DOCKET NO. ______

OCTOBER TERM 2020

IN THE

SUPREME COURT OF THE UNITED STATES

LEONARDO FRANQUI,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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301 So.3d 152
Supreme Court of Florida.

Leonardo FRANQUI, Appellant,
v.
STATE of Florida, Appellee.

No. SC19-203
|
May 7, 2020

Synopsis

Background: In first case, after conviction and death sentence for capital murder were affirmed on direct appeal, 699 So.2d 1312, death-sentenced defendant filed motion for postconviction relief, asserting claim that he was intellectually disabled. The Circuit Court, Miami-Dade County, denied relief, and defendant appealed. The Supreme Court, 59 So.3d 82, affirmed. In separate case, after conviction and death sentence for capital murder of police officer were affirmed on direct appeal, defendant filed separate motion for postconviction relief, again based on claim of intellectual disability. The Circuit Court denied relief, and defendant appealed. The Supreme Court, 118 So.3d 807, affirmed. Defendant then filed successive motions for postconviction relief, contending that prior motions were denied under standard in *Cherry v. State*, 959 So.2d 702, which was subsequently held unconstitutional in *Hall v. Florida*, 134 S.Ct. 1986. The Circuit Court, Stanford Blake, J., denied motions, and defendant appealed. The Supreme Court, 211 So.3d 1026, reversed and remanded. On remand, the Circuit Court, 11th Judicial Circuit, Miami-Dade County, Ellen Sue Venzer, J., denied the motion. Defendant appealed.

The Supreme Court held that defendant was not intellectually disabled within meaning of statute that prohibited imposition of death sentence upon intellectually disabled person.

Affirmed.

Canady, C.J., concurred in the result with opinion.

Labarga, J., concurred in the result with opinion.

***153** An Appeal from the Circuit Court in and for Miami-Dade County, Ellen Sue Venzer, Judge - Case Nos. 131992CF002141B000XX and 131992CF006089B000XX

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Opinion

PER CURIAM.

Leonardo Franqui appeals an order denying his claim of intellectual disability, raised in successive motions for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. We affirm the denial of postconviction relief.

FACTS AND PROCEDURAL BACKGROUND

Franqui was convicted of first-degree murder and sentenced to death in two separate cases. He was convicted of the 1991 murder of Raul Lopez (the Hialeah case), and the trial court sentenced him to death after the jury recommended death by a vote of nine to three. *See Franqui v. State*, 699 So. 2d 1312, 1316 (Fla. 1997). On direct appeal, this Court vacated Franqui's convictions for attempted murder but affirmed the remaining convictions and sentences. *Id.* at 1329. Franqui was also convicted of the 1992 murder of law enforcement officer Steven Bauer (the North Miami case). On direct appeal, this Court affirmed Franqui's convictions but reversed for a new penalty phase. *See Franqui v. State*, 699 So. 2d 1312 (Fla. 1997). On resentencing, the trial court sentenced Franqui to death after the jury recommended death by a vote of ten to two. *See Franqui v. State*, 804 So. 2d 1185, 1190-91 (Fla. 2001). This Court affirmed Franqui's death sentence on direct appeal. *Id.* at 1199.

Franqui's initial motion for postconviction relief in the Hialeah case raised, among other issues, a claim that he is intellectually disabled. This Court affirmed the circuit court's denial of postconviction relief. *See Franqui v. State*, 59 So.

3d 82 (Fla. 2011). Although Franqui's initial postconviction appeal in the North Miami case raised an ineffective assistance of counsel claim alleging mental illness, Franqui did not argue that he is intellectually disabled. *See Franqui v. State*, 965 So. 2d 22, 29-30 (Fla. 2007). This Court affirmed the circuit court's denial of relief, *see id*. at 26, 38, and Franqui later raised a claim of intellectual disability in a successive motion for postconviction relief. The circuit court summarily denied the claim, and this Court affirmed. *See Franqui v. State*, 118 So. 3d 807 (Fla. 2013) (unpublished opinion).

In the wake of the United States Supreme Court's decision in *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), Franqui filed successive motions for postconviction relief in both of his capital cases. Relying on *Hall*, Franqui's motions asserted that the denials of his previous claims of intellectual disability were based on an improper interpretation of Florida's intellectual disability statute, and that as a result, he was entitled to an additional evidentiary hearing. The circuit ***154** court summarily denied both motions, and Franqui appealed to this Court.

In 2017, in light of this Court's decision in *Walls v. State*, 213 So. 3d 340 (Fla. 2016) (holding that *Hall v. Florida* is to be retroactively applied), this Court reversed the circuit court's summary denials of Franqui's claims and remanded for a single evidentiary hearing on the issue of intellectual disability. *See Franqui v. State*, 211 So. 3d 1026, 1032 (Fla. 2017).

Following an evidentiary hearing in 2017, the circuit court denied Franqui's intellectual disability claim. Franqui now appeals the circuit court's order. He also argues that his death sentences are invalid under *Hurst v. Florida*, ––– U.S. ––––, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 45 Fla. L. Weekly S41, ––– So.3d ––––, 2020 WL 370302 (Fla. Jan. 23, 2020), *clarified*, 45 Fla. L. Weekly S121, ––– So.3d ––––, 2020 WL 1592953 (Fla. Apr. 2, 2020). As we explain below, we affirm the denial of postconviction relief on the issue of Franqui's intellectual disability, and we deny Franqui's *Hurst*-related claims.

ANALYSIS

I. Intellectual Disability

The determination of intellectual disability is subject to a three-prong test: (1) significantly subaverage intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. § 921.137(1), Fla. Stat. (2017). Subaverage intellectual functioning is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." Fla. R. Crim. P. 3.203(b).

Pursuant to *Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. 2007), in determining significantly subaverage intellectual functioning, this Court previously applied a bright-line IQ score cutoff of 70, which is two standard deviations below the mean IQ score of 100. Under the *Cherry* analysis, where a defendant could not establish that he has an IQ of 70 or below, the circuit court need not reach the remaining two prongs of the intellectual disability determination. *Id.* at 714.

However, in *Hall*, the United States Supreme Court held that Florida's strict IQ test score cutoff of 70 "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." 572 U.S. at 704, 134 S.Ct. 1986. The Court stated that when assessing the subaverage intellectual functioning prong, courts must take into account the standard error of measurement (SEM) of IQ tests. *Id.* at 722-23, 134 S.Ct. 1986. Moreover, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723, 134 S.Ct. 1986.

Franqui argues that the circuit court erred in not conducting the **holistic** analysis of intellectual disability set forth in ***Hall***. We disagree. In reviewing the circuit court's determination that Franqui is not intellectually disabled, "this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011). "If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016) (citing *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009)). "This Court does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." ***155** *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007) (citing *Trotter v. State*, 932 So. 2d 1045, 1050 (Fla. 2006)).

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First, we reject Franqui's argument that this Court should recede from *Salazar*, as well as his challenge to the clear and convincing burden of proof set forth in section 921.137(4), Florida Statutes. In the proceedings below, Franqui did not timely present his challenge to the statutory clear and convincing evidence standard, so this issue was not preserved for review on appeal.

Second, we reject Franqui's argument that the circuit court failed to conduct a proper review of his intellectual disability claim. In its order denying postconviction relief, the circuit court evaluated each of the three intellectual disability prongs. Having reviewed the extensive evidence relating to Franqui's IQ, the court concluded that Franqui's IQ scores, when taking the SEM into account, did not demonstrate significantly subaverage intellectual functioning, and did not meet the first prong, stating: "Mr. Franqui has not shown, by clear and convincing evidence, that his intellectual functioning is two standard deviations below the norm of 100." In a footnote, the court indicated that it did not consider Franqui's score on the Revised Beta Test because of expert testimony conceding that it was not a recommended IQ test. Competent substantial evidence supports the court's conclusion.

The circuit court continued its analysis and considered the second prong, whether Franqui exhibited concurrent deficits in adaptive behavior. The court evaluated the conceptual, social, and practical domains of adaptive behavior, and it concluded that Franqui failed to demonstrate adaptive deficits. Competent substantial evidence supports the court's conclusion.

The circuit court then considered the third prong, manifestation of adaptive deficits before age eighteen, and concluded: "The evidence presented is overwhelming that, prior to his incarceration, the Defendant functioned normally in society and, while incarcerated the Defendant has shown no adaptive deficits. Franqui has failed to prove, by clear and convincing evidence, any concurrent deficits that would satisfy the third prong of the intellectual disability test." Competent substantial evidence supports the circuit court's conclusions as to all three prongs of the intellectual disability analysis.

Third, we reject Franqui's claim that he is entitled to relief under *Moore v. Texas*, ––– U.S. ––––, 137 S. Ct. 1039, 197 L.Ed.2d 416 (2017). In evaluating whether Franqui had significantly subaverage intellectual functioning, the circuit court accounted for the SEM and concluded that Franqui's lowest IQ score was a 71. Despite finding that Franqui did not fall "within the clinically established range for intellectual-functioning deficits," 137 S. Ct. at 1050, the trial court considered other evidence of intellectual disability and evaluated the second and third prongs of the intellectual disability analysis.

II. *Hurst v. Florida* and *Hurst v. State*

Franqui also argues that he is entitled to relief pursuant to *Hurst v. Florida*, ––– U.S. ––––, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 45 Fla. L. Weekly S41, ––– So.3d ––––, 2020 WL 370302 (Fla. Jan. 23, 2020), *clarified*, 45 Fla. L. Weekly S121, ––– So.3d ––––, 2020 WL 1592953 (Fla. Apr. 2, 2020). However, neither case provides a basis for relief because in each of Franqui's cases, a jury unanimously found the existence of an aggravating factor beyond a reasonable doubt. *See Poole*, 45 Fla. L. Weekly at S48, ––– So.3d at ––––, 2020 WL 370302 ("reced[ing] from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt"); *see also* ***156** *McKinney v. Arizona*, ––– U.S. ––––, 140 S. Ct. 702, 707, 206 L.Ed.2d 69 (2020) (stating that under *Hurst v. Florida*, "a jury must find the aggravating circumstance that makes the defendant death eligible," but a jury "is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range"). In the Hialeah case, Franqui was also convicted of attempted robbery, which was found as an aggravating factor. In the North Miami case, Franqui was also convicted of robbery, which was also found as an aggravating factor. These findings satisfy the requirements of *Hurst v. Florida* and *Hurst v. State*.

Moreover, Franqui's argument that *Hurst v. Florida* compels a jury determination of intellectual disability is without merit. Under Florida law, both the statute and the rule governing intellectual disability in capital cases provide that the determination shall be made by a judge, not a jury. *See* § 921.137, Fla. Stat. (2017); Fla. R. Crim. P. 3.203(e). Further, intellectual disability is a categorical bar to execution, and *Hurst v. Florida* does not address findings that render a defendant ineligible to be executed.

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For the foregoing reasons, we affirm the denial of Franqui's claim of intellectual disability.

It is so ordered.

POLSTON, LAWSON, and MUÑIZ, JJ., concur.

CANADY, C.J., concurs in result with an opinion.

LABARGA, J., concurs in result with an opinion.

CANADY, C.J., concurring in result.

I agree that the decision of the circuit court should be affirmed. But I would reject the intellectual disability claim on the ground that *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), should not be given retroactive effect. *See Walls v. State*, 213 So. 3d 340, 350-52 (Fla. 2016) (Canady, J., dissenting).

LABARGA, J., concurring in result.

I agree that the circuit court did not err in denying Franqui's intellectual disability claim. I also agree with the denial of Franqui's *Hurst*-related claims because this Court held that *Hurst v. Florida*[1] and *Hurst v. State*[2] do not apply retroactively to cases where the defendant's death sentence was final when *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), was decided. *See Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017).

1 *Hurst v. Florida*, ––– U.S. ––––, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016).

2 *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 45 Fla. L. Weekly S41, ––– So.3d ––––, 2020 WL 370302 (Fla. Jan. 23, 2020).

However, rather than rely on *Hitchcock*, the majority relies on *State v. Poole*, 45 Fla. L. Weekly S41, ––– So.3d ––––, 2020 WL 370302 (Fla. Jan. 23, 2020), *clarified*, 45 Fla. L. Weekly S121, ––– So.3d ––––, 2020 WL 1592953 (Fla. Apr. 2, 2020), a wrongfully decided opinion to which I strenuously dissented. Because I conclude that the denial of *Hurst* relief in this case is correctly based on *Hitchcock* and not *Poole*, I can only concur in the result.

All Citations

301 So.3d 152, 45 Fla. L. Weekly S132

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Supreme Court of Florida

THURSDAY, SEPTEMBER 17, 2020

CASE NO.: SC19-203
Lower Tribunal No(s).:
131992CF002141B000XX;
131992CF006089B000XX

LEONARDO FRANQUI vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.
COURIEL and GROSSHANS, JJ., did not participate.

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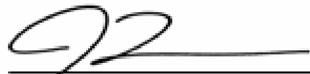

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HON. BERTILA ANA SOTO, CHIEF JUDGE

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

CASE NO. F92-2141B
& F92-6089
JUDGE VENZER

STATE OF FLORIDA,
Plaintiff
vs

LEONARDO FRANQUI,
Defendant.
_______________________________/

ORDER DENYING CLAIM TO DECLARE
DEFENDANT FRANQUI INTELLECTUALLY DISABLED

Following remand from the Florida Supreme Court on May 14, 2017, this cause came before this Court for a single evidentiary issue on Leonardo Franqui's claim of intellectual disability:

> [B]ecause the circuit court was aware that pursuant to *Cherry,* Franqui's intellectual disability claim failed because none of his IQ scores on the WAIS and Stanford–Binet tests were below 70, the circuit court may have determined that it was unnecessary to consider or discuss the second and third prongs in detail. If this is the case, then Franqui did not receive the "holistic" evaluation of his claim that he is entitled to under *Hall.* Requiring the circuit court to hold a second evidentiary hearing will afford Franqui a full opportunity to present evidence in support of his intellectual disability claims.

Franqui v. State, 211 So.3d 1026, 1032 (Fla. 2017).

THE UNDERLYING CASES:

Defendant was sentenced to death in two separate cases (hereinafter referred to as the "Hialeah case" and "North Miami/Bauer case").[1] The facts of the Hialeah case are as follows:

> Danilo Cabanas, Sr., and his son, Danilo Cabanas, Jr., operated a check-cashing business in Medley, Florida. On Fridays, Cabanas Sr. would pick up cash from his bank for the business. After Cabanas Sr. was robbed during a bank trip, Cabanas Jr. and a friend, Raul Lopez, regularly accompanied Cabanas Sr. to the bank. The Cabanases were each armed with a 9mm handgun, and Lopez was armed with a 32 caliber gun. On Friday, December 6, 1991, the Cabanases and Lopez drove in separate vehicles to the bank. Cabanas Sr. withdrew about $25,000 in cash and returned to the Chevrolet Blazer driven by his son. Lopez followed in his Ford pickup truck. Shortly thereafter, the Cabanases were cut off and "boxed in" at an intersection by two Chevrolet Suburbans. Two occupants of the front Suburban, wearing masks, got out and began shooting at the Cabanases. When Cabanas Sr. returned fire, the assailants returned to their vehicle and fled. Cabanas Jr. saw one person, also masked, exit the rear Suburban.
>
> Following the gunfight, Lopez was found outside his vehicle with a bullet wound in his chest. He died at a hospital shortly thereafter. One bullet hole was found in the passenger door of Lopez's pickup. The Suburbans, subsequently determined to have been stolen, were found abandoned. Both Suburbans suffered bullet damage — one was riddled with thirteen bullet holes. The Cabanases' Blazer had ten bullet holes.
>
> Franqui's confession was admitted at trial. When police initially questioned Franqui, he denied any knowledge of the Lopez shooting. However, when confronted with photographs of the bank and the Suburbans, he confessed. *Franqui explained that he had learned from Fernando Fernandez about the Cabanases' check cashing business and that for three to five months he and his codefendants had planned to rob the Cabanases. He described the use of the stolen Suburbans, the firearms used, and other details of the plan.* Franqui admitted that he had a .357 or .38 revolver. Codefendant San Martin had a 9mm semiautomatic, which at times jammed, and codefendant Abreu had a Tech–9 9mm semiautomatic, which resembles a small machine gun. Franqui stated that San Martin and Abreu drove in front of the Cabanases and Franqui pulled alongside them so they could not escape. Once the gunfight began, Franqui claimed that the pickup rammed the Cabanases' Blazer and Lopez opened fire. Franqui then returned fire in Lopez's direction.

[1] The facts of the underlying cases are recited here only for purposes of providing insight into Franqui's involvement in the crimes in order to evaluate his claim of intellectual disability.

> San Martin refused to sign a formal written statement to police. *However, San Martin orally confessed and, in addition to relating his own role in the incident, detailed Franqui's role in planning and executing the crime.* San Martin admitted initiating the robbery attempt and shooting at the Blazer but not shooting at Lopez's pickup. He placed Franqui in proximity to Lopez's pickup, although he could not tell if Franqui had fired his gun during the incident. San Martin initially claimed that the weapons used in the crime were thrown off a Miami Beach bridge, but subsequently stated that he had thrown the weapons into a river near his home, where they were later recovered by the police. San Martin did not testify at trial, but his oral confession was admitted into evidence over Franqui's objection.

Franqui v. State, 699 So.2d 312, 1315–16 (Fla. 1997).

The facts of the North Miami/Bauer case are as follows:

> Kislak National Bank, in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, Police Officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank. Approximately two weeks later, codefendant Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that *Franqui had planned the robbery, involved the other participants and himself in the scheme, and had chosen the location and date for the crime. He said that Franqui had procured the two stolen Chevys, driven one of the cars, and supplied him with the gun he used during the robbery.* He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. He was subsequently re-interviewed by police and, among other things, described how Franqui had shouted at the victim not to move before shooting him.
>
> Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his pre-interview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez and Abreu had stolen the vehicles. *Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez—and not himself—who yelled at the victim to "freeze" when they saw him pulling*

> *out his gun.* Franqui denied firing the first shot and maintained that he fired only one shot later.
>
> At trial, over the objection of Franqui, the confessions of co-defendants San Martin and Gonzalez were introduced without deletion of their references to Franqui, upon the trial court's finding that their confessions "interlocked" with Franqui's own confession. In addition, an eyewitness identified Franqui as the driver of one of the Chevrolets leaving the bank after the robbery, and his fingerprints were found on the outside of one of the vehicles. Ballistics evidence demonstrated that codefendant Ricardo Gonzalez had fired the fatal shot from his .38 revolver, hitting the victim in the neck, and that Franqui had shot the victim in the leg with his .9mm handgun.

Franqui v. State, 699 So. 2d 1332, 1333–34 (Fla. 1997).

THE HEARING ON REMAND

This Court conducted an evidentiary hearing over several days, hearing evidence from the defendant's mental health experts, Drs. Gordon Taub and Jethro Toomer, as well as the State's expert, Dr. Enrique Suarez. The *only* purpose of this hearing was to determine whether Mr. Franqui satisfied, by clear and convincing evidence, a claim of intellectual disability. Section 921.137 (1), Fla. Stat. (2017), sets forth a three prong test for a finding of intellectual disability. A defendant must demonstrate significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior, manifested during the period from conception to age eighteen. The defendant must prove each of these three elements by clear and convincing evidence.[2] *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011). *Hall v. Florida*, 134 S. Ct. 1986 (2014), sets out the parameters of the Court's inquiry.

[2] See *South Florida Water Management Dist. V. RLI Live Oak, LLC,* 139 So. 3D 869, 872-873 (Fla. 2014) defining clear and convincing standard as requiring evidence to "be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." (Quoting *Inquiry Concerning a Judge,* 645 So. 2d 398, 404 (Fla. 1994).

> Instead of using a fixed number IQ score as determinative of intellectual disability, Florida's courts must also use other indicative evidence such as past performance, environment, and upbringing. Id. at 1996. In sum, when determining the eligibility for the death penalty of a defendant who has an IQ test score approaching 70, Florida courts may not bar the consideration of other evidence of deficits in intellectual and adaptive functioning. Florida courts may continue to abide by section 921.137(1), but may not have a bright-line cutoff IQ test score because "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment."

Hall v. Florida, 134 S.Ct. at 2001.

Franqui contends that intellectual disability should be viewed pursuant to *Moore v. Texas,* 137 S.Ct. 1039 (2017). *Moore* requires that the determination of adaptive behavior be determined by professional medical standards (rather than the factors used in Texas which were in conflict with recognized professional medical standards). *Moore* explains, "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits.*" 137 S. Ct. at 1050. E.g., AAIDD-11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM-5, at 33, 38 (inquiry should focus on "[d]eficits in adaptive functioning"; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits; see *Brumfield v. Cain,* 576 U.S., at ___,___, 135S.C. at 2278). The State argues that the Court should consider the Defendant's strengths in determining deficits. Strengths and deficits are intertwined such that in looking at one, the other will often come into play.

The parties and their experts agree that the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), is the most widely used and accepted publication. As such, this Court will use the criteria set forth in the DSM-5 in considering Franqui's claim.

PRONG I

SIGNIFICANT SUB-AVERAGE GENERAL INTELLECTUAL FUNCTIONING

The first prong requires that the defendant have "significantly sub-average general intellectual functioning" such that the defendant's performance is two or more standard deviations from the mean score on a standardized intelligence test § 921.137 (1), Fla. Stat. (2017).

Dr. Taub, the Defendant's expert, testified that he was retained in May, 2017, to read a previous report prepared by Dr. Trudy Block-Garfield to determine whether Mr. Franqui had an intellectual disability. Dr. Taub did not personally examine the Defendant or contact the Defendant's family in evaluating the Defendant's IQ.[3] However, Dr. Taub read Dr. Block-Garfield's report of the Defendant, outlining the results of two intelligence tests, the Stanford-Binet IV and the WAIS III, both administered in 2003, where the Defendant had scored a 76 and a 75 respectively.[4] (H. Vol. 1, p. 38) In explaining Dr. Block-Garfield's report, Dr. Taub described that all intelligence tests are subject to the "Flynn effect," where scores increase every year due to societal changes relative to the date that the intelligence test is normed. Under the Flynn effect, scores increase by three points every decade. (H. Vol. 1, p. 24-25) Dr. Taub calculated that due to the number of years between when the Stanford-Binet IV test was normed (in 1985) and when it was administered to the Defendant (in 2003), the Defendant's score would have been inflated by roughly five points, changing the observed score from 76 to 71. Likewise,

[3] Neither did Dr. Taub contact Dr. Block-Garfield to review the results of the Defendant's IQ tests, nor did he seek out the materials that Dr. Block-Garfield reviewed to make her determination or ask that they be provided to him. Rather, he made what he described as a "reasonable assumption" and applied "sound psychometric principals" when reviewing the Defendant's reported scores. Dr. Taub did not (and, in fact could not) opine with respect to the 2nd and 3rd prong of the test set forth in section 921.137(1) Fla. Stat. (2017) as he only reviewed Dr. Garfield's previous report. In response to why he chose to ignore Franqui's numerous higher IQ test scores (which fell outside of the range for a diagnosis of intellectual disability even when applying the SEM), Dr. Taub stated he was directed by defense counsel only to consider the 2003 Block-Garfield report. (H. Vol. 1, p. 15)

[4] Dr. Taub opined that on the Stanford-Binet Test, it is much harder for an individual to appear gifted and it is much easier for some to appear intellectually disabled. (H. Vol. 1, p. 28)

according to Dr. Taub, the WAIS III, normed in 1995, would have inflated the Defendant's score by two points, and the re-calculated score would be 73. (H. Vol. 1, p. 30-38)

Dr. Taub further opined that the average standard error of measurement ("SEM"), which accounts for the portion of unreliability in the measuring of intelligence, would have to be taken into account in order to properly score the Defendant's IQ. (H. Vol 1, p.40) Although not knowing the exact measurement of error, Dr. Taub hypothesized that an average of plus or minus four or five points would be appropriate. (H. Vol. 1, p. 40-42) Under this theory, Dr. Taub opined that the Defendant's IQ **could** fall under 70. (H. Vol. 1, p. 44) Dr. Taub was forthcoming when he conceded that the Flynn effect would not be applied in all cases where IQ is being tested. (H. Vol. 1, p. 71) Taking only the SEM into account, Franqui's score on the WAIS would be between 70 and 80, according to Dr. Taub. It is noteworthy that, despite the reported scores, Dr. Taub acknowledged that neither his nor Dr. Block-Garfield's report diagnosed the Defendant as intellectually disabled. Dr. Taub concluded that "Mr. Franqui may be intellectually [disabled]." But then added that "[he] did not make a determination of an intellectual disability." (H. Vol. 1, pg 57-59, 62). Dr. Taub agreed that Dr. Block-Garfield's report mentioned a number of factors she observed about Mr. Franqui. She noted that Mr. Franqui "had difficulties in maintaining a job" but attributed this to "immaturity;" and that while Mr. Franqui did, in some fashion, support his family, this could not be accomplished by an individual who was mentally retarded. (Vol. 1, p. 59-60, 62)

The Defendant's second expert, Dr. Jethro Toomer, was retained in March, 1992 to evaluate the Defendant during the penalty phase in the underlying trial. Dr. Toomer recalled meeting Franqui three times and administering the WAIS-R intelligence test on the third occasion. Dr. Toomer also performed the Bender Gestalt Designs, the Revised Beta Examination, the Carlson Psychological Survey, and the Minnesota Multiphasic Personality Inventory ("MMPI"). He further conducted a

clinical interview with Franqui and gathered biographical and chronological information from the Defendant and the Defendant's uncle. Dr. Toomer could not initially recall if he rendered an opinion during the penalty phase of the underlying trial as to the Defendant's intellectually disability, but he believed that the Defendant had some "cognitive issues," suggestive of organic impairments and schizophrenia. (H. Vol. 2, p. 149) Dr. Toomer later recalled testifying in the underlying case that Franqui functioned within the Intellectually Disabled range.[5] In discussing the intelligence tests, Dr. Toomer acknowledged that he administered the Revised Beta Test, despite knowing that the WAIS is the recommended test to determine intelligence. According to Dr. Toomer, the Defendant scored a 60 on the Revised Beta Test and an 83 on the WAIS-R. (H. Vol. 2, p. 155) In comparing the test results, Dr. Toomer opined that the Revised Beta Test is a more "performance driven test" and relies primarily on the individual's manipulation of objects and symbols whereas the WAIS-R test is broader in terms of domain, testing perceptual ability, processing speed, and verbal skills. Under the WAIS-R, the Defendant received a 79 on the verbal portion of the exam and a 92 on the performance portion of the exam.[6] Dr. Toomer did not address the discrepancy of the poor score of 60 on the Revised Beta test in comparison to the score of 92 on the performance portion of the WAIS-R. He later administered the Carlson Psychological Test, where the Defendant scored highly on the malingering index, indicating his intent to not give his best effort and "faking" his responses.[7] (H. Vol. 2, p. 200-208)

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[5] While Dr. Toomer met with Franqui on three occasions, he acknowledged that he has not seen Franqui since 1992 nor had he reviewed Franqui's prison records or Franqui's test scores from other reports.

[6] Dr. Toomer asserted that the 13-point difference could indicate "neurological involvement" but failed to conduct any further testing on this hypothesis.

[7] Dr. Toomer testified that at the time the tests were administered in 1992 and 1993, he did not consider the Flynn effect, but would now adjust the Defendant's score on the WAIS-R exam to a 78. Dr. Toomer acknowledged that this score is not indicative of "significantly sub-average general intellectual functioning."

Dr. Enrique Suarez, the State's expert, testified that he, too, administered the WAIS-IV test to the Defendant in 2009; the Defendant received a raw score of 75. Suarez opined that taking the SEM into account, the Defendant's score ranged from 71-80.[8] Like Dr. Toomer, Dr. Suarez administered several validity tests. Again, the results indicated that the Defendant was malingering, with the intent to perform poorly. According to Dr. Suarez, the Flynn effect is not wholly accepted among all psychologists and the Flynn effect adjustments are mostly sought after in the criminal forensic arena. Dr. Suarez opined that even if the Flynn effect was taken into account, the Defendant's scores would still not put him in the range of intellectually disabled.

Finally, Dr. Suarez opined that the Defendant's IQ could be higher than his stated score because factors such as "first language," "lack of education," and "cultural immersion" make the test more difficult for the test taker than if it were normed in the test taker's home country or first language. Dr. Suarez testified that he applied the DSM-5, which advises that a numerical score received on an intelligence test does not necessarily reflect whether an individual is intellectually disabled. Analogous to Florida law, the DSM-5 requires deficits in intellectual functions to be concurrent with deficits in adaptive behavior. (H. Vol. 3, p. 9-10)

The DSM-5 does mention that the Flynn effect may affect scores; however, it does not say it should be applied in all instances. However, the Florida Supreme Court recently held in *Quince v. State*, 241 So. 3d 58 (Fla. 2018) that the Flynn effect does not have to be considered in determining intellectual disability:

> As many courts have already recognized, *Hall* does not mention the Flynn effect and does not require its application to all IQ scores in *Atkins* cases. *E.g., Black v. Carpenter*, 866 F.3d 734, 746 (6th Cir. 2017) (noting that *Hall* does not even mention the Flynn effect and does not require that IQ scores be adjusted for it), *petition for cert. filed*, No. 17–8275 (U.S. Mar. 26, 2018); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016) ("*Hall* says nothing about application of the Flynn effect to IQ scores in evaluating a defendant's intellectual disability."), *cert. denied*, —— U.S. —, 137 S.Ct. 1333, 197 L.Ed.2d 526 (2017); *Ledford v. Warden, Ga. Diagnostic &*

[8] Dr. Suarez's testified consistently with Dr. Taub that the Standard Error of Measurement was minus 4/ plus 5.

> *Classification Prison*, 818 F.3d 600, 639 (11th Cir. 2016) ("*Hall* did not mention the Flynn effect. There is no 'established medical practice' of reducing IQ scores pursuant to the Flynn effect... The Flynn effect remains disputed by medical experts, which renders the rationale of *Hall* wholly inapposite."), *cert. denied*, —— U.S. ——, 137 S.Ct. 1432, 197 L.Ed.2d 650 (2017). Although the AAIDD's DPID publication may now advocate the adjustment of all IQ scores in *Atkins* cases that were derived from tests with outdated norms to account for the Flynn effect, "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Moore v. Texas*, —— U.S.——, 137 S.Ct. 1039, 1049, 197 L.Ed.2d 416 (2017). Because Quince has not demonstrated that *Hall* requires that his IQ scores be adjusted for the Flynn effect, and there is competent, substantial evidence in the record to support the trial court's decision not to apply the Flynn effect to adjust Quince's IQ scores, Quince is not entitled to relief on this claim.
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> *Quince*, at 61.

This Court is persuaded by *Quince* not to consider the Flynn effect in determining the Defendant's IQ. Even when applying the SEM to the various IQ exams administered to the Defendant over the years (75, 75, 76, 79, 83, and 92), the lowest IQ score Franqui would receive would be a 71.[9] Mr. Franqui has not shown, by clear and convincing evidence, that his intellectual functioning is two standard deviations below the norm of 100.

PRONG II

ADAPTIVE BEHAVIOR

The second prong, deficits in adaptive behavior, refers to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and socio-cultural background. The DSM-5 describes deficits in adaptive functioning as follows:

> Adaptive functioning (Criterion B) involves three domains: conceptual, social, and practical. The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, and acquisition of practical knowledge, problem solving, and judgement in

[9] In making this determination, this Court is not considering Mr. Franqui's score of 60 on the Revised Beta Test. As noted previously, Dr. Toomer acknowledged that the Revised Beta Test is not the recommended test in determining IQ.

> novel situations among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy, interpersonal communication skills, friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among other. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders influence adaptive functioning.....
>
> *****
>
> Criterion B is met when at least one domain of adaptive functioning-conceptual, social, or practical- is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. Criterion during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

The DSM-5 sets forth a chart, attached to this Order as Exhibit A, that lists severity levels of intellectual disability and describes what adaptive behavior would be expected in the three domains. Dr. Toomer and Dr. Suarez each examined Franqui relative to these three broad domains.

THE CONCEPTUAL DOMAIN

No evidence was presented regarding the Defendant's preschool experience, except that his mother was absent and he did not know his father. According to Dr. Toomer, individuals lacking in the conceptual domain appear to have difficulties in learning academic skills involving reading, writing, arithmetic, time, and money, with support needed in one or more areas to meet age-related expectations. (H. Vol. 2, p. 158-159) With respect to the conceptual/academic domain, Dr. Toomer claimed that Franqui's family history and school-life established conceptual impairments. Dr. Toomer explained that disruption in the home or other domestic difficulties

preclude an individual -- specifically this Defendant -- from progressing in the areas of learning and obtaining the skills necessary to adjust and function in school. Dr. Toomer testified that Franqui never met his biological father, his mother was absent in Cuba, his younger brother died and, at the age of thirteen, he was forced to move into his grandmother's home after his adoptive father began using drugs. (H. Vol. 2, p. 177)

Franqui's home life obviously adversely impacted his adjustment to and functioning in school. However, for purposes of determining intellectual disability, the inquiry does not stop there. To meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to an intellectual impairment.

After being given an opportunity to review his testimony in the underlying case, Dr. Toomer acknowledged that the Defendant was an average "C" student, who had missed only four days of school during the fifth and sixth grades and did not require the enrollment in any remedial classes. Beginning in the seventh grade, the Defendant was absent from school more often than he attended. Dr. Toomer acknowledged that he had no way of knowing whether the absences were a result of Franqui's decompensation or because he simply decided to skip school. (H. Vol. 2, p. 182) Without more, the Defendant's failing grades and eventual disenrollment from school altogether, at the age of 15, could just as easily been attributable to his excessive absences as to an adaptive deficit.

In analyzing the conceptual skills category as a whole, Dr. Suarez failed to find that the Defendant had deficits relative to his adaptive behavior. Dr. Suarez testified that the Defendant indicated that he was in special classes when he was in school in Cuba, but after arriving to the United States, was placed in the sixth grade and later promoted to the seventh grade. The Defendant repeated the seventh grade two or three times and stated that he eventually was

expelled from school because of poor grades and excessive absences. According to Dr. Suarez, the Defendant admitted that he missed a considerable amount of time at school and left school because he "wanted to be with [the] other guys." (H. Vol. 3, p. 26) The Defendant's own explanation for his failing grades and eventual expulsion from school as a result of his absences, belie a claim of an adaptive deficit. While Franqui contends his poor school grades are indicative of this disability, school records presented include a report by a teacher indicating that his failing grades were due to absences and lack of participation when he was in school. His absences from school, not intellectual disability, were the cause of his academic difficulties.

In adults, conceptual difficulties include impairments in abstract thinking, executive functions, such as planning and priority setting, short term memory and functional use of academic skills. There was no testimony that Franqui suffered from deficits in planning or priority setting. In fact, all the evidence was to the contrary. Defendant's own statements regarding his involvement in, and the planning of, the instant crimes are the most telling in this domain. Franqui confessed that he helped plan the Hialeah robbery for approximately three to five months and described the use of the stolen cars and firearms. He drove alongside of the victims so as to block them so they could not escape. Moreover, evidence presented in the underlying trial revealed that the Defendant planned the North Miami robbery, cased the Bank that was robbed and drove the getaway car. This Court is not persuaded by Dr. Toomer's assertion that Franqui was merely responding to the officers' questions during his confession. (H. Vol. 2, p. 224) Franqui went into great detail in explaining why he took the actions he did when planning the crimes. According to Dr. Suarez, interviews with the correction officers tasked with guarding Franqui, and the Defendant's own recollection of his past, there was no evidence indicative of a conceptual deficit.

Dr. Toomer described the Defendant as having a poor memory. However, the Defendant was able to accurately describe to Dr. Toomer how he came to the United States, when his adopted father left, how he lived with his grandmother as well as how he functioned within society with very little guidance. Franqui further explained how he lived on the street, married, fathered two daughters, and, after dropping out of school at age 15, went to work for his uncle's tire shop and refrigeration repair shop. Dr. Toomer acknowledged that the Defendant then worked at the Building and Grounds Department for the City of Miami, conducting lawn maintenance, and was a security guard at the Coconut Grove Marina. None of the foregoing would indicate short-term memory impairments or an inability to prioritize and use academic skills to obtain a job or guide himself in society. There was no testimony that Franqui suffers from short term memory problems, nor did his test scores indicate any. Finally, when speaking with Dr. Suarez, Franqui was able to recall specific details of his past including details of being sexually and physically abused.

With respect to Franqui's functional use of his academic skills, the only evidence presented was that instead of paying the Defendant a salary, Franqui's uncle would pay the Defendant's bills when Franqui worked for him. The Defendant only worked for his uncle for a short period of time and there was no testimony or other evidence that the Defendant was unable to pay his rent and other bills from his subsequent employment. Prior to being incarcerated, the Defendant functioned well in society and did not have deficits in the conceptual domain.

THE SOCIAL DOMAIN

The social domain involves awareness of others' thoughts, feelings, and experiences, empathy, interpersonal communication skills, friendship abilities, and social judgment. DSM-5. Individuals who suffer from deficits in the social domain are often seen as immature in social interactions as compared with typically developing individuals of the same age. There may be difficulty in accurately perceiving peers' social cues and conversation; communication and language are more concrete or immature than expected for the individual's age. There may be difficulties regulating emotion and behavior in age appropriate fashion; these difficulties are noticed by peers in social situations. Moreover, the person is at risk of being manipulated by others; in other words, gullible. There was no testimony that the Defendant was immature, has difficulty perceiving social cues, has more concrete language than others of his age, or has problems regulating his emotions or behavior. In fact, much of what was presented regarding Franqui's life before prison would suggest the opposite. His father-in-law permitted his 15 year old daughter to live with the Defendant because he thought Franqui was going to "make something" of himself. The Defendant was able to hold jobs. He received average annual reviews when working for the sanitation department and no evidence was present of his creating any disturbances at work. Notably, while working at the golf course, his boss claimed that he "showed initiative."

There was no testimony that Franqui was at risk of being manipulated. The only testimony relative to this category was Dr. Toomer's assertion that Franqui's criminal activity indicates a lack of understanding of risk. This Court notes that many individuals who commit crimes do not think they will be caught.

An examination of the language used by the Defendant during his statements to the police demonstrates that it was no more concrete than normal and he responded to open ended questions appropriately. Moreover, the Defendant communicates effectively with staff and other inmates at the Florida State Prison. Franqui has engaged in written correspondence with family members and an internet pen pal and has engaged in telephone conversations with his attorneys. He also has the ability to follow instructions, play chess and card games between cell walls with other inmates, all of which requires the ability to count and remember numbers. Franqui takes advantage of recreational activities, uses the mail for correspondence and uses resources in prison, including the law library to acquire legal materials and shares them with other inmates. Further, while in prison, the Defendant has requested specific books including "The Art of Thinking," "The Biology of Belief," "The Virus of the Mind," a French-English dictionary, a Spanish-English dictionary, and grammar books all indicative of a functional use of academic skills.

The Defendant's ability to recall and request very specific medications also indicates no conceptual deficits. Franqui is capable of dealing with perceived problems and injustices by filing grievance requests and paperwork. Dr. Suarez applied the Flesch Kinaid Index to determine the grade level of Franqui's written grievances. That index revealed that two of Franqui's writings were at the twelfth grade level and a third was at an 11.8 grade level, further supporting a finding of no conceptual deficits.

With respect to deficits in the social domain, Dr. Toomer explained that individuals with an intellectual disability can maintain relationships (romantic and otherwise), have children, and maintain certain types of work. Dr. Toomer stressed that it is not a matter of having the ability to form a relationship, but rather the quality of the Defendant's overall interpersonal relationships is

at issue. According to Dr. Toomer, the Defendant's difficulties and sub-par performance while in school reflected a deficit in the conceptual domain which directly correlated to Franqui's impaired social skills. Dr. Toomer opined that the Defendant's family history, specifically the death of his younger brother, caused him to become increasingly isolated and that Franqui's erratic behavior, including his use of alcohol and drugs in the wake of his brother's death, was evidence of a social deficit. [10]

Conversely, Dr. Suarez opined that, despite the fact that the Defendant was abandoned by his mother in Cuba, came to the United States with his adopted family, his adoptive father's use of crack cocaine, attempted suicide and later abandonment of Franqui, Franqui did not possess deficits in the social domain. (H. Vol. 3, p. 88) Dr. Suarez points to the fact that at the age of seventeen, Franqui met Vivian Gonzalez and, shortly after, they moved into his uncle's home together. Approximately a year later, the couple moved into a home of their own and Franqui worked to provide financial support for his family. Notably, with respect to this domain, the Defendant's father-in-law described Franqui as a "devoted husband." The Defendant formed friendships, had a wife, accomplices, children, all of which reveal no social deficits.

THE PRACTICAL DOMAIN

The third domain, the practical domain, analyzes learning and self-management across life settings, including, but not limited to: personal care, job responsibilities, money management, and self-management.

Dr. Toomer opined that the Defendant's inability to hold a job constitutes a deficit in adaptive behavior. Competitive employment for individuals with practical domain deficits is

[10] While Defendant's behavior after the death of his brother may suggest that he demonstrated a deficit in adaptive behavior, his isolation was short term.

often seen in jobs that do not emphasize conceptual skills. Indeed, Franqui worked in the sanitation department and did not need conceptual skills for that job. Dr. Toomer testified that while Franqui worked at the golf course, his job was repetitive and again did not require conceptual skills. However, his supervisor stated that when he finished one task, he would go perform another, without being told to do so. Dr. Suarez opined that moving from one task to another, without being told to, demonstrate conceptual skills. After working at the golf course tending to the greens, Franqui secured a job as a security guard at a marina, a job which also requires conceptual skills. Interestingly, as Franqui moved from job to job, so did the level of conceptual skills necessary to complete the job. Each subsequent job required more adaptive functioning than the previous one. There was no testimony Franqui was ever fired from a job nor was he unemployed for any prolonged periods of time. His employment history does not support a deficit in the practical domain.

Dr. Toomer also claimed that the Defendant was unable to manage money, which according to Dr. Toomer is also evidence of a deficit in adaptive behavior. Dr. Toomer pointed to the fact that when Franqui worked at the tire store for his uncle, his uncle paid his bills instead of giving him money. However, Franqui worked for his uncle for only a short time. No testimony was adduced that he couldn't handle money when he worked for the sanitation department, the golf course, or as a security guard. The evidence presented does not support a deficit in this area. To illustrate the level of deficiency required in this area, in order to support a claim of intellectual disability, Dr. Suarez opined that it is uncommon for someone who is intellectually disabled to possess a driver's license. Here, Franqui not only had a driver's license, but was the owner of nine cars. He even adapted his mode of transportation, trading in his sports car for a four-door family friendly car, to adapt to his family's needs. While in prison, Franqui

has made very specific requests for specific medications, further proving his ability to care for himself. These actions reveal that the Defendant had (and currently has) a practical understanding of how to personally care for himself and his family. The inquiry into this domain requires a deeper look. Individuals with practical domain deficits may function age appropriately in personal care; however, they may need support with complex daily living in comparison to their peers. In adulthood, the type of support necessary typically involves grocery shopping, transportation, home and child care organization, nutritious food preparation, and banking and money management. There was no evidence that the Defendant was deficient or required assistance in preforming any of these tasks. Moreover, while in prison, he has managed his canteen account and knows the balance. Franqui requests and reads books, has a pen pal in a foreign country that sends him money, knows his medications and can write grievances for himself and other inmates.

Franqui's crimes also belie a claim of a deficit in the practical domain. Franqui helped plan and carry out both robberies. He knew how to hot wire an automobile, box in the victims' vehicles, and use walkie-talkies to communicate with his accomplices. Franqui described his intention to receive $26,000 from the North Miami robbery, clearly reflecting a financially driven motive for the crime. While Dr. Toomer opined that the thought process for committing these crimes is reflective of maladaptive behavior, and therefore not indicative of adaptive functioning, each of the skills necessary to commit the crimes Franqui committed reflect his ability to coordinate and collaborate – skills that exceed the routine and regimented.

Finally, the last subset reflective of a deficiency in the practical domain is that support is typically needed to raise a family. Franqui was not only able to care for himself, but also his wife and children. Again, there is little, if any, competent evidence to suggest any such deficit. The

Defendant related to Dr. Suarez, that he essentially lived on his own from age 15 through 18, procured his own food and clothes, maintained a job, found housing for his family, traveled on his own, obtained a driver's license, drove cars, and maintained public facilities.

Of note, Dr. Block-Garfield's report states:

> The scores do reflect considerable difficulties, but it does not appear that Mr. Franqui functions in the retarded range.
>
> ******
>
> Certainly, he was in some fashion supporting a family which could not be accomplished by an individual who is mentally retarded.

Dr. Block-Garfield report also claimed that while Franqui's functioning at the time of the arrest was impaired, it was likely due to the Defendant's immaturity and impulsive behavior. Franqui had no practical deficits and was able to effectively self-manage across life settings.

PRONG III

ONSET DURING DEVELOPMENTAL PERIOD

The third prong of the intellectual disability test requires that the onset of the intellectual and adaptive deficits manifest during the developmental period.[11] The Florida Supreme Court has been prolific in giving guidance in this area. In *Glover v. State*, 226 So.3d 795, 810 (Fla. 2017), the Florida Supreme Court held:

> [T]he trial court's determination that [the Defendant's] troublemaking and criminal activity prior to age eighteen indicate that [his] adaptive deficits were the result of behavioral or psychological issues (rather than intellectual disability) is supported by competent, substantial evidence and does not run afoul of *Hall.* As the trial court further found, "[t]estimony and records provide substantial and competent evidence [that the Defendant] was able to communicate, care for himself, and live normally in his home with others," and "his performance at school belies any contention of intellectual disability." Cf. *Hampton*, 219 So.3d at 779_(explaining that, under the

[11] Developmental period refers to onset before the age of 18.

> DSM–5, which the experts in Glover's case testified that they relied upon, "[t]he [intellectual disability] deficits 'must be directly related to the intellectual impairments' associated with the first prong; namely, 'reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding.' ") (quoting American Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, 37–38 (5th ed. 2013)).

Similarly, in *Simmons v. State,* 207 So.3d 860, 866 (Fla. 2016), the Florida Supreme Court stated:

> As to the adaptive deficit prong, the trial court concluded that there was little evidence that focused on current deficits in intellectual disability. Credible evidence was presented that as an adult, Simmons was able to function in the community, maintain employment, handle a bank account, and drive a car. Although evidence showed Simmons was immature for his age, he lived on his own, took care of his infant daughter, and was a father figure to his daughter's half-brothers. On this issue, the trial court concluded that there was a lack of credible evidence of concurrent deficits in adaptive behavior that is required for proof of intellectual disability.

Likewise, in *Phillips v. State,* 984 So.2d 503, 511-512 (Fla. 2008), the Florida Supreme Court found:

> [T]he record contains competent substantial evidence that Phillips does not suffer from deficiencies in adaptive functioning. Phillips supported himself. He worked as short-order cook, a garbage collector, and a dishwasher. The mental health experts generally agreed that Phillips possessed job skills that people with mental retardation lacked. Specifically, the defense's expert admitted that Phillips's position as a short-order cook was an "unusually high level" job for someone who has mental retardation.
>
> Phillips also functioned well at home. He resided with his mother. According to her, he paid most of the bills and did the majority of the household chores. Phillips was also described as a great son, brother, and uncle. Phillips purchased a new car for his mother and a typewriter for his sister. He spent a lot of time with his nieces and nephews, and "was real good with them." Phillips often kept the children overnight, took them for ice cream, and would give them rides when needed. In addition to driving, Phillips cooked and went grocery shopping, skills that are indicative of the ability to cope with life's common demands.
>
> The experts also agreed that the planning of the murder and cover-up in this case are inconsistent with a finding that Phillips suffers from mental retardation. Although Phillips argues that his maladjusted behavior does not constitute adaptive behavior, we agree with the circuit court that argument

> is untenable. The mental health experts generally agreed that persons suffering from mental retardation lack goal-directedness and the ability to plan. Phillips had both. To commit the crime, Phillips, having discovered that his parole officer was generally the last to leave the office, lay in wait behind dumpsters outside of the building. When the parole officer emerged and there were no witnesses present, Phillips unloaded his gun into the officer. He reloaded the gun and shot the parole officer three more times. Phillips then retrieved the shell casings from the ground, fled the scene, and disposed of the gun. After he was apprehended, officers tried on several occasions to interview Phillips, but he refused to speak.
>
> Phillips's ability to orchestrate and carry out his crimes, his foresight, and his acts of self-preservation indicate that he has the ability to adapt to his surroundings. Also noteworthy is that Phillips killed the parole officer in a cold, calculated, and premeditated manner. A cold, calculated, premeditated murder is "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Franklin v. State,* 965 So.2d 79, 98 (Fla.2007). A CCP killing demonstrates "that the defendant had a careful plan or prearranged design to commit murder before the fatal incident ...; that the defendant exhibited heightened premeditation." *Id.* The actions required to satisfy the CCP aggravator are not indicative of mental retardation. *See Atkins,* 536 U.S. at 319–20, 122 S.Ct. 2242 ("Exempting the mentally retarded from [the death penalty] will not affect the 'cold calculus that precedes the decision' of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders.")
>
> It is clear from the evidence that Phillips does not suffer from adaptive impairments. Aside from personal independence, Phillips has demonstrated that he is healthy, well-nourished and well-groomed, and exhibits good hygiene. Likewise, there was "no evidence of deficits of adaptive behavior in regards to home living, use of community resources, or leisure." Thus, as the foregoing illustrates, competent substantial evidence supports the trial court's conclusion that Phillips failed to prove the second prong—impairments in adaptive functioning.

Franqui does not suffer from adaptive impairments. While this Court is not insensitive to the terrible losses Franqui sustained as a child (the abandonment by his mother, the failure to know his father, the loss of his little brother, the abandonment by his step-father, and his failing out of school), his adaptive deficits as a minor appear to be a result of behavioral or psychological issues rather than an intellectual disability. None of the experts could say, with any degree of certainty, the reason why Franqui dropped out of school in the 7th grade after

receiving acceptable grades during the 6th grade. Dr. Toomer reluctantly admitted that Franqui's poor grades could be explained because he failed to attend classes and wanted to hang with friends instead of going to school.

There is a dearth of evidence that Franqui suffered from any adaptive deficits as an adult. The testimony and records provide that Franqui was able to cope with life's common demands. He was able to communicate, care for himself, and live normally in his home and with others. Prior to committing the crimes for which he was imprisoned, Franqui was able to function in the community, maintain employment, handle money, as well as drive and hot-wire a car. Franqui lived on his own, maintained a romantic relationship and took care of his girlfriend/wife and children. His ability to plan and carry out his crimes further support the conclusion that he possesses the ability to adapt to his surroundings.

The intellectual disability deficits described in § 921.137 (1), Fla. Stat. (2017), "must be directly related to the intellectual impairments" associated with the first prong; namely, 'reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding." DSM-5, 37–38 (5th ed. 2013). See *Hodges v. State*, 55 So.3d 515, 536 (Fla. 2010) (the relevant inquiry is defendant's adaptive functioning as an adult); *Jones v. State*, 966 So. 2D 319, 326 (Fla. 2007) (significant sub-average intelligence must exist at the same time as adaptive deficits, and there must be *current* adaptive deficits). The evidence presented is overwhelming that, prior to his incarceration, the Defendant functioned normally in society and, while incarcerated, the Defendant has shown no adaptive deficits. Franqui has failed to prove, by clear and convincing evidence, any concurrent deficits that would satisfy the third prong of the intellectual disability test.

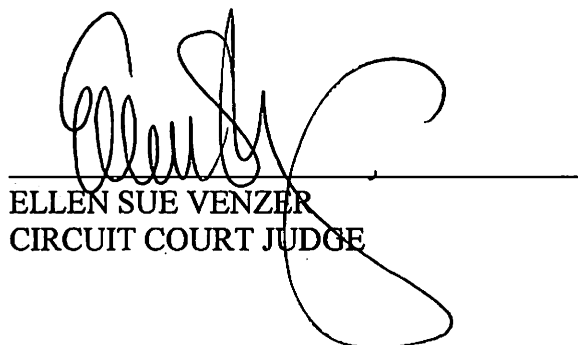
CONCLUSION

After conducting the holistic inquiry required by *Hall,* this Court finds that Franqui has failed to prove, by clear and convincing evidence, that he is intellectually disabled under § 921.137 (1), Fla. Stat. (2017).

WHEREFORE, it is HEREBY ORDERED that the Defendant's Renewed Motion for Determination of Intellectual Disability is DENIED.

The Defendant has 30 days within which to file an appeal.

DONE and ORDERED in Miami-Dade County, Florida this 28th day of September, 2018.



ELLEN SUE VENZER
CIRCUIT COURT JUDGE

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EXHIBIT A.

TABLE 1 Severity levels for intellectual disability (intellectual developmental disorder)

Severity level	Conceptual domain	Social domain	Practical domain
Mild	For preschool children, there may be no obvious conceptual differences. For school-age children and adults, there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations. In adults, abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (e.g., reading, money management), are impaired. There is a somewhat concrete approach to problems and solutions compared with age-mates.	Compared with typically developing age-mates, the individual is immature in social interactions. For example, there may be difficulty in accurately perceiving peers' social cues. Communication, conversation, and language are more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in age-appropriate fashion; these difficulties are noticed by peers in social situations. There is limited understanding of risk in social situations; social judgment is immature for age, and the person is at risk of being manipulated by others (gullibility).	The individual may function age-appropriately in personal care. Individuals need some support with complex daily living tasks in comparison to peers. In adulthood, supports typically involve grocery shopping, transportation, home and child-care organizing, nutritious food preparation, and banking and money management. Recreational skills resemble those of age-mates, although judgment related to well-being and organization around recreation requires support. In adulthood, competitive employment is often seen in jobs that do not emphasize conceptual skills. Individuals generally need support to make health care decisions and legal decisions, and to learn to perform a skilled vocation competently. Support is typically needed to raise a family.

solutions compared with age-mates.

TABLE 1 Severity levels for intellectual disability (intellectual developmental disorder) (*continued*)

Severity level	Conceptual domain	Social domain	Practical domain
Moderate	All through development, the individual's conceptual skills lag markedly behind those of peers. For preschoolers, language and pre-academic skills develop slowly. For school-age children, progress in reading, writing, mathematics, and understanding of time and money occurs slowly across the school years and is markedly limited compared with that of peers. For adults, academic skill development is typically at an elementary level, and support is required for all use of academic skills in work and personal life. Ongoing assistance on a daily basis is needed to complete conceptual tasks of day-to-day life, and others may take over these responsibilities fully for the individual.	The individual shows marked differences from peers in social and communicative behavior across development. Spoken language is typically a primary tool for social communication but is much less complex than that of peers. Capacity for relationships is evident in ties to family and friends, and the individual may have successful friendships across life and sometimes romantic relations in adulthood. However, individuals may not perceive or interpret social cues accurately. Social judgment and decision-making abilities are limited, and caretakers must assist the person with life decisions. Friendships with typically developing peers are often affected by communication or social limitations. Significant social and communicative support is needed in work settings for success.	The individual can care for personal needs involving eating, dressing, elimination, and hygiene as an adult, although an extended period of teaching and time is needed for the individual to become independent in these areas, and reminders may be needed. Similarly, participation in all household tasks can be achieved by adulthood, although an extended period of teaching is needed, and ongoing supports will typically occur for adult-level performance. Independent employment in jobs that require limited conceptual and communication skills can be achieved, but considerable support from co-workers, supervisors, and others is needed to manage social expectations, job complexities, and ancillary responsibilities such as scheduling, transportation, health benefits, and money management. A variety of recreational skills can be developed. These typically require additional supports and learning opportunities over an extended period of time. Maladaptive behavior is present in a significant minority and causes social problems.

TABLE 1 Severity levels for intellectual disability (intellectual developmental disorder) *(continued)*

Severity level	Conceptual domain	Social domain	Practical domain
Severe	Attainment of conceptual skills is limited. The individual generally has little understanding of written language or of concepts involving numbers, quantity, time, and money. Caretakers provide extensive supports for problem solving throughout life.	Spoken language is quite limited in terms of vocabulary and grammar. Speech may be single words or phrases and may be supplemented through augmentative means. Speech and communication are focused on the here and now within everyday events. Language is used for social communication more than for explication. Individuals understand simple speech and gestural communication. Relationships with family members and familiar others are a source of pleasure and help.	The individual requires support for all activities of daily living, including meals, dressing, bathing, and elimination. The individual requires supervision at all times. The individual cannot make responsible decisions regarding well-being of self or others. In adulthood, participation in tasks at home, recreation, and work requires ongoing support and assistance. Skill acquisition in all domains involves long-term teaching and ongoing support. Maladaptive behavior, including self-injury, is present in a significant minority.
Profound	Conceptual skills generally involve the physical world rather than symbolic processes. The individual may use objects in goal-directed fashion for self-care, work, and recreation. Certain visuospatial skills, such as matching and sorting based on physical characteristics, may be acquired. However, co-occurring motor and sensory impairments may prevent functional use of objects.	The individual has very limited understanding of symbolic communication in speech or gesture. He or she may understand some simple instructions or gestures. The individual expresses his or her own desires and emotions largely through nonverbal, nonsymbolic communication. The individual enjoys relationships with well-known family members, caretakers, and familiar others, and initiates and responds to social interactions through gestural and emotional cues. Co-occurring sensory and physical impairments may prevent many social activities.	The individual is dependent on others for all aspects of daily physical care, health, and safety, although he or she may be able to participate in some of these activities as well. Individuals without severe physical impairments may assist with some daily work tasks at home, like carrying dishes to the table. Simple actions with objects may be the basis of participation in some vocational activities with high levels of ongoing support. Recreational activities may involve, for example, enjoyment in listening to music, watching movies, going out for walks, or participating in water activities, all with the support of others. Co-occurring physical and sensory impairments are frequent barriers to participation (beyond watching) in home, recreational, and vocational activities. Maladaptive behavior is present in a significant minority.

211 So.3d 1026
Supreme Court of Florida.

Leonardo FRANQUI, Appellant, v. STATE of Florida, Appellee. Leonardo Franqui, Appellant, v. State of Florida, Appellee.

No. SC15–1441
|
No. SC15–1630
|
January 26, 2017

Synopsis
Background: In first case, after conviction and death sentence for capital murder were affirmed on direct appeal, 699 So.2d 1312, death-sentenced defendant filed motion for postconviction relief, asserting claim that he was intellectually disabled. The Circuit Court, Miami-Dade County, denied relief, and defendant appealed. The Supreme Court, 59 So.3d 82, affirmed. In separate case, after conviction and death sentence for capital murder of police officer were affirmed on direct appeal, defendant filed separate motion for postconviction relief, again based on claim of intellectual disability. The Circuit Court denied relief, and defendant appealed. The Supreme Court, 118 So.3d 807, affirmed. Defendant then filed successive motions for postconviction relief, contending that prior motions were denied under standard in *Cherry v. State*, 959 So.2d 702, which was subsequently held unconstitutional in *Hall v. Florida*, 134 S.Ct. 1986. The Circuit Court Stanford Blake, J., denied motions, and defendant appealed.

on consolidated appeal, the Supreme Court held that evidentiary hearing was required to determine whether death-sentenced defendant was intellectually disabled under standard articulated in *Hall v. Florida*, 134 S.Ct. 1986.

Reversed and remanded.

Lewis, Canady, and Polston, JJ., dissented.

***1027** Appeals from the Circuit Court in and for Miami–Dade County, Stanford Blake, Judge–Case Nos. 131992CF006089B000XX & 131992CF002141B000XX

Attorneys and Law Firms

Todd Gerald Scher of the Law Office of Todd G. Scher, P.L., Dania Beach, Florida; and Martin J. McClain of McClain & McDermott, P.A., Wilton Manors, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Melissa Jean Roca, Assistant Attorney General, Miami, Florida, for Appellee

Opinion

PER CURIAM.

In these consolidated appeals, Leonardo Franqui challenges the summary denial of his successive motions to vacate judgments of conviction and sentence under Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction pursuant to article V, section 3(b)(1), of the Florida Constitution. Franqui contends he is entitled to an evidentiary hearing on his claim of intellectual disability[1] pursuant to the decision of the United States Supreme Court in Hall v. Florida, ––– U.S. ––––, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). For the reasons discussed below, we agree and remand both cases to the circuit court for a single evidentiary hearing.[2]

1 The term originally used in these proceedings was "mentally retarded." This terminology has been changed to "intellectually disabled," as recognized in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM). Both the Florida Statutes and the Florida Rules of Criminal Procedure have been modified to conform to the change in terminology. Accordingly, throughout this opinion, we use the term "intellectually disabled."

2 Franqui also asserts that he is entitled to relief from his death sentences based upon the decisions in Hurst v. Florida, ––– U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and Hurst v. State, 202 So.3d 40 (Fla. 2016). Because we are remanding Franqui's cases for an evidentiary hearing on intellectual disability, we decline to address this claim at the present time.

FACTS AND PROCEDURAL BACKGROUND

Franqui was sentenced to death for the 1991 murder of Raul Lopez. See Franqui v. State, 699 So.2d 1312, 1316 (Fla. 1997) (the Hialeah case). Franqui was separately sentenced to death for the 1992 murder of law enforcement officer Steven Bauer. See Franqui v. State, 804 So.2d 1185, 1190–91 (Fla. 2001) (the North Miami case).[3] We affirmed both sentences. See Franqui, 699 So.2d at 1329; Franqui, 804 So.2d at 1199.

3 For ease of understanding, we refer to each case by the location where the murder occurred. The Hialeah case is the subject of case number SC15–1441, and the North Miami case is the subject of case number SC15–1630.

The Hialeah Case

During the initial postconviction proceedings in the Hialeah case, Franqui alleged in a supplement that he was intellectually disabled and, therefore, could not be executed pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). See Franqui v. State, 59 So.3d 82, 89–90 (Fla. 2011). After the circuit court denied postconviction relief, Franqui appealed; however, because the lower court had failed to rule upon the intellectual disability claim, this Court relinquished jurisdiction so that it could be addressed. ***1028** See id. at 90. Thereafter, the circuit court summarily denied the claim. See id. After the case was returned, this Court reversed the summary denial and again relinquished jurisdiction with directions that an evidentiary hearing be held. See Franqui v. State, 14 So.3d 238, 239 (Fla. 2009). We directed the lower tribunal to consider the requirements delineated in Cherry v. State, 959 So.2d 702 (Fla. 2007), for an intellectual disability determination under the applicable statute, which provided:

> 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 the purpose 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.

§ 921.137(1), Fla. Stat. (2009). Based upon this language, we explained that

> [The defendant] must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, [the defendant] must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.

Franqui, 14 So.3d at 239 (alterations in original) (quoting Cherry, 959 So.2d at 711). In Cherry, 959 So.2d at 712–13, this Court held that a strict cutoff IQ score of 70 is required for a defendant to establish the significantly subaverage general intellectual functioning prong of intellectual disability. Under Cherry, where a defendant could not establish that he has an IQ of 70 or below, the court need not consider the remaining two prongs of the determination. See id. at 714.

Upon relinquishment, the circuit court appointed Dr. Enrique Suarez to evaluate Franqui for intellectual disability. Franqui subsequently notified the court that in 2003, Dr. Trudy Block–Garfield had conducted testing on Franqui at the request of Franqui's prior collateral counsel. She determined that Franqui's full-scale IQ score on the Wechsler Adult Intelligence Scale—Third Edition (WAIS–III) was 75, and his composite score on the Stanford–Binet Intelligence Scale was 76. According to the report of Dr. Block–Garfield, "the DSM–IV does not consider an IQ of 75 as being in the mentally retarded range, rather it is in the Borderline range of functioning." In Dr. Block–Garfield's opinion, it was highly likely that Franqui's true IQ score fell between 71 and 80. Her report also touched upon adaptive behavior:

> Apart from actual IQ, there is also an adaptive level of functioning that must be considered. Mr. Franqui's functioning at the time of his arrest was certainly somewhat impaired. He had difficulties in maintaining a job, but the likelihood that this was due to an inability to function is somewhat limited. Rather this may have been attributable to his immaturity and general impulsive behavior. Certainly, he was in some fashion supporting a family which could not be accomplished by an individual who is mentally retarded. Immaturity was a factor ***1029** and this still seems to be the case to some extent today.

Dr. Suarez's testing revealed a full-scale IQ score of 75 on the WAIS–IV. However, Dr. Suarez administered five symptom validity tests to determine if Franqui was giving his best efforts. He concluded that Franqui's scores indicated malingering with the intent to perform extremely poorly on the tests administered and strongly suggested that the score on the WAIS–IV underestimated Franqui's actual abilities.

Franqui filed a motion asking the circuit court to declare unconstitutional this Court's interpretation in Cherry of intellectual disability on the basis that it violates Atkins. In the motion, he acknowledged that the circuit court was "bound by the Florida Supreme Court's decision in Cherry and that, under the analysis of Cherry, he cannot meet the first prong of the mental retardation test as a matter of law." He further recognized that without a declaration of unconstitutionality, the circuit court would be required to deny his claim under Cherry.

During a status hearing, counsel for Franqui stated that while experts could testify on the adaptive deficits prong of intellectual disability, "if you don't meet [the IQ] prong, that's the end of the story, that's where we find ourselves now." The circuit court denied Franqui's motion to declare the Court's interpretation in Cherry of intellectual disability unconstitutional. During the evidentiary hearing, the parties stipulated into evidence the reports of Dr. Block–Garfield and Dr. Suarez and also stipulated to the fact that if these experts were called to testify, they would testify consistently with the contents of their reports. The circuit court subsequently denied Franqui's Atkins claim.

Upon return of the case, Franqui asked this Court to revisit the decision in Cherry and also that of Nixon v. State, 2 So.3d 137 (Fla. 2009), which reached the same conclusion as Cherry on the strict cutoff IQ score of 70. See Franqui, 59 So.3d at 92. We affirmed the denial of the intellectual disability claim and rejected Franqui's assertion that our interpretation of Atkins was unconstitutional. See id. at 94.

The North Miami Case

In a successive postconviction motion filed in the North Miami case, Franqui similarly contended that his death sentence violates Atkins. Franqui asserted, in part, that Dr. Jethro Toomer testified during the trial in the Hialeah case that Franqui was intellectually disabled based upon an IQ score of less than 60.[4] The State attached to its response to the motion the evaluations of Dr. Block–Garfield and Dr. Suarez from the Hialeah case. After conducting a case management hearing, the circuit court summarily denied the successive motion. The court found that the Atkins claim was time-barred, and also that the issue of intellectual disability had been litigated and resolved adversely to Franqui in the Hialeah case. As to the latter conclusion, the circuit court stated that "[the] Defendant cannot be mentally retarded in one case and not in the other, as that would defy the definition of mental retardation."

4 Dr. Toomer also administered to Franqui the WAIS–Revised in 1993, and Franqui's full-scale IQ score on that test was 83. See Franqui, 59 So.3d at 91.

On appeal, this Court affirmed the denial of Franqui's intellectual disability claim, stating:

> [T]he only IQ tests that are acceptable for purposes of proving mental retardation are the Wechsler Intelligence Scale and the Stanford–Binet Intelligence Scale. See § 921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b); ***1030** Fla. Admin. Code 65G–4.011. Here, Franqui alleged that his IQ score was under 70 based on a report prepared in 1993, but the test utilized to measure his IQ was not the Wechsler Intelligence Scale or the Stanford–Binet Intelligence Scale. His scores on the acceptable IQ tests were above 70. See Franqui, 59 So.3d at 92 (finding, based on the same evidence presented here, that the circuit court had competent, substantial evidence—two separate doctors found Franqui's IQ was above 75 on the rule-approved psychological examinations—to find that Franqui is not mentally retarded). In addition, he did not plead whether the mental retardation manifested before he was 18 years of age. Thus, Franqui cannot demonstrate that he is mentally retarded under Florida law.

Franqui v. State, 118 So.3d 807, 2013 WL 2211675 *2 (Fla. 2013).

The Present Cases

In 2014, the United States Supreme Court held that this Court's interpretation in Cherry of Florida's intellectual disability statute was unconstitutional because it created an unacceptable risk that intellectually disabled individuals would be executed. See Hall, 134 S.Ct. at 1990, 1994. The Supreme Court held that the standard error of measurement (SEM) must be taken into account in determining whether an individual meets the first prong of intellectual disability. See id. at 2001 ("[I]n using these scores to assess a defendant's

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eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number."). The Supreme Court further noted that a person with an IQ score over 70 may have such severe adaptive deficits that his actual functioning is comparable to someone with a lower IQ score. See id. at 2001. Therefore, the Supreme Court concluded that the determination of intellectual disability must be a "conjunctive and interrelated assessment" and ultimately held that where a defendant's IQ score is 75 or below, he must be given the opportunity to present evidence of intellectual disability, "including deficits in adaptive functioning over his lifetime." Id.

Franqui filed successive motions for postconviction relief in his capital cases contending that this Court's prior rejections of his claim were based upon Cherry, an interpretation of the intellectual disability statute which the Supreme Court found unconstitutional in Hall. Franqui asserted that he was entitled to an additional evidentiary hearing on his claim. As previously discussed, the circuit court summarily denied both motions.[5] In the Hialeah case, the court concluded that Hall has "no effect on the individuals who were previously found not to be ... intellectually disabled[ ] due to a lack of deficits in adaptive functioning." The court noted that, even if Franqui's IQ score satisfied the first prong of intellectual disability after taking the SEM into account, Dr. Block–Garfield's report did not find deficits in adaptive functioning. The circuit court then stated:

> His prior motion was denied by this court for failure to meet any of the prongs. IQ was only one of [the] factors considered, as noted by the prior order. Defendant had a hearing and an opportunity to present evidence on all 3 prongs. His own expert did not find deficits in adaptive functioning, as he supported his family. Defendant also failed to meet the third prong. He is not entitled to another evidentiary hearing.

In the North Miami case, the circuit court concluded that Hall did not create a new right to bring a claim of intellectual disability. ***1031** The court also held that Franqui's motion was time-barred. The court attached to its denial order the report of Dr. Block–Garfield from the Hialeah case.

5 The same judge presided over both cases.

These appeals follow.

ANALYSIS

"Because a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." Marek v. State, 8 So.3d 1123, 1127 (Fla. 2009). As a preliminary matter, in Walls v. State, 41 Fla. L. Weekly S466 (Fla. Oct. 20, 2016), we held that the Supreme Court's decision in Hall is retroactive. Therefore, Hall is applicable to Franqui. Accordingly, at issue in these cases is whether the circuit court should have granted Franqui an evidentiary hearing on his intellectual disability claim based upon the holding in Hall that where a defendant's IQ score is 75 or below after taking into account the SEM, he must be afforded the opportunity to present evidence of intellectual disability, "including deficits in adaptive functioning over his lifetime." 134 S.Ct. at 2001. See also Oats v. State, 181 So.3d 457, 467–68 (Fla. 2015) (noting that pursuant to Hall, "courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive ... [B]ecause these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs.").

In the Hialeah case, Franqui obtained a range of full-scale IQ scores from qualifying tests. Those scores are: 75 on the WAIS–IV conducted by Dr. Suarez in 2009, 75 and 76 on the WAIS–III and the Stanford–Binet conducted by Dr. Block–Garfield in 2003, and 83 on the WAIS–Revised conducted by Dr. Toomer in 1993. It is not disputed that during his initial postconviction proceedings in the Hialeah case, Franqui received an evidentiary hearing on his claim of intellectual disability, but he asserts that an additional hearing is required so that the claim can be reviewed within the parameters of Hall and in light of the fact that Cherry was abrogated in that decision. We agree.

The rationale for granting a second evidentiary hearing is articulated in Walls:

> [I]t is clear that although Walls has had an earlier evidentiary hearing as to intellectual disability and was allowed to present evidence of all three prongs of the test, he did not receive the type of holistic review to which he is now entitled. Also, Walls' prior hearing was conducted under standards he could not meet because he did not have

> an IQ score below 70—a fact which may have affected his presentation of evidence at the hearing. Because Walls' prior evidentiary hearing was directed toward satisfying the former definition of intellectual disability and was reviewed by the circuit court with the former IQ score cutoff rule in mind, we remand for the circuit court to conduct a new evidentiary hearing as to Walls' claim of intellectual disability.

41 Fla. L. Weekly at S469 (emphasis added). In Franqui, 14 So.3d at 239, we specifically instructed the circuit court in the Hialeah case to hold an evidentiary hearing pursuant to Cherry, which implemented a strict cutoff IQ score of 70 and also held that if the first prong of intellectual disability was not satisfied, the second and third prongs need not be addressed. See Cherry, 959 So.2d at 713–14.

It appears that during the evidentiary hearing, Franqui may have significantly limited his presentation because he knew that he could not meet the first prong of intellectual disability due to the fact that none of his scores on the approved tests ***1032** was 70 or below. Counsel for Franqui articulated the belief that reaching the second and third prongs of intellectual disability would be futile because of Cherry. As previously discussed, counsel stated that while experts could testify with regard to the adaptive deficits prong, "if you don't meet [the IQ] prong, that's the end of the story, that's where we find ourselves now." Thus, it appears that Franqui did not offer as complete a presentation on the second and third prongs of the intellectual disability determination as he might have under the standard articulated in Hall.

Further, the circuit court's discussion of the adaptive deficits prong in its denial order was very brief and relied on Dr. Block–Garfield's discussion of adaptive deficits, which was also very brief:

> Dr. Block–Garfield's report also states that while his functioning at the time of arrest was impaired, it was likely due to the Defendant's immaturity and impulsive behavior. She further states that: "Certainly, he was in some fashion supporting a family which could not be accomplished by an individual who is mentally retarded."

Because the circuit court was aware that pursuant to Cherry, Franqui's intellectual disability claim failed because none of his IQ scores on the WAIS and Stanford–Binet tests was below 70, the circuit court may have determined that it was unnecessary to consider or discuss the second and third prongs in detail. If this is the case, then Franqui did not receive the "holistic" evaluation of his claim that he is entitled to under Hall. Requiring the circuit court to hold a second evidentiary hearing will afford Franqui a full opportunity to present evidence in support of his intellectual disability claims.

CONCLUSION

Based upon the foregoing, we reverse the circuit court's summary denials in the Hialeah and North Miami cases and remand for the court to conduct a single evidentiary hearing on Franqui's claims of intellectual disability.[6]

6 Counsel for Franqui agree that only one evidentiary hearing is necessary to resolve this claim in both cases.

It is so ordered.

LABARGA, C.J., and PARIENTE, and QUINCE, JJ., and PERRY, Senior Justice, concur.

LEWIS, CANADY, and POLSTON, JJ., dissent.

All Citations

211 So.3d 1026, 42 Fla. L. Weekly S29

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118 So.3d 807 (Table)
Unpublished Disposition
(The decision of the Supreme Court of Florida is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
Supreme Court of Florida.

Leonardo FRANQUI, Appellant(s)
v.
STATE of Florida, Appellee(s).

No. SC12–182.
|
April 9, 2013.
|
Rehearing Denied July 3, 2013.

Opinion

***1** Leonardo Franqui, a prisoner under sentence of death, appeals the circuit court's order summarily denying a successive motion for postconviction relief, which was filed pursuant to Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1), of the Florida Constitution.

On appeal, Franqui contends that: (1) his sentence of death violates the Sixth and Eighth Amendments under *Porter v. McCollum,* 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), and the failure to apply *Porter* retroactively is arbitrary and violates *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and the Fourteenth Amendment; (2) the State withheld *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), or *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), material or, alternatively, Franqui discovered new evidence under *Jones v. State,* 591 So.2d 911 (Fla.1991), which would have reduced the weight of the prior crime of violence aggravating circumstance; and (3) the circuit court erred in summarily denying his mental retardation claim under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

We affirm the summary denial of Franqui's claim that *Porter* is retroactive because this Court decided this precise issue in *Walton v. State,* 77 So.3d 639 (Fla.2011), holding that *Porter* was not retroactive. Although Franqui argues that this Court incorrectly decided *Walton,* this Court is not persuaded. Franqui also argues that this Court's refusal to apply the benefit of the "evolutionary refinement" of *Porter* to his case, though Porter received that same benefit, is arbitrary and a violation of due process pursuant to *Furman.* This Court, however, stated in Walton that "Porter involved a mere application and evolutionary refinement and development of the *Strickland* analysis, i.e., it addressed a misapplication of *Strickland.*" *Walton,* 77 So.3d at 644. Thus, it is not a violation of due process and unconstitutionally arbitrary not to apply *Porter* to Franqui's claim of ineffective assistance of counsel.

As to his second claim, Franqui argues that he is entitled to an evidentiary hearing based on newly discovered evidence. Specifically, Franqui argues that Pablo Abreu, a codefendant in a Hialeah murder involving Franqui and Pablo San Martin, *see Franqui v. State,* 59 So.3d 82, 86 (Fla.2011), signed an affidavit and provided collateral testimony in collateral proceedings in San Martin's case which established that the State did not disclose favorable information in violation of *Brady,* or that the State allowed Abreu to provide false or misleading testimony to go uncorrected in violation of *Giglio.* This claim was untimely and thus procedurally barred. *See* Fla. R.Crim. P. 3.851(d)(2)(A) (requiring postconviction motions to be filed within one year after the judgment and sentence become final unless the facts on which the claim are predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence). To be considered timely filed as newly discovered evidence, Franqui's successive motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence. *See Lukehart v. State,* 103 So.3d 134, 136 (Fla.2012). Abreu's affidavit was executed on March 29, 2000, and he testified in the postconviction evidentiary hearing in the Hialeah case on December 18, 2002. Franqui filed his claim on November 29, 2010, at least eight years after the claim became discoverable.

***2** Even assuming otherwise, we find no merit in Franqui's claim because he cannot demonstrate that "the newly discovered evidence would probably yield a less severe sentence." *Schwab v. State,* 969 So.2d 318, 325 (Fla.2007) (citing *Jones,* 591 So.2d at 915). Franqui argues that the Abreu affidavit and testimony somehow minimize the prior violent felony aggravator in this case because the jury would have heard it was not a premeditated murder. Franqui, however, was still convicted of first-degree murder in the Hialeah case. Thus, that conviction could still support

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the prior violent felony aggravator. In addition, the prior violent felony aggravator was also supported by Franqui's convictions for multiple counts of armed robbery, aggravated assault, and attempted armed robbery, and one count of armed kidnapping. In *Franqui v. State,* 699 So.2d 1312, 1328 (Fla.1997), this Court noted that the trial court's reliance on two attempted murder convictions, which this Court reversed, in finding the statutory aggravator of prior conviction of a felony involving the use or threat of violence was error. The Court, however, held that "the error was harmless beyond a reasonable doubt because the trial court also found that Franqui had been previously convicted of the crimes of aggravated assault and attempted armed robbery in one case and armed robbery and armed kidnapping in another." *See also Sims v. State,* 602 So.2d 1253, 1258 (Fla.1992) (rejecting Sims' claims that fundamental error occurred when the trial court aggravated the penalty based on the common law robbery conviction because Sims had committed a separate, documented violent crime sufficient to support the trial court's finding of aggravation). Accordingly, Franqui's successive postconviction claim regarding newly discovered evidence is without merit.

Finally, we affirm the circuit court's summary denial of Franqui's *Atkins* claim because it is meritless. To establish mental retardation as a bar to the imposition of the death penalty, Franqui must prove each of the following three elements: (1) significantly subaverage general intellectual functioning as demonstrated by an adult IQ score of 70 or below; (2) concurrent deficits in adaptive functioning; and (3) manifestation before the age of 18. *See Cherry v. State,* 959 So.2d 702, 711 (Fla.2007). Further, the only IQ tests that are acceptable for purposes of proving mental retardation are the Wechsler Intelligence Scale and the Stanford–Binet Intelligence Scale. See § 921.137(1), Fla. Stat.; Fla. R.Crim. P. 3.203(b); Fla. Admin. Code 65G–4.011. Here, Franqui alleged that his IQ score was under 70 based on a report prepared in 1993, but the test utilized to measure his IQ was not the Wechsler Intelligence Scale or the Stanford–Binet Intelligence Scale. His scores on the acceptable IQ tests were above 70. *See Franqui,* 59 So.3d at 92 (finding, based on the same evidence presented here, that the circuit court had competent, substantial evidence-two separate doctors found Franqui's IQ was above 75 on the rule-approved psychological examinations-to find that Franqui is not mentally retarded). In addition, he did not plead whether the mental retardation manifested before he was 18 years of age. Thus, Franqui cannot demonstrate that he is mentally retarded under Florida law.

***3** Accordingly, for the foregoing reasons we affirm the circuit court's order summarily denying Franqui's claims.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

All Citations

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59 So.3d 82
Supreme Court of Florida.

Leonardo FRANQUI, Appellant,
v.
STATE of Florida, Appellee.

No. SC05–830.
|
Jan. 6, 2011.
|
Rehearing Denied April 11, 2011.

Synopsis
Background: Defendant, who had been convicted of first-degree murder and sentenced to death, filed a petition for post-conviction relief. The Circuit Court, Dade County, Paul Lawrence Backman, J., denied the petition. Defendant appealed.

Holdings: The Supreme Court held that:

competent, substantial evidence supported determination that defendant was not mentally retarded;

trial counsel's deficient performance in failing to object during penalty phase closing arguments when the prosecutor stated "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" did not prejudice defendant;

trial counsel's deficient performance in failing to object during the penalty phase of capital murder trial when the prosecutor made comments suggesting that mental mitigation was make-believe or fantasy did not prejudice defendant;

trial counsel's failure to call defendant's wife to testify at the hearing on the motion to suppress defendant's confession did not prejudice defendant;

Any alleged conflict between accomplice's testimony during the penalty phase of capital murder trial and accomplice's testimony at the evidentiary hearing was insufficient to establish a *Brady* violation; and

competent, substantial evidence supported the trial court's finding that the prosecutor did not knowingly present false, material testimony by accomplice.

Affirmed.

Attorneys and Law Firms

***86** Todd G. Scher, of Todd G. Scher, P.L., Miami Beach, FL, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, FL, and Sandra S. Jaggard, Assistant Attorney General, Miami, FL, for Appellee.

Opinion

PER CURIAM.

Leonardo Franqui appeals an order of the circuit court denying his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.850. We have jurisdiction under article V, section 3(b)(1), Florida Constitution. For the reasons expressed below, we affirm the circuit court's order denying postconviction relief.

I. FACTS AND PROCEDURAL HISTORY

A. Background and the Direct Appeal Proceedings

Leonardo Franqui was convicted of the December 6, 1991, murder of Raul Lopez in Medley, Florida. We affirmed Franqui's conviction for the first-degree murder of Lopez and the resulting death sentence in *Franqui v. State,* 699 So.2d 1312 (Fla.1997). Franqui now appeals the denial of his first motion, as subsequently amended, for postconviction relief filed in 1999 under rule 3.850. An evidentiary hearing was held on two of the claims and relief was summarily denied on the remaining claims.

The relevant circumstances of the crime and trial are set forth in the Court's opinion on direct appeal as follows:

> Leonardo Franqui and codefendants Pablo San Martin and Pablo Abreu were charged with one count of first-degree murder, two counts of attempted first-degree murder with a firearm, one count of attempted robbery with a firearm,

two counts of grand theft, and one count of unlawful possession of a firearm while engaged in a criminal offense. Prior to trial, codefendant Abreu negotiated a plea with the State and subsequently testified against Franqui during the penalty phase of the proceedings.

The following facts were established at the trial of Franqui and San Martin. Danilo Cabanas, Sr., and his son, Danilo Cabanas, Jr., operated a check-cashing business in Medley, Florida. On Fridays, Cabanas Sr. would pick up cash ***87** from his bank for the business. After Cabanas Sr. was robbed during a bank trip, Cabanas Jr. and a friend, Raul Lopez, regularly accompanied Cabanas Sr. to the bank. The Cabanases were each armed with a 9mm handgun, and Lopez was armed with a .32 caliber gun.

On Friday, December 6, 1991, the Cabanases and Lopez drove in separate vehicles to the bank. Cabanas Sr. withdrew about $25,000 in cash and returned to the Chevrolet Blazer driven by his son. Lopez followed in his Ford pickup truck. Shortly thereafter, the Cabanases were cut off and "boxed in" at an intersection by two Chevrolet Suburbans. Two occupants of the front Suburban, wearing masks, got out and began shooting at the Cabanases. When Cabanas Sr. returned fire, the assailants returned to their vehicle and fled. Cabanas Jr. saw one person, also masked, exit the rear Suburban.

Following the gunfight, Lopez was found outside his vehicle with a bullet wound in his chest. He died at a hospital shortly thereafter. One bullet hole was found in the passenger door of Lopez's pickup. The Suburbans, subsequently determined to have been stolen, were found abandoned. Both Suburbans suffered bullet damage—one was riddled with thirteen bullet holes. The Cabanases' Blazer had ten bullet holes.

Franqui's confession was admitted at trial. When police initially questioned Franqui, he denied any knowledge of the Lopez shooting. However, when confronted with photographs of the bank and the Suburbans, he confessed. Franqui explained that he had learned from Fernando Fernandez about the Cabanases' check cashing business and that for three to five months he and his codefendants had planned to rob the Cabanases. He described the use of the stolen Suburbans, the firearms used, and other details of the plan. Franqui admitted that he had a .357 or .38 revolver. Codefendant San Martin had a 9mm semiautomatic, which at times jammed, and codefendant Abreu had a Tech–9 9mm semiautomatic, which resembles a small machine gun. Franqui stated that San Martin and Abreu drove in front of the Cabanases and Franqui pulled alongside them so they could not escape. Once the gunfight began, Franqui claimed that the pickup rammed the Cabanases' Blazer and Lopez opened fire. Franqui then returned fire in Lopez's direction.

San Martin refused to sign a formal written statement to police. However, San Martin orally confessed and, in addition to relating his own role in the incident, detailed Franqui's role in the planning and execution of the crime. San Martin admitted initiating the robbery attempt and shooting at the Blazer but not shooting at Lopez's pickup. He placed Franqui in proximity to Lopez's pickup, although he could not tell if Franqui had fired his gun during the incident. San Martin initially claimed that the weapons used in the crime were thrown off a Miami Beach bridge, but subsequently stated that he had thrown the weapons into a river near his home, where they were later recovered by the police. San Martin did not testify at trial, but his oral confession was admitted into evidence over Franqui's objection.

Franqui, 699 So.2d at 1315–16. The jury found Franqui guilty as charged and recommended death by a nine-to-three vote. The trial court followed the jury's recommendation after finding and weighing four aggravators against two nonstatutory mitigators. The aggravators found by the trial court were: (1) Franqui was previously convicted of prior violent felonies; (2) the murder was committed during the course ***88** of an attempted robbery; merged with (3) the murder was committed for pecuniary gain; and (4) the murder was committed in a cold, calculated, and premeditated manner. The court found no statutory mitigators, but found two nonstatutory mitigating circumstances: (1) Franqui had a poor family background and deprived childhood; and (2) Franqui was a caring husband, father, brother, and provider.[1] *See Franqui,* 699 So.2d at 1316.

1 Franqui was also sentenced to life imprisonment on the two attempted murder charges, fifteen years for the attempted robbery and second grand theft, and five years for the first grand theft and unlawful firearm possession, all sentences to run consecutively.

Franqui appealed his convictions and sentences to this Court.[2] In the direct appeal, we held that although the trial court erred in admitting codefendant San Martin's written confession during the penalty phase of the trial, the error was harmless in light of Franqui's own confession and other extensive evidence of guilt. *Id.* at 1328. We reversed the two attempted

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murder convictions on the authority of *Valentine v. State,* 688 So.2d 313 (Fla.1996) (citing *State v. Gray,* 654 So.2d 552 (Fla.1995) (holding that the crime of attempted felony murder no longer existed in Florida)). *Franqui,* 699 So.2d at 1323.[3] We affirmed the remaining convictions and sentences.

2 On direct appeal, Franqui raised four issues and six subissues in his initial brief. He subsequently raised two supplemental issues, which the Court also decided in the direct appeal. The issues considered on direct appeal were as follows: (1) the trial court abused its discretion in failing to grant Franqui's motions for severance in light of the introduction, at the joint trial, of his codefendant's post-arrest confession which incriminated Franqui; (2) the trial court erred in failing to exclude portions of Franqui's robbery confession for which the State failed to prove the corpus delicti; (3) the trial court abused its discretion by prohibiting voir dire examination of the jury as to specific mitigating circumstances and in denying access to the jury questionnaire; (4) the trial court erred in sentencing the defendant to death, a disproportionate, cruel, and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth amendments; (4A) the trial court erred in finding the murder was cold, calculated, and premeditated (CCP); (4B) the CCP instruction given to the jury was unconstitutionally vague, ambiguous, and misleading; (4C) the trial court erred in failing to credit the nonstatutory mitigating factors that Franqui had marginal, if not retarded, intelligence and that he was brain-damaged, in rejecting impaired capacity and age as statutory mitigating factors, and in refusing to instruct the jury on the latter; (4D) death is a disproportionate and unconstitutional penalty in light of the circumstances of this case; (4E) the trial court erred in prohibiting Franqui from informing the jury of the court's power to impose consecutive sentences and the possibility of lifelong imprisonment as an alternative to death, as well as in failing to so instruct the jury upon its own inquiry; (4F) the death penalty is unconstitutional on its face and as applied to Franqui under the Fifth, Sixth, Eighth, and Fourteenth amendments, as well as the natural law; (supplemental claim 1) the trial court erred in granting the State's motion in limine and denying Franqui the right to cross-examine about the substance of an exculpatory statement made after the confession that the State introduced in its case-in-chief; and (supplemental claim 2) Franqui's convictions on counts II and III must be reversed due to the likelihood that they were for the nonexistent crime of attempted felony murder.

3 The holding in *State v. Gray* was superseded by enactment of a statute creating the offense of attempted felony murder. We recently explained:

> The Legislature in 1996, in response to our decision in *Gray,* enacted section 782.051, which created the offense of "Felony causing bodily injury." *See* ch. 96–359, § 1, at 2052, Laws of Fla. In 1998, the Legislature substantially rewrote section 782.051 and retitled it "Attempted felony murder." *See* ch. 98–204, § 12, at 1970, Laws of Fla. Thus, attempted felony murder is specifically provided for by statute.

Coicou v. State, 39 So.3d 237, 240 (Fla.2010).

***89 B. Postconviction Proceedings**

On January 15, 1999, Franqui filed his initial rule 3.850 motion, which he amended on April 18, 2000, raising a total of ten claims.[4] After holding a *Huff* hearing[5] on January 8, 2001, the court issued an order on January 7, 2002, summarily denying all of Franqui's claims except the claim pertaining to Abreu's penalty phase testimony, which was presented by the State to support the CCP aggravator. The Court allowed Franqui to participate in an evidentiary hearing in codefendant San Martin's case with respect to two claims raised by San Martin concerning the alleged recantation of codefendant Abreu's penalty phase testimony. Prior to the hearing, and after the Supreme Court issued its decisions in *Ring v. Arizona,*[6] and *Atkins v. Virginia,*[7] Franqui filed a supplement to ***90** his motion on October 18, 2002, raising a *Ring* claim and an *Atkins* claim.

4 Franqui raised the following claims in his rule 3.850 motion: (1) this Court must assess the cumulative impact of all the new facts in this case whether they are newly discovered, suppressed by the prosecution, or ignored due to defense counsel's failings; (2) counsel's failure to investigate and prepare mitigation and to call experts at the penalty phase to testify as to Franqui's mental health constituted ineffective assistance and denied Franqui a fair trial under *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (3) counsel's failure to move for a change of venue rendered Franqui's convictions materially unreliable, and the court's failure to provide for such a change violated his constitutional rights; (4) Franqui was deprived of his right to adversarial testing and effective assistance of counsel at the penalty phase, thus rendering his death sentence unreliable and unconstitutional; (5) Franqui's convictions are materially unreliable because counsel

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failed to present the testimony of Franqui's wife, Vivian Gonzalez, at the hearing on the motion to suppress his confession to support his claim of invocation of counsel and at trial to testify to his condition during interrogation; (6) Franqui's convictions and sentences are materially unreliable because of counsel's failure to investigate and the State's intentional failure to disclose material concerning Abreu's testimony in violation of Franqui's rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and the constitution, later amended to include a claim under *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), that the prosecutor knowingly presented false testimony; (7) Franqui was denied his federal and Florida constitutional rights to effective assistance of counsel in pursuing his postconviction remedies because of the rule prohibiting his lawyers from interviewing jurors to determine if constitutional error was present; (8) Franqui is being denied his rights to due process and equal protection, and cannot prepare an effective postconviction motion, because access to the files and records pertaining to his case in the possession of certain state agencies has been withheld in violation of chapter 119, Florida Statutes; (9) the jury was misled in the penalty phase by comments, questions, and instructions that unconstitutionally and inaccurately diluted the jury's sense of responsibility in the sentencing process, and trial counsel was ineffective for not properly objecting; and (10) Franqui's sentence of death is premised on fundamental error because the jury received inadequate guidance under Florida's capital sentencing statute concerning the aggravating circumstances to be considered, and trial counsel was ineffective in failing to object to these errors.

5 *Huff v. State,* 622 So.2d 982, 983 (Fla.1993) (holding that the judge must allow the attorneys the opportunity to be heard on an initial 3.850 motion in a capital case for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion).

6 *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (holding that under the Sixth Amendment right to trial by jury, aggravating factors that operate as the functional equivalent of an element of a charged offense must be found by a jury).

7 *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding that execution of the mentally retarded is prohibited under the Eighth Amendment to the United States Constitution). On March 19, 2003, Franqui filed a supplement to his *Atkins* claim.

At the evidentiary hearing held on December 18, 2002, Pablo Abreu testified concerning the planning of the crime and the timing of the decision to kill Lopez. After the hearing, Franqui filed an additional supplement to his postconviction motion pertaining to his *Ring, Atkins,* and Abreu claims. On March 31, 2005, the circuit court denied the claims relating to Abreu's testimony and also denied the *Ring* claim. Franqui filed the present appeal, raising five claims. Because the circuit court did not rule on the mental retardation claim, we temporarily relinquished jurisdiction to the postconviction court so it could rule on the *Atkins* claim. The mental retardation claim was summarily denied on February 21, 2008.

On return to this Court from the relinquishment, oral argument was held on March 12, 2009, and we again temporarily relinquished jurisdiction to the circuit court with directions to hold an evidentiary hearing on Franqui's mental retardation claim. *See Franqui v. State,* 14 So.3d 238 (Fla.2009). At the evidentiary hearing held on September 17, 2009, the parties stipulated to introduction into evidence of two expert psychological reports. On October 6, 2009, the circuit court entered its order denying Franqui's mental retardation claim. The case has now returned from the relinquishment period for review and resolution of all pending issues by this Court. As we explain below, the postconviction claims presented in this appeal are without merit. Thus, we affirm the trial court's denial of postconviction relief.

C. This Appeal

In this appeal, Franqui has presented the following claims: (1) this Court's interpretation of mental retardation, as set forth in *Cherry v. State,* 959 So.2d 702 (Fla.2007), and *Nixon v. State,* 2 So.3d 137 (Fla.2009), mandating a cut-off IQ score of 70 or below to meet the first prong of the test for mental retardation in capital sentencing, is contrary to *Atkins v. Virginia* and the Eighth Amendment to the United States Constitution; (2) the circuit 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; (3) the court erred in summarily denying Franqui's claim of ineffective assistance of counsel regarding the failure to present available expert testimony at the penalty phase; (4) the court erred in summarily denying Franqui's claim of ineffective assistance of counsel for failure to present the testimony of Franqui's wife at the suppression hearing

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and at the guilt and penalty phases; and (5) the court erred in denying Franqui's claim that he was entitled to a new penalty phase due to recanted testimony of Pablo Abreu. We will discuss each issue in turn.

II. ANALYSIS

A. Mental Retardation

After we relinquished jurisdiction for an evidentiary hearing on Franqui's mental retardation claim, the State and Franqui stipulated into evidence the expert reports prepared by Dr. Trudy Block–Garfield and Dr. Enrique Suarez. Dr. Block–Garfield, a licensed clinical psychologist specializing in forensic psychology, evaluated Franqui in 2003. She administered the Stanford–Binet Intelligence Scale Test–Fourth Edition to Franqui, which indicated that he had a full scale IQ of 76. This score does not indicate mental retardation, but places Franqui in the borderline range of intelligence. She also administered the Wechsler Adult Intelligence ***91** Scale–Third Edition (WAIS–III), which produced a full scale IQ score of 75. In addition, she was aware of a 1993 intelligence test administered by Dr. Jethro Toomer —the Wechsler Adult Intelligence Scale–Revised—which indicated Franqui's full scale IQ was 83. Dr. Block–Garfield opined that Franqui's true IQ falls somewhere between 71 and 80 and that he is not mentally retarded.

On September 15, 2009, Dr. Suarez, a clinical and forensic psychologist and neuropsychologist, issued a report concerning his mental evaluation of Franqui. The report resulted from two evaluation sessions held on August 31, 2009, and September 4, 2009. Franqui was given a number of tests by Dr. Suarez, including the Wechsler Adult Intelligence Scale–Fourth Edition (WAIS–IV) and the Test of Nonverbal Intelligence–Third Edition (TONI–3). These tests were administered for the purpose of evaluating Franqui for mental retardation. Dr. Suarez found that under the WAIS–IV, Franqui's full scale IQ is 75. Franqui was also given the Minnesota Multiphasic Personality Inventory–Second Edition (MMPI–2).

Dr. Suarez administered five symptom validity tests to determine if Franqui was motivated to give his best effort when taking the IQ tests. These tests included the: (1) Structured Inventory of Malingered Symptomatology; (2) Memory Fifteen Item Test; (3) Test of Memory Malingering; (4) Dot Counting Test; and (5) Validity Indicator Profile. Dr. Suarez concluded that Franqui's scores suggest he may have been malingering with the intent to perform poorly on all the tests administered. Because of this, Dr. Suarez opined that the scores on the IQ tests probably underestimate Franqui's actual abilities. Based on these findings, Dr. Suarez's report concluded that Franqui is not mentally retarded. On October 6, 2009, the postconviction court entered its order denying Franqui's supplemental claim of mental retardation. After considering the stipulated evidence consisting of the experts' reports submitted by Drs. Suarez and Block–Garfield, the court found that under Florida law, Franqui does not meet the test for mental retardation.

In order to establish mental retardation under current Florida law and precedent, the defendant must satisfy a three-prong test for mental retardation. *See* § 921.137(1), Fla. Stat. (2009); Fla. R.Crim. P. 3.203; *Nixon v. State,* 2 So.3d 137, 141 (Fla.2009); *Cherry v. State,* 959 So.2d 702, 711 (Fla.2007). We have "consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation by demonstrating all three of the following factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. Thus, the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation." *Nixon,* 2 So.3d at 142 (citations omitted). In *Cherry,* we held that the language of section 921.137(1) is clear and unambiguous in mandating a strict cut-off IQ score of two standard deviations from the mean score, which is exactly 70. *Cherry,* 959 So.2d at 713. The law is also established that where a defendant does not meet the first prong, the court will not consider the other two prongs. *Id.* at 714.

We review the circuit court's determination that a defendant is not mentally retarded for competent, substantial evidence, and we "do not 'reweigh the evidence or second guess the circuit court's findings as to the credibility of the witnesses.' " *Nixon,* 2 So.3d at 141 (quoting ***92** *Brown v. State,* 959 So.2d 146, 149 (Fla.2007)). The circuit court has discretion to accept or reject expert testimony. *Jones v. State,* 966 So.2d 319, 327 (Fla.2007) (citing *Evans v. State,* 800 So.2d 182, 188 (Fla.2001)). "Trial judges have broad discretion in considering unrebutted expert testimony; however, the rejection of the expert testimony must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons." *Williams v. State,* 37 So.3d 187, 204 (Fla.2010). The circuit court's task

is to apply the law as set forth in section 921.137, Florida Statutes, which provides for mental retardation proceedings in capital cases; and the circuit court must also follow this Court's precedent. *Jones,* 966 So.2d at 327. A defendant who raises mental retardation as a bar to imposition of a death sentence carries the burden to prove mental retardation by clear and convincing evidence. *See* § 921.137(4), Fla. Stat. (2009); *Nixon,* 2 So.3d at 145. Finally, the Court will review the circuit court's legal conclusions de novo. *Nixon,* 2 So.3d at 141. Based on these authorities and the record in this case, we conclude that the circuit court had before it competent, substantial evidence to find that Franqui is not mentally retarded.

Recognizing that Franqui's scores prohibit him from meeting the current requirements of the test for mental retardation as a bar to execution, Franqui's counsel argued below and now argues on appeal that by imposing a strict cut-off IQ score of 70 for a finding of mental retardation, this Court has violated the Eighth Amendment and failed to follow the United States Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). He asks the Court to revisit *Cherry* and *Nixon* to determine if we have misapplied the holding in *Atkins* by setting a bright-line, full scale IQ of 70 or below as the cut-off score in order to meet the first prong of the three-prong test for mental retardation. He contends that *Atkins* approved a wider range of IQ test results that can meet the test for mental retardation. Therefore, the issue presented is solely a question of law subject to de novo review. As explained below, a reading of *Atkins* reveals that the Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in the capital sentencing process.

Atkins v. Virginia

In *Atkins v. Virginia,* the United States Supreme Court overruled *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989),[8] and declared that the mentally retarded must be excluded from execution. *Atkins,* 536 U.S. at 318, 122 S.Ct. 2242. In reaching its holding, the Supreme Court discussed the definitions of mental retardation promulgated by the American Association on Mental Retardation (AAMR)[9] and the American Psychiatric Association (APA). The Supreme Court found the two associations had similar definitions, defining the test for mental retardation as having three prongs: (1) significantly subaverage intellectual functioning; (2) limitations in adaptive functioning; and (3) mental retardation manifested before 18 years of age. *Id.* at 308 n. 3, 122 S.Ct. 2242. These same three prongs ***93** constitute the test for mental retardation under Florida law. The Supreme Court did note that an IQ between 70 and 75 or lower is typically considered the cut-off IQ score for the intellectual function prong of the mental retardation definition. *Id.* n. 5. However, the Supreme Court did not mandate an IQ range of between 70 and 75 for a finding of mental retardation.

8 *Penry* held that executing mentally retarded people convicted of capital offenses is not categorically prohibited by the Eighth Amendment. This holding was abrogated in *Atkins,* when the Supreme Court held that executions of the mentally retarded are cruel and unusual punishments prohibited by the Eighth Amendment to the federal constitution.

9 The AAMR has since changed its name to the American Association of Intellectual and Developmental Disabilities. It will continue to be referred to here as AAMR.

The Supreme Court in *Atkins* recognized that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins,* 536 U.S. at 317, 122 S.Ct. 2242. In addition, the Supreme Court noted that the statutory definitions for mental retardation that were already in existence were not identical, but generally conformed to the clinical definition provided by the AAMR and APA. *Atkins,* 536 U.S. at 317 n. 22, 122 S.Ct. 2242.[10] Consequently, the Supreme Court followed its approach in *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986),[11] and left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins,* 536 U.S. at 317, 122 S.Ct. 2242 (quoting *Ford,* 477 U.S. at 416–17, 106 S.Ct. 2595).

10 In footnote 22, the Supreme Court stated that "[t]he statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n. 3, *supra.*" *Atkins,* 536 U.S. at 317 n. 22, 122 S.Ct. 2242. Footnote 3 notes that the APA and AAMR have similar definitions of mental retardation requiring proof of significantly subaverage intellectual functioning, existing concurrently with limitations in two or more areas of adaptive functioning, all manifesting before age 18. *Id.* at 309 n. 3, 122 S.Ct. 2242.

11 *Ford v. Wainwright* involved insanity as a bar to the death penalty.

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When *Atkins* was issued, Florida had already enacted its statute prohibiting the execution of the mentally retarded. § 921.137, Fla. Stat. (2001). Section 921.137(1), Florida Statutes (2009), which is almost identical to the 2001 version of the statute, provides in pertinent part as follows:

> **921.137 Imposition of the death sentence upon a defendant with mental retardation prohibited.**—
>
> (1) 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 by the Agency for Persons with Disabilities. 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 expected of his or her age, cultural group, and community.

Cherry v. State

The proper interpretation of section 921.137(1) was raised in *Cherry v. State,* 959 So.2d 702, 711 (Fla.2007), where the question before the Court was whether section 921.137(1) and rule 3.203 mandate a strict cut-off score of 70 or below on an approved standardized test in order to establish significantly subaverage intellectual functioning.[12] *Cherry,* 959 So.2d at 712. ***94** In his appeal, Cherry contended in pertinent part that an IQ measurement is more appropriately expressed as a range of scores rather than a concrete single number because of the standard error of measurement (SEM). However, we held in *Cherry:*

12 *Cherry* did not involve a claim that section 921.137 is unconstitutional in how it defines mental retardation. Instead, the claim sought clarification regarding Florida's definition of subaverage intellectual functioning.

> One standard deviation on the WAIS–III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of the statutes[.]
>
> *Id.* at 712–13. This same holding was reiterated in *Nixon,* which we discuss next.

Nixon v. State

In *Nixon,* the appellant raised several arguments challenging this Court's decision in *Cherry.* The essence of the arguments in *Nixon,* which are similar to the arguments Franqui makes in this case, is that based on language in *Atkins,* a firm IQ cut-off score of 70 or below is not the proper standard for determining mental retardation. *Nixon,* 2 So.3d at 142. Nixon asserted, as does Franqui, that the Supreme Court in *Atkins* noted a consensus in the scientific community that a full scale IQ falling within a range of 70 to 75 meets the first prong of the test for mental retardation; therefore, Nixon contended, states must recognize the higher cut-off IQ score of 75. *Nixon,* 2 So.3d at 142. We disagreed, reasoning that *Atkins* recognized a difference of opinion among various sources as to who should be classified as mentally retarded, and consequently left to the states the task of developing appropriate ways to enforce the constitutional restriction on imposition of the death sentence on mentally retarded persons. *Nixon,* 2 So.3d at 142.

Nixon further asserted that this Court's definition of mental retardation violates both the United States and Florida constitutions because *Cherry's* interpretation of section 921.137 is inconsistent with the constitutional bar on the execution of mentally retarded persons. We found Nixon's claim without merit based in part on an earlier finding by the Court in *Jones v. State,* 966 So.2d 319, 326 (Fla.2007), that Florida's definition of mental retardation is consistent with the APA's diagnostic criteria for mental retardation. *Nixon,* 2 So.3d at 143.

Based on the broad authority given in *Atkins* to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another, we deny Franqui's claim that our interpretation of *Atkins* is infirm. Because the circuit court had competent, substantial evidence to find that under current Florida law Franqui is not mentally retarded, the order of the circuit court denying Franqui's mental retardation claim is affirmed.

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We turn next to Franqui's claim that his trial counsel was ineffective during both the guilt phase and the penalty phase of his trial.

B. Ineffective Assistance of Counsel Claims

Standard of Review

To establish a claim for ineffective assistance of trial counsel, Franqui must meet both of the requirements set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made ***95** errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 104 S.Ct. 2052. The prejudice prong is met only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052; *see also Porter v. McCollum,* ––– U.S. ––––, 130 S.Ct. 447, 455–56, 175 L.Ed.2d 398 (2009) (explaining that the Court does not require proof " 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome' ") (quoting *Strickland,* 466 U.S. at 693–94, 104 S.Ct. 2052).

In evaluating counsel's representation under *Strickland,* there is a strong presumption that counsel's performance was not ineffective. *See Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 ("Judicial scrutiny of counsel's performance must be highly deferential."). The defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* It is under these guiding principles that we review the postconviction court's findings as to Franqui's ineffective assistance of counsel claims. Because Franqui's claims of ineffective assistance of counsel were summarily denied, we also consider the standard of review that applies to denial of postconviction evidentiary hearings.

Summary Denial of Evidentiary Hearing

A postconviction court's decision whether to grant an evidentiary hearing on a rule 3.850 motion is ultimately based on written materials before the court.[13] Thus, its ruling is tantamount to a pure question of law, subject to de novo review. *See Willacy v. State,* 967 So.2d 131, 138 (Fla.2007) (citing *State v. Coney,* 845 So.2d 120, 137 (Fla.2003)). When reviewing a court's summary denial of a rule 3.850 motion or claim, the court must accept the movant's factual allegations as true to the extent they are not refuted by the record. *Occhicone v. State,* 768 So.2d 1037, 1041 (Fla.2000). Generally, a defendant is entitled to an evidentiary hearing on a rule 3.850 motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient. *See Freeman* ***96** *v. State,* 761 So.2d 1055, 1061 (Fla.2000). The defendant bears the burden to establish a prima facie case based on a legally valid claim; mere conclusory allegations are insufficient. *Id.* We now turn to the specific claims of ineffective assistance of trial counsel that Franqui raises in this appeal.

13 Franqui's amended rule 3.850 motion is governed by the requirements applicable to rule 3.850 rather than Florida Rule of Criminal Procedure 3.851 because the original motion was filed before October 1, 2001, the effective date of rule 3.851. *See Rodriguez v. State,* 39 So.3d 275, 283 n. 4 (Fla.2010).

1. Summary Denial of Ineffective Assistance of Counsel Claims Pertaining to Prosecutorial Comment

Franqui alleged in his motion for postconviction relief that his trial counsel was ineffective for failing to object to numerous comments made by the prosecutor in both the guilt phase and

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the penalty phase of his trial. The trial court summarily denied the claim, stating that "[t]he 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." However, "claims of ineffective assistance of counsel are not [generally] cognizable on direct appeal." *Eaglin v. State,* 19 So.3d 935, 945 (Fla.2009) (citing *Bruno v. State,* 807 So.2d 55, 63 (Fla.2001)). In *Bruno,* we explained the distinction between claims that are cognizable on direct appeal and claims that are cognizable in postconviction:

> 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.

Id. at 63 (footnotes omitted). Although we agree with Franqui that his claims of ineffective assistance of counsel relating to failure to object to prosecutorial comments are not procedurally barred, and were properly raised in his post-conviction motion, we find that his claims are without merit.[14]

[14] Several of Franqui's claims of improper prosecutorial argument are, however, procedurally barred. Franqui alleged that his counsel was ineffective for failing to object when the prosecutor told the penalty phase jury that if the aggravators outweigh the mitigators, the jury had the "lawful legal duty" to recommend the death penalty. This comment is clearly improper because, as we have held, "[a] jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." *Anderson v. State,* 18 So.3d 501, 517 (Fla.2009) (quoting *Cox v. State,* 819 So.2d 705, 717 (Fla.2002)). Franqui's counsel did lodge an objection to that comment and the issue could have been raised on direct appeal. Because it was not, the claim is now procedurally barred. Moreover, prejudice cannot be shown where, as here, the jury was properly instructed on this issue. *See Anderson,* 18 So.3d at 517–18. Similarly, trial counsel also objected when the prosecutor commented in the penalty phase about mitigation evidence that Franqui was not properly disciplined as a child. The prosecutor argued, "I mean, folks, everything is mitigating. You don't hit me, it's mitigating. You hit me too much, it is mitigating." Because any claim of error as to this comment could and should have been raised on direct appeal, it is also procedurally barred in this postconviction proceeding.

As to the prosecutorial comments cited as improper in both the guilt phase and penalty phase, we first note that the amended motion filed by Franqui failed to establish how these alleged instances of ineffective assistance of counsel prejudiced him—mere conclusory allegations are not sufficient. *See Freeman v. State,* 761 So.2d 1055, 1061 (Fla.2000). In addition, the majority of the prosecutorial argument alleged to be improper was fair comment ***97** on the evidence or inferences arising from the evidence, or was proper response to argument of defense counsel, and will not be discussed in detail.

We do find that several of the comments cited by Franqui were improper under the circumstances. However, as we explain below, trial counsel's failure to object to them does not mandate reversal for a new trial or new penalty phase. During the guilt phase closing argument, the prosecutor stated: "The lessers are a joke in this case ... but they have to be read to you by law." The State contends that this statement was proper because the prosecutor was simply pointing out that the lesser included offenses were inconsistent with the facts of the case. The statement, however, goes beyond that and may reasonably be understood to be an attempt, through sarcasm, to diminish the jury's obligation to follow the law. However, because the trial court properly and fully instructed the jury on the lesser included offenses, we find that Franqui has not met the prejudice prong of *Strickland. See Anderson v. State,* 18 So.3d 501, 517–18 (Fla.2009) (holding that the prejudice prong of *Strickland* was not met in a claim of ineffective assistance of counsel for failing to object to the prosecutor's misstatement of law where the trial court properly instructed the jury). There is no reasonable probability that but for counsel's error in failing to object to this comment, the result of the proceeding would have been different—a reasonable probability being one sufficient to undermine our confidence in the outcome. *See Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

Next, in the penalty phase closing argument, the prosecutor made the following statements: (a) "Yes it is much easier for 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," (b) "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," (c) "Why? Because to kill somebody for money is probably the most basic, the most

vile of all motives," and (d) "There is no more vile motive than to kill somebody for money." The State contends that these statements were proper argument with respect to why the pecuniary gain and the CCP aggravators were entitled to great weight. The statements, while somewhat inflammatory, are relevant to the pecuniary gain aggravator and do not undermine our confidence in the outcome of the penalty phase, despite counsel's failure to object.

Additionally, in the penalty phase closing argument, the prosecutor made the following statements: (a) "Now you know the shocking unbelievable nature of their criminal records," and (b) "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." The State contends that both statements were proper argument with respect to the prior violent felony aggravator. We agree that Franqui's prior violent felony convictions submitted by the State in aggravation were a legitimate subject of prosecutorial comment in the penalty phase, but the words "shocking" and "terrorized" are unnecessarily inflammatory. Even so, our confidence in the outcome of the penalty phase is not undermined by counsel's error. We have found similar comments either not improper or harmless under the circumstances. *See, e.g., Salazar v. State,* 991 So.2d 364, 377 (Fla.2008) (finding prosecutor's use of the word "terrorizing" in reference to the burglary aggravating offense ***98** was not improper); *Bonifay v. State,* 680 So.2d 413, 418 (Fla.1996) (finding prosecutor's use of the word "exterminate" in the context of the case improper but harmless); *cf. Brooks v. State,* 762 So.2d 879, 905 (Fla.2000) (reversing for a new penalty phase for cumulative error where prosecutor made repeated comments about the violent and vicious nature of the defendant as well as numerous other improper comments). Again, we conclude that the prejudice prong of *Strickland* is not met by these comments and, accordingly, Franqui is not entitled to relief on this claim.

Also in the penalty phase closing argument, the prosecutor made the following statement, which was not objected to by trial counsel: "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." The State contends that the comment was fair rebuttal to Franqui's attempt during the penalty phase to use the fact that he had confessed to the crime as a mitigator. The statement, however, is actually an attempt to impugn the integrity and credibility of defense counsel. This is improper. *See Brooks,* 762 So.2d at 904–05 (finding prosecutor's attack on defense counsel's credibility to be improper). Even if counsel was deficient in failing to object to this comment, our confidence in the outcome of the penalty phase is not undermined when we consider the other extensive evidence of aggravation presented to the jury. Any omission on counsel's part in this regard cannot reasonably be viewed as so affecting the fairness and reliability of the proceeding that confidence in the outcome is undermined. *See Maxwell v. Wainwright,* 490 So.2d 927, 933 (Fla.1986) (citing *Strickland,* 466 U.S. at 668, 104 S.Ct. 2052). Thus, based on *Strickland* and *Maxwell,* we find that the record conclusively shows Franqui is not entitled to relief on this claim.

Finally, in the penalty phase, the prosecutor made comments that tended to disparage Franqui's mitigation. The prosecutor argued, "That's the world of Dr. Toomer [Franqui's mental mitigation expert], folks. Through the looking glass at Disney World. Make believe. Use your common sense." This comment, suggesting that the mental mitigation is make-believe or a fantasy, is improper. *See, e.g., Brooks,* 762 So.2d at 904 (holding that prosecutorial denigration of a defendant's mitigation by suggesting it is "phantom" is improper). We have "long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument." *Williamson v. State,* 994 So.2d 1000, 1014 (Fla.2008). Even though the prosecutor's comment in this instance was improper, we conclude that under the prejudice prong of *Strickland,* based on the extensive aggravation present in this case, our confidence in the outcome of the penalty phase is not undermined. Thus, relief is not warranted based on counsel's failure to object to these comments.

Although all the above statements may be read as calling for objections by defense counsel, any omission on counsel's part in this regard does not rise to the level of a deficiency that "so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." *Maxwell,* 490 So.2d at 932. The State presented extensive evidence of guilt and of aggravation. When viewed as a whole, the record shows that the above statements—either individually or cumulatively—are not so prejudicial as to affect the outcome of the guilt or penalty phases of the trial under the standard set forth in *Strickland.* Because our confidence in the outcome of both the guilt and penalty phases is not undermined by counsel's failure ***99** to object to any of the prosecutorial comments cited here, we conclude that the trial court did not err in summarily denying this claim.

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2. Summary Denial of Ineffective Assistance of Counsel Claim Pertaining to Failure to Present Testimony of Dr. Brad Fisher at the Penalty Phase

Franqui contends that the postconviction court erred in summarily denying his claim that counsel was ineffective for failing to call Dr. Brad Fisher, a clinical forensic psychologist, to testify in the penalty phase of the trial. Franqui asserts that Dr. Fisher could have testified, as he did in his deposition, that Franqui would make a good adjustment to prison life and would not commit any acts of violence while incarcerated because he had not done so during the time he had been incarcerated prior to trial. The State submits that the lower court properly found that significant contradictions existed between Dr. Fisher's opinion and Dr. Jethro Toomer's opinion such that not calling Dr. Fisher to testify could be considered to be reasonable trial strategy. The circuit court's order stated:

> 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 to not 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.

Dr. Toomer, a psychologist and diplomate of the American Board of Professional Psychology, conducted a psychological evaluation of Franqui and testified during the penalty phase. He told the jury about Franqui's difficulties and deprivations early in life and about his mental deficits. Dr. Toomer concluded that Franqui exhibited a lifelong condition under which he would make poor decisions regarding how to behave because he had a low IQ, deficits in intellectual functioning, and organic deficits.[15] Dr. Toomer also testified that Franqui had problems communicating. Dr. Fisher, on the other hand, had no difficulty communicating with Franqui, and said he observed nothing in his interaction with Franqui indicating a mental illness or any problems with intellectual functioning. Moreover, Dr. Fisher testified to an opinion about Franqui's level of intelligence that was contrary to Dr. Toomer's opinion. Dr. Fisher said, "Yes, I think his judgment, his intelligence is probably average."

15 Dr. Toomer administered the Revised Beta examination to determine Franqui's IQ, which resulted in a score of 60. This testing occurred before Florida adopted the Stanford–Binet and the Wechsler Adult Intelligence Scale tests as the approved tests for determining IQ in the capital context. Dr. Toomer also administered a Wechsler IQ test which, as he testified on cross-examination, disclosed that Franqui had a full scale IQ of 83.

Thus, any benefit that would have accrued from using Dr. Fisher's testimony in the penalty phase would have been offset by the fact that his testimony was contrary to Dr. Toomer's on a key element of mitigation in Franqui's penalty phase case—that Franqui had substantial mental deficits. Thus, the record demonstrates that counsel's decision not to present Dr. Fisher's testimony under the circumstances " 'might be considered sound trial strategy.' " ***100** *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). We explained in *Winkles v. State,* 21 So.3d 19 (Fla.2009), that "[a]n ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." *Id.* at 26 (quoting *Reed v. State,* 875 So.2d 415, 437 (Fla.2004)). Moreover, error, if any, on counsel's part in failing to present the testimony of Dr. Fisher during the penalty phase cannot reasonably be viewed as so affecting the fairness and reliability of the proceeding that confidence in the outcome is undermined. *See Maxwell,* 490 So.2d at 932. The postconviction court did not err in summarily denying this claim.

3. Summary Denial of Ineffective Assistance of Counsel Claim Pertaining to Failure to Present Testimony of Vivian Gonzalez

Franqui next contends that the postconviction court erred in summarily denying his claim that trial counsel was ineffective in not calling Franqui's wife, Vivian Gonzalez, to testify at the hearing on the motion to suppress his confession. He also claims that trial counsel was ineffective for failing to call Gonzalez to testify at the guilt and penalty phases of trial. Franqui contends that her testimony would have been relevant to a claim that Franqui invoked his right to counsel prior to his statement being taken and was relevant to his condition on the day he was questioned. At the hearing on the motion to suppress Franqui's statement, Detective Albert Nabut was asked if he overheard Franqui and his wife talking in a room where they were left by themselves. Detective

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Nabut confirmed that he overheard some of the conversation but said he did not hear Franqui ask his wife to contact a lawyer.

The postconviction court summarily denied the claim, stating in its order that "Vivian [Gonzalez] Franqui did testify during the suppression hearing regarding the issues raised in the instant 3.850 petition." In fact, Gonzalez did not testify at the suppression hearing. However, this erroneous finding is likely based on a statement made by Franqui's postconviction counsel at the *Huff* hearing held on January 8, 2001, where counsel stated: "Vivian was not used at the first phase, although she—she was used at the motion to suppress." Because the postconviction judge was misinformed on this point, he cannot be faulted for denying relief on a claim that counsel was ineffective for failing to present her testimony at the suppression hearing. *See Terry v. State,* 668 So.2d 954, 962 (Fla.1996) ("[A] party may not invite error and then be heard to complain of that error on appeal.").

Even if counsel had not erroneously caused or contributed to this error, relief would not be warranted on this claim. The fact that Gonzalez would testify that Franqui asked her to call a lawyer is not an invocation of the right to counsel communicated by Franqui to the custodial officers. The request to his wife would not have provided a basis upon which to suppress his subsequent written confession. Moreover, Franqui testified that he was unaware that the police could overhear his conversation with Gonzalez, which occurred in a closed room. Given these circumstances, any statement Franqui may have made to his wife concerning counsel cannot be deemed an invocation of his right to counsel.

In addition, the record shows that Franqui executed a written waiver of rights, including the right to counsel, before giving his verbal statement and sworn written statement. Detective Nabut testified that Franqui began to confess before he met ***101** with Gonzalez. An invocation of the right to counsel does not affect the validity of statements made prior to the invocation. *Maharaj v. State,* 778 So.2d 944, 956 (Fla.2000). In any event, Gonzalez's testimony was not inconsistent with Detective Nabut's testimony that he was initially unaware that the room was monitored, that he did not overhear the beginning of the conversation between Franqui and his wife, and that he never heard Franqui tell her to contact a lawyer. It was possible for Gonzalez to testify that Franqui asked her to call his lawyer and for Detective Nabut to testify that he did not overhear such a request without their statements being inconsistent. In this respect, Gonzalez's testimony could not have been used to effectively impeach Detective Nabut's credibility at the suppression hearing or at trial.

Franqui also claims that trial counsel was ineffective for failing to present Gonzalez's testimony at trial. However, neither his amended postconviction motion nor his brief on appeal makes clear what testimony she could have offered that would probably have altered the outcome of either the guilt phase or the penalty phase. Franqui's allegation that his wife could testify about his condition on the day he was interviewed, without more, is insufficient to require an evidentiary hearing.

Based on the foregoing, any omission on counsel's part in not calling Vivian Gonzalez to testify at the suppression hearing or at trial cannot reasonably be viewed as so affecting the fairness and reliability of the proceedings that our confidence in the outcome is undermined. *See Maxwell,* 490 So.2d at 932. Rather, when viewed as a whole, the record shows that the postconviction court did not err in summarily denying this claim. Under the standard of review noted above, the motion and record conclusively show that Franqui is not entitled to relief on this claim.

C. *Brady* and *Giglio* Claims Relating to the Testimony of Pablo Abreu

1. Standards of Review for *Brady* and *Giglio* Claims

Franqui next contends that the State withheld favorable, material evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and knowingly presented false testimony in violation of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), concerning witness Pablo Abreu. *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *Mordenti v. State,* 894 So.2d 161, 168 (Fla.2004).[16] To demonstrate a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see also Way v. State,* 760 So.2d 903, 910 (Fla.2000). To meet the materiality prong of *Brady,* the defendant must demonstrate "a reasonable probability

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that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler,* 527 U.S. at 280, 119 S.Ct. 1936 (quoting *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). "As with prejudice under *Strickland,* materiality ***102** under *Brady* requires a probability sufficient to undermine confidence in the outcome." *Duest v. State,* 12 So.3d 734, 744 (Fla.2009). The materiality inquiry is not satisfied by simply discounting the inculpatory evidence in light of the undisclosed evidence and determining if the remaining evidence is sufficient. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Strickler,* 527 U.S. at 290, 119 S.Ct. 1936 (quoting *Kyles v. Whitley,* 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)); *see also Rivera v. State,* 995 So.2d 191, 203 (Fla.2008) (same); *Way,* 760 So.2d at 913 (same). "It is the net effect of the evidence that must be assessed." *Jones v. State,* 709 So.2d 512, 521 (Fla.1998). "Although reviewing courts must give deference to the trial court's findings of historical fact, the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review." *Way,* 760 So.2d at 913.

16 "[T]he duty to disclose such evidence is applicable even though there has been no request by the accused." *Strickler v. Greene,* 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (citing *United States v. Agurs,* 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

In *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court held that the prosecutor is prohibited from knowingly presenting false testimony against the defendant. In order to prove a *Giglio* violation, "a defendant must show that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." *Tompkins v. State,* 994 So.2d 1072, 1091 (Fla.2008) (quoting *Rhodes v. State,* 986 So.2d 501, 508–09 (Fla.2008)); *accord Hurst v. State,* 18 So.3d 975, 991 (Fla.2009). If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. *Tompkins,* 994 So.2d at 1091. The State must then "prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." *Id.* (quoting *Rhodes,* 986 So.2d at 509). Under the harmless error test, the State must prove " 'there is no reasonable possibility that the error contributed to the conviction.' " *Guzman v. State,* 941 So.2d 1045, 1050 (Fla.2006) (quoting *State v. DiGuilio,* 491 So.2d 1129, 1138 (Fla.1986)).

Both *Giglio* and *Brady* claims present mixed questions of law and fact. *See Sochor v. State,* 883 So.2d 766, 785 (Fla.2004). Thus, as to findings of fact, we will defer to the lower court's findings if they are supported by competent, substantial evidence. *See id.* "[T]his Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." *Hurst,* 18 So.3d at 988 (quoting *Lowe v. State,* 2 So.3d 21, 30 (Fla.2008)). We review the trial court's application of the law to the facts de novo. *Hurst,* 18 So.3d at 988. It is within this framework that we now analyze Franqui's *Brady* and *Giglio* claims pertaining to the testimony of Pablo Abreu.

2. Discussion

Franqui was granted an evidentiary hearing on his claims that the State withheld favorable evidence concerning codefendant Pablo Abreu's penalty phase testimony in violation of *Brady,* and that the State knowingly presented Abreu's false testimony in violation of *Giglio* during the penalty phase to support the cold, calculated, and premeditated aggravator. We turn first to Franqui's *Brady* claim.

During the penalty phase of trial, Abreu testified through an interpreter that a couple of days before the shooting, a discussion among Franqui, Abreu, and San Martin ***103** occurred in which Franqui explained the plan to rob the Cabanases and the need to steal two cars to facilitate that plan. When asked what Franqui said at that time about Lopez, the Cabanases' unofficial bodyguard, Abreu testified: "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." When asked if the shooting of Lopez was planned before the incident, Abreu stated, "Yes, when we went around," referring to the discussion that ensued when the three codefendants went out before the day of the robbery to steal two vehicles. The trial court found in the sentencing order that the murder was cold, calculated, and premeditated in part because the robbery was carefully planned in advance and because, sometime before the robbery took place, the defendants decided that Franqui would have to shoot Lopez.

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At the evidentiary hearing, Abreu testified in response to questions by codefendant San Martin's counsel that he reached a plea agreement with the State in which he would avoid a possible death sentence in exchange for testifying against both Franqui and San Martin. Abreu reiterated that he, Franqui, and San Martin made a plan to steal two cars and rob the Cabanases. The vehicles were stolen the day before the robbery and parked for use the next day. Abreu testified that the day the Suburbans were stolen, there was a discussion of the robbery but not about killing anyone. Abreu testified that sometime before the robbery took place (from thirty minutes up to several hours), while riding around in his van with Franqui and San Martin to scout out possible escape routes, Abreu heard Franqui say that he would "take care of" the bodyguard (Lopez) by running his car off the road, and that Abreu and San Martin would take the money. Abreu also testified at the evidentiary hearing that Franqui said the bodyguard was going to shoot at him and he was going to shoot back. According to Abreu, Franqui added, "I know that he's going to fire at me because he's the bodyguard and I'm going to shoot also." However, when asked if the bodyguard shot at Franqui, Abreu said, "Well, I would imagine, right."[17] The postconviction court denied Franqui's *Brady* claim as follows:

17 Abreu testified at trial that immediately upon stopping his own vehicle in front of the Cabanases, he heard Franqui's shot. Firearms identification expert Robert Kennington testified at trial that Lopez's weapon had not been fired. Abreu admitted at trial that when he initially told police Lopez fired his gun first, that was not true. Abreu also testified at the penalty phase that on the day of the attempted robbery, Franqui supplied the handguns. The testimony Abreu gave at the evidentiary hearing did not directly conflict with his trial testimony or that of the expert on these points.

> San Martin claims that a *Brady* violation occurred because exculpatory evidence favorable to San Martin (and the Defendant) was suppressed by the State and the State presented false or misleading evidence to the jury....
>
> Based on the record and the testimony of the witnesses during the evidentiary hearing, this Court finds that San Martin (and the Defendant) [have] failed to establish any of the *Brady* elements. As discussed above, Pablo Abreu testified that he was always truthful and that no one told him how to testify. The difference between Mr. Abreu's testimony during the penalty phase and the evidentiary hearing was slight, a mere inconsistency.
>
> No evidence was presented that the State suppressed or failed to disclose any evidence to San Martin or the Defendant. Because San Martin's motion and the Defendant's motion and the evidence failed to establish a *Brady* violation, this claim is denied. ***104** This claim is also denied for the Defendant for the same reasons.

We agree with the postconviction court that no evidence supports the allegation that the State suppressed or withheld favorable evidence. We also find that even if this testimony could be considered to conflict with Abreu's trial testimony —in which Abreu said that Franqui planned the day before the attempted robbery to kill Lopez—there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler,* 527 U.S. at 280, 119 S.Ct. 1936 (quoting *Bagley,* 473 U.S. at 676, 105 S.Ct. 3375). Regardless of whether Franqui's plan to kill Lopez was made in the days before the shooting or in the hours before the shooting, the evidence is sufficient to establish the CCP aggravator. Even without the CCP aggravator, the trial court had before it competent, substantial evidence of other aggravating circumstances: prior violent felony conviction for aggravated assault and armed robbery, and the merged aggravators of murder while engaged in the commission of an attempted robbery and for pecuniary gain, weighed against only two nonstatutory mitigators.

Under the circumstances, even if Abreu had testified at the penalty phase as he did in the evidentiary hearing, there is no reasonable probability that the proceeding would have resulted in a life sentence—that is, our confidence in the outcome is not undermined by Abreu's evidentiary hearing testimony. *See Duest,* 12 So.3d at 744 (reiterating that *Brady* requires a reasonable probability of a different result sufficient to undermine confidence in the outcome). Thus, we affirm the circuit court's denial of Franqui's *Brady* claim.

We turn now to Franqui's *Giglio* claim, in which he contends that the State knowingly presented false, material testimony by Abreu during the penalty phase. Although there were some inconsistencies in Abreu's testimony about when the discussion of killing Lopez occurred, the postconviction court found them not to be material and denied Franqui's *Giglio* claim as follows:

> Mr. Abreu testified during the penalty phase that a meeting regarding stealing cars to be used during the robbery took place a couple of days before the shooting. When asked about what the Defendant [18] was going to do about the

bodyguard (the victim, Raul Lopez), Mr. Abreu responded, "First he was going to crash against him and throw him down the curb side, and then he would shoot him, but he didn't do it that way." *Trial Transcript, pp. 2717–2718.* Later in his testimony, Mr. Abreu was asked about the discussion he had with the Defendant and San Martin about killing the bodyguard that occurred before the cars were stolen. Mr. Abreu indicated that Franqui told him that he was going to run the bodyguard off the road then shoot him. *Trial Transcript, pp. 2727–2728.*

18 The order was entered in the instant case and applies to Franqui's claims even though there are references in the order to claims of the codefendant San Martin. References in the order to "the Defendant" are to Franqui and appear in the original court order.

During the evidentiary hearing, Mr. Abreu stated that the killing was discussed the day of the robbery while he, the Defendant and San Martin were driving around in his van before the robbery took place. Mr. Abreu testified on direct that this discussion occurred thirty minutes before the robbery. On cross-exam, he testified that this discussion could have taken place several hours before the robbery. Mr. Abreu ***105** testified that his testimony on this subject had always been consistent and truthful. *Trial Transcript, p. 60, 66–68, 102–104.*

....

Based on the record and the testimony of the witnesses at the evidentiary hearing, this Court finds that San Martin has failed to establish that the state forced Pablo Abreu to present perjurious testimony to the jury. During the penalty phase, the question asked about what Franqui was going to do with the bodyguard did not actually have a time frame. San Martin's claim assumes that the discussion regarding stealing the cars which occurred several days before the robbery included the interchange about killing the bodyguard. Mr. Abreu's testimony during the penalty phase does seem to indicate that the discussion about killing the bodyguard took place before the cars to be used in the crime were stolen. The testimony elicited from Abreu during the evidentiary hearing indicates that the discussion about the killing took place between thirty minutes and several hours before the robbery and the killing of the bodyguard. San Martin, at most, has shown that the difference between Mr. Abreu's trial testimony and the testimony during the evidentiary hearing was an arguable inconsistency. This Court finds that San Martin and the Defendant did not prove that Mr. Abreu's testimony was false. Inconsistencies are insufficient to show that testimony is false. *Maharaj v. State,* 778 So.2d 944 (Fla.2000).

Marilyn Milian, the trial prosecutor testified during the evidentiary hearing that she only asked witnesses to truthfully relate what they knew. She stated, "Under no circumstances in this case or any other case would I ever tell a defendant who is flipping what to testify to or suggest to him that if he doesn't say it my way he won't have a plea agreement or force anybody to testify contrary to what it is truthfully happened." *Transcript, p. 171.* She further stated, "That is all we did and anything else would not only be unethical but suborning perjury. I never did that in my career and certainly not on this case either." *Transcript, p. 172.* ... This Court finds that San Martin and the Defendant failed to prove that the State knew any testimony was false or that the State knowingly presented perjurious testimony.

The inconsistency in Pablo Abreu's testimony regarded the time that the plan to kill the bodyguard was discussed. During the penalty phase, Mr. Abreu testified that the discussion took place before the cars were stolen and perhaps several days before the robbery. During the evidentiary hearing, Mr. Abreu testified that the discussion took place thirty minutes to several hours before the robbery, after the cars had been stolen. In either event, the time was sufficient to support the CCP aggravating circumstance.... This Court finds that San Martin (and the Defendant) [have] failed to prove that Mr. Abreu's statement was material.

We agree that competent, substantial evidence supports the court's finding that the prosecutor did not knowingly present false, material testimony by Abreu. Abreu testified at the evidentiary hearing that he told the truth at trial, and that no one threatened him, forced him, or told him how to testify. The prosecutor testified at the evidentiary hearing that she did not knowingly present any false testimony. The inconsistencies shown between Abreu's testimony in the penalty phase and his testimony at the evidentiary hearing do not prove that the penalty phase testimony was false. *See Maharaj,* 778 So.2d at 956 ("To demonstrate perjury, ***106** Maharaj must also show more than mere inconsistencies.").

Moreover, the inconsistencies are not material. "In order to find the CCP aggravating factor, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a

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fit of rage (cold); that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification." *Franklin v. State,* 965 So.2d 79, 98 (Fla.2007). Both versions of Abreu's testimony meet these requirements. Both versions of Abreu's testimony show that Franqui had a plan in place substantially in advance of the attempted robbery to shoot Lopez and that he took a weapon with him for that purpose.

The last element of CCP is the lack of any pretense of moral or legal justification. Nothing in Abreu's evidentiary hearing testimony, had it been presented by the State at trial, would have supported a finding of a pretense of moral or legal justification. Abreu's testimony at the evidentiary hearing that Franqui said the bodyguard would be shooting at him so he would shoot back does not suggest a moral or legal justification for the shooting. Abreu's evidentiary hearing testimony concerning when he heard Franqui's shot did not conflict with his trial testimony or with the uncontradicted trial testimony of the expert that Lopez did not fire his weapon. Even if the prosecutor should have presented the latter version of Abreu's testimony at trial, we find that that there is no reasonable possibility that the error contributed to the imposition of the death sentence. *See Guzman,* 941 So.2d at 1050 (quoting *DiGuilio,* 491 So.2d at 1138). Thus, relief is also denied on Franqui's *Giglio* claim.

III. CONCLUSION

In accord with the above analysis, we affirm the circuit court's denial of Franqui's claims for postconviction relief.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, and LABARGA, JJ., concur.

PERRY, J., did not participate.

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965 So.2d 22
Supreme Court of Florida.

Leonardo FRANQUI, Appellant,
v.
STATE of Florida, Appellee.
Leonardo Franqui, Petitioner,
v.
James R. McDonough, etc., Respondent.

Nos. SC04–2380, SC06–36.
|
May 3, 2007.
|
Rehearing Denied Sept. 10, 2007.

Synopsis

Background: Defendant was convicted of first-degree murder of a law enforcement officer and other crimes, and was sentenced to death. Defendant appealed. The Supreme Court, 699 So.2d 1332, affirmed defendant's convictions, but reversed sentence and remanded for resentencing. On remand, defendant was again sentenced to death, and he appealed. The Supreme Court, 804 So.2d 1185, affirmed. Defendant filed petition for post-conviction relief. The Circuit Court, Dade County, Kevin Emas, J., denied petition. Defendant appealed and filed petition for writ of habeas corpus in the Supreme Court.

Holdings: The Supreme Court held that:

trial counsel did not render ineffective assistance;

while state might have abused its statutory subpoena authority by using investigatory subpoena to compel defense counsel to appear for questioning prior to hearing on defendant's petition for post-conviction relief, defendant suffered no harm as a result; and

substantial evidence supported trial court's ruling that defendant's confession was not coerced and that his waiver of rights was both free and voluntary.

Affirmed; writ denied.

Attorneys and Law Firms

***26** Mary Catherine Bonner, Fort Lauderdale, FL, for Appellant/Petitioner.

Bill McCollum, Attorney General, Tallahassee, Florida and Sandra S. Jaggard, Assistant Attorney General, Miami, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Franqui appeals an order of the circuit court denying his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons expressed below, we affirm the circuit court's order denying postconviction relief and deny Franqui's habeas petition.

FACTS AND PROCEDURAL HISTORY

The facts of this crime are set forth in our opinion from Franqui's direct appeal after resentencing, *Franqui v. State,* 804 So.2d 1185 (Fla.2001) (*Franqui II*). For the purposes of these proceedings, we note that Franqui was convicted of first-degree murder of a law enforcement officer, armed robbery, aggravated assault, two counts of grand theft, and two counts of burglary following the robbery of Kislak National Bank in North Miami. *Id.* at 1189–90. Franqui was sentenced to death by the trial court after a jury recommended a death sentence by a vote of nine to three. *Id.* at 1190. Franqui's convictions were affirmed on his first direct appeal but his case was remanded for resentencing. *See Franqui v. State,* 699 So.2d 1332, 1333 (Fla.1997) (*Franqui I*). After a new penalty phase, Franqui was again sentenced to death after a jury recommendation for death by a vote of ten to two. ***27** *Franqui II,* 804 So.2d at 1190. In sentencing Franqui to death, the judge found three aggravating circumstances,[1] no statutory mitigating circumstances,[2] and four nonstatutory mitigating circumstances.[3] *Id.* at 1191. In his second direct appeal to this Court, Franqui raised six claims for relief. *Id.* This Court rejected all six claims and affirmed Franqui's death sentence. *Id.* at 1199.

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1 The trial court found the following aggravators: prior conviction for a capital or violent felony (great weight); the murder was committed during the course of a robbery and for pecuniary gain (merged) (great weight); and the murder was committed to avoid arrest and hinder law enforcement and the victim was a law enforcement officer (merged) (great weight). *Franqui II,* 804 So.2d at 1191 n. 2.

2 The trial court considered but rejected the age mitigators, and found no other statutory mitigators. *Id.* at 1191 n. 3.

3 The trial court found the following four nonstatutory mitigating circumstances: Franqui's relationship with his children (little weight); his cooperation with authorities (little weight); that his codefendants only received life sentences (little weight); and his self-improvement and faith while in custody (some weight). *Id.* at 1191 n. 4.

Franqui filed a rule 3.851 petition for postconviction relief on April 7, 2003, raising eighteen claims for relief.[4] The trial court granted an evidentiary hearing on four claims: whether the waiver of his right to testify was voluntary, whether counsel was ineffective for failing to prosecute a motion to suppress his confession, whether counsel was ineffective for failing to present relevant witnesses at a hearing on Franqui's motion to suppress, and whether counsel was ineffective for failing to litigate the involuntary nature of his confession to the sentencing jury. The trial court ultimately denied postconviction relief on all claims. Franqui now appeals that decision to this court, raising eight claims of trial court error. He has also filed a petition for writ of habeas corpus in this Court.

4 Franqui raised the following postconviction claims to the trial court: (1) the procedure for the assignment of trial judges in Dade County criminal cases is inherently unfair, particularly in Franqui's case; (2) the circumstances surrounding Franqui's waiver of his right to testify show that the waiver was involuntary and unknowing; (3) the circumstances surrounding his confession make Franqui's statement unreliable, illegal and inadmissible; (4) the trial court denied Franqui the right to obtain evidence from a material, relevant witness; (5) Franqui was denied due process when the second sentencing court allowed his statement to be admitted into evidence but failed to permit the defense to present evidence on the confession issues; and (6) trial counsel was ineffective for [a] making no effort to litigate the suppression of Franqui's statement despite ample and compelling evidence for suppression; [b] failing to pursue Franqui's right to obtain evidence from a material, relevant witness; [c] failing to present witnesses; [d] resentencing counsel failed to litigate Franqui's filed suppression motion apparently because both he and the judge mistakenly believed that the confession issue had already been litigated and lost in the Florida Supreme Court; [e] resentencing counsel failed to challenge the voluntariness of Franqui's confession to the jury; [f] resentencing counsel failed to challenge the constitutionality of Florida's death penalty scheme; [g] failing to file a motion to dismiss the charges against Franqui based on patent deficiencies in the indictment; [h] failing to present neutral reasons for exercising a peremptory challenge against panel member Diaz, resulting in that juror being seated; [i] failing to preserve patent trial court error in preventing a defense strike against prospective juror Andani; [j] failing to litigate Franqui's request for individual voir dire and motion to sequester; [k] failing to preserve patent trial court error in allowing the State to peremptorily challenge prospective juror Pascual; [l] failing to object to the prosecutor's misstatement of the law in closing; and [m] appellate counsel's failure to raise the issue of prosecutorial misconduct.

***28** Franqui was also sentenced to death for the first-degree murder of Raul Lopez during the robbery of a check-cashing business in Hialeah (the “Hialeah murder”). *Franqui v. State,* 699 So.2d 1312, 1315 (Fla.1997). On direct appeal, this Court found error regarding the admission of evidence but found that error to be harmless and affirmed Franqui's convictions and sentences, including his death sentence. *Id.* Franqui subsequently filed a 3.851 motion for postconviction relief in that case. That motion was also denied by the trial court and review by this Court is pending in a separate appeal.

POSTCONVICTION CLAIMS

1. Ineffective Assistance of Trial Counsel

Franqui alleges that his trial counsel, Eric Cohen, was ineffective for failing to litigate the motion to suppress Franqui's confession, failing to present mental health mitigation and evidence of coercion at Franqui's resentencing, and for conduct during voir dire regarding two potential jurors.

Based upon the United States Supreme Court's decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for

ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.1986) (citations omitted).

Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State,* 883 So.2d 766, 771–72 (Fla.2004).

There is a strong presumption that trial counsel's performance was not ineffective. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* In *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000), this Court held that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." We have also explained that where this Court has previously rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to advance the same claim in the trial court. ***29** *Melendez v. State,* 612 So.2d 1366, 1369 (Fla.1992).

A. Failure to Litigate the Motion to Suppress Franqui's Confession

Franqui raised a number of claims in the trial court involving an assertion that trial counsel did not properly litigate a motion to suppress Franqui's confession. Prior to the guilt phase in the instant trial, defense counsel agreed to the trial court's use of the transcripts from a hearing on a similar suppression motion filed in the Hialeah murder case. Upon review, we find no fault with the lower court's conclusion that trial counsel's decision to stipulate to the use of the transcripts from the Hialeah case hearing was reasonable.[5]

5 Inasmuch as Franqui claims that original trial counsel did not take any action at the suppression hearing in the instant case, this claim is clearly refuted by the record; accordingly, this claim will be treated as if Franqui asserts that the assistance trial counsel did provide was ineffective.

After being detained and questioned, Franqui gave two separate statements to the police on the same day regarding both the instant crime and the Hialeah murder, and trial counsel ultimately moved to suppress both confessions in each case. However, the evidentiary hearing on the motion to suppress the Hialeah statement occurred a little more than one year prior to the hearing on the instant motion to suppress. The record of the hearing in the Hialeah case indicates that the focus of that hearing was on both the circumstances of the instant crime and statement as well as the Hialeah crime and confession. The testimony from all of the witnesses presented at that hearing, Franqui included, focused on both statements: the officers detailed when Franqui was read his rights during the day and in relation to which crime, and defense counsel Cohen questioned each of them in great detail, including asking them to specify at which points Franqui supposedly agreed to keep talking without counsel present. Thus, the underlying circumstances relating to the issues Franqui is now claiming were not fully explored in the instant hearing were in fact comprehensively explored during the previous hearing in the Hialeah case in front of the same judge and with the same parties. As defense counsel Cohen explained to the court in agreeing to the stipulation for use of the transcripts, any testimony and cross-examination of Officers Crawford, Rivers and Smith was likely to be "identical."[6] Under these circumstances, defense counsel could have reasonably concluded that requiring these officers to be called again was unnecessary and potentially

counterproductive. Given the comprehensive nature of the first hearing in the Hialeah case on a statement taken the exact same day arising out of the same interrogation and involving all of the same parties, being heard in front of the same judge, we find no error in the postconviction court's conclusion that Cohen acted reasonably in stipulating to the use of the prior testimony of Rivers, Crawford and Smith at the hearing on the instant motion to suppress.

6 In addition, Cohen did assert a claim at the suppression hearing relating to Detective Naboot overhearing a conversation between Franqui and his wife in which he told her that he shot at the officer but his was not the fatal bullet. Cohen would not stipulate to any testimony in this regard and instead deposed Naboot and was granted a separate suppression hearing on the issues raised.

Franqui asserts further, however, that despite the comprehensive nature of the prior hearing, trial counsel was ineffective at the instant suppression hearing for failing to present evidence of Franqui's mental illness and expert testimony on ***30** coerciveness. First, Franqui argues that trial counsel should have presented evidence of his supposed mental illness at the suppression hearing to demonstrate that Franqui was not capable of making a valid waiver of his rights when making his confession. He asserts that defense counsel should have presented a letter from Dr. Jethro Toomer to trial counsel Cohen, which Cohen received during the period between the trial court's denial of the motion to suppress in the Hialeah case and the hearing on the motion to suppress in the instant case. This letter makes a number of findings based on two meetings between Dr. Toomer and Franqui, including observations of personality disorganization, overall mental confusion and spotty memory. The letter stated that Franqui suffers from extreme mental and emotional disturbance and severe impairment of cognitive functioning, and concluded by characterizing Franqui as an individual "whose behavior is characterized by a pervasive pattern of instability" with resulting behavior that is "impulsive, irrational, maladaptive and self-destructive."

At the evidentiary hearing below, Cohen testified that he did not utilize this information at the suppression hearing because Dr. Toomer had been retained solely for use at the penalty phase and also because, throughout their relationship, Cohen did not observe any signs of mental impairment in Franqui that would cause him to conclude that Franqui was incompetent during his police questioning.

We find no error in the trial court's conclusion that counsel's actions were reasonable and did not constitute ineffectiveness under *Strickland.* First, assuming Cohen believed his client, Franqui's testimony from the Hialeah suppression hearing indicates that he understood his rights, that he wished to invoke them, and that he only gave the statements he did due to police misconduct, including blatant abuse and coercion. In other words, Franqui's testimony at the suppression hearing asserted no waiver was given and raised no issues of mental competency. Rather, his testimony at the suppression hearing directly contradicted that of the police, affirmatively asserting that he understood his rights and invoked them, but that his invocation was ignored and that he was abused and coerced by the police into giving a confession. Franqui does not suggest how this prior testimony could have been utilized during the instant suppression hearing had Cohen adopted a new strategy claiming that Franqui was incompetent.

In addition, as noted above, Cohen testified at the postconviction evidentiary hearing that he had observed no mental problems with Franqui. He also stated that Dr. Toomer had been called as a witness during the penalty phase in the Hialeah trial six months prior to the suppression hearing in the instant case; the same trial judge found substantial problems with Toomer's credibility.[7] In fact, in the Hialeah ***31** sentencing order, issued some six months prior to the suppression hearing, the trial court expressly rejected Dr. Toomer's credibility and his opinions. The trial court questioned Dr. Toomer's "leap" from a diagnosis of borderline personality disorder to the conclusion that Franqui was acting under the influence of "extreme mental or emotional disturbance." The trial court concluded that "every piece of evidence presented in this trial, penalty phase and sentencing hearings, with the exception of Dr. Toomer's testimony, definitely establishes that Mr. Franqui is not mentally retarded."

7 Records from the Hialeah case indicate that defense counsel called Dr. Toomer during the penalty phase, when he testified as an expert in forensic psychology. This was in November of 1993, well before the suppression hearing in the instant case, which occurred in May of 1994. In addition to meeting with Franqui three times, Dr. Toomer testified that he reviewed various records extensively, met with members of Franqui's family, and gathered information about his background. Dr. Toomer's testimony basically reflects what was contained in his letter to Cohen, expounding upon it to illustrate that Franqui has suffered these problems since childhood. Dr. Toomer then discussed the "Revised

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> Beta Exam," which indicated that Franqui's IQ was "less than 60." Dr. Toomer explained that this particular test relied on nonverbal intelligence, that it was a standard IQ test, and that he scored the test, a task he is trained to do. Franqui's score indicated that he is in the "retarded range." Dr. Toomer concluded his testimony by stating that the "extreme emotional disturbance" mitigator applied to Franqui, and also that his chronological age did not reflect his mental age.
>
> On cross-examination, Dr. Toomer confirmed that he had testified for defendants between fifteen and twenty times in previous trials. The State spent a lot of time going through statements Dr. Toomer made in previous trials and diagnoses he had given, as well as the fact that he had no other version of the facts in the instant case other than what Franqui had told him and that he had not read any police reports about the incident. The State also pointed out inconsistencies between Franqui's own testimony and the conclusions reached and testified to by Dr. Toomer, including the fact that the hospital records from Franqui's accident as a teenager do not indicate that he lost consciousness. The State asked Dr. Toomer about the results of Franqui's Wechsler Test, which indicted he had a full-scale IQ score of 83.

Considering all of these circumstances, we find no error in the postconviction court's conclusion that deficient performance by defense counsel has not been established given *Strickland's* presumption that trial counsel's performance was not ineffective. *See Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). There is competent, substantial evidence in the record to support these rulings by the postconviction court.

Franqui next argues that trial counsel was ineffective for failing to present expert testimony at the suppression hearing regarding the effect of police coercion during interrogations. Franqui's witness at the postconviction evidentiary hearing below, Dr. Meisner, testified as an expert in police interrogations and confessions, expressing the opinion that coercion could have played a role in Franqui's confession. However, this witness also explained that there was only one expert who routinely gave testimony in this field in the early 1990s; furthermore, there was no showing that such an expert was known to or readily available to defense counsel at the time of Franqui's trial. In addition, trial counsel is granted great latitude in decisions regarding the use of expert witnesses. Thus, we find no error in the lower court's conclusion that deficient performance has not been established pursuant to a *Strickland* analysis for failing to call an expert on interrogation tactics at the suppression hearing, given that the use of experts in this area of the law was relatively new and unexplored at the time of Franqui's trial.

B. Resentencing

Franqui claims that trial counsel was ineffective for failing to relitigate the suppression of his confession during his resentencing (penalty phase) trial. We find no error in the trial court's rejection of the argument that trial counsel was ineffective for failing to present this issue to the resentencing jury. Since such evidence would presumably have been used to ***32** cast doubt upon the admissibility or veracity of Franqui's confession to establish his guilt, it would not have been relevant to sentencing issues or admissible in the sentencing phase. *See Way v. State,* 760 So.2d 903, 916 (Fla.2000) ("[T]his Court has previously rejected the argument that evidence that would serve only to create a lingering doubt of the defendant's guilt is admissible as a nonstatutory mitigating circumstance.") (citing *Preston v. State,* 607 So.2d 404, 411 (Fla.1992); *King v. State,* 514 So.2d 354, 358 (Fla.1987)). Franqui has made no showing in this appeal of the relevancy of such evidence for purposes of sentencing.

Franqui also alleges that trial counsel was ineffective for failing to present Dr. Toomer's letter to the resentencing court. However, this claim was not raised in the trial court, nor was there any type of similar claim in which Franqui alleged error for failing to present the Toomer letter to the resentencing jury or judge as a means of establishing mental health mitigation. Accordingly, this claim is procedurally barred as an argument raised for the first time on appeal to this Court. *See Griffin v. State,* 866 So.2d 1, 11 n. 5 (Fla.2003) (finding that postconviction claim raised for the first time on appeal was procedurally barred).

In addition, the record from Franqui's resentencing indicates that, regardless of any procedural bar, he is entitled to no relief. First, trial counsel Cohen testified at the evidentiary hearing that, while the primary reason he had Dr. Toomer evaluate Franqui was in preparation for the penalty phase, Cohen and Franqui jointly agreed to not present the letter at resentencing. The resentencing record reflects a specific discussion about Dr. Toomer's letter report:

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THE COURT: All right. I'll allow you to make arguments later. Any other evidence or testimony on the behalf of Mr. Franqui?

MR. COHEN: No, your Honor.

THE COURT: All right. You had indicated the last time you were considering presenting the former testimony of one of the doctors, you and Mr. Franqui have agreed not to present that?

MR. COHEN: Unfortunately, Judge, the situation is that we have not been able to find a report. But based on our conversations previously, I don't think that there's anything in that report that we would be submitting to the Court.

THE COURT: I just want to make sure there's not a claim later that not finding the report in some way—

MR. COHEN: No.

THE COURT:—prevented you from making an effective presentation or prevents me from making an appropriate sentence. Does the State have a copy of the report?

MR. COHEN: We don't have the report present now but obviously we reviewed the report previously and the doctor did testify at the sentencing hearing of what we refer to as the Hialeah case. So we're well aware of contents and the findings of the doctor. And it's our decision not to present that evidence to the jury and I don't see any reason why that decision would change in presenting any evidence to the Court.

THE COURT: All right. Have you spoken to Mr. Franqui with about [sic] that?

MR. COHEN: We mentioned it briefly the other day. I don't think he has any different feelings about that.

THE COURT: Mr. Franqui, do you agree with Mr. Cohen's decision not to have me consider the testimony or the report of that doctor?

MR. FRANQUI: Yes, your honor.

***33** THE COURT: Is there anything Mr. Franqui would like to say?

MR. COHEN: I don't believe so, Your Honor.

MR. FRANQUI: No, your Honor.

Thus, the record reflects that Cohen and Franqui made a joint, strategic decision not to present this evidence at resentencing.[8] We find no error in the trial court's conclusion that Franqui is not entitled to relief on this claim. *See Occhicone,* 768 So.2d at 1048.

8 We have already discussed the fact that the trial court had both considered and rejected Dr. Toomer's opinion testimony as presented at sentencing in the Hialeah murder.

C. Voir Dire

Franqui next asserts error in defense counsel's actions during jury selection. His argument, however, is unclear: first, Franqui takes issue with the lower court's dispensation of this claim as a *Batson–Neil* issue;[9] Franqui argues that since both he and juror Diaz were both Hispanic males, there was no need for trial counsel to articulate a race-neutral reason as a basis for a preemptory strike of Diaz when the State objected. He asserts that the issue for this Court to decide is whether a race-neutral reason must be given by a defendant when he wishes to strike a juror of his own race, gender and ethnicity. In addition, Franqui appears to assert an ineffective assistance of counsel claim for not objecting to the trial court's failure to strike juror Andani.[10] In the postconviction court Franqui asserted that counsel's delay in presenting neutral reasons beyond his bare dislike of Diaz resulted in the seating of a juror whose ability to be fair was subject to question. Regarding Andani, Franqui argued that counsel failed to preserve trial court error in disallowing a defense strike since, when the State challenged the strike, defense counsel declined to be heard.

9 *See Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Neil,* 457 So.2d 481 (Fla.1984).

10 When Cohen challenged this particular juror, the State objected, but Cohen failed to respond and juror Andani was seated.

We find no error in the trial court's denial of relief on this claim since Franqui has shown neither deficient performance nor prejudice. First, as the court below noted, we addressed the seating of these two jurors in *Franqui I.* Regarding Diaz, we held that "the trial court did not abuse its discretion in striking Franqui's peremptory challenge." *Franqui I,* 699 So.2d at 1335. This Court further ruled: "We also reject

Franqui's contention that the trial court erred in refusing to permit him to challenge prospective juror Andani." *Id.* at 1335 n. 6. We conclude that Franqui should not be permitted to relitigate these claims under the guise of ineffective assistance of counsel when the same issues were resolved against him on appeal. *Harvey v. Dugger,* 656 So.2d 1253, 1256 (Fla.1995) ("It is also not appropriate to use a different argument to relitigate the same issue.") (citing *Medina v. State,* 573 So.2d 293, 295 (Fla.1990)). In addition, Franqui has made no showing of any prejudice that could have resulted from defense counsel's alleged deficiencies on these jury issues.

2. Judicial Assignment

Franqui's next argument asserts that he was denied due process of law when the same trial judge presided over his two death cases. The trial court dismissed this claim without an evidentiary ***34** hearing. As explained in the order denying relief,

> The facts are not in dispute. [Franqui] was charged in four separate cases (including two separate first-degree murder cases), all of which were pending at the same time. By administrative order, the first case was assigned (randomly) to a felony trial division. So long as that case remained open and pending (i.e., not resolved by plea, trial, or dismissal), all subsequently-filed cases involving that same defendant were assigned to the same trial division. As a result of this administrative procedure, all of [Franqui's] cases were assigned to a single judge. [Franqui] argues this procedure is inherently unfair.

The lower court concluded that this claim was procedurally barred since, under prevailing Florida law, Franqui should have raised this claim prior to trial. In addition, the trial court held that a judge is not subject to disqualification in a case simply because that judge has made adverse rulings against the defendant in the past or because the judge has previously heard some of the facts of the case.

Franqui did not allege ineffective assistance of counsel for failure to insist upon a different judge in the instant case; rather, Franqui claimed that his due process rights were violated by reason of the administrative procedures invoked in this case.[11] The lower court correctly concluded that this claim is procedurally barred because it was not properly asserted before trial. Further, *Wild v. Dozier,* 672 So.2d 16 (Fla.1996), establishes that this Court has exclusive jurisdiction to review administrative orders making judicial assignments. *Id.* at 17 ("[W]e conclude that this Court has exclusive jurisdiction to review judicial assignments.").

11 Inasmuch as Franqui claims that trial counsel was ineffective for failing to pursue joinder of the instant case with the Hialeah case, we conclude this claim is insufficiently pled. Franqui's entire argument in this appeal is one sentence contained in a footnote: "Whether a motion to consolidate should have been filed is an issue, which speaks to whether the defense counsel was ineffective in not so filing." *See* Appellant's Initial Brief at 58 n. 29.

Franqui also claims that his due process rights were violated because the same judge sentenced him to death in both of Franqui's murder cases. This argument, however, is refuted by the record. While the same judge did initially sentence Franqui to death in the Hialeah case and the instant case, ultimately Franqui's death sentence for this crime was reversed by this Court. *See Franqui I,* 699 So.2d at 1333. A different trial judge subsequently presided over Franqui's resentencing and issued the death sentence that was later affirmed on direct appeal. *See Franqui II,* 804 So.2d at 1189. Thus, the same judge did not issue the two death sentences now pending.

3. State's Subpoena of Eric Cohen

Franqui claims it was improper for the State to invoke the use of an investigatory subpoena to compel defense counsel to appear for questioning in the prosecutor's office prior to the postconviction evidentiary hearing. Section 27.04, Florida Statutes (2006), provides as follows:

> The state attorney shall have summoned all witnesses required on behalf of the state; and he or she is allowed the process of his or her court to summon witnesses from throughout the state to appear before the state attorney in or out of term time at such convenient places in the state attorney's judicial circuit and at such convenient times as may be designated in the summons, to ***35** testify before him or her as to any violation of the law upon which they may be interrogated, and he or she is empowered to administer oaths to all witnesses summoned to testify by the process of his or her court or who may voluntarily appear before the state attorney to testify as to any violation or violations of the law.

While we may agree with Franqui that this statute, giving prosecutors the powers necessary to investigate crimes,

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should not be used as a discovery tool to compel defense counsel to testify ex parte in postconviction proceedings, we find no error in the trial judge's treatment of the issue as asserted in this case. We conclude that the record conclusively demonstrates that no harm resulted from the State's pretrial questioning of defense counsel or the failure of the State to notify postconviction counsel of this questioning. In other words, while it may appear that the State abused its authority under the statute, Franqui has not demonstrated that the State was provided information that it was not otherwise entitled to in defending Franqui's assertions of ineffectiveness of counsel.

4. Improper Prosecutorial Conduct

Franqui next takes issue with the trial court's denial of relief on his claim of fundamental error in the prosecutor's improper remark in the State's closing: "If the aggravation is always stronger, always more powerful in your hearts and minds, the Judge is going to tell you it's your obligation that you should vote to recommend for death." As the trial court correctly noted, this Court did address several improper comments made at Franqui's trial on the direct appeal after resentencing and found no reversible error. Further, even though it was not specifically challenged on direct appeal, we addressed the comment at issue in this claim:

> At oral argument, Franqui's appellate counsel also argued that the State misstated the law during closing argument in commenting, "[I]f the aggravation is always stronger, always more powerful in your hearts and in your minds, the Judge is going to tell you it's your obligation that you should vote to recommend for the death penalty." No objection was made to this comment at trial, nor was this issue raised in Franqui's brief. Nevertheless, we take this opportunity to caution prosecutors to avoid using language instructing the jury that it has a duty or obligation to recommend death. *See Urbin v. State,* 714 So.2d at 411, 421 (Fla.1998); *Garron [v. State],* 528 So.2d [353,] 359 [(Fla.1988)].

Franqui II, 804 So.2d at 1194 n. 8.

We also agree with the postconviction court that this claim is procedurally barred since it could have been raised as fundamental error on direct appeal. Further, Franqui has not established that the comment constitutes the fundamental error necessary to overcome the lack of preservation by trial counsel. *See Robinson v. State,* 520 So.2d 1, 7 (Fla.1988) ("Our cases also have long recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below...."). In fact, it is apparent from our discussion that we considered this comment on direct appeal and did not conclude that it constituted fundamental error. We also note that Franqui has not demonstrated that the jury was not properly instructed by the trial court on this same issue. For all of these reasons, we conclude relief on this claim was properly denied.

5. Florida's Death Penalty is Unconstitutional

Franqui next asserts that Florida's death penalty scheme is unconstitutional ***36** under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). However, both this court and the United States Supreme Court have held that *Ring* does not apply retroactively. *See Johnson v. State,* 904 So.2d 400 (Fla.2005); *Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Franqui's death sentence became final after the Court rejected his direct appeal following resentencing in 2001; therefore, Franqui cannot rely on *Ring* to find his death sentence unconstitutional. *See Washington v. State,* 907 So.2d 512, 514 (Fla.) (finding defendant not entitled to relief under *Ring* because *Ring* is not applied retroactively), *cert. denied,* 546 U.S. 1064, 126 S.Ct. 802, 163 L.Ed.2d 632 (2005).

PETITION FOR WRIT OF HABEAS CORPUS

1. Ineffective Assistance of Appellate Counsel

Consistent with the *Strickland* standard, to grant habeas relief based on ineffectiveness of counsel, this Court must determine

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986); *see also Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000); *Thompson v. State,* 759 So.2d 650, 660 (Fla.2000). In raising

such a claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman,* 761 So.2d at 1069; *see Knight v. State,* 394 So.2d 997, 1001 (Fla.1981); *see also Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Id.* (quoting *Williamson v. Dugger,* 651 So.2d 84, 86 (Fla.1994)).

A. Failure to Challenge Franqui's Confession

Franqui claims that appellate counsel was ineffective for failing to challenge the circumstances of Franqui's confession on direct appeal. This issue is somewhat related to Franqui's postconviction claim challenging trial counsel's effectiveness in seeking suppression of Franqui's confession. After a lengthy hearing on Franqui's motion to suppress, the trial judge concluded that Franqui's confession was not coerced and that his waiver of rights was both free and voluntary. Importantly, Franqui has not demonstrated in his habeas petition that, in all probability, appellate counsel would have been successful in overturning the trial court's findings and rulings on direct appeal. While Franqui testified at the suppression hearing that he was coerced and that his confession was essentially beaten out of him, this testimony was not found credible by the trial judge, who instead credited the officers' testimony that Franqui voluntarily waived his rights and that he was not mistreated in any way. Although the suppression hearing revealed that Franqui was questioned over a lengthy period, the record also demonstrates that he was given refreshment, allowed to take a break to speak with his wife, was repeatedly informed of his rights on multiple occasions, ***37** and, according to the State's witnesses, appeared alert the entire time.

Based on the totality of the circumstances in the instant case, and the existence of competent, substantial evidence to support the trial court's rulings, we cannot conclude that appellate counsel was ineffective for failing to challenge the denial of the motion to suppress on appeal. *See Chavez v. State,* 832 So.2d 730, 748–49 (Fla.2002) (finding that continual police custody of more than fifty-four hours was not dispositive of whether or not to suppress a confession since the defendant in that case was provided with frequent breaks, refreshment, and time away from the police facility, and furthermore that the defendant consistently agreed to waive his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)); *Walker v. State,* 707 So.2d 300, 310–11 (Fla.1997) (upholding voluntariness of confession where the defendant was questioned for six hours during the morning and early part of day, was provided with drinks and allowed to use the bathroom when he wished, was never threatened with capital punishment, and was never promised anything other than that the officer would inform the prosecutor that the defendant had cooperated).

Further, as the State correctly notes in response to Franqui's alternative argument, Franqui did not argue during trial that his confession should have been suppressed because of the state of his mental health; accordingly, any claim based on his mental health during interrogation was not preserved for review. *Perez v. State,* 919 So.2d 347, 359 (Fla.2005) (holding that, for an issue to be preserved for appeal, the specific legal argument or ground to be argued on appeal must have been presented to the lower court), *cert. denied,* 547 U.S. 1182, 126 S.Ct. 2359, 165 L.Ed.2d 285 (2006). In turn, since the issue was not preserved, appellate counsel cannot be deemed ineffective for failing to raise it. *Groover v. Singletary,* 656 So.2d 424, 425 (Fla.1995).

B. Prosecutorial Misconduct

Although not specified in his brief, Franqui claims ineffective assistance of appellate counsel for failing to challenge alleged improper prosecutorial comments made at trial. Given that the particular comments are not argued with any specificity and there is no attempt to demonstrate that any alleged errors were preserved for appeal, we find any such claim to be insufficiently pled and we deny relief. *See Patton v. State,* 878 So.2d 368, 380 (Fla.2004) (holding that conclusory allegations are insufficient to properly state a claim). We also note that a similar issue was raised by counsel on appeal and we found similar comments to be harmless in view of the overall circumstances of the case, including the trial court's instructions to the jury. *See Franqui II,* 804 So.2d at 1192–94.

C. Record of Confessions

Franqui raised a claim in his original 3.851 motion to the court below, alleging that the circumstances surrounding his confession, including the officers' election not to make an audio or visual recording of any portion of the interrogation,

make the defendant's statement unreliable, illegal and inadmissible. However, the trial court denied relief, finding the claim to be procedurally barred while also noting that that there is no constitutional or other legal requirement that police agencies record or preserve an oral confession. In his habeas petition, Franqui now argues that appellate counsel was ineffective for not raising the same claim on direct appeal. The record reflects that while Franqui did move to suppress his confession, he did not ***38** argue that it should be suppressed because it was not recorded. As the State correctly notes, in order to preserve an issue regarding suppression, Franqui must have raised to the trial court the same argument he raises on appeal. *See Perez,* 919 So.2d at 349. We agree that since the issue was not preserved, appellate counsel cannot be deemed ineffective for failing to raise it. *See Groover,* 656 So.2d at 425.

D. Testimony of Assistant State Attorney DiGregory

Franqui argues that appellate counsel was ineffective when he failed to raise on direct appeal the trial court's decision to prevent defense counsel Cohen from calling Assistant State Attorney Kevin DiGregory as a witness. Without providing any legal basis for a claim of error or details regarding the failed attempt to call DiGregory as a witness in the guilt-phase trial, Franqui argues that DiGregory should have been asked a number of questions that Franqui now posits for the first time in this proceeding. Given the lack of specificity and legal basis regarding this claim, as well as the hypothetical nature of the questions posed, we find this claim to be insufficiently pled and deny relief. *See Patton,* 878 So.2d at 380.

E. Mitigation

Franqui claims that appellate counsel failed to sufficiently challenge the resentencing court's rejection of the fact that Franqui did not fire the fatal bullet as nonstatutory mitigation. This claim, however, is refuted by the record, which reflects that appellate counsel did raise this argument in Franqui's direct appeal after resentencing, and the argument was expressly rejected by this Court. *See Franqui II,* 804 So.2d at 1197 ("Under the particular facts in this case, we find that the trial court did not err in considering, but ultimately rejecting, the fact that Franqui did not fire the fatal bullet as a mitigating circumstance.").

CONCLUSION

For the reasons stated, we affirm the circuit court's denial of postconviction relief and deny Franqui's petition for a writ of habeas corpus.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

All Citations

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804 So.2d 1185
Supreme Court of Florida.

Leonardo FRANQUI, Appellant,
v.
STATE of Florida, Appellee.

No. SC94269.
|
Oct. 18, 2001.
|
Rehearing Denied Jan. 8, 2002.

Synopsis

Defendant was convicted in the Circuit Court, Dade County, Rodolfo Sorondo, J., of first-degree murder of law enforcement officer and other crimes, and was sentenced to death. Defendant appealed. The Supreme Court affirmed defendant's convictions, but vacated. On remand, the trial court, Robert N. Scola, Jr., J., again sentenced defendant to death, and defendant again appealed. The Supreme Court held that: (1) prospective jurors who vacillated as to their ability to recommend death were properly excused for cause; (2) jury was not required to recommend death sentence upon finding that aggravating factors outweighed mitigating factors; (3) court's error in instructing jury during voir dire that it was required to recommend death sentence if aggravating circumstances outweighed mitigating circumstances was harmless; (4) any error in prosecutor's voir dire comment implying the same obligation was also harmless; (5) state's closing argument did not improperly ask jury to draw particular logical conclusion from evidence; (6) prosecutor's improper comment during closing argument was not so egregious as to taint entire proceeding; (7) court gave appropriate weight and consideration to all aggravating and mitigating factors; (8) sentencing order contained constitutionally adequate findings as to defendant's culpability; and (9) sentence of death was not disproportionate.

Affirmed.

Wells, C.J., concurred in result only.

Shaw, J., concurred in part and dissented in part with separate opinion in which Anstead and Pariente, JJ., joined.

Anstead, J., concurred in part and dissented in part with separate opinion in which Shaw and Pariente, JJ., joined.

Quince, J., concurred in result only.

Attorneys and Law Firms

***1188** John H. Lipinski, Special Assistant Public Defender, Miami, FL, for Appellant.

***1189** Robert A. Butterworth, Attorney General, and Sandra S. Jaggard, Assistant Attorney General, Miami, FL, for Appellee.

Opinion

PER CURIAM.

We have on appeal an order of the trial court imposing the death penalty upon Leonardo Franqui following resentencing. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons set forth below, we affirm Franqui's death sentence.

BACKGROUND

On February 14, 1992, Franqui was charged with committing first-degree murder of a law enforcement officer; armed robbery; aggravated assault; two counts of grand theft; and two counts of burglary in connection with a bank robbery. Franqui was tried jointly with codefendants Ricardo Gonzalez and Pablo San Martin. This Court previously summarized the facts in this case as follows:

> The defendant, Leonardo Franqui, along with codefendants Pablo San Martin, Ricardo Gonzalez, Fernando Fernandez, and Pablo Abreu were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft third degree, and burglary [Note 1]. Franqui, Gonzalez, and San Martin were tried together before a jury in May, 1994.
>
>> [Note 1] One count of aggravated assault and the unlawful possession of a firearm while engaged in a criminal offense were nol prossed by the State after its opening statement.
>
> The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen

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grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, Police Officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank.

Approximately two weeks later, codefendant Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that Franqui had procured the two stolen Chevys, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. He was subsequently reinterviewed by police and, among other things, described how Franqui had shouted at the victim not to move before shooting him [Note 2].

> [Note 2] San Martin also made a confession to police, in which he stated that the robbery was planned by a black friend of the codefendant Fernandez and that the planning occurred at Fernandez's apartment. San Martin admitted that he had grabbed the money tray during the robbery but could not say who carried guns or did the shooting.

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied ***1190** any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez-and not himself-who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.

> At trial, over the objection of Franqui, the confessions of codefendants San Martin and Gonzalez were introduced without deletion of their references to Franqui, upon the trial court's finding that their confessions "interlocked" with Franqui's own confession. In addition, an eyewitness identified Franqui as the driver of one of the Chevrolets leaving the bank after the robbery, and his fingerprints were found on the outside of one of the vehicles. Ballistics evidence demonstrated that codefendant Ricardo Gonzalez had fired the fatal shot from his .38 revolver, hitting the victim in the neck, and that Franqui had shot the victim in the leg with his .9 mm handgun.

Franqui v. State, 699 So.2d 1332, 1333-34 (Fla.1997). Franqui was convicted on all counts and the jury recommended death by a vote of nine to three. *See id.* at 1334. The trial court followed the jury's recommendation and sentenced Franqui to death. *See id.*

On appeal, we affirmed Franqui's convictions but vacated his sentence on the basis that the trial court erred in admitting the confession of codefendant Gonzalez against Franqui in their joint trial. *See id.* at 1335-36. Although we found the admission of Gonzalez's confession was harmless beyond a reasonable doubt with respect to guilt, we concluded that the confession could have prejudiced Franqui during the penalty phase. *See id.* at 1336. Accordingly, we vacated Franqui's death sentence and remanded the case for a new penalty phase proceeding. *See id.*

During the week of August 24-31, 1998, a jury was empaneled and a new penalty phase was held. At the resentencing, the State presented several witnesses, including the two bank tellers who were with Officer Bauer the morning of his murder; law enforcement officers who arrived at the scene following the shooting to gather evidence and render emergency assistance to the victim; detectives who questioned and obtained a sworn statement from Franqui describing his role in the robbery leading to Officer Bauer's death; and a medical examiner regarding the cause of death and injuries.

Franqui presented the testimony of several witnesses to substantiate his claims for mitigation. Specifically, Franqui's uncle testified with respect to his family history and background. Franqui's cousin testified regarding his self-improvement and faith since being incarcerated. In addition, Franqui's father-in-law and sister-in-law testified that he was

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a good husband as well as a loving and caring father to his two children.[1]

1 Although Franqui developed a marital relationship with his girlfriend and they had two children together, the record reflects that they never officially married.

The jury recommended the death penalty by a vote of ten to two. The trial court ***1191** followed the jury's recommendation and sentenced Franqui to death. In so doing, the trial court found three aggravating circumstances,[2] no statutory mitigating circumstances,[3] and four nonstatutory mitigating circumstances.[4] The trial court concluded that the aggravating circumstances outweighed the mitigating circumstances and sentenced Franqui to death.

2 The trial court found the following three aggravating circumstances: (1) Franqui had a prior conviction for a capital or violent felony (great weight); (2) the murder was committed during the course of a robbery and for pecuniary gain, merged (great weight); and (3) the murder was committed to avoid arrest and hinder law enforcement and the victim was a law enforcement officer, merged (great weight).

3 The trial court considered and rejected Franqui's age as a mitigating circumstance based on his maturity at the time of the murder. In addition, the trial court concluded no evidence presented reasonably established any of the other statutory mitigating circumstances.

4 The trial court found the following four nonstatutory mitigating circumstances: (1) Franqui's relationship with his children (little weight); (2) cooperation with authorities (little weight); (3) life sentences imposed on codefendants San Martin and Abreu (little weight); and (4) self-improvement and faith while in custody (some weight). The trial court rejected Franqui's family history and the fact that he did not fire the fatal bullet as nonstatutory mitigating circumstances.

This appeal follows, in which Franqui raises the following six issues: (1) the trial court erred in excusing two potential jurors for cause; (2) the trial court erred in instructing and permitting the jury to be instructed by the State that it was required to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances; (3) the trial court erred in overruling defense objections to prosecutorial closing argument; (4) the trial court erred in refusing to instruct the jury that it could consider the life sentences given to codefendants San Martin and Abreu as a mitigating factor; (5) the trial court failed to find and weigh all mitigating circumstances; and (6) the death penalty is disproportionate in this case.

ANALYSIS

First, Franqui asserts that the trial court improperly excused jurors Pereira and Lopez for cause over defense counsel's objections. Franqui claims that both jurors indicated their ability to follow the law and the court's instructions and, therefore, should not have been excused. The test for determining juror competency is "whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." *Kearse v. State,* 770 So.2d 1119, 1128 (Fla.2000) (citing *Lusk v. State,* 446 So.2d 1038, 1041 (Fla.1984)). Under this test, a trial court should excuse a juror for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See id.; see also Singer v. State,* 109 So.2d 7, 23-24 (Fla.1959) ("[I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused for cause on motion of a party, or by the court on its own motion."). The trial court has the duty to decide if a challenge for cause is proper, and its ruling will be sustained on appeal absent an abuse of discretion. *See Castro v. State,* 644 So.2d 987, 989-90 (Fla.1994); *see also Singleton v. State,* 783 So.2d 970, 973 (Fla.2001).

***1192** During voir dire, juror Pereira initially expressed doubts about her support of the death penalty but thought it was necessary given the current state of affairs. When asked by the court if she could recommend death if the aggravating circumstances outweighed the mitigating circumstances, Pereira responded, "I think yes." Upon further questioning by the court, Pereira clarified her previous response by stating that she would recommend death if she really believed that it was necessary. Pereira, however, subsequently indicated that she agreed with another veniremember who responded that she would never impose the death sentence. Based upon her vacillation throughout voir dire, we find that the trial court did not abuse its discretion in excusing her for cause. *See Hannon v. State,* 638 So.2d 39, 41-42 (Fla.1994); *Randolph v. State,* 562 So.2d 331, 336-37 (Fla.1990).

Similarly, we find that the trial court did not abuse its discretion in excusing juror Lopez for cause. Although

Lopez initially told the court that she was in favor of the death penalty, she later stated that she could not cast the deciding vote recommending a death sentence. Following an overnight recess, Lopez indicated that she was under a lot of stress because of the trial and the possibility of having to decide about the death penalty. Subsequently, she stated for the second time that she could not cast the deciding vote recommending a death sentence. Upon questioning by defense counsel, however, Lopez indicated that she would be able to recommend the death penalty if voting was done by secret ballot. Given the equivocal responses Lopez provided as to whether she could recommend the death penalty, we find the trial court did not abuse its discretion in excusing her for cause.

Next, Franqui argues that the trial court erred in instructing and permitting the jury to be instructed by the State during voir dire that it was required to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances. During its opening remarks to the initial venire, the trial court stated, "If you believe that the aggravating factors outweigh the mitigating factors, then the law *requires* that you recommend a sentence of death." (Emphasis added.) The State argues that this issue was not preserved for appeal because trial counsel did not raise a contemporaneous objection. We disagree. Although defense counsel did not object until a short time after the trial court's opening remarks were completed, we find the purpose of the contemporaneous objection rule was satisfied in this case, i.e., to place the trial judge on notice that an error may have occurred and provide him or her with the opportunity to correct the error at an early stage of the proceedings.

In *Henyard v. State,* 689 So.2d 239 (Fla.1996), we considered whether a prosecutor's comments during voir dire that jurors *must* recommend death when aggravating circumstances outweigh mitigating circumstances misstated the law. *See id.* at 249-50. We held that the prosecutor's comments were misstatements of law because "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." *Id.; see also Brooks v. State,* 762 So.2d 879, 902 (Fla.2000) (stating that prosecutor misstated the law in commenting that jurors must recommend a death sentence unless the aggravating circumstances are outweighed by the mitigating circumstances); *cf. Garron v. State,* 528 So.2d 353, 359 & n. 7 (Fla.1988) (finding that it was a misstatement of the law to argue that "when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty"). For the ***1193** same reasons expressed in *Henyard,* we agree with Franqui that the trial court's comment that the law required jurors to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances misstated the law.[5]

5 We also ask that the Committee on Standard Jury Instructions in Criminal Cases review the standard instructions to be certain our opinions in *Henyard, Brooks* and *Garron* have been properly considered, and to consider whether additional instructions such as those given by the trial court here should be included in the standard instructions. *See* note 7, *infra.* We note, for example, that the Eleventh Circuit's pattern jury instructions for death penalty cases provide in part:

> If, after weighing the aggravating and mitigating factors, you determine that the aggravating factors found to exist sufficiently outweigh the mitigating factors; or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend that a sentence of death be imposed rather than some lesser sentence. *Regardless of your findings with respect to aggravating and mitigating factors, however, you are never required to recommend a sentence of death.*
>
> ....
>
> *The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weights or values by different jurors. In your decision making process, you, and you alone, are to decide what weight is to be given to a particular factor.*
>
> Your only interest is to seek the truth from the evidence and to determine in the light of that evidence and the Court's instructions whether to recommend a sentence of death. If you do not recommend a sentence of death, the Court is required by law to impose a sentence other than death, which sentence is to be determined by the Court alone. *Let me admonish you again, while you may recommend a sentence of death, you are not required to do so.*

Pattern Jury Instructions (Criminal Cases), Offense Instruction 76.4 (Eleventh Circuit District Judges Ass'n 1997) (emphasis added).

As in *Henyard,* however, we conclude that Franqui was not prejudiced by this error. Despite Franqui's contrary assertions, we find that the trial court's subsequent comments to prospective jurors during voir dire were consistent with

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the standard jury instructions.[6] More importantly, the trial court did not repeat the misstatement of law when instructing the jury prior to its deliberations. To the contrary, the final jury instructions given in this case were consistent with the standard jury instructions. In addition, the trial court gave defense counsel's requested instruction apprising the jury that the weighing process was not a mere counting of the aggravating and mitigating circumstances, but rather a reasoned judgment as to what the appropriate sentence should be in light of the nature of the aggravating and mitigating circumstances found to exist.[7] This additional instruction was more in accord with *Henyard* and our seminal decision in *State v. Dixon,* 283 So.2d 1, 10 (Fla.1973), *cert. denied,* ***1194** 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), wherein we stressed:

6 We do note, however, that the trial court did repeat its prior statement that the law requires the jury to recommend a death sentence if the aggravating circumstances outweigh the mitigating circumstances during individual voir dire of juror Hernandez, who was subsequently removed for cause.

7 In particular, the trial court instructed the jury:

> It must be emphasized that the weighing process is not a mere counting of the number of aggravating circumstances and the number of mitigating circumstances. But rather, a reasoned judgment as to what the appropriate sentence in this case in light of the nature and aggravating factors that you find-excuse me, aggravating and mitigating factors that you find.

The record reveals that the latter part of the trial court's written instructions read: "[B]ut rather a reasoned judgement as to what the appropriate sentence is in this case in light of the nature of the aggravators and mitigators you find."

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Under these circumstances, we find the trial court's isolated misstatements of the law during voir dire to be harmless. *See Henyard,* 689 So.2d at 250. Further, we find that the trial court did not abuse its discretion in refusing to give the curative instruction requested by defense counsel during voir dire. *See Foster v. State,* 614 So.2d 455, 462 (Fla.1992) (finding trial court did not abuse its discretion in refusing to give instruction on jury's pardon power); *Mendyk v. State,* 545 So.2d 846, 850 (Fla.1989) (stating that there is no requirement that the jury be instructed on its pardon power); *see also Dougan v. State,* 595 So.2d 1, 4 (Fla.1992).

Within this issue, Franqui also argues that the trial court erred in permitting the State to instruct the venire that "if mitigation never outweighs the aggravation in your mind, if aggravation is always more powerful, more weighted, than the mitigation, then you vote to recommend the death penalty." Defense counsel objected to this comment, and in response the trial court informed the jury concerning the law relating to the weighing of aggravating and mitigating circumstances. More importantly, as noted above, the final jury instructions given in this case were consistent with the standard jury instructions. Thus, even assuming that the objected-to comment misstated the law, we conclude any error resulting from this isolated comment made during an extensive jury selection process was harmless.[8] *See Henyard,* 689 So.2d at 250.

8 At oral argument, Franqui's appellate counsel also argued that the State misstated the law during closing argument in commenting, "[I]f the aggravation is always stronger, always more powerful in your hearts and in your minds, the Judge is going to tell you it's your obligation that you should vote to recommend for the death penalty." No objection was made to this comment at trial, nor was this issue raised in Franqui's brief. Nevertheless, we take this opportunity to caution prosecutors to avoid using language instructing the jury that it has a duty or obligation to recommend death. *See Urbin v. State,* 714 So.2d at 411, 421 (Fla.1998); *Garron,* 528 So.2d at 359.

Franqui also argues that the trial court erred in overruling defense counsel's objections to arguments made by the State during closing argument. In particular, Franqui alleges that the State improperly made comments outside the scope of the evidence by arguing that he used part of the proceeds from the Kislak Bank robbery to repaint his father-in-law's car so as to avoid arrest and to purchase a gun which was used in the subsequent robbery of Craig Van Ness. Franqui also asserts that the State improperly commented on the robbery of Van Ness, implying that he would have murdered Van Ness if he had not been arrested.[9]

9 In particular, the State argued:

> January 14, a very wonderful thing happens to the people of Dade County. This defendant gets

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> arrested. He's in custody. Or perhaps, you thought, like perhaps the defendant thought, this would never end. But it did end. Maybe by luck, maybe by accident, a uniformed officer sees somebody, looks a little hinky [sic] inside a van, guy starts to flee from him, follows him and catches him and look what happens. He catches somebody on what was a traffic offense, only to find out he's got a man held at gunpoint whose been kidnaped here and it's the same gang that's involved in this crime and this crime and this crime.
>
> And if there wasn't that police officer there, who just happened to have seen what took place on January 14, I don't want to guess about-
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: All right. This is argument. Overruled.
>
> [STATE]: I don't want to guess about how that day would have ended. But it's nice to know that Craig Van Nest [sic] was able to walk into a courtroom some time later, tell a jury what had taken place and this defendant was convicted of those crimes as well.

***1195** This Court has held that wide latitude is afforded counsel during argument. *See Moore v. State,* 701 So.2d 545, 550 (Fla.1997); *Breedlove v. State,* 413 So.2d 1, 8 (Fla.1982). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. *See Thomas v. State,* 748 So.2d 970, 984 (Fla.1999). The standard jury instructions contain cautions that while the arguments of counsel are intended to be helpful and persuasive, such arguments are not to be taken as sources of the law or evidence. Further, the control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. *See Occhicone v. State,* 570 So.2d 902, 904 (Fla.1990).

As to the comment pertaining to Franqui's use of part of the proceeds from the bank robbery, we find no error. The record reflects that Franqui was unemployed at the time of the offense and had been so since December 1991. Nonetheless, the car used as the getaway vehicle upon abandoning the two stolen vehicles, which was owned by Franqui's father-in-law, was repainted shortly after the crime. The record also indicates that the guns used in the bank robbery were discarded following the crime. However, eleven days after the bank robbery, Franqui and two accomplices robbed and kidnapped Van Ness with a different gun. Based on these facts, we find the State's comment did not constitute an improper attempt to ask the jury to draw a logical inference based upon the evidence. *See Mann v. State,* 603 So.2d 1141, 1143 (Fla.1992) (holding that merely arguing conclusions which can be drawn from the evidence is "permissible fair comment"). Thus, the trial court did not abuse its discretion in overruling defense counsel's objection to this comment.

On the other hand, we find the State's comment pertaining to the subsequent robbery of Van Ness was improper since it implied that Franqui and his accomplices would have murdered Van Ness had the police not stopped the van and arrested the occupants. Nonetheless, this isolated comment, by itself, does not warrant resentencing. This Court has held that prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding. *See Bertolotti v. State,* 476 So.2d 130, 133 (Fla.1985). In light of the record in this case, this single erroneous comment within the State's lengthy closing argument was not so egregious as to taint the validity of the jury's recommendation and require reversal of the entire resentencing proceeding. *See id.*

Next, Franqui asserts that the trial court erred in refusing defense counsel's request that the jury be given a specific instruction that it could consider the life sentences of codefendants San Martin and Abreu as a mitigating circumstance. The trial court refused the requested instruction, concluding that this issue was ***1196** covered by the standard jury instruction regarding nonstatutory mitigation. Contrary to the State's assertion, we find this issue was preserved for review. *See Toole v. State,* 479 So.2d 731, 733 (Fla.1985) ("The contemporaneous objection rule is satisfied when, as here, the record shows that there was a request for an instruction, that the trial court understood the request, and that the trial court denied the specific request."); *see also State v. Heathcoat,* 442 So.2d 955, 955-56 (Fla.1983). Nonetheless, we find this issue to be without merit. The trial court gave the standard jury instruction on nonstatutory mitigating circumstances, which explains in part that the jury may consider "any other circumstance of the offense" in mitigation. We have held that this standard jury instruction on nonstatutory mitigating circumstances is sufficient, and there is no need to give separate instructions on each item of nonstatutory mitigation. *See Gore v. State,* 706 So.2d 1328, 1334 (Fla.1997); *San Martin v. State,* 705 So.2d 1337, 1349 (Fla.1997); *James v. State,* 695 So.2d 1229, 1236 (Fla.1997). Moreover, the trial court read to the jury a stipulation pertaining to the life sentences given to codefendants San Martin and Abreu prior to closing arguments, and the trial court specifically informed defense counsel that he could argue codefendants' life sentences as a

mitigating circumstance to the jury, which counsel did during closing argument.

Franqui also argues that the trial court failed to find and weigh all of the nonstatutory mitigating evidence presented at resentencing. Specifically, Franqui contends that the trial court should have found and weighed in mitigation his family history and abandonment by his natural parents, his newfound maturity while incarcerated, and the fact that he did not fire the fatal bullet. This Court has stated that a trial court in its written order must evaluate each mitigating circumstance offered by the defendant and decide if it has been established and, in the case of nonstatutory factors, if it is of a truly mitigating nature. *See Campbell v. State,* 571 So.2d 415, 419 (Fla.1990). A trial court "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." *Id.* (footnote omitted). However, a trial court may reject a claim that a mitigating circumstance has been proven, provided the record contains competent substantial evidence to support the rejection. *See Mansfield v. State,* 758 So.2d 636, 646 (Fla.2000); *Ferrell v. State,* 653 So.2d 367, 371 (Fla.1995).

First, Franqui argues that the trial court failed to find and weigh in mitigation his family history, including his abandonment by his natural parents. We disagree. The sentencing order reveals that the trial court expressly considered in great detail whether Franqui's family history, including his abandonment by his natural parents, was a mitigating circumstance. Indeed, the trial court made extensive findings and explained its reasoning for rejecting Franqui's family history as a mitigating circumstance. Based upon our review, we find that competent substantial evidence supports the trial court's conclusion.

Similarly, Franqui's contention that the trial court did not find and weigh as a mitigating circumstance his newfound maturity while incarcerated is without merit. Franqui's cousin testified at resentencing that Franqui had requested books on psychology, exercise, fitness, and mental health since his incarceration in order to improve himself. He also testified that Franqui had found religion since being incarcerated. It was this testimony pertaining to Franqui's self-improvement and ***1197** faith that served as the basis for his alleged newfound maturity, as exemplified by defense counsel's argument during closing and at the *Spencer*[10] hearing. The record reflects that the trial court not only considered this evidence, but found Franqui's self-improvement and faith while in custody was established as a mitigating circumstance and entitled to some weight.

10 *Spencer v. State,* 615 So.2d 688 (Fla.1993).

Franqui also contends that the trial court failed to find and weigh as a mitigating circumstance the fact that he did not fire the fatal bullet. Although we have indicated that the fact that a defendant did not fire the fatal shot may be a mitigating factor,[11] whether it actually is depends on the particular facts of the case. Here, it is uncontradicted that Franqui shot at Officer Bauer, striking him in the hip. Although this wound alone was not fatal, the medical examiner testified that his findings were consistent with the conclusion that Officer Bauer was first shot in the hip by a bullet which ricocheted off the pillar he took cover behind, causing him to fall forward and be struck by the fatal bullet fired by Gonzalez. Under the particular facts in this case, we find that the trial court did not err in considering, but ultimately rejecting, the fact that Franqui did not fire the fatal bullet as a mitigating circumstance.

11 *See, e.g., Curtis v. State,* 685 So.2d 1234, 1237 (Fla.1996) (noting as a mitigating circumstance the fact that defendant did not kill the victim and his bullet merely struck victim in the foot after co-perpetrator had fired the fatal shot); *cf. Taylor v. State,* 294 So.2d 648, 652 (Fla.1974) (noting that downward trajectory of the fatal bullet at least raised the possibility that the defendant had not fired the shot).

Lastly, Franqui challenges the proportionality of his death sentence. In so doing, Franqui first contends that the trial court failed to include in its sentencing order findings that support the *Enmund-Tison* culpability requirement.[12] We disagree. In its sentencing order, the trial court expressly found that Franqui was prepared to use lethal force to eliminate any impediment to his robbery plan and did not hesitate to actually use such force during the bank robbery. Indeed, the record demonstrates that Franqui surveyed the bank the day before the crime and observed the bank tellers being escorted to their drive-through booths; he came to the bank armed with a .9 mm handgun; and he fired the gun at Officer Bauer, striking him in the hip. Franqui was a direct, active participant in the bank robbery which resulted in Officer Bauer's death, and his actions not only exhibit a reckless indifference to life, but demonstrate that he intended lethal force to be used should he and his accomplices face any resistance during the robbery. Thus, we conclude the *Enmund-Tison* culpability requirement is satisfied. *See San Martin v. State,* 705 So.2d

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1337, 1345-46 (Fla.1997); *Van Poyck v. State,* 564 So.2d 1066, 1070-71 (Fla.1990); *DuBoise v. State,* 520 So.2d 260, 265-66 (Fla.1988); *Diaz v. State,* 513 So.2d 1045, 1048 (Fla.1987).

12 In *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the United States Supreme Court held that imposition of the death penalty in a felony murder case in which the defendant did not kill, attempt to kill, or intend that a killing take place or that lethal force be employed violates the Eighth Amendment prohibition against cruel and unusual punishment as applied to the states through the Fourteenth Amendment of the United States Constitution. In *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Court held that a finding of major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement for consistency with the Eighth Amendment.

***1198** Nonetheless, Franqui claims that his death sentence is disproportionate. Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. *See Porter v. State,* 564 So.2d 1060, 1064 (Fla.1990). In conducting this review, this Court considers the totality of the circumstances in a case as compared to other cases in which the death penalty has been imposed, thereby providing for uniformity in the application of the death penalty. *See Urbin v. State,* 714 So.2d 411, 416-17 (Fla.1998) (quoting *Tillman v. State,* 591 So.2d 167, 169 (Fla.1991)). The death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders. *See Urbin,* 714 So.2d at 416; *State v. Dixon,* 283 So.2d 1, 7 (Fla.1973).

In this case, the trial court found three aggravating circumstances: (1) the defendant had a prior conviction for a capital or violent felony (great weight); (2) the murder was committed during the course of a robbery and for pecuniary gain, merged (great weight); and (3) the murder was committed to avoid arrest and hinder law enforcement and the victim was a law enforcement officer, merged (great weight).[13] The trial court found no statutory mitigating circumstances, but did find the following four nonstatutory mitigating circumstances: (1) Franqui's relationship with his children (little weight); (2) his cooperation with authorities (little weight); (3) the life sentences imposed on codefendants San Martin and Abreu (little weight); and (4) Franqui's self-improvement and faith while in custody (some weight).

13 Although Franqui does not challenge the trial court's finding as to any of the aggravating circumstances, we find that the record reveals competent substantial evidence to support the three aggravating circumstances.

To support his claim that his death sentence is disproportionate, Franqui primarily relies on *Curtis v. State,* 685 So.2d 1234 (Fla.1996). We find such reliance to be misplaced. In *Curtis,* we found death to be a disproportionate penalty given the substantial mitigation established in the case, including defendant's age of seventeen years and the fact that the co-perpetrator who fired the fatal shot was sentenced to life. *See id.* at 1237. By contrast, in this case there is minimal mitigation when weighed against the aggravating circumstances. More importantly, in contrast to *Curtis,* Franqui was not a minor at the time of the offense and his codefendant who fired the fatal shot was sentenced to death.[14] *See Gonzalez v. State,* 786 So.2d 559 (Fla.2001).

14 The three other codefendants involved in this crime were sentenced to life. *See Fernandez v. State,* 730 So.2d 277 (Fla.1999) (imposing life sentence); *San Martin v. State,* 717 So.2d 462 (Fla.1998) (reversing jury override and imposing life sentence). Codefendant Abreu received a life sentence as a result of a plea negotiation.

We find the circumstances in this case are similar to other cases in which the death penalty has been imposed. For instance, in *Armstrong v. State,* 642 So.2d 730 (Fla.1994), the defendant shot a police officer after the officer responded to a robbery in progress at a restaurant. The same three aggravating circumstances that exist in this case were found in *Armstrong.* The defendant in *Armstrong* also presented evidence of several nonstatutory mitigators. On appeal, this Court affirmed the death sentence. *See id.* at 740; *see also Burns v. State,* 699 So.2d 646 (Fla.1997) (affirming death sentence for the murder of a law enforcement officer where avoid arrest and hinder law enforcement aggravating ***1199** circumstances were found and merged, there was one statutory mitigating circumstance of no significant criminal history, and insignificant nonstatutory mitigation); *Reaves v. State,* 639 So.2d 1 (Fla.1994) (affirming death sentence for the murder of a deputy sheriff, where the record supported the existence of two aggravating circumstances of prior violent felony and avoid arrest, no statutory mitigators, and three nonstatutory mitigators). Accordingly, we find death is a proportionate penalty in this case.

For the reasons stated above, we affirm Franqui's sentence.

It is so ordered.

HARDING and LEWIS, JJ., concur.

WELLS, C.J., concurs in result only with an opinion.

SHAW, J., concurs in part and dissents in part with an opinion, in which ANSTEAD and PARIENTE, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which SHAW and PARIENTE, JJ., concur.

QUINCE, J., concurs in result only.

WELLS, C.J., concurring in result only.

I concur in result only. I specifically do not agree with the majority's footnote 5. I believe the majority confuses federal and Florida law by its reference to the Eleventh Federal Circuit's pattern jury instructions. Under Florida law it is not proper for a trial judge to "admonish" a jury as does this federal instruction. Under Florida law the trial judge is required to be much more neutral than in the federal instruction.

Nor do I believe that the Court's statement in *Henyard v. State,* 689 So.2d 239, 249-250 (Fla.1997), was intended to be a jury instruction. Section 921.141, Florida Statutes, sets out the jury's role, and we should follow the statute. That statute states:

> (2) ADVISORY SENTENCE BY THE JURY.-After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This is what the jury should be instructed to do, and it is covered by the Standard Jury Instructions.

SHAW, J., concurring in part and dissenting in part.

I dissent from the majority's application of a harmless error analysis to the trial court's opening remarks to the initial venire wherein the trial judge stated:

> If you believe that the aggravating factors outweigh the mitigating factors, then the law *requires* that you recommend a death sentence.

This was a serious misstatement 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.

The majority's reliance in *Henyard v. State,* 689 So.2d 239 (Fla.1996), and *Brooks v. State,* 762 So.2d 879 (Fla.2000), ignores a critical distinction. In *Henyard* and *Brooks* the originator of the erroneous misstatement of the law was an advocate, i.e., the prosecutor, not the trial judge as in this instance. Undoubtedly, a jury would and should accord greater weight to ***1200** guidance given by the judge than to an advocate's arguments relative to their duty as jurors. The majority's harmless error analysis ignores this reality or does not give proper weight to the source of the misstatements. In *Almeida v. State,* 748 So.2d 922 (Fla.1999), we implicitly recognized this distinction in finding a prosecutor's improper argument on the law governing a defendant's sanity harmless error by noting, *inter alia,* that "[t]he misstatement was presented to the jury in the context of closing argument by an advocate, not in the context of an instruction by the court." *Id.* at 927.

Moreover, unlike *Brooks* where the trial court immediately responded to the defense's objection to the prosecutor's improper argument by appropriately instructing the jury on the law relating to the weighing of aggravating and mitigating circumstances, the misstatement of law in the instant case was never cogently addressed or straightforwardly corrected despite the fact that the error was brought to the judge's attention in time "to place [him] on notice that an error may have occurred and provide him ... with the opportunity to correct the error at an early stage in the proceedings." Majority op. at 1192.

The majority assumes in its harmless error analysis that the trial court's reading of the standard jury instructions, which included a correct statement of the law, diffused the effect of the earlier misstatement. I feel that this misses the mark. When one considers the litany of instructions the jury is exposed to before retiring to deliberate, it is purely speculative to assume that a serious misstatement of the law given during the voir dire can be overcome by a mechanical reading of a catalog of

standard jury instructions, one of which correctly states the law which was misstated at the beginning of the trial. This kind of speculation is not the kind of "principled analysis" which should be the hallmark of a harmless error inquiry. *See State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla.1986). Accordingly, I dissent.

ANSTEAD and PARIENTE, JJ., concur.

ANSTEAD, J., concurring in part and dissenting in part.
I concur in Justice Shaw's opinion and write separately to emphasize the critical importance of jury instructions in capital cases, especially as they may impact the fairness and constitutionality of a death penalty scheme.

In the U.S. Supreme Court's recent decision in *Penry v. Johnson,* 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001), the Court reiterated that "it is only when the jury is given a 'vehicle for expressing its "reasoned moral response" to that [mitigating] evidence in rendering its sentencing decision,' that we can be sure that the jury 'has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence.' " *Penry,* 532 U.S. at ----, 121 S.Ct. at 1920 (citations omitted).

The Supreme Court's admonition in *Penry* is similar to one contained in this Court's seminal decision in *State v. Dixon,* 283 So.2d 1 (Fla.1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), where in evaluating the constitutionality of Florida's death penalty scheme, we declared:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations ***1201** require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Id. at 10; *see also Beasley v. State,* 774 So.2d 649, 673-74 (Fla.2000) (quoting *Dixon*). More recently, this Court has cautioned that "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." *Henyard v. State,* 689 So.2d 239, 249-50 (Fla.1996). In addition, of course, we have long ago established that a jury's recommendation of life will be sustained so long as the record contains any rational basis for the jury's grant of mercy. *See Tedder v. State,* 322 So.2d 908, 910 (Fla.1975).

OTHER JURISDICTIONS

The statutory schemes in many other states are similar to Florida's in providing for consideration of aggravating and mitigating circumstances in order for the jury or court to determine an appropriate penalty of life or death. Many states also provide guidance to capital juries similar to that contained in our decisions in *Dixon* and *Henyard.*

For example, New Hampshire's statute provides in part:

> If an aggravating factor set forth in subparagraph VII(a) and one or more of the aggravating factors set forth in subparagraph VII(b)-(j) are found to exist, the jury shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, if the jury concludes that the aggravating factors outweigh the mitigating factors or that the aggravating factors, in the absence of any mitigating factors, are themselves sufficient to justify a death sentence, the jury, by unanimous vote only, may recommend that a sentence of death be imposed rather than a sentence of life imprisonment without possibility of parole. *The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.*

N.H.Rev.Stat. Ann. § 630:5(IV) (1996) (emphasis added). Of course, the New Hampshire statutory scheme requires the unanimous vote of the jury for a death recommendation, a safeguard not present in Florida where a death recommendation can be made by a bare majority vote. Obviously, the need for caution is even greater when a bare majority vote carries such significant consequences.

California's statutory scheme for finding and weighing aggravation is also similar to Florida's scheme. *See* Cal.Penal Code § 190.3 (West 1999). However, in California, the pattern jury instructions for the penalty phase of a death penalty case are much more explicit as to the jury's responsibility:

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without

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> possibility of parole, shall be imposed on [the] [each] defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the ***1202** elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> *The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.*

1 Cal. Jury Instr.-Crim. 8.88 (6th ed. Supp.2001) (emphasis added).

Not surprisingly, cases have arisen in California where the defendant alleges that the jury was misled as to its sentencing function when the court instructed the jury that it shall impose a sentence of death if the aggravating circumstances outweigh the mitigating circumstances. In *People v. Brown,* 40 Cal.3d 512, 230 Cal.Rptr. 834, 726 P.2d 516 (1985), *rev'd on other grounds,* 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the California Supreme Court, much like this Court in *Dixon,* explained that the jury's discretion was not limited:

> Similarly, the reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

Id. at 854, 726 P.2d at 532 (footnote omitted). The court recognized that, under some circumstances, the instruction might confuse a penalty jury regarding the fundamental character of the capital sentencing process.[15] Thus, the court noted that ***1203** any case in which the mandatory language was used "must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." 230 Cal.Rptr. at 856 n. 17, 726 P.2d at 534 n. 17.[16]

15 In *People v. Bonin,* 47 Cal.3d 808, 254 Cal.Rptr. 298, 765 P.2d 460 (1989), the court commented on *Brown* as follows:

> Although in *Brown* we upheld the constitutionality of section 190.3, we nevertheless recognized that when delivered in an instruction the provision's mandatory sentencing language might mislead jurors as to the scope of their sentencing discretion and responsibility. Specifically, a juror might reasonably understand that language to define the penalty determination as "simply a finding of facts" or "a mere mechanical counting of factors on each side of the imaginary 'scale.' " A juror might also reasonably understand the language to require him to vote for death if he finds that the evidence in aggravation outweighs the evidence in mitigation-even if he determines that death is not the appropriate penalty under all the circumstances.

Id. at 327, 765 P.2d at 489 (citations omitted).

16 Following the court's opinion in *Brown,* the pattern jury instruction was changed to conform almost verbatim to a proposed jury instruction the court mentioned in footnote 19 of its opinion. *See Brown,* 230 Cal.Rptr. 834, 726 P.2d at 535 n. 19; *see also* 1 Cal. Jury Instr. Crim. 8.88 (6th ed. Supp.2001) (set forth above in opinion and including language that the weighing process is not a mere mechanical weighing of factors).

In *Geary v. State,* 114 Nev. 100, 952 P.2d 431 (1998) (on rehearing), the Nevada Supreme Court addressed the potentially confusing nature of a final jury instruction given in capital cases which provided:

> The defendant in the case has been found guilty of murder in the first degree.
>
> Under the law of this State, you must now determine the sentence to be imposed upon the defendant. First degree murder is punishable by death only if the jury finds one or more aggravating circumstances have been proved beyond a reasonable doubt and the jury further finds that any mitigating circumstances do not outweigh the aggravating circumstances.
>
> Otherwise, murder in the first degree is punishable by imprisonment in the state prison for life with or without the possibility of parole.

Id. at 432. In a prior decision, the court had concluded that this same instruction may have misled the jury into believing that it was required to automatically impose the death sentence if it found that the aggravating circumstances outweighed the mitigating circumstances. *See id.* (referring to *Geary v. State,* 112 Nev. 1434, 930 P.2d 719 (1996)). Thereafter, the state filed a motion for rehearing noting that the same jury had also been instructed that imposing the death sentence was not mandatory even after a finding that the aggravating circumstances outweighed the mitigating circumstances. On rehearing, the court agreed, finding it had overlooked the existence of the other instruction, which it found sufficiently informed the jury that a death sentence is never mandatory. *See id.* Nevertheless, to prevent future uncertainty, the court set forth the following additional instruction for district courts to give in the sentencing phase of all capital cases:

> The jury must find the existence of each aggravating circumstance, if any, unanimously and beyond a reasonable doubt.
>
> The jurors need not find mitigating circumstances unanimously. In determining the appropriate sentence, each juror must consider and weigh any mitigating circumstance or circumstances which that juror finds.
>
> The jury *may* impose a sentence of death only if:
>
> 1) The jurors find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists;
>
> 2) Each and every juror determines that the mitigating circumstance or circumstances, ***1204** if any, which he or she has found do not outweigh the aggravating circumstance or circumstances; and
>
> 3) The jurors unanimously determine that in their discretion a sentence of death is appropriate.

Id. at 433 (emphasis added). Subsequent cases in Nevada have consistently reiterated the principle that the jury always retains the discretion to decide whether it considers death the appropriate penalty. *See Hollaway v. State,* 6 P.3d 987, 996 (Nev.2000); *Middleton v. State,* 114 Nev. 1089, 968 P.2d 296, 315 (1998).

In New York, Criminal Procedure Law section 400.27 sets forth the procedure for determining a defendant's sentence upon conviction for first-degree murder. In particular, section 400.27 provides:

> 11. (a) *The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed.* Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.
>
> (b) If the jury directs imposition of either a sentence of death or life imprisonment without parole, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any.

N.Y.Crim. Proc. Law § 400.27(11) (McKinney Supp.2001) (emphasis added). In accordance with section 400.27, the New York standard jury instructions provide in part:

> Members of the jury, I will now explain how you are to consider the aggravating and mitigating factors in making your sentencing determination in this case.

> *Our law does not suggest or imply that a sentence of death is expected or appropriate for a defendant found guilty of murder in the first degree.*
>
> Our law provides that *a jury may not direct the imposition of a sentence of death unless, after due deliberation, the jury unanimously finds, beyond a reasonable doubt, that the aggravating factor substantially outweighs any and all mitigating factors established by the defendant, and unanimously determines that the penalty of death should be imposed.*
>
> In other words, you as a jury may not direct the imposition of a sentence of death unless each of you, individually, makes the following two determinations:
>
> First, that, beyond a reasonable doubt, the aggravating factor in the case substantially outweighs any and all mitigating factors that you personally find to have been established, and second, that the penalty of death should be imposed.
>
> ....
>
> *The process of determining whether, beyond a reasonable doubt, the aggravating factor substantially outweighs the mitigating factors is not subject to a mathematical formula. Rather, it requires an analysis and evaluation of the aggravating and mitigating factors.*
>
> In order to conduct that analysis and evaluation, you must consider three questions:
>
> First, to what extent, if any, does the aggravating factor support a sentence of death for this defendant in this case?
>
> Second, to what extent, if any, do the mitigating factors, individually or collectively, ***1205** support a sentence other than death for this defendant in this case?
>
> And, third, does the extent to which the aggravating factor supports a sentence of death substantially outweigh beyond a reasonable doubt the extent to which the mitigating factors support a sentence other than death?
>
> *If each one of you concludes beyond a reasonable doubt that the aggravating factor substantially outweighs any and all mitigating factors, then you must go on to consider whether, under all the facts and circumstances of this case, you as a jury unanimously determine that a sentence of death should be imposed. In other words, you must consider whether, under all the facts and circumstances of this case, you as a jury unanimously determine that death is the fitting and appropriate punishment that should be imposed upon the defendant.*
>
> *If each one of you concludes that, beyond a reasonable doubt, the aggravating factor substantially outweighs any and all mitigating factors that you individually find to exist, and that a sentence of death should be imposed, then and only then may you as a jury direct the imposition of a sentence of death.*
>
> On the other hand, if any one of you has a reasonable doubt as to whether the aggravating factor substantially outweighs the mitigating factors established in the case, or, if any one of you does not agree that a sentence of death should be imposed, then you as a jury may not direct the imposition of a sentence of death.

Capital Sentencing Proceeding Basic Final Instructions section 440.27 *available at* http://www.courts.state.ny.us/cji/capsntfi.htm (emphasis added). Hence, while New York requires a unanimous jury vote for a death recommendation, its standard jury instructions contain numerous cautions to the jury as to the exercise of its discretion in determining an appropriate penalty.

Missouri also has pattern jury instructions in death cases, one of which explicitly informs the jury that it is never required to recommend a death sentence. For example, in *State v. Petary,* 790 S.W.2d 243 (Mo.1990), the following jury instruction was cited:

> You are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

Id. at 244-45. The above instruction is referred to as the “life option” instruction. *See State v. Storey,* 40 S.W.3d 898, 912 (Mo.2001).

CONCLUSION

Most of the sample pattern jury instructions set forth above have aspects which arguably should be included in Florida's standard jury instructions for penalty phase proceedings in capital cases. Most notably, and, consistent with this

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Court's decisions in *Dixon* and *Henyard,* these pattern jury instructions explicitly inform the jury that the "weighing" process is not a mere numerical or mathematical calculation, but rather involves a reasoned judgment and analysis of the circumstances and ultimately a choice left to the discretion of the jury based upon all of the circumstances presented.

While we have been diligent in reminding trial court judges of the qualitative process they must follow in determining an ***1206** appropriate sentence in each individual case, we must not overlook the importance of such instructions for Florida juries. Although the *Dixon* and *Henyard* holdings are consistently repeated in our case law, including such guidance in the standard jury instructions would obviously aid the jury in understanding its role and responsibility during deliberations by further clarifying the "weighing" process.

SHAW and PARIENTE, JJ., concur.

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699 So.2d 1332
Supreme Court of Florida.

Leonardo FRANQUI, Appellant,
v.
STATE of Florida, Appellee.

No. 84701.
|
July 3, 1997.
|
Rehearing Denied Oct. 7, 1997.

Synopsis

Defendant was convicted in the Circuit Court, Dade County, Rodolfo Sorondo, J., of first-degree murder of law enforcement officer and other crimes, and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) prospective juror who was born and raised in Cuba and who had ethnic-sounding name was not required to be removed pursuant to defendant's peremptory challenge; (2) erroneous admission of codefendant's confession was harmless beyond reasonable doubt, with respect to guilt; but (3) erroneous admission of codefendant's confession was not harmless, with respect to sentence.

Convictions affirmed; sentence reversed and remanded.

Anstead, J., concurred in part and dissented in part and filed opinion in which Kogan, C.J., concurred.

Harding, J., dissented and filed opinion in which Kogan, C.J., and Anstead, J., concurred.

Attorneys and Law Firms

***1333** Eric M. Cohen, Miami, for Appellant.

Robert A. Butterworth, Attorney General and Randall Sutton, Assistant Attorney General, Miami, for Appellee.

Opinion

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Leonardo Franqui. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm Franqui's convictions. However, because we find a violation of appellant's Sixth Amendment constitutional right to confront his accusers, we reverse his death sentence and remand for a new sentencing proceeding before a jury.

FACTS

The defendant, Leonardo Franqui, along with codefendants Pablo San Martin, Ricardo Gonzalez, Fernando Fernandez, and Pablo Abreu were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft third degree, and burglary.[1] Franqui, Gonzalez, and San Martin were tried together before a jury in May, 1994.

1 One count of aggravated assault and the unlawful possession of a firearm while engaged in a criminal offense were nol prossed by the State after its opening statement.

The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, Police Officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank.

Approximately two weeks later, codefendant Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that Franqui had procured the two stolen Chevys, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. He was subsequently reinterviewed by police and, among other things, described how Franqui had shouted at the victim not to move before shooting him.[2]

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2 San Martin also made a confession to police, in which he stated that the robbery was planned by a black friend of the codefendant Fernandez and that the planning occurred at Fernandez's apartment. San Martin admitted that he had grabbed the money tray during the robbery but could not say who carried guns or did the shooting.

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez—and not himself—who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of Franqui, the confessions of codefendants San Martin and Gonzalez were introduced without deletion of their references to Franqui, upon the trial ***1334** court's finding that their confessions "interlocked" with Franqui's own confession. In addition, an eyewitness identified Franqui as the driver of one of the Chevrolets leaving the bank after the robbery, and his fingerprints were found on the outside of one of the vehicles. Ballistics evidence demonstrated that codefendant Ricardo Gonzalez had fired the fatal shot from his .38 revolver, hitting the victim in the neck, and that Franqui had shot the victim in the leg with his .9 mm handgun.

Franqui was convicted on all counts, and after a penalty phase trial the jury recommended death by a vote of nine to three. The trial court followed the jury's recommendation and sentenced Franqui to death. Franqui presents the following claims on appeal: (1) that the trial court erred in denying Franqui's peremptory challenges of jurors Diaz and Andani; (2) that the trial court abused its discretion in granting the State's peremptory challenge of juror Pascual because the State's reasons for striking this juror were not gender neutral; (3) that the trial court erred in denying Franqui's motion for severance based upon the introduction of nontestifying codefendant Gonzalez's confession at their joint trial; (4) that the trial court erred in admitting the prosecutor's comments to the jury concerning the victim's personality and character; and (5) that the trial court erred in sentencing Franqui to death.

We find claim 2 to be procedurally barred under *Joiner v. State,* 618 So.2d 174 (Fla.1993), because defense counsel failed to properly renew his objection to juror Pascual before accepting the jury and allowing it be sworn.[3] *See Joiner,* 618 So.2d at 176 n. 2 (requiring strict construction of rules of preservation because otherwise, the defense "could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial"). Similarly, we find claim 4, dealing with the prosecutor's allegedly improper comments appealing to jurors' sympathy also to be procedurally barred because it was not properly preserved for review.[4] We also decline to address the merits of claim 5 because these sentencing issues are rendered moot by our decision here to remand for a new penalty phase trial. We address the remaining claims below.

3 In this case, defense counsel accepted the jury panel "subject to our previous objection," but then allowed the trial court to define his objection as limited to jurors "Diaz, Andani and Weaver." At no time did defense counsel renew his objection to juror Pascual or otherwise disabuse the trial court of the notion that his objection to the jury was not limited to the three jurors specifically identified by the court.

4 First, as Franqui concedes, the allegedly inflammatory comments made during the state's opening statement received no objection and therefore are unpreserved. *Castor v. State,* 365 So.2d 701 (Fla.1978). Similarly, we decline to address the alleged prosecutorial misconduct in relation to bank teller Hadley's testimony because it too failed to receive a sufficient objection. *See Ferguson v. State,* 417 So.2d 639, 641 (Fla.1982) (holding that objections must be made with sufficient specificity to apprise trial court of potential error and preserve point for appellate review). Finally, the potential error in allowing Ms. Chin–Watson, another bank teller whom the victim in this case was escorting when he was shot, to testify about her friendship with Officer Bauer was objected to at trial. Nevertheless, we find that Chin–Watson's brief statement, even if improper, was harmless beyond a reasonable doubt. *See Stein v. State,* 632 So.2d 1361, 1367 (Fla.1994) (finding brief humanizing comments do not constitute grounds for reversal).

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JURY SELECTION

Franqui first contends that the trial court erred in denying his exercise of a peremptory challenge to excuse prospective juror Diaz from the jury. The initial colloquy on the issue was as follows:

> MS. BRILL: Wait a minute, Judge, are they striking Aurelio Diaz? State would challenge that strike.
>
> THE COURT: On Aurelio Diaz, let me hear your reasons. Mr. Diaz [the defense counsel], your grounds?
>
> MR. DIAZ: I don't like him.
>
> THE COURT: Okay, that, in that case I will have to disallow that being the reason, I will have to disallow your strike. As it is not a race neutral reason.

We have consistently held that trial courts have broad discretion in determining the propriety ***1335** of the exercise of peremptory challenges. *Curtis v. State,* 685 So.2d 1234 (Fla.1996); *Files v. State,* 613 So.2d 1301 (Fla.1992). We conclude that the trial court did not abuse its discretion in striking Franqui's peremptory challenge.

We cannot agree with the dissenting opinion that the State's objection was insufficient to permit the trial court to make inquiry with respect to whether juror Diaz was being challenged for nonracial reasons. In support of their position, the dissenters rely on *Windom v. State,* 656 So.2d 432 (Fla.), *cert. denied,* 516 U.S. 1012, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995), and *Melbourne v. State,* 679 So.2d 759 (Fla.1996), both of which stated that a party objecting to the other side's use of a peremptory challenge on racial grounds must show that the person being challenged is a member of a distinct racial group.

Our holding in *Windom* was that there was not a sufficient objection to reverse the trial court for *not* requiring the challenging party to provide race-neutral reasons for the challenge. Thus, the rationale of *Windom* would be pertinent if the trial court in the instant case had declined to inquire into the racial basis for the challenge. Here, however, the trial court clearly understood that the objection to the challenge of a venireperson in Dade County, who was born and raised in Havana, Cuba, and whose name was Aurelio Diaz, was being made on racial grounds. This is especially true because there was never any contention made to the trial court that prospective juror Diaz was not a member of a cognizable minority or that there should not be a *Neil*[5] inquiry. Moreover, we have encouraged trial judges to err on the side of holding a *Neil* inquiry. *State v. Slappy,* 522 So.2d 18 (Fla.1988). *See Curtis* (upholding denial of peremptory challenge in face of contention that objecting party had failed to make a prima facie showing of discrimination). The facts of *Melbourne* are equally inapposite. In that case, the objection to the challenge was clearly made on racial grounds, but the objecting party failed to preserve the issue for review because the objection was not renewed before the jury was sworn.

5 In *State v. Neil,* 457 So.2d 481 (Fla.1984), we first authorized trial courts to make inquiry into whether peremptory challenges were being exercised for racial reasons.

Standing alone, defense counsel's statement, "I don't like him," may appear to be a race-neutral reason. However, the trial court was obligated to evaluate the credibility of this statement in the full context in which this statement was made. The present record reveals that juror Diaz was questioned extensively by the court, the State, and defense counsel. The questioning takes place over nearly a half-dozen pages of transcript and yields no obvious reason for disqualification. When defense counsel, as an afterthought, later made an attempt to justify the challenge with other reasons, it was the trial court's responsibility to evaluate these reasons to determine whether they were credible. As we explained in *Melbourne,* "the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." 679 So.2d at 764–65. This trial court's determination to strike the challenge of prospective juror Diaz was not clearly erroneous.[6]

6 We also reject Franqui's contention that the trial court erred in refusing to permit him to challenge prospective juror Ondani.

ADMISSION OF CODEFENDANT'S STATEMENTS AGAINST FRANQUI

Franqui also asserts that the trial court erred by permitting the confession of his codefendant Ricardo Gonzalez to be admitted against him in their joint trial and by denying his motion to sever his trial from that of his codefendant. In *Franqui v. State,* 699 So.2d 1312 (Fla.1997), we discussed in detail the law applicable to the admissibility of a codefendant's confession. In this case, there is

no question that Gonzalez's confession interlocked with Franqui's confession in many respects and was substantially incriminating to Franqui. Moreover, we cannot say that the totality of the circumstances under which Gonzalez made his confession demonstrated the particularized guarantee of trustworthiness sufficient to overcome the presumption ***1336** of unreliability that attaches to accomplices' hearsay confessions which implicate the defendant.

Thus, the admission of Gonzalez's confession was error. However, with respect to guilt, we conclude that the error was harmless beyond a reasonable doubt. Not only did Franqui confess to participating in the robbery, he also admitted shooting the victim. He does not contest the legality of his confession in this appeal. In addition, a bullet recovered from the victim came from Franqui's gun, and an eyewitness identified Franqui as the driver of one of the stolen cars leaving the scene of the crime. Finally, Franqui's fingerprints were also found on one of the stolen vehicles used to commit the crime. Thus, we conclude that there is no reasonable possibility that the erroneous admission of Gonzalez's confession contributed to Franqui's conviction for *felony* murder.

PENALTY

We agree, however, that Franqui's sentence must be reversed. In Gonzalez's confession he went into great detail in characterizing Franqui as the leader of the robbery plan, and this confession easily could have prejudiced Franqui in the penalty phase deliberations. Accordingly, we affirm Franqui's convictions but remand for a new penalty phase proceeding consistent with this opinion.

It is so ordered.

OVERTON, SHAW, GRIMES and WELLS, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which KOGAN, C.J., concurs.

HARDING, J., dissents with an opinion, in which KOGAN, C.J., and ANSTEAD, J., concur.

ANSTEAD, Judge, concurring in part and dissenting in part.
I agree with Justice Harding that this case should be reversed because of the clear error in the trial court's ruling on appellant's peremptory challenge of juror Diaz. As noted by Justice Harding, the majority opinion creates a serious perception of an unjust double standard being applied to death-sentenced defendants when this case is compared to *Windom v. State,* 656 So.2d 432, 437 (Fla.), *cert. denied,* 516 U.S. 1012, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995).

I agree with the majority, however, that the trial court erred by permitting the confession of the codefendant, Ricardo Gonzalez, to be admitted against Franqui at their joint trial and by denying Franqui's motion to sever his trial from that of his codefendant. Of course, both of these serious errors require that a new trial be ordered.

PEREMPTORY CHALLENGE

Initially, I note that the majority's reasoning is seriously flawed on the peremptory challenge issue since it is erroneously predicated upon the assumption that the trial court focused on the *credibility* of defense counsel's proffered reasons for the challenge. The record, however, demonstrates the opposite: the trial court mechanically applied an "I don't think that is a race-neutral reason" test. The majority has simply turned a blind eye to the obvious error in this case. As Chief Judge Schwartz declared in reversing a murder conviction under identical circumstances in *Betancourt v. State,* 650 So.2d 1021 (Fla. 3d DCA 1995):

> Our holding that overruling the attempted strike of Garcia was reversible error is essentially based upon the fact that there is no basis whatever for concluding that the challenge involved the evil proscribed by the *Batson–Neil* rule; that is, that it was based on a "constitutionally impermissible prejudice," *State v. Slappy,* 522 So.2d 18, 20 (Fla.1988), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), or racially motivated in any way. In this case, the Hispanic defendant challenged a Hispanic prospective juror. On the face of it—and there is nothing in the record to suggest otherwise—there would seem no basis for even implying a racial reason for Betancourt's not wanting Garcia to serve on his jury. See *Portu v. State,* 651 So.2d 791 (Fla. 3d DCA 1995). In this respect, the case is decisively unlike the ***1337** overwhelming majority of cases—if not every case—in which a peremptory challenge has been disallowed under *Batson* and *Neil.* Typically—if not invariably—they involve situations in which the prospective juror belongs to a group whose general characteristics would seem to

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> be adverse to the position of the challenger. E.g., *J.E.B. v. Alabama ex. rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)(defendant's challenge to female juror in paternity action); *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (prosecutions's challenge to black juror in case with black defendant); *Slappy,* 522 So.2d at 18 (same); *State v. Neil,* 457 So.2d 481 (Fla.1984) (same); *Abshire v. State,* 642 So.2d 542 (Fla.1994)(state's challenge to exclude women with male defendant); *State v. Alen,* 616 So.2d 452 (Fla.1993) (prosecution's challenge to Hispanic juror in case with Hispanic defendant); *Joseph v. State,* 636 So.2d 777 (Fla. 3d DCA 1994) (state's challenge of Jewish venireperson in case with Jewish defendant). When, as here, there is no reason in common sense, legal intuition or the record to overcome "the presumption that peremptories will be exercised in a non-discriminatory manner," *Neil,* 457 So.2d at 486; *State v. Johans,* 613 So.2d 1319 (Fla.1993), or to justify a finding of "discriminatory intent," which is the critical, indeed the only, issue in question, *see Hernandez v. New York,* 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395, 406 (1991), no strike may be countermanded. See *Johans,* 613 So.2d at 1321 (*Neil* inquiry required when objection raised that peremptory challenge is being used "in a racially discriminatory manner"); *Portu,* 651 So.2d at 791.

650 So.2d at 1023 (footnotes omitted). In addition to the striking similarity of the circumstances in *Betancourt,* the Third District opinion also noted the same inadequacy of the State's objection in *Betancourt* as exists here:

> The request for a "race-neutral" explanation was both made and, without objection acceded to, entirely on the basis that the challenge was to a juror who happened to be Hispanic. The parties and the court thus proceeded upon a mutual misunderstanding of *State v. Johans,* 613 So.2d 1319 (Fla.1993), which governed this trial because it occurred after it was decided. *Johans* provides that a *Neil* inquiry is required only when "an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." 613 So.2d at 1321. *There was no such objection below and the record shows that none could have been raised in good faith.*

650 So.2d at 1022 n. 2 (emphasis added). Chief Judge Schwartz' analysis is clearly applicable here. Even if the State had noted juror Diaz's ethnicity or race for the record—and I agree with Justice Harding that the State did not—there was absolutely no reason for the trial court to require Franqui, a Cuban, male defendant, to provide a race-neutral justification for striking prospective juror Diaz, presumably a Cuban male resident of Dade County. If there is ever a case where the presumption that preemptory strikes are exercised in a non-discriminatory manner holds true, it is this one.

FLORIDA EVIDENCE CODE

Although the majority discusses the constitutional problem with admitting the codefendant's out-of-court hearsay statement, the majority fails to note that the statement was not admissible under the Florida Evidence Code. The statement was hearsay and fails to qualify under any hearsay exception.

When a codefendant's confession is obtained in a custodial setting, as was the case here, the only hearsay exception that has potential applicability is the "statement against interest" exception.[7] *See* ***1338** § 90.804(2)(c), Fla. Stat. (1995). Section 90.804(2)(c) states:

> *Statement Against Interest.* A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the defendant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

Of course, for a statement to be admissible as a statement against interest, a trial judge also must find that: (1) the declarant is unavailable as a witness, *see* § 90.804(1), Fla. Stat. (1995); (2) "a person in the declarant's position would not have made the statement unless he [or she] believed it to be true," *Peninsular Fire Ins. Co. v. Wells,* 438 So.2d 46 (Fla. 1st DCA), *review dismissed,* 443 So.2d 980 (Fla.1983); (3) the statement is not only against the

7 Unlike the Federal Evidence Code, *see* Fed.R.Evid. 804(b)(5), the Florida Evidence Code does not contain a "catch-all" exception to the hearsay rule. The federal "catch-all" exception admits any hearsay statement, even though it is not admissible under a listed exception, which possesses the same guarantees of trustworthiness as do the listed exceptions.

I would not foreclose the possibility that a confession obtained in a non-custodial, non-interrogatory setting may qualify under a different hearsay exception, such as the "excited utterance" or "spontaneous statement" exceptions. *See* § 90.803(1), (2), Fla. Stat. (1995).

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declarant's interest when made, but the declarant is also aware of that fact, *Dinter v. Brewer,* 420 So.2d 932, 935 n. 4 (Fla. 3d DCA 1982); and (4) corroborating circumstances clearly indicate the trustworthiness of the statement, *Maugeri v. State,* 460 So.2d 975, 977 (Fla. 3d DCA 1984), *cause dismissed,* 469 So.2d 749 (Fla.1985). *See United States v. Riley,* 657 F.2d 1377 (8th Cir.1981), *cert. denied,* 459 U.S. 1111, 103 S.Ct. 742, 74 L.Ed.2d 962 (1983).

The Federal Evidence Code also has a "statement against interest" exception. In *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), the United States Supreme Court narrowly construed the federal "statement against interest" exception[8] so that only those declarations or remarks within a confession that "are individually self-inculpatory" are included within the exception as statements against penal interest.[9] "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id.* at 599, 114 S.Ct. at 2434. The Court found that this was "especially true when the statement implicates someone else." *Id.* at 601, 114 S.Ct. at 2435–36. In explaining its rationale, the Court, through Justice O'Connor, stated:

8 The corollary provision of the Federal Evidence Code is found under rule 804(b)(3).

9 The Supreme Court planted the seed for its reasoning set out in *Williamson* in *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), where it rejected the State of Illinois' categorization of the codefendant's confession as a simple "declaration against penal interest." The Court explained that this specific hearsay exception "defines too large a class for meaningful Confrontation Clause analysis." *Lee* at 544 n. 5, 106 S.Ct. at 2063–64 n. 5.

> To decide whether Harris' confession is made admissible by Rule 804(b)(3), we must first determine what the Rule means by "statement," which Federal Rule of Evidence 801(a)(1) defines as "an oral or written assertion." One possible meaning, "a report or narrative," *Webster's Third New International Dictionary* 2229, defn. 2(a) (1961), connotes an extended declaration. Under this reading, Harris' entire confession—even if it contains both self-inculpatory and non-self-inculpatory parts—would be admissible so long as in the aggregate the confession sufficiently inculpates him. Another meaning of "statement," "a single declaration or remark," ibid., defn. 2(b), would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory. *See also id.,* at 131 (defining "assertion" as a "declaration"); *id.,* at 586 (defining "declaration" as a "statement").
>
> Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is ***1339** making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
>
> ... And when part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.

Williamson, 512 U.S. at 599–600, 114 S.Ct. at 2434–35. Thus, under *Williamson* a nontestifying codefendant's confession which also implicates the defendant can be admitted in their joint trial only if it sensibly and fairly can be redacted to include only those statements which are *solely* self-inculpatory vis-a-vis the codefendant. *See* § 90.108, Fla. Stat. (1995); *see also Richardson v. Marsh,* 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). For example, Justice Kennedy noted in his separate opinion in *Williamson:*

> In the criminal context, a self-serving statement is one that tends to reduce the charges or mitigate the punishment for which the declarant might be liable. See M. Graham, Federal Practice and Procedure, § 6795, p. 810, n. 20 (1992). For example, if two masked gunmen robbed a bank and one of them shot and killed the bank teller, a statement by one robber that the other robber was the triggerman may be the kind of self-serving statement that should be inadmissible. *See ibid.* (collateral self-serving statement is "John used the

> gun”). (The Government concedes that such a statement may be inadmissible. See Brief for United States 12.)
>
> Under *Williamson* and *Richardson,* a codefendant's confession which in fact partially exonerates or reduces the culpability of the codefendant by implicating or shifting the blame to another defendant is not a statement against the codefendant's interest. Such a statement is admissible in a joint trial with another defendant only if the statement falls within another hearsay exception, and none has been suggested here.

Under this analysis, the testimony of Detective Diecidue as to the oral confession of Ricardo Gonzalez as well as the taped recording of Gonzalez's confession were erroneously admitted into evidence. While portions of Detective Diecidue's testimony and Gonzalez's taped confession concerned solely self-inculpatory statements made by Gonzalez, other portions directly implicated defendant Franqui and also served to exonerate codefendant Gonzalez. Both Gonzalez's confession and the detective's testimony described Franqui as the mastermind behind the robbery, who involved Gonzalez and the other participants in the plan and otherwise played the leading role in their criminal activity. Gonzalez's confession and the detective's' testimony identify Franqui as the procurer of the stolen cars, the supplier of Gonzalez's weapon, and the first shooter, who fired at the victim three to four times while Gonzalez shot only once. Consequently, those statements were inadmissible under the Florida Evidence Code and *Williamson.*

HARMLESS ERROR

Further, because Gonzalez's confession placed the bulk of the blame for the robbery and murder on Franqui, I cannot find that this error was harmless under *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986) (error harmless only if there is no reasonable possibility that the error contributed to the conviction). It is reasonable to assume that a jury would utilize a statement placing the majority of the blame on Franqui in deciding upon a verdict and sentence against him, since that was the very reason advanced by the State for seeking to use the statement in evidence against him in the first place.

KOGAN, C.J., concurs.

HARDING, Judge, dissenting.

I dissent from the majority opinion in regard to the jury selection issue. Franqui argues that the trial court erred in denying his use of peremptory challenges to excuse two prospective jurors from the jury. While ***1340** I find no error as to one of the prospective jurors, I find the record to be barren of any support for the trial court's denial of Franqui's peremptory challenge of prospective juror Diaz. Because I find that this issue requires reversal of Franqui's conviction, I dissent from the majority opinion.

I dissent for the following reasons: 1) The majority has abandoned this Court's precedent that requires the party objecting to the use of a peremptory challenge to carry the burden to trigger a *Neil*[10] inquiry and mandates that the record demonstrate that the challenged person is a member of a distinct racial group. 2) The majority opinion sets up a double standard—one requiring a defendant to meet specific requirements before a *Neil* inquiry is necessary while allowing the State to trigger a *Neil* inquiry without meeting the same requirements. 3) By approving the trial court's handling of this matter, the majority confirms the trial court's assertion that peremptory challenges no longer exist. 4) By any standard, even if the State properly triggered a *Neil* inquiry, the reasons ultimately given by the defendant for the challenge were race-neutral and sufficient to support the challenge.

10 *State v. Neil,* 457 So.2d 481 (Fla.1984).

I.

The majority opinion essentially forsakes this Court's precedent regarding *Neil* inquiries. When Franqui attempted to peremptorily strike from the venire Aurelio Diaz, the State objected but offered no explanation nor basis of any kind for the objection. The initial colloquy on the issue was as follows:

> MS. BRILL: Wait a minute, Judge, are they striking Aurelio Diaz? State would challenge that strike.
>
> THE COURT: On Aurelio Diaz, let me hear your reasons. Mr. Diaz [the defense counsel], your grounds?
>
> MR. DIAZ: I don't like him.
>
> THE COURT: Okay, that, in that case I will have to disallow that being the reason, I will have to disallow your strike. As it is not a race-neutral reason.

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I believe that the State's objection here was insufficient to require the defendant, the party exercising the peremptory challenge, to justify his peremptory strike. This record simply does not demonstrate that the challenged juror was a member of a protected group or that the challenge appeared to be used in a racially discriminatory manner. It is a stretch of the imagination and beyond logic how the majority, as the appellate court charged with reviewing the trial court's action, can conclude from this record that "the trial court clearly understood that the objection to the challenge of a venireperson in Dade County, who was born and raised in Havana, Cuba, and whose name was Aurelio Diaz, was being made on racial grounds." Majority op. at 1335. In fact, at oral argument, the State candidly conceded that we cannot know from this record whether the challenged juror was a member of a distinct racial group, or whether his color or national origin was even the basis of the State's objection to the strike.

In *Windom v. State,* 656 So.2d 432, 437 (Fla.), *cert. denied,* 516 U.S. 1012, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995), this Court expressly rejected a capital defendant's claim that his objection to the State's use of a peremptory challenge was sufficient to require a *Neil* inquiry. In *Windom,* we affirmed a capital conviction and death sentence and held that the defendant had failed to carry his initial burden in objecting to the State's use of a peremptory challenge to excuse an East Indian woman. We stated that the law

> requir[ed] a *Neil* inquiry when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. However, a timely objection *and a demonstration on the record that the challenged person is a member of a distinct racial group have consistently been held to be necessary.*

Id. at 437 (emphasis added). Specifically, we observed that defense counsel did not make a timely objection which demonstrated on the record that the prospective juror was a member of a cognizable class. We concluded "that the defendant's expressed objection did not make it necessary for the trial court to ***1341** require the State to have and express a race-neutral reason for the challenge." *Id.* We also reaffirmed the principle that a timely objection and demonstration on the record that the challenged juror is a member of a distinct racial group is a necessary prerequisite to trigger a *Neil* inquiry. *Id.*

Under our recent decision in *Melbourne v. State,* 679 So.2d 759 (Fla.1996),[11] we have continued to impose a substantial burden on the party objecting to the exercise of a peremptory challenge by the other side:

11 I recognize that the trial judge in this case did not have the benefit of our decisions in *Melbourne* and *Windom.* However, those opinions merely restate the requirements that this Court has set forth in opinions rendered before the trial here. *See Melbourne,* 679 So.2d at 764 nn. 2–5; *Windom* 656 So.2d at 437.

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) *show that the venireperson is a member of a distinct racial group,* and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike. *Id.* at 764 (emphasis added) (footnotes omitted). When a party objects to an opposing party's use of a peremptory challenge, the basis of the objection and the challenged juror's race or ethnicity cannot be left to inference. Rather, the party objecting to the challenge must demonstrate on the record that the juror is a member of a particular group at the time the objection is made. *Id.*

In the instant case, the State's objection failed to claim that the peremptory challenge was being used in a racially discriminatory manner and also failed to demonstrate on the record that the challenged juror was a member of a protected group. Not only did the State fail to demonstrate the racial or ethnic identity of the challenged juror on the record as the defendant in *Windom* similarly failed to do, but the record also fails to reflect that anyone, including the trial court, demonstrated such identity on the record. This Court has repeatedly stated that "peremptories are presumed to be exercised in a nondiscriminatory manner." *Melbourne,* 679 So.2d at 764; *Neil,* 457 So.2d at 486. Without a clear record to support the trial court's denial of Franqui's peremptory challenge, I cannot agree with the majority that the trial court's action "was not clearly erroneous." Majority op. at 1335.

II.

I am also distressed that in its holding affirming the trial court, the majority has instituted a double standard for reviewing trial court rulings relating to peremptory challenges. Here, the majority has determined that the State's general objection was sufficient to trigger a *Neil* inquiry. However, in other cases where a defendant has objected to the State's use of

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a peremptory challenge, this Court has concluded that the objecting defendant must meet very specific requirements—state adequate reasons to initiate a *Neil* inquiry and create a record adequate to review. *Windom; Melbourne.* I would apply the same requirements without regard to who the objecting party is. Not only should what's good for the goose be good for the gander, but also what cooks one party's goose should also cook the other's.

III.

The error here is compounded by the majority's apparent approval of the trial court's erroneous assertion that "peremptory challenges no longer exist."[12] By accepting the State's position that the objection here was sufficient to trigger a *Neil* inquiry, the majority essentially approves this view. If nothing more that a general objection can thwart the use of peremptory challenge, then we *do* eliminate peremptory challenges as they have been used historically and substitute in their place two classes of challenges for cause.

12 Before the discussion as to juror Diaz, the trial court refused to allow a prior peremptory challenge. In explaining its reasoning in refusing the challenge, the court stated:

> Personally I think that the entire body of law in this area is outrageous, but it is clear that peremptory challenges no longer exist, and that neutral reasons must be given and you have not given me any.

***1342** IV.

Finally, even if I agreed with the majority that the State had properly raised the issue of the discriminatory use of a peremptory challenge in the first instance, I could not conclude that Franqui's proffered reasons for striking Diaz were insufficient to justify his peremptory challenge. Subsequent to the initial exchange concerning juror Diaz, Franqui's counsel informed the court of additional "race-neutral" reasons for objection to Diaz, including his lengthy employment by Metropolitan Dade County:

> We would renew our peremptory based upon the fact that Mr. Diaz has had the same job basically for the last thirty years and we feel that he lacks the life experience and variety of occupations that we are looking for on this jury. He also stated that he has two daughters, he has never had a problem with the daughter and he may not sympathize with our defendants who I am sure have given their parents many, many problems in the past, so based on that, we would try to excuse Mr. Diaz.... In addition to that Judge, many of the witnesses who are expected to testify for the state in this case are employed by Metropolitan Dade County. Which he has an allegiance with them for over thirty years in the county.

The trial court ruled that these were not race-neutral reasons for the challenge; the majority characterizes them as an "afterthought." Majority op. at 1335. I cannot agree with either conclusion.

Peremptory challenges may be exercised up to point where the jury is sworn. Fla. R.Crim. P. 3.310 ("The state or defendant may challenge an individual prospective juror before the juror is sworn to try the cause...."). A *renewed* peremptory challenge based upon additional reasons should not be dismissed as an "afterthought"[13] and must be assessed under the same standard as the original challenge.

13 The trial court did not treat the renewed challenge as an afterthought and ruled that the additional reasons were not race-neutral.

As the United States Supreme Court recently explained in *Purkett v. Elem,* 514 U.S. 765, 768–69, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995), the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. After the opponent of a peremptory challenge has made out a prima facie case of racial discrimination, the burden of *production* shifts to the proponent of the strike to come forward with a race-neutral explanation. 514 U.S. at 767, 115 S.Ct. at 1770. If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. *Id.* The explanation offered by the party attempting to exercise the peremptory challenge need not be "persuasive, or even plausible." *Id.* at 768, 115 S.Ct. at 1771. Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. *Id.* Only after these two steps have been met does the persuasiveness of the proffered justification become relevant and then only in the context of determining "whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id.*

In the instant case, the majority has disregarded its prior pronouncements relating to the burdens involved. The majority concludes that the trial court "clearly understood" that the State's objection was being made on racial grounds,

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"especially ... because there was never any contention made to the trial court that prospective juror Diaz was not a member of a cognizable minority or that there should not be a *Neil* inquiry." Majority op. at 1335. Instead of determining whether the State proved purposeful racial discrimination, the majority has placed the burden on the defendant to prove a lack of discriminatory intent in exercising this peremptory challenge. While "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination," *Purkett,* 514 U.S. at 768, 115 S.Ct. at 1771, I cannot agree with the trial court or the majority that the defendant's justifications here fall into that realm. Thus, I could not sanction the trial court's conclusion ***1343** here even if I found that the State had made a prima facie case of racial discrimination.

Finally, my previously stated concern that this Court is creating a double standard requiring defendants to meet higher requirements than the State is born out by our decision in *Smith v. State,* 699 So.2d 629 (Fla.1997). I concurred in that opinion in which the Court affirmed a trial judge's ruling to sustain the State's peremptory challenge of an African–American juror over a properly raised *Neil* objection by the defense. The State submitted the following race-neutral reasons to strike the juror in question: "(1) her occupation as a guidance counselor; (2) the possibility she would err on the side of life during the penalty phase; and (3) her reference to Oprah Winfrey." *Smith,* 699 So.2d at 636. This Court concluded that the trial court's decision to sustain the strike was not clearly erroneous. *Id.* at 637. Certainly, the reasons stated by the defense in the instant case are as race-neutral as those approved by this Court in *Smith.* I find it strange that, although they come out of the same pot, the defendant's goose gets cooked and the State's does not.

CONCLUSION

For the reasons stated above, I conclude that the trial court erred in prohibiting defense counsel from striking Diaz. As a result, and over Franqui's objection, juror Diaz was improperly allowed to remain on the jury that ultimately convicted Franqui and recommended a sentence of death. Such error is not subject to a harmless error review and requires a new trial. *See United States v. Annigoni,* 96 F.3d 1132 (9th Cir.1996) (finding that erroneous denial of peremptory challenge is not subject to harmless error analysis and requires automatic reversal).

KOGAN, C.J., and ANSTEAD, J., concur.

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699 So.2d 1312
Supreme Court of Florida.

Leonardo FRANQUI, Appellant,
v.
STATE of Florida, Appellee.

No. 83116.
|
June 26, 1997.
|
Rehearing Denied Oct. 6, 1997.

Synopsis

Defendant was convicted in the Circuit Court, Dade County, Rodolfo Sorondo, Jr., J., of first-degree murder, attempted first-degree murder with firearm, attempted robbery with firearm, grand theft, and unlawful possession of firearm while engaged in criminal offense, and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) evidence established corpus delicti of attempted robbery; (2) admission of portion of codefendant's confession implicating defendant violated confrontation clause; (3) erroneous admission of nontestifying codefendant's confession was harmless; (4) evidence established cold, calculated and premeditated aggravator in sentencing phase; (5) convictions for attempted felony murder were invalid; and (6) death penalty imposed was not disproportionate.

Affirmed in part, vacated in part and remanded.

Anstead, J., filed opinion concurring in part and dissenting in part in which Kogan, C.J., concurred.

Attorneys and Law Firms

***1315** Eric M. Cohen, Miami, for Appellant.

Robert A. Butterworth, Attorney General; and Fariba N. Komeily and Randall Sutton, Assistant Attorneys General, Miami, for Appellee.

Opinion

PER CURIAM.

We have on appeal the judgment of the trial court adjudicating the appellant, Leonardo Franqui, guilty of first-degree murder and other crimes, as well as its imposition of the death penalty. We have jurisdiction under article V, section 3(b)(1), of the Florida Constitution. Although we find error in the admission of evidence in violation of the United States Constitution, we find the error harmless and affirm Franqui's convictions and sentences.

I. TRIAL COURT PROCEEDINGS

Leonardo Franqui and codefendants Pablo San Martin and Pablo Abreu were charged with one count of first-degree murder, two counts of attempted first-degree murder with a firearm, one count of attempted robbery with a firearm, two counts of grand theft, and one count of unlawful possession of a firearm while engaged in a criminal offense. Prior to trial, codefendant Abreu negotiated a plea with the State and subsequently testified against Franqui during the penalty phase of the proceedings.

The following facts were established at the trial of Franqui and San Martin. Danilo Cabanas, Sr., and his son, Danilo Cabanas, Jr., operated a check-cashing business in Medley, Florida. On Fridays, Cabanas Sr. would pick up cash from his bank for the business. After Cabanas Sr. was robbed during a bank trip, Cabanas Jr. and a friend, Raul Lopez, regularly accompanied Cabanas Sr. to the bank. The Cabanases were each armed with a 9mm handgun, and Lopez was armed with a .32 caliber gun.

On Friday, December 6, 1991, the Cabanases and Lopez drove in separate vehicles to the bank. Cabanas Sr. withdrew about $25,000 in cash and returned to the Chevrolet Blazer driven by his son. Lopez followed in his Ford pickup truck. Shortly thereafter, the Cabanases were cut off and "boxed in" at an intersection by two Chevrolet Suburbans. Two occupants of the front Suburban, wearing masks, got out and began shooting at the ***1316** Cabanases. When Cabanas Sr. returned fire, the assailants returned to their vehicle and fled. Cabanas Jr. saw one person, also masked, exit the rear Suburban.

Following the gunfight, Lopez was found outside his vehicle with a bullet wound in his chest. He died at a hospital shortly thereafter. One bullet hole was found in the passenger door of Lopez's pickup. The Suburbans, subsequently determined to have been stolen, were found abandoned. Both Suburbans suffered bullet damage—one was riddled with thirteen bullet holes. The Cabanases' Blazer had ten bullet holes.

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Franqui's confession was admitted at trial. When police initially questioned Franqui, he denied any knowledge of the Lopez shooting. However, when confronted with photographs of the bank and the Suburbans, he confessed. Franqui explained that he had learned from Fernando Fernandez about the Cabanases' check cashing business and that for three to five months he and his codefendants had planned to rob the Cabanases. He described the use of the stolen Suburbans, the firearms used, and other details of the plan. Franqui admitted that he had a .357 or .38 revolver. Codefendant San Martin had a 9mm semiautomatic, which at times jammed, and codefendant Abreu had a Tech–9 9mm semiautomatic, which resembles a small machine gun. Franqui stated that San Martin and Abreu drove in front of the Cabanases and Franqui pulled alongside them so they could not escape. Once the gunfight began, Franqui claimed that the pickup rammed the Cabanases' Blazer and Lopez opened fire. Franqui then returned fire in Lopez's direction.

San Martin refused to sign a formal written statement to police. However, San Martin orally confessed and, in addition to relating his own role in the incident, detailed Franqui's role in the planning and execution of the crime. San Martin admitted initiating the robbery attempt and shooting at the Blazer but not shooting at Lopez's pickup. He placed Franqui in proximity to Lopez's pickup, although he could not tell if Franqui had fired his gun during the incident. San Martin initially claimed that the weapons used in the crime were thrown off a Miami Beach bridge, but subsequently stated that he had thrown the weapons into a river near his home, where they were later recovered by the police. San Martin did not testify at trial, but his oral confession was admitted into evidence over Franqui's objection.

A firearms expert testified that the bullet recovered from Lopez's body was consistent with the .357 revolver used by Franqui during the attempted robbery. He said the same about a bullet recovered from the passenger mirror of one of the Suburbans and a bullet found in the hood of the Blazer. The rust on the .357, however, prevented him from ruling out the possibility that the bullets may have been fired from another .357 revolver.

The jury found Franqui guilty as charged and recommended the death penalty for the first-degree murder conviction by a nine-to-three vote. The trial court followed the jury's recommendation and found four aggravators: (1) prior violent felony convictions, *see* § 921.141(5)(b), Fla. Stat. (1995); (2) murder committed during the course of an attempted robbery, *see id.* § 921.141(5)(d); (3) murder committed for pecuniary gain, *see id.* § 921.141(5)(f); and (4) murder committed in a cold, calculated, and premeditated manner. *See id.* § 921.141(5)(i). The court found no statutory mitigating circumstances and two non-statutory mitigating circumstances: (1) Franqui had a poor family background and deprived childhood, including abandonment by his mother, the death of his mother, and being raised by a man who was a drug addict and alcoholic; and (2) Franqui was a caring husband, father, brother, and provider. The court sentenced Franqui to death on the first-degree murder charge; life imprisonment on the two attempted murder charges; fifteen years imprisonment on the attempted robbery and second grand theft charge; and five years imprisonment on the first grand theft charge and unlawful firearm possession charge. All sentences were ordered to run consecutively.

II. LAW & ANALYSIS ON APPEAL

Corpus Delicti

We reject Franqui's claim that the trial court erred in failing to exclude Franqui's ***1317** own confession from evidence because the State did not first present sufficient evidence of corpus delicti. The phrase "corpus delicti" means "body of the crime," *Black's Law Dictionary* 344 (6th ed.1990), and refers generally to the proof that a crime has been committed. Florida law requires that the corpus delicti be established independently of any confession before the confession is admitted into evidence. *Bassett v. State,* 449 So.2d 803 (Fla.1984); *Frazier v. State,* 107 So.2d 16 (Fla.1958). In order to prove corpus delicti, the State must establish: (1) that a crime of the type charged was committed; and (2) that the crime was committed through the criminal agency of another. *State v. Allen,* 335 So.2d 823, 825 (Fla.1976). In regard to the first part—that a crime was committed—each element of the relevant offense must be shown to exist. *Burks v. State,* 613 So.2d 441, 443 (Fla.1993). With respect to the second part —the criminal agency of another—the proof need not show the specific identity of the person who committed the crime. *Id.* That is, it is not necessary to prove that the crime was committed by the defendant.

In order to prove attempted armed robbery, the State must show: (1) the formation of an intent to commit the crime of robbery; (2) the commission of some physical act in furtherance of the robbery; and (3) the use of a firearm.

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See §§ 777.04(1), 812.13(2)(a), Fla. Stat. (1993); *Cooper v. Wainwright,* 308 So.2d 182, 184 (Fla. 4th DCA), *cert. dismissed,* 312 So.2d 761 (Fla.1975). In this context, intent may be proved by considering the conduct of the accused and his colleagues before, during, and after the alleged attempt along with any other relevant circumstances. *Cooper,* 308 So.2d at 185.

Here, the Cabanases' testimony established that they departed the bank, as they did every Friday, with a large sum of money—$25,000 in cash. A short distance from the bank, a Suburban stopped in front of them. A second Suburban pulled alongside them at a high rate of speed and also stopped, foreclosing an escape. Two masked men emerged from the front Suburban and immediately opened fire at the Cabanases. One person, possibly armed, and also masked, exited the rear Suburban. The victims returned fire and the attackers fled. The two Suburbans, subsequently determined to be stolen, were found nearby, abandoned beside an expressway.

We find that the evidence in this case is sufficient to establish that the attackers did intend a robbery, did some physical act which was intended to accomplish the commission of this crime, and unlawfully used a firearm during the commission of a felony. We find that the corpus delicti of the crimes was shown independently of the confession. We therefore conclude that the trial court did not err in failing to exclude portions of Franqui's confession.

San Martin's Statement

Franqui also asserts that the trial court erred by admitting into evidence at their joint trial codefendant San Martin's confession incriminating Franqui and by denying his motion to have his trial severed from that of San Martin. Specifically, he argues that the trial court's failure to grant a severance violated his federal constitutional right to confront San Martin, who did not testify at their joint trial, as to those portions of San Martin's confession admitted at trial which incriminated Franqui in the crime and in the shooting death of Lopez.

While the issue which Franqui raises on appeal is the denial of the motion to sever the codefendants' cases, the admissibility of the codefendant's confession is a subissue within this issue. Franqui argued that he was prejudiced by having a joint trial with San Martin in which San Martin's verbal confession was admitted as direct evidence against Franqui. Franqui's argument was that because San Martin's verbal confession was not sufficiently interlocking with Franqui's own confession, San Martin's confession failed to meet the indicia of reliability required by the United States Supreme Court in *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), as interpreted by the same Court in *Cruz v. New York,* 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). In opposition, the State argued that ***1318** the two confessions did sufficiently interlock to provide that indicia of reliability.

In *Lee,* the Court confronted the situation in which the trier of fact used a codefendant's confession as substantive evidence *against* the defendant when the defendant's own confession also was admitted into evidence. The *Lee* court stated that the issue before it was "whether [the] substantive use of the hearsay confession denied Petitioner [Lee] rights guaranteed her under the Confrontation Clause." *Lee,* 476 U.S. at 539, 106 S.Ct. at 2061 (quoting respondent's brief at 11). In holding that the codefendant's confession did not bear sufficient indicia of reliability to be directly admissible under the Confrontation Clause, the Court rejected the State's argument that because the two confessions interlocked on some points, the codefendant's confession was reliable. *Id.* at 545, 106 S.Ct. at 2064. The Court stated:

> If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. *In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.*

Id. (emphasis added).

The *Cruz* Court held that the giving of a limiting instruction cannot cure the Confrontation Clause violation resulting from the admission of a codefendant's interlocking confession which implicates the other defendant in the crime even in cases in which the defendant's own confession is properly before the jury. *Cruz,* 481 U.S. at 191–92, 107 S.Ct. at 1718–19. The Court reasoned that the codefendant's confession which implicated the defendant was all the more harmful to the defendant if it interlocked with the defendant's own confession. Notwithstanding, the Court also stated:

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> Of course, the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient "indicia of reliability" to be directly admissible against him (assuming the "unavailability" of the codefendant) despite the lack of opportunity for cross-examination, *see Lee* ....

Id. at 193–94, 107 S.Ct. at 1719–20. Thus, the citation in *Cruz* to *Lee* appeared to suggest the possibility that a codefendant's confession still may be admitted under some circumstances as direct evidence against a defendant upon a showing of sufficient indicia of reliability resulting from the interlocking nature of the confessions. *Lee,* 476 U.S. at 545, 106 S.Ct. at 2064.

It was upon this analysis of *Cruz* that we held in *Grossman v. State,* 525 So.2d 833, 838 (Fla.1988):

> Taylor's [the codefendant's] statement interlocks with and is fully consistent in all significant aspects with all three statements that [defendant] made to Hancock, Allen, and Brewer and which were directly admissible against [defendant]. The indicia of reliability are sufficient to have permitted introduction of Taylor's statement as evidence against [defendant].

However, in 1990 the United States Supreme Court modified its earlier indicia of reliability analysis and held that to be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness rather than by reference to other evidence introduced at trial. *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

In *Wright,* the Court addressed the issue of whether admission of certain hearsay statements made by a child declarant to an examining pediatrician violated the Confrontation Clause. The Court found that to be admissible under the Confrontation Clause, the hearsay statements must possess sufficient indicia of reliability from either their admission through a firmly rooted exception or by a showing of particularized guarantees of trustworthiness. *Id.* at 816, 110 S.Ct. at 3147 (quoting *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980)). In determining what constitutes such a showing, the Court held that the relevant circumstances only include those ***1319** that surround the making of the statement and those that render the declarant worthy of belief. *Wright,* 497 U.S. at 819, 110 S.Ct. at 3148. The Court observed that the presence of corroborating evidence would more appropriately indicate that the error in admitting the statement was harmless than provide a basis for presuming the declarant to be trustworthy. Justice Kennedy, writing for the four dissenting justices, pointed out how the majority opinion had altered the rationale of *Lee* and *Cruz.*

In any event, the bottom line of *Wright* is that the interlocking nature of the confessions cannot provide a basis upon which to determine whether there are sufficient indicia of reliability to introduce the codefendant's hearsay confession as substantive evidence of the defendant's guilt. *Wright* 's impact on this case is obvious because it was the interlocking nature of the confession which prompted the trial court to conclude that San Martin's confession had sufficient indicia of reliability to overcome the presumption of unreliability which attaches to accomplices' hearsay confessions that incriminate the defendant. *Lee,* 476 U.S. at 541, 106 S.Ct. at 2062.

Having determined that the interlocking nature of the confessions did not provide sufficient indicia of reliability to avoid the Confrontation Clause, we proceed to the question of whether San Martin's confession possesses inherent trustworthiness to be directly admissible on another basis. In *Wright,* the Court gave the following guidance:

> We think the "particularized guarantees of trustworthiness" required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. Our precedents have recognized that statements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability.

Wright, 497 U.S. at 820–21, 110 S.Ct. at 3149–50. Thus, the question of the admissibility of San Martin's confession against Franqui becomes whether San Martin's confession comes within a firmly-rooted hearsay exception or whether the totality of the circumstances in which San Martin's confession was made makes the statement inherently trustworthy and renders the declarant particularly worthy of belief.

While a statement against penal interest is an exception to the hearsay rule under section 90.804(2)(c), Florida Statutes (1995), we cannot say that it is a firmly rooted exception. Prior to the adoption of the Evidence Code, this Court first recognized the statement-against-penal-interest exception in *Baker v. State,* 336 So.2d 364 (Fla.1976).[1] The exception was thereafter codified as section 90.804(2)(c), and included the following sentence: "A statement or

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confession which is offered against the accused in a criminal action, and which is made by a co-defendant or other person implicating both himself and the accused, is not within this exception." *See also* Nelson v. State, 490 So.2d 32 (Fla.1986). However, in 1990, the legislature deleted this sentence, thereby allowing for the admission of self-inculpatory statements of nontestifying codefendants. *See generally* Charles W. Ehrhardt, *Florida Evidence* § 804.4 (1995). Since that section of the Evidence Code specifically excluded such a statement as being an exception to the hearsay rule until 1990, *see Nelson,* this exception is not firmly rooted. Finally, we cannot say that the totality of the circumstances under which San Martin made his confession demonstrated the particularized guarantee of trustworthiness sufficient to overcome the presumption of unreliability of a codefendant's statement which implicates the defendant.

1 At early common law, the exception applied only to statements against pecuniary or proprietary interest; however, the Court noted that there was no reason not to extend the exception to statements against penal interest. *Baker* at 369.

Moreover, our analysis of the decisions of the United States Supreme Court now requires us to recede from that portion of *Grossman* which relied upon the interlocking nature of the confession to provide the requisite ***1320** indicia of reliability. For the same reason, we also recede from that portion of *Farina v. State,* 679 So.2d 1151 (Fla.1996), in which we indicated that the defendant's confession could be considered in assessing whether a codefendant's statements are supported by sufficient indicia of reliability. *Id.* at 1155. However, in *Farina,* because the defendant and the codefendant discussed the crime with each other, that case is a unique example of when a codefendant's statements, although implicating the defendant, had a particularized guarantee of trustworthiness so as to be introduced against him based solely upon the circumstances under which the statements were made. *See also Puiatti v. State,* 521 So.2d 1106 (Fla.1988) (reliability clearly established by joint confession).

San Martin was interviewed a second time after his arrest by Detective Albert Nabut. San Martin's statement to Detective Nabut was also admitted against Franqui at their joint trial. In this instance, the statement was essentially limited to San Martin's actions in disposing of the weapons used in the crime which further implicated him in the crime and his efforts to destroy evidence connecting him to the crime. He made no reference to Franqui in this statement.

The decision of the United States Supreme Court in *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), is instructive with respect to whether San Martin's statement to Detective Nabut was admissible. In *Williamson,* the Court clarified the scope of the hearsay exception for statements against penal interest, *see* Fed R.Evid. 804(b)(3), in determining the admissibility of an accomplice's confession. The Court narrowly construed this exception to the hearsay rule and found only the self-inculpatory portions of the statement contained within the confession would be admissible. *Id.* at 602–03, 114 S.Ct. at 2436–37.

While *Williamson* dealt with a hearsay question and the instant case deals with a Confrontation Clause objection, *Williamson* is significant for the purpose of this discussion because it naturally follows that if the self-inculpatory portions of an accomplice's confession meet this hearsay exception, then these portions can be found to have sufficient inherent trustworthiness to also meet the test of admissibility under the Confrontation Clause as announced in *Wright.* The Court in *Williamson* stated that "[e]ven the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." *Williamson,* 512 U.S. at 603, 114 S.Ct. at 2436. Similarly, Justices O'Connor and Scalia directly recognized in *Williamson* that the very fact that a statement is genuinely self-inculpatory is itself a particularized guarantee of trustworthiness that makes a statement admissible under the Confrontation Clause. *Williamson,* 512 U.S. at 605, 114 S.Ct. at 2437–38 (plurality opinion of O'Connor, J.) (citing *Lee v. Illinois*).[2]

2 The tenor of Justice Kennedy's concurring opinion, in which Chief Justice Rehnquist and Justice Thomas joined, suggests that at least five justices agreed with this pronouncement.

Accordingly, we hold that the substance of San Martin's interview with Detective Nabut concerning the whereabouts of the weapons used in the crime was admissible because it was individually self-incriminatory. While the weapons recovered provided the State with additional evidence against Franqui, San Martin's statement as to the disposition of the weapons was focused on his own actions and bore the requisite "sufficient indicia of reliability" and "particularized guarantees of trustworthiness" to render it admissible against Franqui at their joint trial.

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Having determined that the admission of San Martin's initial confession was error because it contained statements which were incriminating as to Franqui, we move to the issue of whether the admission of that confession was harmless error. Though there is language in *Cruz* which may lend to an argument that error in the admission of interlocking confessions prohibits the error from being harmless, upon close analysis we conclude that both *Cruz* and *Wright* authorize a harmless-error review. We point specifically to that portion of *Cruz* which states:

> We hold that, where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation ***1321** Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. *Of course, the defendant's confession may be considered ... on appeal in assessing whether any Confrontation Clause violation was harmless.*

Cruz, 481 U.S. at 193–94, 107 S.Ct. at 1719–20 (emphasis added) (citation omitted).

Our conclusion is bolstered by recognizing that in an earlier portion of the *Cruz* opinion Justice Scalia pointed out that the Court was adopting the approach espoused by Justice Blackmun in *Parker v. Randolph,* 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). In that case, a plurality of four justices held that where interlocking confessions were introduced, there was no Confrontation Clause violation. Three other justices subscribed to the view expressed by Justice Blackmun that while the introduction of the defendant's own interlocking confession might render the violation of the Confrontation Clause harmless, it could not prevent the introduction of the nontestifying codefendant's confession from constituting a violation. *See id.* at 81, 99 S.Ct. at 2143–44 (Stevens, J., dissenting). Justice Blackmun alone went on to find that the interlocking nature of the confessions in that case made the error harmless so as to produce a majority for affirmance of the convictions. In fact, Justice Blackmun observed “that in most interlocking-confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt.” 442 U.S. at 79, 99 S.Ct. at 2142 (Blackmun, J., concurring in part and in the judgment).

The *Cruz* decision suggested the obvious question of why be concerned about whether an interlocking confession is admissible against the defendant if its admission is always going to be harmless error because it is interlocking. The dissenting opinion in *Cruz* answered the question by explaining how the *Cruz* opinion would affect future trials.

> That the error the Court finds may be harmless and the conviction saved will not comfort prosecutors and judges. I doubt that the former will seek joint trials in interlocking confession cases, and if that occurs, the judge is not likely to commit error by admitting the codefendant's confession.

481 U.S. at 198, 107 S.Ct. at 1721–22 (White, J., dissenting).

Our analysis with respect to harmless error is reaffirmed in *Wright,* which states:

> [W]e think the presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless rather than that any basis exists for presuming the declarant to be trustworthy.

497 U.S. at 823, 110 S.Ct. at 3151 (footnote omitted). In sum, it is now clear that a nontestifying codefendant's confession which implicates the defendant cannot be introduced simply because it interlocks with the defendant's confession. On the other hand, it is equally clear that the interlocking nature of the confession is likely to render the Confrontation Clause violation harmless on appellate review.

Thus, while that portion of San Martin's confession which implicated Franqui should not have been introduced into evidence, the fact that it mirrors Franqui's confession in so many respects strongly indicates that the error was harmless. Of course, Franqui's confession is powerful evidence of his guilt.[3] Further, Franqui's confession is corroborated by other evidence in the case, including the manner in which the crime was committed. Further, as noted previously, the evidence relating to the police having recovered the guns at San Martin's direction was properly admitted. The State's forensic expert testified that the bullet that killed Lopez was fired from a revolver. One of the guns the police recovered was a revolver, and Franqui confessed that he was the only one of the codefendants armed with that kind of gun. The other two guns recovered by the police and all of the guns carried by the victims were inconsistent with the fatal bullet. Because the revolver was rusty, the expert ***1322** could not say with certainty that the fatal bullet came from that revolver. However, he did say that the bullet which killed Lopez came from the same gun as another bullet which was lodged in the passenger mirror of the grey Suburban, and the trajectory of a hole in the passenger window lined up with that bullet, thereby indicating that it was fired from within the vehicle. Franqui was the only occupant of the grey Suburban, and he admitted firing a .357 revolver toward Lopez's vehicle.

3 While Franqui's attorney questioned the reliability of Franqui's confession at closing argument, there is no competent evidence in the record to support that argument.

The jury specifically found Franqui guilty of first-degree murder *either* by premeditated design *or* in the course of a felony,[4] and evidence supporting both theories is extensive. At the very least, we are convinced beyond a reasonable doubt that the Confrontation Clause violation was harmless beyond a reasonable doubt as it relates to Franqui's conviction of first-degree felony murder. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

4 The jury found Franqui guilty of first-degree murder "as charged in Count I of the Indictment." Count I of the indictment charged that Franqui "did unlawfully and feloniously kill a human being ... from a premeditated design to effect the death of the person killed or any human being and/or while engaged in the perpetration of ... any robbery."

As his third issue, Franqui claims two errors were made in the jury selection process. First, he contends that the trial court abused its discretion by prohibiting Franqui's voir dire examination of the jury regarding specific mitigating circumstances.

The scope of voir dire questioning rests in the sound discretion of the court and will not be interfered with unless that discretion is clearly abused. *Vining v. State,* 637 So.2d 921, 926 (Fla.), *cert. denied,* 513 U.S. 1022, 115 S.Ct. 589, 130 L.Ed.2d 502 (1994). In *Lavado v. State,* 492 So.2d 1322 (Fla.1986), the issue presented was whether the trial court erred in refusing defense counsel's request to ask prospective jurors about their willingness and ability to accept the defense of involuntary intoxication. *See also Brown v. State,* 614 So.2d 12 (Fla. 1st DCA 1993) (similar issue). We decided that the trial court's restriction of defense counsel's questioning on voir dire denied Lavado his right to a fair and impartial jury. *Lavado,* 492 So.2d at 1323. We adopted the reasoning of the dissent of Judge Pearson where he stated:

> [W]here a juror's attitude about a particular legal doctrine (in the words of the trial court, "the law") is essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of the voir dire properly includes questions about and references to that legal doctrine even if stated in the form of hypothetical questions. *Pait v. State,* 112 So.2d 380 (Fla.1959) (no error where prosecutor propounded question to prospective jurors on voir dire concerning their attitudes toward a finding of guilt on a homicide charge based solely on a theory of felony murder); *Pope v. State,* 84 Fla. 428, 438, 94 So. 865, 869 (1922) (no error where prosecutor explained legal doctrine of criminal responsibility of aiders and abettors to prospective jurors and then asked them if they would render a verdict of guilty of all necessary elements for conviction under doctrine present).

Lavado v. State, 469 So.2d 917, 919–20 (Fla. 3d DCA 1985). Judge Pearson also noted the importance of "the nature and purpose of the question" in each case, and indicated that asking whether jurors would acquit based on hypothetical testimony rather than asking jurors about their attitudes towards a particular defense would be improper. *See id.* at 920 n. 3; *compare Pope v. State,* 84 Fla. 428, 94 So. 865 (1922) *with Dicks v. State,* 83 Fla. 717, 93 So. 137 (1922).[5]

5 In earlier cases, we have stated this same rule. In *Dicks,* we asserted that it is improper to ask jurors hypothetical questions purporting to embody testimony that is intended to be submitted for the purpose of ascertaining from the jurors how they will vote on such a state of the testimony. 93 So. at 138. Counsel may not have jurors indicate, in advance, what their decision will be under a certain state of evidence or upon a certain state of facts. *Id. Vining v. State,* 637 So.2d at 921, also provides some guidance. In that case, we held that, although the trial judge did not permit questioning about the prospective jurors' personal views of what constitutes a mitigating circumstance, it was not an abuse of discretion since defense counsel was able to explore the potential jurors' understanding of the two-part procedure involved and their ability to follow the law as instructed by the judge in the penalty phase. *Id.* at 926. Additionally, we found that the questioning was comprehensive enough to permit defense counsel to strike several prospective jurors for cause.

***1323** In this case, during voir dire, defense counsel asked: "Do you feel that the defendant's young age would be a factor you would take into effect, take into your mind in deciding whether or not to impose the death penalty?"[6]

6 In Franqui's supplemental motion for a new trial, he proffered that, had he been permitted, he would have inquired into each and every mitigating factor relevant to Franqui's case.

The State objected and the court sustained the objection directing defense counsel to "[a]sk the question generically." In sustaining the objection the court explained:

> I think that you can ask them hypotheticals. If the court were to say to you that the fact that the Defendant has never had a traffic infraction, is a mitigating circumstance, do you follow up an instruction even if you did not feel that it was a mitigating circumstance, or any subject like that? That is what I mean by generic. Not specifically addressing any particular mitigating circumstance.

The State argues that this explanation meant that defense counsel "was welcome to inquire regarding the process so long as the questions were put in the context of the jurors' ability to follow the law, rather than eliciting a promise that the juror *would* factor in a specific mitigating circumstance." We agree. Our examination of the record reflects that the trial court left defense counsel with plenty of latitude to discuss mitigating circumstances with the jurors in the context of the legal instructions that would be given by the court. We find no abuse of discretion.

As his second jury selection issue, Franqui maintains that the trial court abused its discretion by denying him access to the jury questionnaires after they were returned by the potential jurors. The State responds that this claim is procedurally barred, and even if it were not, it would be meritless. We agree that this claim is procedurally barred but find that in the absence of the bar, the error would nevertheless be harmless since appellant was not prejudiced. The very same, and limited, information in the questionnaires was elicited from the prospective jurors by the trial court in appellant's presence before the trial began.

Finally, Franqui asserts that his convictions for attempted murder must be reversed on the authority of *State v. Gray,* 654 So.2d 552 (Fla.1995). In *Gray,* this Court held that the crime of attempted felony murder no longer existed in the State of Florida and directed that our decision would be applied to all cases pending on direct review or not yet final. Consequently, the effect of *State v. Gray* upon Franqui's convictions for attempted murder must be considered.

On each of the two counts, the jury was instructed on both attempted premeditated murder and attempted felony murder, and the jury returned a verdict of guilt on both charges. Thus, Franqui's convictions for attempted murder must be reversed upon the authority of *Valentine v. State,* 688 So.2d 313, 317 (Fla.1996), *petition for cert. filed,* No. 96–9047 (U.S. May 16, 1997), in which this Court held:

> Valentine next argues that his conviction for attempted first-degree murder is error. We agree. The jury was instructed on two possible theories on this count, attempted first-degree felony murder and attempted first degree premeditated murder, and the verdict fails to state on which ground the jury relied. After Valentine was sentenced, this Court held that the crime of attempted first-degree felony murder does not exist in Florida *See State v. Gray,* 654 So.2d 552 (Fla.1995). Because the jury may have relied on this legally unsupportable theory, the conviction for attempted first-degree murder must be reversed. *See Griffin v. United States,* 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).

Sentencing Phase

Franqui claims that the trial court erred in finding the cold, calculated, and premeditated aggravator. *See* § 921.141(5)(i), Fla. Stat. (1991). Specifically, ***1324** Franqui argues that the State failed to prove beyond a reasonable doubt that the murder, rather than the robbery, was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In the instant case, the trial court's sentencing order sets out the basis for its finding:

> The evidence established that the defendant was aware of the method in which the Cabanas [sic] went to the bank to make their cash withdrawals. The defendant Franqui himself, in his confession, explained that he was aware of the Cabanas' [sic] schedule up to five to six months before the attempted robbery, murder and attempted murder in this case occurred. The co-defendant Abreu testified that the robbery was carefully planned but that the issue of how to handle the "bodyguard" the Cabanas [sic] had hired was also discussed. The defendant and his co-defendants decided that in order to successfully execute the robbery of the Cabanas [sic] the "bodyguard" would have to be murdered. At some point in time the defendants decided that the defendant Franqui would be the one to distract and assassinate the "bodyguard". It was planned that Franqui would drive his car in such a way as to force the "bodyguard's" car off the road and then he would kill him.
>
> ...

> The defendant Franqui's passenger window was open and the evidence shows that immediately upon stopping his vehicle Franqui opened fire on Raul Lopez. Consistent with their intentions Franqui killed Raul Lopez before the latter could in any way help his friends.

The State cites codefendant Abreu's testimony as support for the court's finding:

> 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.

The record also reflects that Franqui told Abreu that he, Franqui, would "take care of the escort."

We agree this evidence supports the trial court's 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. In sum, we conclude that the trial court did not err in finding the cold, calculated, and premeditated aggravator.[7]

7 *See, e.g., Jackson v. State,* 648 So.2d 85, 89 (Fla.1994); *Crump v. State,* 622 So.2d 963, 972 (Fla.1993); *Rogers v. State,* 511 So.2d 526, 533 (Fla.1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

Next, Franqui claims that the cold, calculated, and premeditated jury instruction given in this case is unconstitutionally vague. At the outset, we note that this claim has not been preserved for review. "Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal." *Jackson v. State,* 648 So.2d 85, 90 (Fla.1994). In the case at bar, defense counsel's objections were directed towards the standard instruction, which was subsequently disapproved of in *Jackson,* and not to the more detailed instruction which was ultimately given in this case. We find that the instruction approved in *Jackson* and the instruction given in this case[8] are virtually ***1325** identical. Thus, the instruction given in this case was not unconstitutionally vague.

8 In this case, the trial judge gave the following instruction on the cold, calculated and premeditated aggravator:

> The crime for which LEONARDO FRANQUI and/or PABLO SAN MARTIN are to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> "Cold" means calm and cool reflection, not prompted by wild emotion.
>
> "Calculated" means a careful plan or prearranged design.
>
> "Premeditated" means that the killing was committed after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The premeditated intent to kill must be formed before the killing. The period of time must be long enough to allow reflection by the defendant. Although the law does not fix the exact period of time that must pass between the formation of the premeditated intent and the killing, this aggravating factor requires that the premeditation be of a heightened degree, more than what is necessary to prove first degree premeditated murder.
>
> "Pretense of moral or legal justification" means any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

As his next claim, Franqui argues that the trial court erred in failing to find the non-statutory mitigators of marginal or retarded intelligence and brain damage and the statutory mitigators of age and impaired capacity. *See* § 921.141(6)(f), (g), Fla. Stat. (1991).

A mitigating circumstance must be "reasonably established by the greater weight of the evidence." *Nibert v. State,* 574 So.2d 1059, 1061 (Fla.1990) (quoting *Campbell v. State,* 571 So.2d 415, 419 (Fla.1990)).

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,

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> 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 and 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 and 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 in 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 result and with the mental status examination which he conducted.

With respect to the existence of the organic brain damage mitigator, the trial court stated:

> Dr. Toomer testified that there were factors in his evaluation of the defendant that indicated the existence of organicity. However, there is no direct proof of this and the court is not reasonably convinced of the existence of this mitigator. It is therefore rejected.

***1326** Again, Dr. Mutter disputed Dr. Toomer's finding that Franqui may suffer from organic brain damage.

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.

As to the statutory mitigators, Franqui argues that the trial court should have found that he failed to appreciate the criminality of his conduct and that his capacity to conform his conduct to the requirements of the law was substantially impaired. *See* 921.141(6)(f), Fla. Stat. (1993). With regard to the first mitigator, the sentencing order stated:

> The court recalls no expert testimony establishing the existence of this mitigating factor nor does the court feel that any evidence presented on the defendant's behalf established it. Accordingly, the court rejects the existence of this statutory mitigating circumstance.

Upon review, the record supports the trial court's conclusion.

Franqui also claims that the court should have found his age, 21, at the time of the crime as a statutory mitigator. *See id.* § 921.141(6)(g). The trial court considered, but rejected, the defendant's age as a mitigating factor. In *Peek v. State,* 395 So.2d 492, 498 (Fla.1980), *cert. denied,* 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), we posited that "[t]here is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing." We find that the trial court did not err in properly considering, but ultimately rejecting, the age mitigator under the circumstances of this case.[9]

9 In fact, the trial court cited to eight cases which support its finding. *See, e.g., Scull v. State,* 533 So.2d 1137 (Fla.1988), *cert. denied,* 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989); *Kokal v. State,* 492 So.2d 1317 (Fla.1986); *Cooper v. State,* 492 So.2d 1059 (Fla.1986), *cert. denied,* 479 U.S. 1101, 107 S.Ct. 1330, 94 L.Ed.2d 181 (1987).

As his next issue, Franqui asserts that the trial court erred by prohibiting him from informing the jury about two things: (1) the court's power to impose consecutive sentences for all the counts; and (2) the likelihood of lifelong imprisonment as an alternative to death for the capital offense. In *Nixon v. State,* 572 So.2d 1336, 1345 (Fla.1990), *cert. denied,* 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991), we held that a capital murder defendant, who had also been convicted of three other offenses which carried lengthy maximum penalties, was not

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entitled to an instruction informing the jury of the maximum sentences for other crimes as a mitigating factor.

We addressed a similar issue in *Marquard v. State,* 641 So.2d 54 (Fla.1994), *cert. denied,* 513 U.S. 1132, 115 S.Ct. 946, 130 L.Ed.2d 890 (1995). In that case, the trial court, after the State's objection, cut off defense counsel's penalty phase concluding argument at the point where he began discussing hypothetical sentencing on an armed robbery count. *Id.* at 57–58. We held no error existed where sentencing on that charge was not before the jury, but rather, the sole issue before them was the proper sentence on the murder charge. *Id.* at 58; *cf. Jones v. State,* 569 So.2d 1234, 1239–40 (Fla.1990) (holding that fact that defendant would be removed from society for at least fifty years if he received life sentences for *two murders* could be argued to and considered by jury as mitigating factor in penalty phase of capital murder prosecution). We conclude, under *Nixon* and *Marquard,* that the trial court did not abuse its discretion.[10]

10 Appellant relies on *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), in which the United States Supreme Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at 156, 114 S.Ct. at 2190. However, *Simmons* is inapposite here since this case does not involve any direct effort to impose the death penalty based on the defendant's future dangerousness.

As to the second point, the trial judge instructed the jury that "the punishment for ***1327** this crime [first-degree murder] is either death or life imprisonment without the possibility of parole for 25 years." Thus, Franqui's claim is without merit.

As his next issue on appeal, Franqui contends that the death penalty is unconstitutional facially and as applied. The State, however, argues that this claim is procedurally barred since it was never raised in the trial court. We agree. In addition, this claim has been previously rejected. *See e.g., Fotopoulos v. State,* 608 So.2d 784, 794 n. 7 (Fla.1992), *cert. denied,* 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993).

As his last issue on appeal, Franqui argues that the death sentence is a disproportionate penalty in this case compared to others. In reviewing a death sentence, we must consider the circumstances revealed in the record in relation to other decisions and then decide if death is the appropriate penalty, considering that this penalty is reserved for the most aggravated and least mitigated cases. *Livingston v. State,* 565 So.2d 1288, 1292 (Fla.1988). In the case at bar, the trial court found four aggravators: (1) prior violent felony convictions for aggravated assault, attempted armed robbery, armed robbery, armed kidnapping, and attempted first-degree murder; (2) murder committed during the course of an attempted robbery; (3) murder committed for pecuniary gain (merged with prior aggravator); and (4) murder committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. There were no statutory mitigating circumstances. The non-statutory mitigation consisted of: (1) hardships during the defendant's youth, including abandonment by his mother, the death of a younger brother, and a father's drug and alcohol abuse, and (2) the fact that the defendant was a caring husband, father, brother, and provider.

Franqui first argues that murders committed during armed robberies, such as the one committed by Franqui, are generally not death cases, citing *Caruthers v. State,* 465 So.2d 496 (Fla.1985). However, *Caruthers* and other cases cited are clearly factually distinguishable from the circumstances found to exist as aggravation and mitigation in this case.[11]

11 In *Caruthers,* the defendant fatally shot a store clerk while attempting to rob a convenience store. We found a death sentence not appropriate where there was only one valid aggravator (commission of murder during armed robbery), one statutory mitigator (no significant history of prior criminal activity), and several non-statutory mitigators (voluntary confession, conditional guilty plea subject to a life sentence, mutual love and affection of family and friends, remorse, encouragement of younger brother to do well and avoid violating the law). *Id.* at 499; *see also Rembert v. State,* 445 So.2d 337 (Fla.1984).

Next, the Defendant relies on *Cannady v. State,* 427 So.2d 723 (Fla.1983), and the consolidated cases of *McCaskill v. State,* and *Williams v. State,* 344 So.2d 1276 (Fla.1977). However, his reliance on those cases is also misplaced. Those cases involve an override of a jury recommendation of life imprisonment which entails a wholly different legal principle and analysis. *Watts v. State,* 593 So.2d 198, 204 (Fla.), *cert. denied,* 505 U.S. 1210, 112 S.Ct. 3006, 120 L.Ed.2d 881 (1992).

Third, Franqui contends that this Court has consistently reversed death sentences in cases where similar mitigating circumstances outweighed even significant aggravating

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circumstances. Here also, the cases do not support Franqui's position. For example, in *Livingston v. State,* 565 So.2d 1288 (Fla.1988), the defendant entered a convenience store, fatally shot the female attendant, fired a shot at another woman inside the store, and carried off the cash register. *Id.* at 1289. The extensive mitigating circumstances included the following: (1) defendant's childhood was marked by severe beatings by his mother's boyfriend; (2) defendant's intellectual functioning was, at best, marginal; (3) defendant was only seventeen; and (4) defendant had used cocaine and marijuana extensively. With respect to aggravators, there were two: (1) previous conviction of a violent felony; and (2) commission of murder during armed robbery. This Court found that the death penalty was not warranted because the mitigating circumstances outweighed the aggravating circumstances.

***1328** In *Livingston* and other cases like *Nibert v. State,* 574 So.2d 1059, 1061 (Fla.1990), the mitigating factors were significant in comparison to the limited aggravators. In Franqui's case, however, there is minimal mitigation when considered in conjunction with the substantial aggravation.

Conversely, several recent cases support a conclusion that death is not a disproportionate penalty for Franqui. *See, e.g., Lowe v. State,* 650 So.2d 969 (Fla.1994), 516 U.S. 887, 116 S.Ct. 230, 133 L.Ed.2d 159 (1995); *Smith v. State,* 641 So.2d 1319 (Fla.1994), *cert. denied,* 513 U.S. 1163, 115 S.Ct. 1129, 130 L.Ed.2d 1091 (1995); *Mordenti v. State,* 630 So.2d 1080 (Fla.), *cert. denied,* 512 U.S. 1227, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994). After considering *Smith, Lowe, Mordenti,* and other relevant cases, we find that we cannot conclude that death is a disproportionate penalty here.

We note that the two attempted murder convictions imposed in this case were among the prior violent felonies enumerated by the trial court in finding the statutory aggravator of prior conviction of a felony involving the use or threat of violence to the person. Because we are reversing the attempted murder convictions, the trial court's reliance upon them in finding the existence of this aggravator was error. However, we are convinced that the error was harmless beyond a reasonable doubt because the trial court also found that Franqui had been previously convicted of the crimes of aggravated assault and attempted armed robbery in one case and armed robbery and armed kidnapping in another.

III. CONCLUSION

Campbell v. State, 571 So.2d 415 (Fla.1990), and its progeny[12] established our firm adherence to the rule that the trial court must scrupulously follow the statutory and case law guidelines in the sentencing process, and “[w]hen addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.” *Id.* at 419 (footnote omitted) (citing *Rogers v. State,* 511 So.2d 526 (Fla.1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988)); *see also* § 921.141(3), Fla. Stat. (1991). We have also stressed that the trial court must weigh the aggravating circumstances against the mitigating and must expressly consider in its written order each established mitigating circumstance. *Campbell,* 571 So.2d at 420.

12 *See, e.g., Ferrell v. State,* 653 So.2d 367 (Fla.1995); *Crump v. State,* 622 So.2d 963 (Fla.1993).

The *Campbell* procedure was not intended to be a mere formality, but rather to serve as a substantive guide for the most serious of sentencing evaluations and decisions. The procedure mandated was intended to ensure the overall quality and integrity of the complex and delicate sentencing process in death penalty cases. It forces the trial court to consider, with calm and deliberate reflection, the evidence adduced, and to carefully consider and apply the legal standards for determining an appropriate sentence. The process should also promote the uniform application of aggravating and mitigating circumstances in reaching the *individualized decision* required by law. *Id.* It also facilitates our appellate review of the trial court's decision. *Id.*

In this case, we note that the trial court's detailed sentencing order stands as a model of compliance with the *Campbell* requirement. In a 22–page order,[13] the trial court carefully and deliberately evaluated every mitigating circumstance proposed by the defendant and every aggravating circumstance proposed by the State. In a well-reasoned analysis, the trial court considered counsel's sentencing memorandum, the trial testimony and evidence, and relevant case law to reach its conclusions. In short, it is the epitome of what should be done by a trial court in order to determine an appropriate sentence.

13 We note, however, that there is no "magic" number of pages for a compliant sentencing order.

We conclude that the error in admitting San Martin's confession was also harmless ***1329** in the penalty phase because San Martin said nothing in his confession that was adverse to Franqui that was not contained in Franqui's confession. San Martin stated that because his vision was obscured he was unable even to say whether Franqui fired his gun, and he did not characterize Franqui as the leader in the enterprise.

Finding no reversible error, we affirm all the judgments and sentences except those of attempted murder. The two convictions of attempted murder are hereby vacated and the pending charges on these crimes are remanded for further proceedings.

It is so ordered.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which KOGAN, C.J., concurs.

ANSTEAD, Justice, concurring in part and dissenting in part. While I disagree with much of the majority's framework for analyzing Franqui's claim that his right to confront the witnesses against him was violated in this case,[14] I agree with the majority's conclusion that the trial court erred under the Sixth Amendment in admitting against Franqui the testimony of Detective Santos concerning codefendant San Martin's initial confession.[15] I write in dissent to emphasize my disagreement with the majority's holding that a constitutional error of such major proportions was somehow harmless to Franqui in his trial for capital murder.

14 In my view, Franqui's claim of error can be properly analyzed only by first determining whether, under Florida evidence law, the confession of the nontestifying codefendant San Martin was admissible at trial under a hearsay exception. In fact, it is this Court's previous failure to deal with this issue that underlies our prior misinterpretation of *Cruz* and *Lee* that we are receding from today. Because of our prior misinterpretations, trial courts too have overlooked the necessity to apply a state evidentiary standard for the admission of out-of-court statements *before* even getting to the federal constitutional issue. Only if San Martin's confession was admissible under the state Evidence Code, would we then jump to the majority's focus on whether the trial court's failure to grant the severance violated Franqui's Sixth Amendment constitutional right to confront witnesses against him.

> Under the Florida Evidence Code, I conclude that the testimony of Detective Michael Santos relating to the jury the oral confession of Franqui's codefendant, Pablo San Martin, was inadmissible as a statement against penal interest, the only possible hearsay exception applicable here. On this point, I find the U.S. Supreme Court's interpretation of the virtually identical provision in the Federal Evidence Code to be compelling. The United States Supreme Court's construction of the statement against penal interest exception to the hearsay rule set out in *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), limited this exception to statements that "are individually self-inculpatory." While some of Detective Santos' testimony at trial concerned solely self-inculpatory statements made by San Martin during his oral confession, the majority of San Martin's statements related by Detective Santos also implicated the accused, Leonardo Franqui. Moreover, some of San Martin's statements, as told by Detective Santos, also served to exonerate San Martin. There was no attempt here to limit San Martin's statement or eliminate any portions particularly inculpatory as to Franqui or exculpatory as to San Martin. Thus, I find that the detective's testimony concerning San Martin's oral confession does not make it over even the first hurdle of admissibility—the Florida Evidence Code—let alone the Sixth Amendment Confrontation Clause.

15 I concur fully in the majority opinion's acknowledgment that the trial court's sentencing order stands as a model for compliance with our directives in *Campbell* and other cases.

In *Cruz,* the United States Supreme Court specifically addressed the application of the harmless error standard in exactly the situation we have before us in this case. First, the Court expressly noted that the defendant's own confession may be considered in determining, on appeal, the harmfulness of the admission of a codefendant's confession implicating the defendant, but also emphasized that the reviewing court must consider for harmless error purposes the similarity of the codefendants' confessions. 481 U.S. at 193–94, 107 S.Ct. at 1719–20.

Further, in *Cruz,* the defendant attempted to avoid the damaging nature of his alleged confession at trial by showing that his friend had a motive to falsely report to police a confession the defendant allegedly never made. The Court, through Justice Scalia, pointedly explained:

> ***1330** A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. It might be otherwise if the defendant were *standing by* his confession, in which case it could be said that the codefendant's confession does no more than support the defendant's very own case. But in the real world of criminal litigation, the defendant is seeking to *avoid* his confession—on the ground that it was not accurately reported, or that it was not really true when made.... In such circumstances a codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case, whereas one that is positively incompatible gives credence to the defendant's assertion that his own alleged confession was nonexistent or false.

Id. at 192, 107 S.Ct. at 1718–19. In short, I read the *Cruz* opinion to mean that where the accused attempts to avoid his own confession at trial on grounds that it was false or never made, the "interlocking" nature of a codefendant's confession bears a positive relationship to its "devastation." *Id.*

Here, of course, Franqui gave a confession which implicated himself in this crime; and San Martin's confession serves to corroborate Franqui's account. Without San Martin's confession, however, the State's case against Franqui consists only of the fact of the crime itself, Franqui's own statement, and the weapons recovered based upon San Martin's admission as to their location. Neither of the surviving victims could identify Franqui as one of their assailants, and his fingerprints were not found at the scene or on the guns. Like the defendant in *Cruz,* Franqui attempted to avoid his own confession at trial on grounds that his confession was false, unreliable and should not be believed.[16]

16 In closing argument, Franqui's defense counsel argued to the jury:

> Now, the State will argue I'm sure that Mr. Franqui admits that there was a plan to rob in his statement but it's going to be for you to consider the reliability of that statement.
>
> Because that statement when considered in light of all the evidence in this case is not reliable and cannot be believed.
>
> In fact, Franqui's own confession was the subject of a pretrial motion to suppress alleging numerous grounds for its suppression and unreliability.

The State, on the other hand, relied on the corroborating, or "interlocking," nature of San Martin's confession to prove its case against Franqui. On numerous occasions throughout her closing argument, the prosecutor argued to the jury that San Martin's confession was a critical piece of evidence of Franqui's guilt, and repeatedly emphasized how it "corroborated" Franqui's own statement. Among these many references, two of the prosecutor's comments are particularly noteworthy as they illustrate that the *Cruz* test for "devastation," i.e., harmfulness, has been met here. Early in her closing remarks, the prosecutor argued:

> We have two people in separate rooms who confess to the homicide detectives [,] to two different homicide detectives, what a coincidence that they both happened to say the exact same thing in those two separate rooms. I mean what do they want you to believe? Mr. Cohen [Franqui's defense counsel] wants you to believe that he's falsely confessing and Mr. DeAguero [San Martin's defense counsel] wants you to believe that he [San Martin] didn't even confess, but we have two people, in two separate rooms telling the same story.

The prosecutor reiterated this point again and again throughout her closing argument to the jury. On another occasion, for instance, she argued:

> But see, Technician Kennington wasn't the only witness we called, you have to consider all the evidence that you heard and when you put what he said together with what the crime victims tell you about who had which guns on their side, and together with the confessions of the defendants, that Abreu and Pablo San Martin, both [had] their semi-automatics, there is only one person who could have fired that bullet. Leonardo Franqui.

Yet another comment to the jury, similar to the others, was:

> ***1331** But you know what, they weren't identified by the victims because they wore masks, they were identified by each other because they both admitted that the other was there and they both admitted that they were there and they both said that they had exactly the same role as the other one says it.

In view of the way the prosecution explicitly relied upon San Martin's confession to prove its case against Franqui, I simply

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cannot conclude that the State has met its burden of showing that the improper admission of San Martin's confession at this joint trial was harmless to Franqui.

In *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986), we explained that:

> The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Id. at 1135. It would be naive to say here that the jury, although it was repeatedly implored to do so by the prosecutor, did not use the codefendant's statement as a major building block in the case against Franqui. We do not have to wonder if this is a "possibility" since we have the prosecutor's explicit pleas to confirm its prejudicial use as a certainty.

In addition, the majority has in essence adopted a per se rule that any error, no matter how serious, will be deemed harmless, if a defendant's confession is allowed into evidence. The majority forgets that it is the role of the jury to evaluate the reliability and weight of the evidence, and not the role of this Court. The majority has found the confession "overwhelming" and, in doing so, has fallen into the trap explicitly warned of by Justice Shaw in *DiGuilio:*

> The [harmless error] test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. This rather truncated summary is not comprehensive but it does serve to warn of the more common errors which must be avoided.

Id. at 1139. This case is analogous to the situation in *Cruz* where the Supreme Court expressly concluded:

> It seems to us illogical, and therefore contrary to common sense and good judgment, to believe that codefendant confessions are less likely to be taken into account by the jury the more they are corroborated by the defendant's own admissions; or that they are less likely to be harmful when they confirm the validity of the defendant's alleged confession.

Cruz, 481 U.S. at 193, 107 S.Ct. at 1719. By emphasizing to the jury that San Martin's confession corroborated Franqui's own account of his involvement and, therefore, that Franqui's confession was reliable and must be believed, Franqui, like Cruz, was significantly harmed in his effort to avoid his own confession at trial. Had testimony concerning San Martin's confession been properly excluded from the trial, the jury might have concluded that Franqui's own confession was not credible and, consequently, his guilt was not proved beyond a reasonable doubt. Instead, the testimony concerning San Martin's confession, which corroborated Franqui's own statement, might well have tipped the balance in the jurors' minds in favor of conviction.

KOGAN, C.J., concurs.

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