

IN THE SUPREME COURT OF FLORIDA

CASE m 94-269

LEONARDO FRANQUI,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY
Case No.: 92-2141 B

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	5
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
I.A. Death is a Disproportionate Penalty to Impose on Leonardo Franqui in Light of the Circumstances of this Case and Constitutes a Constitutionally Impermissible Application of Capital Punishment	11
B. The Death Penalty is Unconstitutional on its Face and as Applied to Leonardo Franqui and Violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as the Natural Law	17
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF CITATIONS

	<u>Page(s)</u>
Adams v. State, 412 So.2d 850 (Fla. 1982).	12
Brown v. State, 381 So.2d 689 (Fla. 1979).	12
Buenoano v. State, 565 So.2d 309 (Fla. 1990).	17
Caldwell v. Mississippi, 472 U.S. 320 (1985).	12
Cannady v. State, 427 So.2d 723 (Fla. 1983).	12
Caruthers v. State, 465 So.2d 496 (Fla. 1985).	12
Eddings v. Oklahoma, 455 U.S. 104 (1982).	11
Fead v. State, 512 So.2d 176 (Fla. 1987).	14
Foster v. State, 436 So.2d 56 (Fla. 1983).	12
Furman v. Georgia, 408 U.S. 238 (1972).	11
Hamblen v. State, 527 So.2d 800, 807 (Fla. 1988).	15
Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).	12
Hitchcock v. State, 413 So.2d 741 (Fla. 1982).	12
Holsworth v. State, 522 So.2d 348 (Fla. 1988).	14
Hoy v. State, 353 So.2d 826 (Fla. 1977).	12
King v. State, 390 So.2d 315 (Fla. 1980).	12
Lightbourne v. State, 438 So.2d 380 (Fla. 1983).	12
Livingstone v. State, 565 So.2d 1288 (Fla. 1988).	15

Maxwell v. State, 603 So.2d 490 (Fla. 1992).	14
McCampbell v. State, 421 So.2d 1072 (Fla. 1982).	14
Meeks v. State, 336 So.2d 1142, (Fla. 1976).	12
Morgan v. State, __ So.2d __, 19 Fla.L.Weekly S290 (Fla. June 2, 1994).	16
Randolph v. State, 463 So.2d 186 (Fla. 1984).	12
Rembert v. State, 445 So.2d 337, 338 (Fla. 1984).	13
Skipper v. South Carolina, 476 U.S. 1(1986).	12
Smalley v. State, 546 So.2d 720 (Fla. 1989).	16
Smith v. State, 492 So.2d 1063 (Fla. 1963).	12
State v. Dixon, 283 So.2d 1 (Fla. 1973).	14
Thompson v. State, 456 So.2d 444 (Fla. 1984).	14
Williams v. State, 344 So.2d 1276 (Fla. 1977).	13

PRELIMINARY STATEMENT

The appellant, **LEONARDO FRANQUI**, was a defendant in the trial court and the appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appeared in the trial court. The symbol "R" will be used to designate the record on appeal and "TR" will be used in reference to the transcripts of trial and re-sentencing proceedings.

STATEMENT OF THE CASE

The defendant, **LEONARDO FRANQUI**, along with co-defendants Pablo San Martin, Ricardo Gonzalez, Fernando Fernandez, and Pablo Abreu, were charged by indictment on February 4, 1992, with first degree murder of a law enforcement officer [count I], armed robbery with a firearm [count II], aggravated assault [counts III and IV], unlawful possession of a firearm while engaged in a criminal offense [count V], grand theft third degree [counts VI and VIII], and burglary [counts VII and IX, in violations of Florida Statutes §§ 782.04(1), 775.087, 777.04, 775.0823, 777.011, 784.021(1)(a), 790.07, 810.02, 812.13 and 812.014(1)(2)(c). [R 1-5] **FRANQUI**, Gonzalez, and San Martin were tried together, by jury, on May 23, 1993. Fernandez was tried by a separate jury at the same time. Abreu negotiated a guilty plea prior to trial and avoided the death penalty.

Prior to trial, co-defendant Fernandez filed a motion for severance of defendants (joined by all defendants) due to the fact that San Martin and Gonzalez had made post-conviction statements which directly incriminated him. **FRANQUI** renewed his motion throughout the trial and, particularly, when his co-defendants' confession were

offered into evidence against him prior to the penalty phase. San Martin's and Gonzalez' statements were introduced without deletion of its references to **FRANQUI** upon the trial court's finding that they were "interlocking."

The jury ultimately found **FRANQUI** guilty as charged. Counts III and V were *nolle prossed* by the state after its opening statement.

Prior to the penalty phase hearing, **FRANQUI** unsuccessfully renewed his motion for severance. The jury recommended death by a vote of nine to three.

The trial court sentenced **FRANQUI** to death on count I, life imprisonment on counts II and III, fifteen (15) years imprisonment on counts IV and VI, and five (5) years imprisonment on counts V and VII. Counts II, III, and IV included three (3) year minimum mandatory terms. All sentences were ordered to run consecutive.

FRANQUI filed a timely motion for new trial and supplemental motion for new trial which the trial court denied. He filed a timely notice of appeal on December 2, 1993.

On July 3, 1997, The Florida Supreme Court issued a mandate affirming **FRANQUI'S** conviction but remanding the case to the trial court for re-sentencing. (R54-69).

On August 24, 1998 through August 26, 1998, a jury was empaneled so that **FRANQUI** could be resentenced. (R 99-102). On August 31, 1998, the Jury recommended that **FRANQUI** be sentenced to death by a vote of 10-2. (R 155).

On September 18, 1998, the Trial Judge imposed a sentence of death with respect to Count I. (R- 175) This appeal follows.

STATEMENT OF THE FACTS

The Kislak National Bank in North Miami, Florida was robbed by four armed gunmen on January 3, 1992. [TR 956 - 960] The perpetrators made their getaway in two stolen grey Chevrolet Caprice automobiles after taking a cash box from one of the drive-in tellers. [TR 969, 991, 1074, 1108, 1112] During the robbery, police officer Steven Bauer was shot and killed. The vehicles were found abandoned a short distance away. [TR 992]

Co-defendant Gonzalez was stopped by the police on January 18, 1992 after leaving his residence. [TR 1336] He said, "I got bad luck. I knew I would get stopped driving that car." [TR 1378] He subsequently made unrecorded and recorded confessions. [TR 1409 - 1415, 1421 - 1456] He described **FRANQUI** as the mastermind who planned the robbery, involved the other participants and himself, and chose the location and the date. [TR 1427 - 1429] He described **FRANQUI** as procurer of the stolen cars, the driver of one of the vehicles, and the supplier of his weapon. [TR 1431 - 1440] He described **FRANQUI** as the first shooter who shot Officer Bauer three to four times while he only shot once. [TR 1444] Gonzalez indicated that he shot low and believed he shot the officer of the leg with a ricochet.

[TR 1461] In fact, ballistics evidence proved it was Gonzalez, not **FRANQUI**, who fired the fatal bullet into Officer Bauer's neck. [TR 1900 - 1903]

Gonzalez consented to a search of his apartment which revealed \$1,200.00 of the stolen money in his bedroom closet. [TR 1534 - 1542] Gonzalez was reinterviewed. He described how **FRANQUI** told Officer Bauer not to move before he shot him and how they fled in **FRANQUI'S** car. [TR 1551 - 1570]

San Martin also confessed. [TR 1604 - 1610, 1616 - 1644] He said that the robbery was planned by a black friend of co-defendant Fernandez who did not participate and that the planning occurred at Fernandez' apartment. [TR 1604 - 1605, 1623 - 1625] He explained that Pablo Abreu drove **FRANQUI'S** Buick which remained several blocks away and was used as a getaway car. [TR 1608] They expected a man with a shirt and tie, not a police officer, to accompany the clerks. He could not say who carried guns or did the shooting. [TR 1608, 1638] He did not see **FRANQUI** with a gun. [TR 1643] San Martin admitted taking the money tray. [TR 1609] He received \$3,000.00. [TR 1610, 1642] He later admitted having disposed of the weapons in the river off the Dolphin Expressway where they were later recovered. [TR 1774 - 1775, 1820]

Twenty-one year old **LEONARDO FRANQUI** was questioned by the police on January 18, 1992 in a series of recorded and unrecorded sessions. [TR 1739,

1744] During his preinterview, he initially denied any knowledge of his co-defendants (except San Martin [TR 1709]) and any involvement in the Kislak Bank robbery. [TR 1683 - 1684] When confronted by the fact his accomplices were in custody and had implicated him, he ultimately confessed. [TR 1684]

FRANQUI admitted that he and Gonzalez were armed and that Fernandez had originated the idea for the robbery after talking to a black male (Gary Cromer). [TR 1685 - 1686] He and Fernandez had accompanied the black male to the bank a week before the robbery. [TR 1714, 1750] He returned to the bank again the day before the robbery. [TR 1714, 1753] At that time, **FRANQUI**, observed an unarmed civilian accompany the tellers to their booths rather than a police officer. [TR 1754] They intended to commit the robbery then, but there were too many customers at the bank. [TR 1755]

He explained that the .9 millimeter which he carried had been purchased the summer before by all five of the people involved. [TR 1693, 1762] He claimed that the black male suggested the use of the two stolen cars, but denied any involvement in the thefts of the vehicles. [TR 1687 - 1688] According to **FRANQUI**, San Martin, Fernandez, and Abreu stole the cars. [TR 1751] **FRANQUI** said he drove a stolen Buick Regal before parking it and driving one of the stolen Chevrolets to the bank. [TR 1691 - 1692] **FRANQUI** denied that the Buick was his even when confronted

by his interrogating officer's knowledge that it was his. [TR 1699] Later, however, he admitted to another officer that it was his and that it had been painted a different color after the offense. [TR 1730] San Martin and Fernandez were to accost the tellers and take the money. [TR 1697]

FRANQUI related that Gonzalez, not he, yelled "Freeze" to Officer Bauer after his firearm was seen. **FRANQUI** denied having fired the first shot, and admitted firing only one shot later. [TR 1696, 1760] He said Abreu kept the guns subsequently and that San Martin and Abreu later told him that the weapons had been thrown in the water somewhere. [TR 1729, 1732]

FRANQUI did not know the total take from the robbery but admitted having received \$2,400.00 afterwards at Abreu's house. [TR 1698, 1765] He was unable to describe the route taken away from the bank or how the money was transported. [TR 1716] He did not know that Bauer was a police officer - he saw no badges or uniform. [TR 1759]

FRANQUI was very concerned about who had actually killed Officer Bauer. He asked whether he had been responsible for firing the fatal shot, but the answer, at the time, was unknown. [TR 1700] Subsequent ballistics evidence demonstrated that co-defendant Ricardo Gonzalez fired the fatal shot from his .38 Smith & Wesson

Model 19 revolver and **FRANQUI** shot Bauer in the leg with his .9 mm Smith & Wesson semi-automatic handgun. [TR 1900 - 1903]

A fingerprint of **FRANQUI'S** was found on the outside of one of the Chevrolets. [TR 1852 - 1853] Seven were found on the Buick. [TR 1854]

A bystander in a bus identified **FRANQUI** as the driver of one of the Chevrolets leaving the bank after the robbery. [TR 1869]

SUMMARY OF THE ARGUMENT

The trial court erred in sentencing the defendant to death, thereby denying the defendant due process of law and equal protection while imposing a disproportional, cruel and unusual, punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The trial court erred in rejecting altogether the non-statutory mitigating factors that he was a good employee, that he had demonstrated good conduct and rehabilitation in prison, and that he suffered mental problems, as well as rejecting and refusing to instruct the jury on age as either a statutory or non-statutory mitigating factor .

Death is a disproportionate penalty to impose on **LEONARDO FRANQUI** in light of the circumstances of this case and would constitute a constitutionally impermissible application of capital punishment.

The death penalty is unconstitutional on its face and as applied to **LEONARDO FRANQUI** and violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as the natural law.

ARGUMENT

A.

Death is a Disproportionate Penalty to Impose on Leonardo Franqui in Light of the Circumstances of this Case and would Constitute a Constitutionally Impermissible Application of Capital Punishment.

The United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny have resolved that the Florida death penalty scheme is constitutional only because it is subject to the doctrine of proportionality.

In this case, to uphold the imposition of the sentence of death would be inconsistent with the penalties meted other defendants committing similar crimes under like circumstances. As such, the defendant's sentence of death cannot be sustained consistent with the promise of equal protection, due process, and freedom from cruel and unusual punishment guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Florida Statutes § 921.141(5) establishes an automatic review procedure in this Court to ensure against the disproportionate application of the death penalty.

Death must "serve both goals of measured, consistent application and fairness to the accused," *Eddings v. Oklahoma*, 455 U.S. 104, 111, 102 S.Ct. 869, 875, 71

L.Ed.2d 1 (1982), and must "be imposed fairly, and with reasonable consistency, or not at all." *Id.* Accord *Hitchcock v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Applying these tests, this is not a case where the death penalty is warranted.

Murders committed during armed robberies such as **LEONARDO FRANQUI** committed are generally not death cases. *Caruthers v. State*, 465 So.2d 496 (Fla. 1985). In *Cannady v. State*, 427 So.2d 723 (Fla. 1983), the defendant was arrested for the robbery, kidnaping, and first degree murder of a night auditor at a Ramada Inn after having been arrested earlier for an unrelated robbery and kidnaping. The defendant confessed that he stole money from the Ramada Inn, kidnapped the victim, drove him to a remote wooded area, and shot him. This Court affirmed the trial court's findings that the murder was committed during the commission of a felony kidnaping and committed for pecuniary gain. *Cannady*, although admitting the kidnaping, denied intending to kill the victim who he claimed "jumped at him." *Id.* at 730. Here, by comparison, no kidnaping was involved. In *Cannady*, this Court reversed the trial court's override of the jury's life sentence recommendation. *Cannady* is serving his mandatory life sentence.

Eddie Rembert entered the victim's bait and tackle shop, hit the elderly victim on the head once or twice with a club, and took forty to sixty dollars from the victim's cash drawer. *Rembert v. State*, 445 So.2d 337, 338 (Fla. 1984). He was convicted of first degree murder and robbery and sentenced to death pursuant to the jury's recommendation of death by a trial court which found, as here, two mitigating circumstances. This Court reversed, noting that at oral argument the state conceded that in similar circumstances many people receive a less severe sentence and held:

Given the facts and circumstances of this case, as compared with other first-degree murder cases, however, we find the death penalty to be unwarranted here.
[*Id.* at 340]

The *Rembert* Court vacated the death sentence and remanded for the imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years. The same result should apply here.

In the consolidated appeals of *McCaskill v. State*, and *Williams v. State*, 344 So.2d 1276 (Fla. 1977), both defendants were charged with attempted robbery, robbery, and first degree murder resulting from the robbery of a liquor store and its patrons. During their get-a-way, one of the patrons was shot twice in the neck with a handgun at close range and another patron was killed by a shotgun blast by a third, unnamed, accomplice. The trial judge overruled the jury's life recommendation and

imposed the death penalty noting, among other things, that the killing was wanton and unnecessary. *Id.* at 1278. This Court exercised its final responsibility to review the case in light of other decisions and determine whether or not the punishment was too great and reversed the imposition of the death penalty:

Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in the light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia, supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in judgement at all. *Dixon v. State*, 283 So.2d 1 (Fla. 1973) at 10.
[*Id.* at 1279]

It is thereby that the system insures that capital punishment is reserved only in "the most aggravated, the most indefensible of crimes." *State v. Dixon*, 283 So.2d 1 (Fla. 1973). Recognizing that "death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation," *Dixon, supra*, the ultimate penalty has historically been reserved for homicides which are sadistic, physically torturous, committed execution-styled, or committed under circumstances involving kidnaping and/or the prolonged anticipation of death.

Here, the victim was killed by a single gunshot, not even fired by the defendant, but by his co-defendant. [TR 1900 - 1903]

The death penalty is reserved for the most heinous of crimes committed by the most depraved of criminals. *Hamblen v. State*, 527 So.2d 800, 807 (Fla. 1988) (Barkett, J. Dissenting). As Justice Stewart noted:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. Georgia, *supra*, at 306 (Stewart, J., concurring).

This Court has consistently reversed death penalties in cases, such as this, where, similar mitigating circumstances outweighed even significant aggravating circumstances. *Livingstone v. State*, 565 So.2d 1288 (Fla. 1988) (death sentence is disproportionate when mitigating circumstances of youth, abusive childhood, inexperience, immaturity, marginal intelligence, and extensive substance abuse effectively outweigh two aggravating circumstances of previous conviction of violent felony and committed during armed robbery); *Nibert v. State*, *supra*, (even where victim suffered multiple stab and defensive wounds and death was heinous, atrocious,

or cruel, substantial mitigation, including diminished capacity, may make the death penalty inappropriate).

Even where homicides are determined to be particularly heinous, atrocious, or cruel, a factor clearly not present here, this Court has not hesitated to reverse given substantial mitigation. *Smalley v. State*, 546 So.2d 720 (Fla. 1989)

We know that “death is different: and is reserved for only the most horrible of offenses”. Here, the advisory sentencing verdict was nine to three in the first sentencing proceeding and ten to two in the second sentencing proceeding. Fully one-quarter of the jury disagreed with the recommendation of death in the first proceeding and one-sixth in the second. **LEONARDO FRANQUI'S** crime, as inexcusable as it was, was not "the most aggravated, the most indefensible of crimes." The circumstances of this case are not "so clear and convincing that virtually no reasonable person could differ" concerning the appropriate penalty. Indeed, there is nothing in this record to suggest that consecutive life sentences including consecutive minimum mandatory terms of imprisonment is not the appropriate, proportional sentence in this case.

Accordingly, **LEONARDO FRANQUI**, prays this Court to vacate his sentence of death.

B.

The Death Penalty is Unconstitutional on its Face and as Applied to Leonardo Franqui and Violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as the Natural Law.

FRANQUI further alleges that electrocution as punishment violates the United States and Florida Constitutions. Electrocution is unconstitutional in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. Indeed, most states have abandoned electrocution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and the Florida Constitution. Electrocution amounts to excruciating torture. Malfunctions in the electric chair cause unspeakable torture. *Buenoano v. State*, 565 So. 2d 309 (Fla. 1990).

The death penalty constitutes cruel and unusual punishment under any circumstances.

In Florida, the death penalty is arbitrarily applied. Its application is discriminatory on the basis of the race, sex, and economic status of the victim as well as the offender.

The death penalty is morally wrong.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the appellant, **LEONARDO FRANQUI**, respectfully prays this Court to vacate his disproportionate and misapplied death penalty and sentence him to life imprisonment.

Respectfully submitted,

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