes especially relevant in light of Mr. Franqui's testimony at the motion to suppress (See R350-367). Mr. Franqui's testified that he retained Mr. Cohen as counsel after his robbery arreste but before the questioning about the Lopez homicides (R350-352). Mr. Franqui said that Detectives Smith and Crawford first saw him in the interrogatory room (R354). Mr. Franqui testified that he did not want to speak without a lawyer present (R355-356). The questioning by Smith and Crawford was directed to the "Bauer" case (R358-359) and that Crawford slapped, kicked and threatened him for 6 to 7 hours before Detective Nabut came to speak to him (R360-367). The scenario by Mr. Franqui makes complete sense. The emotions in the community were extremely volatile from the "Bauer" case (also called the North Miami case) since the victim was a policeman (officer Bauer).

Assuming motives for the purpose of this argument, the treatment by Detectives Crawford and Smith of Mr. Franqui were associated with the death of Officer Bauer especially since after 6 or 7 hours Detective Nabut arrives to talk about the Hialeah homicide, i.e. the shooting of Raul Lopez. Furthermore, Vivian Gonzalez was a necessary witness, not only in regard to the request for an attorney present, but as to the condition of Mr. Franqui since she arrived in the transition period from Detectives Smith and Crawford to Detective Nabut. Her credibility would be a matter for a court to decide. However, to not use Vivian Gonzalez in that motion to suppress hearing denied effective presentation of his case.

Arguably, since a jury may "suppress" a confession and since defense counsel essentially argued in closing address to the jury in the guilt phase that Mr. Franqui's confession should be invalidated, Vivian Gonzalez's testimony was clearly relevant to that issue. However, trial counsel was ineffective in not producing Vivian

> Gonzalez at either proceeding, and thus the merits of Mr. Franqui's case were never truly presented.

(PCR160-163).

In summarily denying this claim, the lower court simply concluded that "Vivian Franqui did testify during the suppression hearing regarding the issues raised in the instant 3.850 petition" (PCR483-84) (citing page 47 of the *Huff* hearing transcript). However, a review of page 47 of the *Huff* hearing transcript reveals no such fact. Indeed, this claim is not even mentioned on page 47 of the *Huff* hearing transcript (PCT253). The issue of Vivian Gonzalez's testimony *was* discussed on page 46 of the *Huff* hearing transcript (PCT252), and the State never addressed this claim at the *Huff* hearing (PCT255-258). The State *did* address this argument very briefly in its written response to the amended Rule 3.850 motion; nowhere in that response does the State allege that Vivian did testify at the motion to suppress or at any other phase of Mr. Franqui's trial on the issue detailed in this claim. Rather, it was the State's position below that it "is possible for Ms. Gonzalez to testify that Defendant asked her to call his lawyer and Detective Nabut to testify that he never overheard such a request without creating any conflict in their testimony" (PCR213-14).

Because the lower court's disposition of this claim finds no support in the

record whatsoever, the order under review should be reversed and an evidentiary hearing should be granted. As Mr. Franqui alleged, Vivian's testimony would have been helpful at the motion to suppress and at the guilt and/or penalty phases. Trial counsel had no reasonable strategic reason for failing to present her testimony, which would have had to have been evaluated under all the circumstances presented at the suppression hearing and later at trial. Reversal for an evidentiary hearing is warranted.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. FRANQUI'S CLAIM THAT HE WAS ENTITLED TO A NEW PENALTY PHASE DUE TO THE RECANTED TESTIMONY OF PABLO ABREU.

A. Standard of Review.

An evidentiary hearing was conducted on this claim. When reviewing the lower court's disposition of this claim, the Court defers to factual findings made by the trial court only to the extent that they are supported by competent, substantial evidence. The Court reviews mixed legal questions *de novo*. *Stephens v. State*, 748 So. 2d 1029 (Fla. 1999).

B. Mr. Franqui's Claim and the Evidentiary Hearing Testimony.

Mr. Franqui was granted an evidentiary hearing (upon concession of the State) on aspects of a claim raised in co-defendant San Martin's Rule 3.850 motion. That claim was premised on an affidavit executed by Pablo Abreu, the other co-defendant, who testified at the Franqui/San Martin penalty phase, in which Abreu purported to recant from some of his testimony given at the penalty phase, specifically that part of his testimony wherein he provided the State with evidence of premeditation to support the cold, calculated, and premeditated (CCP) aggravating circumstance (PCR725). Unquestionably, this Court, on direct

appeal, concluded that the lower court's finding of CCP was supported by the evidence, and specifically by the testimony of Abreu; indeed, the Court noted that the State specifically contended, and this Court agreed, that Abreu's testimony supported the finding that "not only was the robbery carefully planned in advance, but there was also a plan for Franqui to shoot and kill the bodyguard, the victim here." *Franqui*, 699 So. 2d at 1324.

At the evidentiary hearing,[8] Abreu, currently serving a life sentence for his participation in the instant case, testified that he reached a plea agreement with the State in exchange for testifying against both Mr. Franqui and San Martin (PCT372). According to Abreu, the "plan" he, Franqui, and San Martin had was to steal two cars and to take money (PCT373). The cars were stolen the day before the actual robbery (PCT373-74). Abreu and San Martin were to take the money, and Mr. Franqui was to "grab" the security guard (PCT375). In the van shortly before the robbery went down, Abreu testified that Mr. Franqui said that he would "take care" of the security guard, but not kill anyone; it was never part of the plan to shoot or kill anyone (PCT376). He imparted this information to the trial prosecutors before he testified (PCT376-77).

Abreu recalled testifying at the penalty phase against Mr. Franqui and San

[8]The evidentiary hearing was conducted jointly for both Mr. Franqui and San Martin.

Martin, and repeated that, prior to his testimony, he met with his attorney and the prosecutors, and discussed the fact that there was no prior plan to kill anyone when the cars were stolen or when the robbery was first discussed (PCT379). As he testified, "[f]rom the very beginning I said that we didn't know that we were going to kill anybody" (PCT383). They only began to shoot in self-defense to shots being fired at them during the robbery (PCT400), and that Mr. Franqui's statement about "taking out" the bodyguard referred to the fact that Mr. Franqui would shoot back if the guard shot at him first (PCT401-02). Abreu again clarified the context of Mr. Franqui's statement:

> Q And when he [Mr. Franqui] said he was going to take care of him, he did not say to you that I am going to kill him; isn't that correct?
>
> A He said that man is going to kill me because he is the security guard and I am going to shoot at him also to defend my life also.
>
> Q So his statement to you was, just to clarify what you just said, was that he was, meaning Mr. Franqui, was going to defend himself from the body guard; is that correct?
>
> A Yeah, to have it out with the bodyguard in the rear.
>
> Q And that was in case the bodyguard decided to shoot at Mr. Franqui, isn't that right?
>
> A Well, I would imagine, right.

(PCT401-02). He also reiterated that when he spoke with the prosecutors about

his anticipated penalty phase testimony, he "told them what happened, what happened" (PCT408).

C. Mr. Franqui is Entitled to a New Penalty Phase.

Mr. Franqui respectfully submits that, based on the evidence presented at the evidentiary hearing, a new penalty phase proceeding is warranted because he established that the State, through Abreu's penalty phase testimony, withheld material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Moreover, the information presented through Abreu's testimony establishes that the State, at Mr. Franqui's penalty phase, knowingly presented false evidence, in violation of due process and *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny.

At the evidentiary hearing, Mr. Franqui conclusively established that the only reason for the shootings was self-defense and, consequently, Abreu's testimony established a recantation of his penalty phase testimony, where Abreu directly and unequivocally testified that Mr. Franqui had premeditated this murder to an extent that the State was able to argue, and convince the trial court and this Court, that the CCP aggravator applied. As this Court noted on direct appeal, Abreu testimony at the penalty phase established CCP beyond a reasonable doubt:

> Q And what did Franqui tell you about the bodyguard, what would he have [to do] with him?

A He said not to worry about it, that the only one that could shoot there was the bodyguard, not the others.

Q And what did Franqui tell you or Pablo they were going to do to the bodyguard, if anything?

A That it would be better for him to be dead first than Franqui.

Q What did Franqui tell you that they were going to do with the bodyguard during the crime?

A First he was going to crash against him and throw him down the curb side, and then he would shoot at him, but he didn't do it that way.

Franqui, 699 So. 2d at 1324. This Court also noted that Abreu testified that Mr. Franqui said that he (Mr. Franqui) would "take care of the escort." *Id.*

In rejecting this claim, the lower court concluded that Mr. Franqui[9] had failed to establish the knowing presentation of false testimony because, at best, the evidentiary hearing testimony of Abreu showed merely an "arguable inconsistency" with Abreu's penalty phase testimony (PCR756). However, the "inconsistency" was neither "arguable" nor as insignificant as the lower court would have it. Unquestionably, as this Court noted on direct appeal, Abreu testified that Mr. Franqui had a pre-arranged intentional plan to murder the victim, and his testimony was couched in such terms as to make Mr. Franqui appear to be

[9]The lower court's order denied the claim both as to Mr. Franqui and to San Martin.

utterly cavalier about the entire prospect of killing the victim. However, during his evidentiary hearing testimony, which was credited by the lower court, Abreu made clear on numerous occasions that Mr. Franqui had no such plan. Rather, the only discussion about shooting anyone was in the context of self-defense if the bodyguard shot first:

> Q Mr. Franqui's statement to you that, basically, the reason he would shoot at the bodyguard was for self-defense purposes; is that correct?
>
> A *Of course because his life was going to be in danger, also.*
>
> * * *
>
> Q And of course Mr. Abreu and Mr. San Martin were required to do the same thing too because people started shooting at you too; is that correct?
>
> A Once we stepped out of the van with revolvers in hand to go take the money away they began to fire, so we fired back.
>
> Q Would it be correct for me to say that neither Mr. San Martin, Mr. Franqui nor you intended to just shoot anyone for just any reason at all; would that be correct?
>
> A Well, we were going to do a robbery, I mean we were armed.
>
> Q But there were no intentions to shoot someone by you, Mr. San Martin, or Mr. Franqui?
>
> A Well, we spoke that someone was going to be dead because we were going to defend our lives.
>
> Q And that is a matter of self-defense in your mind?

A Yeah, to defend myself. If he's going to shoot at me, I'm going to shoot at them.

(PCT403-04) (emphasis added).

In light of Abreu's testimony that Mr. Franqui never in fact stated any pre-arranged intention to kill, and that he (Abreu) told the prosecutors this prior to the penalty phase, Mr. Franqui submits that he has made out a meritorious *Giglio* claim. Under *Giglio*, relief is warranted if the false testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." *Williams v. Griswald*, 743 F. 2d 1533, 1543 (11th Cir. 1984) (quoting *Giglio*, 405 U.S. at 154). The focus is on the affect that Abreu's false testimony may have had on the jury, and the standard for establishing a *Giglio* violation is less onerous than for a *Brady* violation. *United States v. Agurs*, 427 U.S. 97 (1976).[10] Despite the State's

[10]In *Agurs*, the Supreme Court explained that the post-trial discovery of suppressed information can give rise to several legal claims. One type of claim occurs where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Agurs*, 427 U.S. at 103. In this type of situation, a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id*. Unlike a *Brady* situation where no intent to suppress is required to be established, a "strict standard of materiality" applies in cases involving perjured testimony because "they involve a corruption of the truth-seeking process." *Id*. at 104. Thus, although both *Brady* and *Giglio* require a showing of "materiality," the legal standard for demonstrating entitlement to relief is significantly different. The standard for establishing "materiality" under *Giglio* has "the lowest threshold" and is "the least onerous." *United States v. Anderson*, 574 So. 2d 1347, 1355 (5th Cir. 1978).

knowledge from Abreu that his penalty phase testimony was not, in fact, true, the State nonetheless presented it to the jury in order to convince the jury that the CCP factor was established beyond a reasonable doubt.[11] The State also successfully argued to this Court that CCP was proven by Abreu's now-recanted penalty phase testimony. *Franqui*, 699 So. 2d at 1324. Because of Abreu's testimony below, the CCP factor can not reasonably be upheld at this point. Given that the jury recommended death by a 9-3 vote, that there was mitigation presented to the jury, and the other errors that permeated this case, including the substantial error found on direct appeal and the fact that his attempted first-degree murder convictions were also vacated on appeal, Mr. Franqui submits that a new penalty phase proceeding is warranted so that a jury, hearing appropriate evidence, can conduct the requisite weighing of aggravators and mitigators.

[11]In the alternative, Mr. Franqui asserts that the testimony of Abreu is newly-discovered evidence warranting relief. *See Jones v. State*, 591 So. 2d 911 (Fla. 1991).

CONCLUSION

Based on the foregoing arguments, Mr. Franqui requests that the Court grant a new trial, a new penalty phase, and/or reverse for further evidentiary development. Mr. Franqui also requests that the Court permit a remand in order for him to file a motion for relief pursuant to Fla. R. Crim. P. 3.203, and grant any other relief as deemed just and proper at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief was furnished by U.S. Mail to Sandra Jaggard, Assistant Attorney General, 444 Brickell Avenue, 6th Floor, Miami, Florida 3313, on this 17th day of April, 2008.

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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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