

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC94,269

LEONARDO FRANQUI,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

A CAPITAL APPEAL TO THE FLORIDA SUPREME COURT

**APPELLANT'S BRIEF ON THE MERITS
OF LEONARDO FRANQUI**

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INTRODUCTION

The appellant, Leonardo Franqui, was the defendant in the trial court and the appellee, State of Florida was the prosecution. The Record on Appeal will be designated by the letter “R”. The trial transcript will be designated by the letter “T”. All emphasis is added unless otherwise indicated.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is formatted to print in Times New Roman 14.

STATEMENT OF THE CASE

The appellant, Leonardo Franqui was remanded to the trial court for Re-sentencing on Count I, First Degree Murder of a Law Enforcement Officer (R. 1).

Following the Sentencing Trial, the jury, by a vote of 10-2 advised and recommended to the court that it impose the death penalty upon Leonard Franqui (R. 155).

The trial court conducted a *Spencer* hearing, hearing argument of counsel (R. 186).

The trial court then entered an order (R. 157) sentencing appellant Franqui to death.

This appeal follows.

STATEMENT OF THE FACTS

In the trial court, at the Sentencing trial the following facts were elicited:

LaSonya Hadley testified that she was a teller at the Kislak National Bank drive in (T. 678).

LaSonya and another teller, Michelle Chin, had gotten their money trays and were going to their drive-in booths. Officer Steven Bauer, working off-duty, escorted them out of the bank.

A line of cars waited at the drive in booths (T. 686).

LaSonya went to her booth (T. 687).

Men with guns exited cars and ran towards them (T. 688). There were four men involved. She saw all four. All four were armed (T. 699).

She saw Officer Bauer trying to draw his gun from his holster (T. 688).

LaSonya unlocked the door to her drive in booth and, literally, fell in. She heard shots (T. 689).

When she looked out she saw that Officer Bauer had been shot and she went to him (T. 689) putting his head in her lap. Officer Bauer stated that he had been shot in the leg (T. 690).

Michelle Chin was the other teller at the drive up booths (T. 701).

As she walked to her booth, she saw a long line of cars and realized that it was going to be a busy day (T. 708).

She heard a yell or something (T. 708). There were men outside of the first two vehicles (T. 709). There were four men. They all had guns. They all appeared to be firing (T. 718).

When she heard the gunfire, Michelle put her money tray on the ground and lowered her head, not looking up. Someone came and removed her money tray (T. 709, 713).

She saw that Officer Bauer had been wounded (T. 710). He believed he had been shot in the leg (T. 710).

LaSonya put his head in her lap (T. 715).

Fire Rescue then came (T. 711).

Detective Ron Pearce went to the scene (T. 727). At the bank, a pillar had been damaged. It appeared that the projectile had struck the pillar at two different locations (T. 743).

A projectile and casings were collected at the scene (T. 752).

Officer Bauer's gun was found to be loaded (T. 758).

One 9mm casing was found (T. 761).

Detective Pearce went to another location where two vehicles were found (T. 729). They appeared to have been “hot-wired” (T. 734).

On February 7, 1992, Detective Pearce went to the Pices Motel where, in a canal, he found the missing money tray from the bank (T. 759).

Officer Pereira went to the scene where the vehicles were found (T. 772). He found that the vehicles had been stolen (T. 774).

Lieutenant Richard Spotts of the North Miami Police Department testified that North Miami officers were allowed, with permission, to work off duty as police officers (T. 777).

Detective Nabut of the Hialeah Police Department testified (T. 778). He went to the scene of the murder (T. 783).

When he was given details, it reminded him of a Hialeah murder occurring in December, 1991, in which a Raul Lopez was killed (T. 784).

A firearms examiner determined that the bullet that killed Raul Lopez was fired from the same .357 fired at the Bauer scene (T. 792).

Later he spoke to Leonardo Franqui (T. 792).

Mr. Franqui gave him a statement, about the Hialeah murder (T. 796) and stated at that scene he “fired back out of the Suburban that he was driving” (T. 801). He didn’t believe that he hit anybody (T. 811). It was never their intention that anyone would be hurt (T. 820). Here was no prior talk of shooting (T. 814). Once the gunfight at the Hialeah shooting began, Mr. Franqui “ducked and he stretched his arm back out towards the back of the Suburban he was in and fired in that direction (T. 814).

Detective Nabut then retrieved two guns, a .357 and .9 mm with the aid of divers (T. 806). The .9 mm casings found at the scene of the Lopez murder matched the casing found at the Kislak National Bank (T. 809).

Pedro Santos testified to being a security guard at a Republic National Bank (T. 823). In December, 1991, a man attempted a robbery (T. 827). He fired at Mr. Santos who fired back (T. 829-830). The man then fled in a car (T. 830).

Hialeah detective Nazario interviewed Mr. Franqui which resulted in a statement (T. 840) concerning the attempted Republic Bank robbery. Mr.

Franqui was not in the car that approached Mr. Santos (T. 844-5) but was a distance away.

.9 mm casings were found at the Republic National Bank (T. 842).

The casings matched the gun found in the water (T. 842) and the .9 mm casings found at the Bauer murder scene (T. 843).

Miami Detective Montecon because involved in the January, 1992 investigation of the robbery and kidnapping of Craig Van Ness (T. 847). He related the Van Ness crime (T. 848). Mr. Franqui was arrested during that offense (T. 853).

Detective Smith testified (T. 866). The shell casing found at the Kislak Bank was fired from the .9 mm that had been found.

The .9 mm partial shell removed from Steven Bauer was fired from the .9 mm that was found (T. 875).

A .357 bullet was removed from Bauer's chest. It had been fired from the .357 which had been recovered (T. 876).

Detective Smith, interviewed Mr. Franqui (T. 893).

Mr. Franqui lived with his girlfriend and two children (T. 886). He was unemployed (T. 894). He had been raised by his uncle (T. 895). His mother was in Cuba. He didn't know where his father was (T. 953). Mr. Franqui regretted not having a father while he was growing up (T. 954). He had tried to obtain his GED but failed (T. 886).

Mr. Franqui was approached by Fernandez with regards to a robbery scheme and became involved in this robbery murder (T. 900).

Mr. Franqui was not involved in the theft of the cars used in the robbery (T. 937, 957).

The plan was to rob the two tellers as they came out of the bank (T. 938). Franqui had a .9 mm pistol (T. 905). Ricardo Gonzalez had a .357 Magnum (T. 907).

When the tellers and Officer Bauer left the bank and walked towards the booths, Ricardo Gonzalez screamed something (T. 910). Officer Bauer began to pull his gun (T. 910). Franqui heard a shot (T. 911). Franqui fired at the officer then entered a car and left (T. 912).

When Franqui was told that it was not his shot that killed Officer Bauer, Mr. Franqui cried and hugged Detective Rivers (T. 959).

Dr. Bell, a medical examiner testified (T. 963) after reviewing Dr. Barnhart's autopsy report (T. 968).

The first wound to Officer Bauer was a ricochet off a pillar (T. 994). The bullet was consistent with having struck a pillar then going into Officer Bauer's leg (T. 984). The bullet did not go in straight (T. 982). The bullet imbedded itself in the femur bone (T. 978). Dr. Bell doubts that there was any permanent damage from the first shot to Bauer's leg (T. 994).

The second bullet wound was to Bauer's neck and went straight in (T. 981). That bullet wound was fatal (T. 991).

The wounds were consistent with Officer Bauer being "hit by the bullet that hits the pillar and then hits him in the hip", falls to the ground, "and then is shot from a second angle or second gunman, once he makes it to the ground" (T. 985).

Mario Franqui, Sr. testified that Leonardo was his nephew. He didn't know Leonardo's father. In Cuba, Mario's brother Fernando became involved with Leonardo's mother when she was pregnant (T. 1000).

Leonardo's mother is in Cuba. Leonardo last saw her in 1980 (T. 1001).

In 1980 Leonardo came to Miami with Mario's mother his brother, Fernando, Jr. and Mario's brother Fernando, Sr. (T. 1003).

Fernando Jr. died in 1981 from a cardiac condition (T. 1004).

After the death of Fernando Jr., Fernando Sr., who had taken the father role for Leonardo (T. 1001), started drinking and doing crack cocaine (T. 1004).

Fernando now lives in the street (T. 1005). Fernando, Sr. and Leonardo haven't had a meaningful relationship since Leonardo was ten years old (T. 1005).

Leonardo then lived in a house with Mario's mother (T. 1006).

While there, Leonardo was run over by an automobile, suffered a fractured thigh, requiring a "metal piece" imbedded in him and a long hospital stay (T. 1006).

When Leonardo was sixteen, he came to live with Mario (T. 1007).

Leonardo had two children with Vivian (T. 1008) and was a very good father giving his daughters what he never had, his parents" (T. 1009).

Leonardo treated Mario's family with respect (T. 1009).

Alberto Gonzalez, is the father of Vivian. Vivian and Leonardo lived together and had two children (T. 1018).

Leonardo was a good father and a good husband (T. 1019).

Mario Fernandez, Jr. is Leonardo's cousin (T. 1025).

When Leonardo calls him, Leonardo asks for books to improve himself (T. 1027).

Leonardo asks about his family and misses his daughters (T. 1027).

When speaking to Leonardo, Leonardo recognized that he had made a mistake, that he had done something stupid (T. 1030).

Cynthia Gonzalez is Vivian's sister (T. 1034). She knows Leonardo as a nice guy (T. 1033) and a great father (T. 1034). Leonardo stays in constant contact with his daughters and sends them whatever canteen money he has so that Cynthia can buy them necessities (T. 1040).

The Court then advised the jury, pursuant to Stipulation, that co-defendant Pablo Abreu had been sentenced to life imprisonment for this crime (T. 1043) and that co-defendant Pablo San Martin was ordered by (Florida) Supreme Court to be sentenced to life imprisonment (T. 1044).

This appeal follows.

QUESTION PRESENTED

I

WHETHER THE TRIAL COURT ERRED IN
EXCUSING FOR CAUSE POTENTIAL JURORS
PEREIRA AND LOPEZ?

II

WHETHER THE TRIAL COURT ERRED IN
INSTRUCTING AND ALLOWING THE JURY TO
BE INSTRUCTED THAT ITS
RECOMMENDATION SHOULD BE DEATH IF
THE AGGRAVATORS OUTWEIGH THE
MITIGATORS?

III

WHETHER THE TRIAL COURT ERRED IN
OVERRULING DEFENSE OBJECTIONS TO
PROSECUTORIAL CLOSING ARGUMENT
WHICH DENIED FRANQUI A FAIR TRIAL?

IV

WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IT COULD TAKE INTO CONSIDERATION THE LIFE SENTENCES GIVEN TO THE CO-DEFENDANTS AS A MITIGATING FACTOR?

V

WHETHER THE TRIAL COURT ERRED IN ITS SENTENCING ORDER IN FAILING TO FIND AND WEIGH EACH MITIGATING CIRCUMSTANCE PROPOSED BY THE DEFENSE?

VI

WHETHER THE TRIAL COURT ERRED IN FINDING THAT A SENTENCE OF DEATH WAS APPROPRIATE ON THE FACTS OF THIS CASE?

SUMMARY OF THE ARGUMENT

The trial court erred in excusing for cause potential jurors who would have honored their oaths and followed the instructions of the court.

The trial court erred in continuously instructing and allowing the prosecution to instruct the jurors that death should/must be imposed if the aggravators outweighed the mitigators.

The state's closing argument, allowed by the trial court, denied appellant a fair penalty phase/trial.

The trial court erred in refusing to instruct the jury, as requested by the defense, that the life sentences given to co-defendants could be considered a mitigating factor.

The trial court erred in failing to consider and evaluate mitigating factors which were established by the evidence in a "robbery gone bad", where a co-defendant fired the fatal shot, the death penalty should not have been imposed.

ARGUMENT

I

THE TRIAL COURT ERRED IN EXCUSING FOR CAUSE POTENTIAL JURORS PEREIRA AND LOPEZ

During the questioning of potential juror Pereira:

Unfortunately, Ms. Pereira, you, I have to return to. And I know that you have spoken probably more than anybody on the panel. But again, you said one thing to Mr. Laeser, and then at the other, you said another thing to Mr. Laeser and we need to know where you stand.

Ms. Pereira: Uh-huh.

Mr. Cohen: When he was addressing you earlier this morning, you said he would have to work to get you to vote for the death penalty but that you could do it.

Ms. Pereira: If I understand, that the circumstances, when the crime was committed, he had the opportunity to don't

shoot but he shoot the policeman, I think that I could -
- I would consider the death penalty.

Mr. Cohen: So if you could find that the aggravating
circumstances in this case are so compelling.

Ms. Pereira: Overwhelming.

Mr. Cohen: Outweigh what we present to your in mitigation, you
can still recommend the death penalty?

Mrs. Pereira: Exactly.

(T. 320)

The state requested the Ms. Pereira be excused for cause:

The Court: What's the defense position?

Mr. Cohen: We disagree, Judge, I think that my final questioning
of her, she indicated that under certain circumstances
and proper circumstances, she could still impose the
death penalty.

The Court: Well, I have a reasonable doubt about her ability to be
fair based upon her going back and forth and always
you gave your last example, you what you were trying
to tell her, would you be able to go through the

weighing process and against the mitigating, she threw in the aggravating would have to be overwhelming. I have a reasonable doubt about her ability to serve. Excuse her for cause. Daniel Tomaszewski?

(T. 348)

During the questioning of potential juror Lopez:

Mr. Cohen: Thank you, sir. Mr. Lopez, you were asked about whether or not you could cast the deciding vote. I've never been a juror and I don't know how voting goes on in a jury room. But say voting is done by secret lot and you're not the last one in line and nobody is pointing to you as the one to make a difference. If you had to cast a secret vote at the same time eleven other people were voting, and you found that the aggravating circumstances outweighed the mitigating circumstances, would you be able to vote for the death penalty?

Ms. Lopez: Yes.

(T. 341)

The State requested that Ms. Lopez be excused for cause (T. 349):

The Court: What's the defense position?

Mr. Cohen: We disagree there, Judge. The only time she said she wouldn't be able to impose - - would have trouble imposing the death penalty is if and when she was to be the deciding vote. If it was another type of balloting, a secret ballot, she said she would be able to weigh the factors and impose the death penalty in the appropriate case.

The Court: I think on a number of occasions, said she couldn't do it. She said she cracked a molar last night, she was so worried about her possibility of being selected and I have a reasonable doubt about her ability to be fair so I'll excuse her for cause. Nelson Ruiz?

(T. 349)

In the case of *Fitzpatrick v. State*, 437 So.2d 1072 (Fla. 1983), this Court considered causal challenges in a death case and stated:

“A man who opposes the death penalty, *no less than the one who favors it*, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror.” Witherspoon v. Illinois, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968) (emphasis added). Witherspoon requires that veniremen who oppose the death penalty be excused for cause only when irrevocably committed before the trial to voting against the death penalty under any circumstances or where their views on capital punishment would interfere with finding the accused guilty.

(p. 1075-6)

A juror cannot be removed for cause if that juror’s views on capital punishment would not prevent or substantially impair the performance of the juror’s duties as a juror in accordance with the juror’s instructions and the juror’s oath. See, Wainwright v. Witt, 105 S.Ct. 844 (1980).

In the case of Waterhouse v. State, 596 So.2d 1008 (Fla. 1992), this Court considered this issue with respect to a challenged juror and found:

According to the record, Marshall said that he would only vote to impose the death penalty if it were “justified” and that he would weigh the aggravating and mitigating factors to determine whether

the death penalty should be imposed. Marshall met the test of juror competency.

(p. 1016)

In the case of *Farina v. State*, 680 So.2d 392 (Fla. 1996), this Court again addressed this issue and stated:

In a capital case, it is reversible error to exclude for cause a juror who can follow his or her instructions and oath in regard to the death penalty. See, *Gray v. Mississippi*, 481 U.S. 648, 107, S.Ct. 2045, 95 L.Ed.2d 622 (1987); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976). The relevant inquiry is whether a juror can perform his or her duties in accordance with the court's instructions and the juror's oath. *Gray*, 481 U.S. at 658, 107 S.Ct. at 2051.

(T. 396)

In this case, the State gave no reason for its causal challenges to Pereira and Lopez. The record does not show that their views on the death penalty would prevent or substantially impair her from performing their duties as a juror in accordance with their instructions and oath.

On this Record, it was error to excuse potential juror Pereira and /or potential juror Lopez. On this Record appellant's death sentence must be Vacated.

II

THE TRIAL COURT ERRED IN INSTRUCTING
AND ALLOWING THE JURY TO BE
INSTRUCTED THAT ITS RECOMMENDATION
SHOULD BE DEATH IF THE AGGRAVATORS
OUTWEIGH THE MITIGATORS

During its preliminary instructions, the Court stated:

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

(p. 17)

The defense objected to the Court's instruction (T. 31).

The Court then again advised the prospective jurors:

If the aggravating circumstances outweighed the mitigating circumstances, you should recommend a sentence of death.

(T. 39)

The Court again advised prospective jurors:

If the aggravating circumstances outweighed the mitigating circumstances, the law would require that you make recommendation in favor of the death penalty.

(T. 42)

Again, the Court stated:

If you are selected to serve on the jury, you're going to have to listen to the evidence, evaluate it, and what the law tells us is that if the aggravating circumstances in the case outweigh the mitigating circumstances, you should recommend the sentence of death.

(T. 59)

The defense objected to the misstatements of the law handing the Court a copy of the *Henyard* opinion (T. 90). The Court refused to give a curative instruction requested by the defense (T. 91).

Emboldened by the Court's ruling, the State instructed the jury:

In other words, if the mitigation never outweighs the aggravation in your mind, if the aggravation is always more powerful, more weighed, then the mitigation, then you vote to recommend for the death penalty.

(T. 301)

The defense objected (T. 301) which objection was overruled (T. 301) and the Court again instructed:

But in the balancing process, even though the State has to prove each aggravating circumstances beyond a reasonable doubt, if you do the weighing, the aggravating outweigh the mitigating by any amount, then you should recommend a sentence for the death penalty.

(T. 302)

Later, the Court instructed the potential jurors:

If you feel that the aggravating circumstances outweigh the mitigating circumstances, then you should recommend that appropriate sentence is the death penalty.

(T. 367)

and,

But you may also feel that the value and the strength and the weight of the aggravating factors outweigh the mitigating factors

even though there are more mitigating factors. In that situation, then you should recommend a sentence of the death penalty.

(T. 367)

and,

But once you have established, under those standards, what evidence there is, of each aggravating and mitigating and the weighing process, the law just says if the weight of the aggravating is more than the mitigating, then you should recommend a sentence of death.

(T. 380)

and,

And do you think that you understand that if you're selected, you have to go through a weighing process and if the aggravating circumstances outweigh the mitigating circumstance, you should recommend a sentence of the death penalty. Do you understand that's what the law says.

(T. 387)

Again, the defense objected to the Court's instructions (T. 436). Again, the defense objection, based on *Henyard*, was overruled (T. 436).

Later the Court again addressed the potential jurors:

The Court: Okay. Now, having said that, you're on the jury. You listen to the evidence that's presented as to the aggravating circumstances and the mitigating circumstances, and you're an intelligent person, you say to yourself, okay, based upon this information, I believe that the aggravating factors outweigh the mitigating factors. Are you going to say to yourself, even though I have come to that conclusion and I know that I should recommend a sentence of death, I am not comfortable being asked to make this decision, knowing that I wasn't part of the process that found him guilty, so therefore I'm not going to recommend the death penalty, even though I should?

(T. 484)

Later, the State argued that the submittedly improper instructions given were proper (T. 506). The State dismissed *Henryard* as "an aberration" (T. 507). The Court agreed with the State (T. 507).

In the case of *Henryard v. State*, 689 So.2d 239 (Fla. 1996), this Court considered a situation in which a prosecutor instructed prospective jurors that “if the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death”.

In finding such comments to be error, this Court stated:

[12] In *Alvord v. State*, 322 So.2d 533, 540 (Fla. 1975), cert.denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), we stated:

Certain factual situations may warrant the infliction of capital punishment, but nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to Life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

See also *Gregg v. Georgia*, 428 U.S. 153, 206, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976) (stating that jury can constitutionally dispense mercy in case deserving of death penalty). Thus, a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.

In this case, we agree with Henyard that the prosecutor's comments that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances were misstatements of law.

(p. 249-250)

In Urbini v. State, 714 So.2d 411 (Fla. 1998), this Court again considered this issue and stated:

The prosecutor also misstated the law and we have defined it regarding the jury's obligation to recommend death. See, Henyard v. State, 689 So.2d 239, 249-50 (Fla. 1996)(stating that "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors"): see also Garron, 528 So.2d at 359 & n. 7 (misstatement of the law to argue "that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty").

(p. 421, n. 12)

Again, in Brooks v. State, 25 Fla.L.Weekly S417 (Fla. 2000), this Court addressed the issue and stated:

Brooks next argues that the prosecutor in this case, and in Urbini, see 714 So.2d at 421 n. 12, misstated the law regarding the jury's recommendation of a death sentence. Specifically, in this case, the prosecutor stated: "And if sufficient aggravating factors are proved beyond a reasonable doubt, you must recommend a death sentence unless those aggravating circumstances are outweighed. Outweighed by the mitigating circumstances." This was an improper statement by the prosecutor, as "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." Heynard v. State, 689 So.2d 239 249-50 (Fla. 1996); of Garron, 528 So.2d at 359 & n. 7 (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") Defense counsel objected to this misstatement, and in response the trial court correctly informed the jury concerning the law relating to the weighing of aggravating and mitigating circumstances. Thus if the prosecutor's initial misstatement of the law were viewed in isolation, we would find

that such misstatement was harmless error see Heynard, 689 So.2d at 249.

(S. 424)

In the instant case, the concerns of Garron and Henryard were disregarded. The Court and prosecution continually misstated the law and irreversibly ingrained in this jury that “if the aggravating factors outweigh the mitigating factors, the recommendation must be death”. This error was continually objected - to by the defense, to no avail. This error was never corrected. The continuous pounding of this misstatement of the law into the minds of this jury requires Reversal.

III

THE TRIAL COURT ERRED IN OVERRULING
DEFENSE OBJECTIONS TO PROSECUTORIAL
CLOSING ARGUMENT WHICH DENIED
FRANQUI A FAIR TRIAL

During its closing arguments the State commented, in referring to the money that Mr. Franqui obtained from the robbery:

Eleven days later, the armed kidnapping, armed robbery of Craig Van Ness. The defendant had gone from somebody who had worked for a living and lead a reasonably decent life to somebody who decided he's going start a new profession. I'm going to be a professional robber, a professional killer, a professional criminal. And those people have to be treated in a very simple, special way by the laws.

Let's talk about that 2400 bucks. He finally gets that money in his hand. Where does it go? What happens with that money? Does he suddenly take part of it and give, perhaps, a gift, a piece of jewelry to the mother of his children? Does he share with Mr.

Gonzalez, the man who's allowed him to live in his home, allowed him to use his car, share some of that with him? Some gifts? Something for the house? Does the, I'll use the phrase as unpleasantly as I can, does this great father take some of the money and buy food or clothing or things for his own children? Was there a single word of testimony, one iota of testimony that that's where the money from this crime went? Some of it went to paint that car so that they wouldn't be arrested and the went rest of it went to buy a gun so they could rob Greg Van Ness later.

Mr. Cohen: Objection. There's no evidence about that your Honor.

The Court: Overruled.

(T. 1079)

No evidence was presented that of the money Franqui received "Some of it went to paint that car so that they wouldn't be arrested and that rest of it went to buy a gun so they could rob Greg Van Ness later".

It was improper for the State to make comments outside of the evidence. See, *Huff v. State*, 437 So.2d 1087 (Fla. 1983); *Pope v. Wainwright*, 496 So.2d

798 (Fla. 1986) *Urbini v. State*, 714 So.2d 411 (Fla. 1998). This comment requires Reversal.

Later, the State commented (as to the Van Ness robbery):

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

Mr. Cohen: Objection.

The Court: All right. This is argument. Overruled.

Mr. Laeser: I don't want to guess about how that day would have ended. But it's nice to know that Craig Van Nest 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.

(T. 1104-5)

The implication of the State's remarks, made without Record evidence to support them, were that Franqui would have murdered Van Nest if the police had not arrested Franqui.

In the case of *Gleason v. State*, 591 So.2d 278 (Fla. 5th DCA 1991), an attempted sexual battery prosecution, the State commented during closing argument:

[T]hat's where you have [-] saw that night, him pulling her back to that van. To do what? To commit another felony? To commit another sexual battery? Maybe he didn't get finished off . . . or was he going to try to lessen the chance of detection of the felony that had already been committed. The defense, especially in cases like this, attack the victim. We talked about TV shows and the expectations. That's why they've got to attack the victim.

The clear implication is that the accused has committed other crimes and possibly was about to commit murder to silence the witness. These indefensible comments are fundamentally unfair and cause reversal. See also Stokes v. Wet 'N Wild, Inc., 523 So.2d 181 (Fla. 5th DCA 1988).

(T. 279)

As in Gleason, it was error to imply that Franqui would have killed Van Nest. As in Gleason, Reversible Error was committed. See, also, Jackson v. State, 690 So.2d 714 (Fla. 4th DCA 1997).

Due to either, but certainly due to both of the above comments, Reversible Error was committed in this case.

IV

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IT COULD TAKE INTO CONSIDERATION THE LIFE SENTENCES GIVEN TO THE CO-DEFENDANTS AS A MITIGATING FACTOR

The Record reflects that the defense requested (T. 1062) but was denied a jury instruction as to the less-than-death sentences of some co-defendants being a mitigating factor to be considered. The life sentences of co-defendants Abreu and San Martin had been presented to the jury by means of stipulation (T. 1043-4).

During its instructions to the jury, the Court advised:

Mitigating circumstances are factors that in part or in the totality of the defendant's life or character, may be considered as extenuating or reducing or moral culpability for the crime committed.

Among the mitigating circumstances you may have, if established by the evidence, are any other aspect of the

defendant's character, record or background and any other circumstances of the offense.

(T. 1157)

The co-defendant's life sentences were not part of Mr. Franqui's life or character, record or background. Neither were they part of the circumstances of the offense. The jury was not instructed that it could consider the co-defendant's life sentence in reaching an advisory sentence in this case. This was particularly prejudicial as the trial court, in its sentencing order (T. 171), considered the life sentences imposed on Pablo Abreu and Pablo San Martin to be a mitigating circumstance (T. 171).

Where evidence of a mitigating factor has been presented to a jury, an instruction on the mitigating factor is required at the penalty phase. See, *Bouden v. State*, 588 So.2d 225 (Fla. 1991).

In the case of *O'Callaghan v. State*, 542 So.2d 1324 (Fla. 1989), the defendant argued that the trial court had insufficiently instructed the jury as to mitigating factors. Agreeing this Court stated:

The jury instructions in the instant case clearly violated *Hitchcocks*. Nothing suggests that the jury knew it could consider nonstatutory O'Callaghan's penalty phase.

(P. 1326)

and,

The question in the instant case is whether the jury, in the penalty phase, knew it could take into consideration, as non-statutory mitigating evidence, the disparate treatment and punishment given the other participants. We have previously held that the disparate sentencing of individuals involved in the same offense may be considered in determining an appropriate sentence (citations omitted). Although the jury knew that E. Tucker would be sentenced for second-degree murder, that Cox had been granted immunity, and that LaPointe had not been charged with a crime, it did not know that this information could be used in recommending an appropriate sentence for O'Callaghan. Applying the test set forth by this Court in *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), we are unable to say that the error in this case was harmless.

(P. 1326)

As in *O'Callaghan*, nothing in the instant jury instructions suggests that the jury knew it could take into consideration as non-statutory mitigation evidence, the disparate treatment and punishment given the other participants.

This was particularly harmful as the trial court, in its sentencing order, recognized the disparate treatment and punishment given to Abreu and San Martin to be a non-statutory mitigating circumstance.

As in *O'Callaghan*, the trial court's failure to give a jury instruction as requested by the defense (T. 1062) was Reversible Error.

V

THE TRIAL COURT ERRED IN ITS
SENTENCING ORDER IN FAILING TO FIND
AND WEIGH EACH MITIGATING
CIRCUMSTANCE PROPOSED BY THE
DEFENSE

During its closing argument, the defense argued that Franqui was abandoned by his parents (T. 1145), his mother “abandoned him when he was one or two years old” (T. 1145). He didn’t know where his father was (T. 953). His father was unknown (T. 1000).

The defense later (T. 1146) argued: “Should also consider his relationship with his family” (T. 1146).

In its sentencing order, the trial court lumped Franqui’s abandonment by his parents into the general category - “The defendant’s family history” (R. 167). The court went on to find “that the defendant has not reasonably established that his family history is a non-statutory mitigating circumstance (R. 169).

Mr. Franqui first submits that the trial court's failure in finding that his abandonment by his natural parents was not a mitigating factor was error. When a child grows-up being not wanted by either person who made him that cannot help but have a detrimental effect on his development. His abandonment by both persons who conceived him was a non-statutory mitigating factor that should have been considered by the trial court. The trial court's failure to both consider this mitigating factor and give it the weight it deserved was error.

Additionally, a perusal of Franqui's family history (R. 167-169) reveals a child who was certainly not raised by "Ozzie and Harriett". The trial court's failure to give this "tinkers to errors - to chance" child rearing any weight at all as a non-statutory mitigating factor was error.

The defense spoke about Franqui's "new found maturity" (T. 1150), a "sincere heart-felt maturity" (T. 1150), a person who's "had an opportunity to mature, he is maturing and he will continue to mature and because of that maturity, he will continue to be a valuable asset to his family" (T. 1150-1).

The trial court does not mention this mitigating factor of maturity in its sentencing order. The trial court failed to consider it. It's failure to even consider this argued non-statutory mitigating factor was error.

In its sentencing order, the trial court found that “The evidence is uncontroverted that Franqui did not fire the fatal bullet. This fact, then, has been reasonably established.” (R. 170). The trial court went on (apparently buying the state’s argument) to speak of Franqui’s other violent convictions rather than dwell on the fact it found - that Franqui did not fire the fatal shot in this case! The court’s conclusion that it is “not reasonably convinced that this mitigating circumstance has been established “ is erroneous and ignores the *Edmund/Tison* rationale that makes it infinitely more difficult to validly impose a death sentence on a defendant who did not fire the fatal bullet. Franqui’s bullet was not fatal. Officer Bauer would have recovered from the resulting leg wound. The trial court’s failure to find and weigh this mitigating factor was error.

The trial court, in considering mitigating evidence, must determine whether the facts alleged in mitigation are supported by the evidence. A trial court is obligated to find and weigh all valid mitigating evidence available in the record at the conclusion of the penalty phase. Evidence is mitigating if, in fairness or in the totality of the defendant’s life or character it may be considered as extenuating or reducing the degree of moral culpability for the

crime charged. See, *Merk v. State*, 25 Fla.L.Weekly S584 (Fla. 2000). A sentencing order must expressly discuss and weigh the evidence offered in mitigation. See, *Jackson v. State*, 704 So.2d 500 (Fla. 1997). A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. See, *Ferrell v. State*, 653 So.2d 366 (Fla. 1995).

The mitigator of “abandonment by parents” was established by the evidence, but not considered, found or weighed.

The mitigator of “family history” was established but not found or weighed.

The mitigator of “new found maturity” was established by the evidence, but not considered, found or weighed.

The mitigator of “did not fire the fatal bullet was admittedly by established, but not found or weighed.

By failing to consider or weigh any or all of these mitigators, the trial court erred and this cause must be Remanded for Re-sentencing.

VI

THE TRIAL COURT ERRED IN FINDING THAT A SENTENCE OF DEATH WAS APPROPRIATE ON THE FACTS OF THIS CASE

The penalty of death is available for only the most aggravated, the most indefensible of crimes. See, *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

In the case of *Tillman v. State*, 733 So.2d 980 (Fla. 1999), this Court stated:

Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the circumstances in a case and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

(p. 990)

This case is a robbery gone wrong in which a police officer was killed by a co-defendant.

In the case of *Terry v. State*, 668 So.2d 954 (Fla. 1996), this Court indicated that a “robbery gone bad” was not necessarily a death case. Indeed,

such “robberies gone bad” have been held not to justify the death penalty even where the defendant was the shooter. See, *Sinclair v. State*, 657 So.2d 1138 (Fla. 1995); *Thompson v. State*, 647 So.2d 824 (Fla. 1994).

As appellant Franqui did not fire the fatal shot in this “robbery gone bad”, the death penalty is completely inappropriate as to him. See, *Curtis v. State*, 685 So.2d 1234 (Fla. 1996).

The fact, that Franqui was not the fatal shooter requires that an *Enmund/Tison* analysis be conducted in this case. See, *Fernandez v. State*, 24 Fla.L.Weekly S102 (Fla. 1999).

The trial court failed to include in its sentencing orders findings that support the *Enmund/Tison* culpability requirement in imposing the death penalty (R. 173). See, *Benedith v. State*, 717 So.2d 472 (Fla. 1998). For this reason alone, the death sentence must be Vacated.

When considering the circumstances of this case, where it was a “robbery gone bad” with the fatal shot being fired by a co-defendant, the imposition of the death penalty on the facts of this case is not proportional and must be Vacated and a Life Sentence imposed.

CONCLUSION

In light of the foregoing facts, arguments, and authorities, appellant submits that the death penalty imposed in this case must be Vacated and this cause Remanded for appropriate proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this ____ day of October, 2000.

Respectfully submitted,

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