IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-182

LEONARDO FRANQUI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case involves the appeal of the circuit court's summary denial of a Rule 3.851 motion. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"T." –- trial transcript;

"R2." –- record from resentencing on the direct appeal to this Court;

"PC-R." -- record on appeal from denial of first Rule 3.851motion;

"PC-SR." -- supplemental record on appeal from denial of first Rule 3.851 motion;

"2PC-R." -- record on appeal of denial of the second Rule 3.851 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Franqui has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Franqui, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

On January 3, 1992, a bank was robbed by four gunmen in North Miami.[1] During the robbery a police officer was shot and killed (T. 956-60). A couple of weeks later the police investigation led to Mr. Franqui and four other individuals.[2] Mr. Franqui, along with his four co-defendants, was 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, third degree grand theft and burglary (R. 1-5).

In May of 1994, Mr. Franqui was tried jointly with two of his co-defendants, Gonzalez and San Martin (R. 24).[3] Over Mr. Franqui's objection during the presentation of its case, the State was permitted

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[1]Because Mr. Franqui was also charged with a homicide that occurred on December 6, 1991, in Hialeah and had multiple co-defendants in that case, a common way to reference to the two different cases in by the city in which they occurred. The homicide at issue in the current appeal is frequently referenced as the North Miami case, while the December 6th homicide is often referenced as the Hialeah case.

[2]The other co-defendants in the North Miami case were Pablo San Martin, Ricardo Gonzalez, Fernando Fernandez and Pablo Abreu.

The co-defendants in the Hialeah case were Pablo San Martin and Pablo Abreu. *Franqui v. State*, 699 So. 2d 1312 (Fla. 1997).

[3]Co-defendant Fernandez in the North Miami case was tried by a separate jury at the same time. Co-defendant Abreu negotiated a guilty plea prior to trial and avoided a death sentence in the North Miami case.

Co-defendant Abreu also negotiated a plea prior to trial and avoided a death sentence in the Hialeah case. Pursuant to his plea agreement, he testified against Mr. Franqui in the Hialeah case. *Franqui v. State*, 699 So. 2d at 1324.

to introduce statements by co-defendants Gonzalez and San Martin.[4] Mr. Franqui was convicted of all charges (T. 2324-25). Thereafter, the jury returned a death recommendation and the sentencing judge imposed a sentence of death on the first degree murder conviction (R. 480, 588-601).

On direct appeal, this Court found that the introduction of co-defendant Gonzalez's statement was error. *Franqui v. State,* 699 So. 2d 1332, 1335-36 (Fla. 1997).[5] However, a majority of the Court concluded that the introduction of the statement was harmless as to the guilt phase of the trial, reversing only as to the imposition of

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[4]Prior to trial, co-defendant Fernandez filed a motion for severance of defendants due to the fact that San Martin and Gonzalez had made post-arrest statements which directly incriminated him (R. 115). Mr. Franqui, who had joined the motion, renewed it throughout the trial and prior to the penalty phase (T. 17-33, 57-58, 80-88, 1347, 1375-76, 1398-1400, 1408, 1419-20, 1544, 1564, 1773, 1776, 2348, 2908, 2917, 3101). Over Mr. Franqui's objections, San Martin's and Gonzalez's statements were introduced without deletion of their references to Mr. Franqui upon the trial court's finding that they were "interlocking." (R. 122-28).

[5]The majority opinion of this Court stated:

> 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 of unreliability that attaches to accomplices' hearsay confessions which implicate the defendant.
>
> Thus, the admission of Gonzalez's confession was error.

Franqui, 699 So. 2d at 1335-36.

a death sentence. *Id.* at 1336.[6] Accordingly, Mr. Franqui's case was remanded for a new sentencing proceeding before a newly impaneled jury. *Id*.

A new penalty phase was held before a second jury in August, 1998 (R2. 1). At the 1998 resentencing, the State presented Mr. Franqui's conviction of first degree murder in the Hialeah case as establishing that Mr. Franqui was previously convicted of a crime of violence.[7] After the presentation of the evidence, the jury returned a death recommendation (R2. 155). The sentencing judge followed the recommendation and imposed a sentence of death (R2. 158-75). In his findings, the judge found 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).

Franqui v. State, 804 So. 2d 1185, 1191 n. 2 (Fla. 2002). The judge found no statutory mitigating circumstances, while he identified four nonstatutory mitigating circumstances as present:

> (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

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[6]Two justices dissented as to the failure to order a new trial as to the erroneous introduction of Gonzalez's statement. *Id.* at 1337-38.

[7]This Court had affirmed Mr. Franqui's conviction and sentence of death in the Hialeah case in 1997. *Franqui v. State*, 699 So. 2d at 1315.

> Franqui's family history and the fact that he did not fire the fatal bullet as nonstatutory mitigating circumstances.

Id. at 1191 n. 4.[8]

In Mr. Franqui's second direct appeal in the North Miami case, this Court affirmed the imposition of a death sentence. This Court did find that the trial judge erred when he "comment[ed] that the law required jurors to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances misstated the law." *Franqui v. State*, 804 So. 2d at 1193. However over the objection of three dissenters, a majority of this Court concluded that "Franqui was not prejudiced by this error." *Id*.[9]

Following the direct appeal, Mary Catherine Bonner was

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[8]For sake of clarity, it should be noted that Pablo San Martin received a life sentence for his role in the North Miami case. In the Hialeah case, San Martin received a death sentence which this Court affirmed on direct appeal. *San Martin v. State*, 705 So. 2d 1337 (Fla. 1997).

[9]Justice Shaw writing for the three dissenters explained their reasoning as to why they believed that Mr. Franqui's sentence of death should be vacated and remanded:

> 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.
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> 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.

Franqui v. State, 804 So. 2d at 1199.

appointed to serve as Mr. Franqui's registry counsel in the North Miami case.[10]

On January 8, 2003, Mr. Franqui filed a Rule 3.851 motion in the circuit court (PC-SR. 759-74). The motion was subsequently withdrawn and refiled on April 7, 2003 (PC-R. 100-161). An evidentiary hearing was conducted on August 24, 2004 (PC-SR. 465-635). Included in the Rule 3.851 motion was Mr. Franqui's claim that he received ineffective assistance of counsel at the resentencing. *Franqui v. State*, 965 So. 2d 22, 32-33 (Fla. 2007).[11] Following the evidentiary hearing, the circuit court denied Mr. Franqui's motion for postconviction relief (PC-R. 290-329). Mr. Franqui appealed to this Court. After briefing, this Court affirmed the denial of postconviction relief. *Franqui v. State,* 965 So. 2d

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[10]Ms. Bonner was not appointed to serve as registry counsel for Mr. Franqui in the Hialeah case.

[11]In the subsequent appeal of the denial of relief, this Court found that Mr. Franqui's registry counsel had failed to fully plead his ineffective assistance of counsel claim:

> 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.

Franqui v. State, 965 So. 2d at 32. Dr. Toomer's 1993 letter which this Court referenced was attached to the State's response to the 2010 Rule 3.851 motion and is accordingly in the record before this Court (2PC-R. 148-51).

22 (Fla. 2007).

Mr. Franqui filed a petition for writ of habeas corpus with this Court simultaneously with the submission of his initial brief on appeal. However, this Court denied the habeas petition in the same opinion in which it affirmed the denial of the motion for postconviction relief.

On September 12, 2007, Mr. Franqui filed a petition for writ of habeas corpus in the District Court for the Southern District of Florida. Mary Catherine Bonner, who had been appointed by the state circuit court to represent Mr. Franqui in postconviction proceedings under §27.711 signed the petition and sought appointment as Mr. Franqui's counsel by the federal court in a separate motion. An order appointing Ms. Bonner as Mr. Franqui's counsel under the federal Criminal Justice Act was entered on October 2, 2007. Subsequently, on July 10, 2008, the district court entered its order denying the habeas petition. Mr. Franqui appealed to the Eleventh Circuit.[12] On November 20, 2008, Mr. Franqui filed an Application for a Certificate of Appealability (hereinafter COA). On December 15, 2008, the district court entered a one page *pro forma* order denying the request for a COA.

[12]On October 10, 2008, as counsel for Mr. Franqui, Bonner filed a motion to reopen the case and for re-entry of the order denying relief in order to permit Bonner to file a timely notice of appeal on behalf of Mr. Franqui. On October 23, 2008, the district court granted the motion in order to permit an appeal to be taken from the order denying the 2254 petition.

On April 7, 2009, Mr. Franqui filed a *pro se* motion for relief from judgment pursuant to Rule 60(b) as well as a motion to discharge counsel and to appoint alternative counsel. The motion was denied by the district court on April 20, 2009. Mr. Franqui filed a *pro se* notice of appeal and application for a COA on May 11, 2010. The application for a COA was granted by the district court on May 14, 2009 (Doc. 30).[13]

Thereafter in connection with the appeal from the denial of habeas relief, counsel for Mr. Franqui filed an application for a COA from the denial of the federal habeas petition with the Eleventh Circuit. Subsequently, Mr. Franqui filed a *pro se* motion with the Eleventh Circuit requesting that Bonner be discharged as his federal counsel and that the Eleventh Circuit appoint alternative counsel to represent him. On August 12, 2009, the motion to discharge Bonner was granted. In its order, the Eleventh Circuit indicated that new counsel would be appointed and that the new counsel would be permitted to supplement or amend Mr. Franqui's pending application for a COA.

On August 26, 2009, undersigned counsel was appointed as Mr. Franqui's counsel in the federal proceedings under the Criminal Justice Act. On December 2, 2009, Mr. Franqui filed an Amended Application for Certificate of Appealability and/or Motion to Vacate *Pro Forma* Order Denying COA and Remand for Reconsideration. On

[13]The State later asked the Eleventh Court to vacate the COA issued as to the denial of Mr. Franqui's Rule 60(b) motion. The Eleventh Circuit denied the State's request on February 18, 2010.

December 7, 2009, the Eleventh Circuit remanded the matter and directed the district court to consider the issues raised in Mr. Franqui's amended application for a COA. Thereafter, on January 28, 2010, the district court issued a seventeen page order denying the amended application for a COA.

Mr. Franqui subsequently filed an application for a COA with the Eleventh Circuit as to the appeal of the denial of the habeas petition. This application for a COA was denied on May 18, 2010.

However, the appeal of the denial of the Rule 60(b) motion on which the district court had issued a COA proceeded. Following briefing and oral argument, the Eleventh Circuit issued an opinion on April 22, 2011, vacated the district court's order on the Rule 60(b) motion, found a lack of subject matter jurisdiction, and remanded with instructions to dismiss the motion for want of jurisdiction. The Eleventh Circuit explained that the *pro se* Rule 60(b) motion "[did] not itself raise new claims for habeas relief, but rather [sought] permission to do so in further proceedings." *Franqui v. Florida*, 638 F.3d 1368, 1371 (11th Cir. 2011). As a result, the Court treated the motion as a successive habeas petition—as if it had raised new claims for habeas relief—based on its reading of a passage from *Gonzalez v. Crosby*, 545 U.S. 524 (2005), that classifies Rule 60(b) motions as successive habeas petitioner when they present new claims "even claims couched in the language of a true Rule 60(b) motion." *See id*. at 1371-72.

Meanwhile, undersigned counsel discovered in November of 2010 that Mr. Franqui was without registry counsel in Florida state courts. When Ms. Bonner ceased to represent Mr. Franqui in federal court, she was in violation of the contract that she was required to execute with the Department of Financial Services under §27.711. At that time, Ms. Bonner ceased her representation of Mr. Franqui in state court. Undersigned counsel, concerned about the failure of prior registry counsel to present a claim on behalf of Mr. Franqui that his mental retardation precluded the imposition of a sentence of death and concerned about the need to present a *Porter v. McCollum* claim on behalf of Mr. Franqui, consulted with Mr. Franqui, who expressed his desire that counsel seek to be appointed as registry counsel and present the circuit court with all claims that could be made on his behalf. Mr. Franqui made it clear that he wished to have his claims presented to the circuit court and, if the circuit court denied those claims, he wished to appeal any and all adverse rulings to this Court. As a result, undersigned counsel served a motion seeking to be appointed as registry counsel on November 26, 2010 (2PC-R 81). Because of the potential expiration of the one-year clock to present a *Porter v. McCollum* claim, undersigned counsel filed a Rule 3.851 motion on November 29, 2010, which included both the *Porter v. McCollum* claim and the mental retardation claim as well as a claim premised upon new evidence of a *Brady/Giglio* violation (2PC-R. 47).

Over the State's objection,[14] the circuit court issued an order appointing undersigned counsel as Mr. Franqui's registry counsel on January 13, 2011 (2PC-R. 119). From experience, undersigned counsel was aware that by law the appointment was not official until a contract was executed between undersigned counsel and the Department of Financial Services concerning the terms of the appointment (2PC-R. 296). After receiving the order of appointment, undersigned counsel immediately notified the Department of Financial Services of the order of appointment in order to expedite the issuance of the contract and its formal execution. Ultimately, the Department of Financial Services sent the formally executed contract to undersigned counsel by mail on February 8, 2011. Undersigned counsel received the executed contract on February 10, 2011 (Petition for Belated Appeal at 6, *Franqui v. State*, Case No. SC11-2013).

Meanwhile, despite the lack of a formally executed contract, the circuit court scheduled a case management hearing on January 19, 2011 (2PC-R. 298). Undersigned counsel appeared at the case management hearing and orally argued Mr. Franqui's claims.[15]

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[14]The State first objected to the appointment of undersigned counsel as Mr. Franqui's registry counsel at a hearing conducted on January 10, 2011 (2PC-R. 272-80). A second hearing was conducted on January 13, 2011. During that hearing the State again objected to the appointment of the undersigned as Mr. Franqui's registry counsel (2PC-R. 285-94). The presiding judge overruled the State's objection and announced that he was appointing undersigned counsel to represent Mr. Franqui (2PC-R. 295). The State did not appeal the ruling.

[15]The case management hearing was held on January 19, 2011, as the

Without waiting for the contract with the Department of Financial Services to be executed making undersigned counsel's appointment final, the presiding judge signed an order denying Mr. Franqui's motion to vacate on January 21, 2011. At a proceeding conducted on January 28, 2011, without notice to either Mr. Franqui or undersigned counsel, the signed order was provided to the clerk of court and filed in open court (2PC-R. 36).

On January 28, 2011, the clerk of the circuit court for unknown reasons executed a certificate indicating that the copy of the circuit court's order denying Mr. Franqui's Rule 3.851 motion mailed to counsel was true and correct (2PC-R. 206). The copy of the order that undersigned counsel received from the clerk's office came in an envelop that bore a metered postmark of February 2, 2011 (2PC-R. 206).[16]

On February 8, 2011, the Department of Financial Services

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clerk's progress notes reflect (2PC-R. 33). However, a transcript of the hearing could not obtained despite counsel's repeated efforts to locate the court reporter who was present and reporting the hearing (See Attachment, ¶6-9 of Affidavit of Martin J. McClain). As a result, Mr. Franqui requested that the record on appeal be provided to this Court without a transcript of the January 19, 2011, case management hearing (2PC-R. 246).

[16]*Rule 3.851(5)(D)* provides that: "The clerk of the trial court shall promptly serve upon the parties and the attorney general a copy of the final order, with a certificate of service." The order was not placed in the mail and sent to counsel until February 2, 2011, when a postage meter was used to place postage on the envelop in which a copy of the order was sent to undersigned counsel by the clerk of the court as required by *Rule 3.851(5)(D)*. No certificate of service was executed by the clerk of the circuit court and attached to the order served on counsel.

sent counsel the executed contract confirming and finalizing his appointment as Mr. Franqui's registry counsel (2PC-R. 206). Counsel received the executed contract on February 10, 2011 (2PC-R. 206). On February 16, 2011, undersigned counsel served a motion to amend the Rule 3.851 to include a challenge to the method of execution in light of the unavailability of sodium thiopental based upon new information that counsel received on February 7, 2011 (2PC-R. 193). On Saturday, February 19, 2011, undersigned counsel sent a motion for rehearing in overnight mail to the clerk of court (2PC-R. 206).[17] As explained in the motion, Mr. Franqui understood that the 15 day clock for filing a motion for rehearing commences when the denial of a Rule 3.851 is mailed or handed to parties and that an additional three days is provided when service is by mail (2PC-R. 207). However, the clerk's office did not stamp the motion as received until February 24, 2011 (2PC-R. 206).[18] The presiding judge entered an order denying the motion for rehearing as untimely; in this order he found in the order that "Defendant filed a Motion for Rehearing on February 19, 2011" (2PC-R. 215). The judge ruled that the "Motion for Rehearing is time barred and does not raise any errors of law" (2PC-R. 215). The order

[17]In this motion, undersigned counsel raised the clerk's office failure to comply with *Fla. R. Crim. Pro. 3.851(f)(5)(D)*, and "serve upon the parties and the attorney general a copy of the final order, with a certificate of service" (2PC-R. 207).

[18]Tellingly, the clerk's office also stamped the State's Response to Motion for Rehearing as received February 24, 2011 (2PC-R. 211). Obviously by the time the State filed this February 24th response, it had been in possession of the rehearing motion for some time.

denying the motion for rehearing as untimely, while signed March 7, 2011, and filed stamped by the clerk on March 15, 2011 (2PC-R. 215), was not put in an envelop and sent to counsel by the clerk of court until March 17, 2011. Undersigned counsel filed a notice of appeal on April 15, 2011 (2PC-R. 217).

On July 12, 2011, this Court granted the State's motion to dismiss on the grounds that the notice of appeal had been filed untimely. In this order, this Court stated:

> Appellee's Motion to Dismiss filed in the above cause is granted and it is ordered that the Notice of Appeal be and the same is hereby dismissed **but with express leave for the appellant to file a proper petition for belated review**.

Franqui v. State, Case No. SC11-810 (July 12, 2011)(emphasis added). Thereafter, Mr. Franqui filed a motion for rehearing/clarification which this Court subsequently denied on September 13, 2011.

On October 18, 2011, undersigned counsel on behalf Mr. Franqui filed a petition for belated appeal. On January 31, 2012, this court granted the petition and provided a new case styled as *Franqui v. State*, Case No. SC12-182, as the vehicle to hear Mr. Franqui's appeal of the denial of his Rule 3.851 motion. Thereafter, the record on appeal was compiled and provided to this Court.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. Normally, where evidentiary development has been permitted in circuit court rulings

of law are reviewed *de novo* while deference to the trial court is given as to findings of fact. However, here the circuit court denied an evidentiary hearing, and therefore, the facts alleged by Mr. Franqui must be accepted as true for purposes of this appeal in order to determine whether Mr. Franqui was and is entitled to an opportunity to present evidence in support of his factual allegations. *Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

SUMMARY OF THE ARGUMENTS

1. Following the decision in *Porter v. McCollum* and this Court's ruling in *Walton v. State,* the manner in which Florida's capital sentencing scheme operates is arbitrary and capricious within the meaning of the Eighth Amendment, and thus unconstitutional. The arbitrary manner in which the *Porter v. McCollum* analysis of ineffective assistance of counsel claims is being retroactively applied violates *Furman v. Georgia*. This arbitrariness infects in Mr. Franqui's death sentence. Accordingly, his sentence of death stands in violation of the Eighth Amendment principles enunciated in *Furman v. Georgia*.

2. The circuit court erred in summarily denying Mr. Franqui's claim premised upon Abreu's postconviction affidavit and testimony on behalf of San Martin in his Rule 3.851 motion because Abreu's postconviction affidavit and testimony demonstrate that the State withheld *Brady/Giglio* material from Mr. Franqui when it

introduced his conviction in the Hialeah case in order to establish an aggravating circumstance at his resentencing. This undisclosed favorable information, or alternatively newly discovered impeachment evidence would have reduced the weight of the prior crime of violence aggravating circumstance. As a result, Abreu's postconviction affidavit and testimony undermine confidence in the reliability of the jury's death recommendation. At a minimum, an evidentiary hearing was and is warranted on Mr. Franqui's claim.

3. The circuit court erred in summarily denying Mr. Franqui's mental retardation. An evidentiary hearing on the claim is required.

ARGUMENT

ARGUMENT I

MR. FRANQUI'S SENTENCE OF DEATH VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER THE PROPER *STRICKLAND* ANALYSIS FOR THE REASONS EXPLAINED IN *PORTER V. McCOLLUM* AND THE FAILURE TO APPLY *PORTER V. McCOLLUM* TO MR. FRANQUI'S INEFFECTIVE ASSISTANCE OF COUNSEL IS ARBITRARY AND VIOLATES *FURMAN V. GEORGIA*, AND THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT

A. Introduction

On December 1, 2011, this Court issued an opinion in *Walton v. State*, 77 So. 3d 639 (Fla. 2011).[19] Mr. Franqui, like Walton, has

[19]Interestingly, it was the State that filed a motion for clarification in *Walton v. State*, complaining that this Court's opinion "represents a 'green light' to the collateral defense bar". Appellee's Motion for Clarification, *Walton v. State*, at 3. This Court denied the State's motion in *Walton* on December 30, 2011.

asserted that *Porter v. McCollum*, 130 S. Ct. 447 (2009), represented a change in Florida law, specifically this Court's *Strickland* jurisprudence.[20] Thus, based on *Witt v. State*, 387 So. 2d 922 (Fla. 1980), Mr. Franqui argued in his Rule 3.851 motion at issue in this appeal that *Porter* should be retroactively applied to Mr. Franqui's ineffective assistance of counsel claim.

This Court has now found that *Porter* "does not constitute a fundamental change in the law that mandates retroactive application under *Witt*." *Walton*, 77 So. 3d at 644.[21] Nevertheless, this Court went on in *Walton* to state that *Porter v. McCollum* constituted "a mere application and **evolutionary refinement and development of the *Strickland* analysis**" *Id*.[22] According to this Court's analysis in

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[20]The U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), adopted a standard for measuring the performance of counsel in order to ascertain whether a criminal defendant's Sixth Amendment right to effective representation had been honored. As explained in *Strickland*, the purpose of the Sixth Amendment right is to insure that the trial is a constitutionally adequate adversarial testing and that it guarantees a reliable result.

[21]While Mr. Franqui's recognizes the Court's recent opinion in *Walton* has adversely decided whether *Porter v. McCollum* qualifies as new Florida law under *Witt v. State*, Mr. Franqui herein does request in Section B of this argument that this Court reconsider its *Witt* analysis for all the reasons he argued in his Rule 3.851 motion that *Porter v. McCollum* qualified as new law under *Witt*.

[22]Thus, this Court's decision in *Walton* has created a new issue as to Mr. Franqui, *i.e.* whether the failure to give Mr. Franqui, who was sentenced to death in 1998, the benefit of an evolutionary refinement that was applied to a 1986 capital sentencing and to George Porter's right to effective representation in that 1986 capital proceeding is arbitrary within the meaning of the Eighth Amendment and within the meaning of the Equal Protection and Due Process Clauses of the

Walton, the "evolutionary refinement and development" of the *Strickland* analysis that the United States Supreme Court announced in *Porter v. McCollum* did not constitute a substantial enough change in Florida law to qualify under *Witt* for retroactive application.[23] But of course, the U.S. Supreme Court chose to announce this "evolutionary refinement and development" of the *Strickland* standard in *Porter v. McCollum* and apply it to George Porter's 1986 capital sentencing proceeding, a proceeding that occurred twelve years before Mr. Franqui's 1998 resentencing proceedings.[24]

The "evolutionary refinement and development" of the *Strickland* standard entitled Mr. Porter to obtain relief from his death sentence which had been imposed in 1986. While finding the "evolutionary refinement and development" was not substantial enough to qualify under *Witt* in its opinion in *Walton*, this Court did not address in that decision Mr. Franqui's Eighth and Fourteenth Amendment claims regarding his sentence of death which was returned

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Fourteenth Amendment.

[23]Mr. Franqui recognizes that *Witt v. State* involves a question of state law. However, state law may not be applied in a fashion that violates the Eighth or Fourteenth Amendments. While this Court's decision in *Walton v. State* may have resolved the state law issue of how to apply *Witt v. State* to *Porter v. McCollum*, it did not resolve whether depriving Mr. Franqui the benefit of the decision in *Porter v. McCollum* violates his Eighth and/or Fourteenth Amendment rights.

[24]Within this Court's opinion in *Walton v. State*, there is no discussion or even recognition of the fact that the U.S. Supreme Court applied its "evolutionary refinement" to a 1986 capital sentencing proceeding in *Porter v. McCollum*.

during a capital re-sentencing proceeding in 1998, twelve years after George Porter's sentence of death. *See Porter v. State*, 564 So. 1060 (Fla. 1990). By virtue of *Porter v. McCollum*, the "evolutionary refinement" of *Strickland* was thus part of George Porter's right to effective representation in a capital sentencing conducted in 1986.[25] To have such an "evolutionary refinement" apply in a 1986 capital proceeding, but not in a 1998 capital proceeding, can only be described as arbitrary.[26] It is arbitrary within in the meaning of the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972). And, likewise, it is arbitrary within the meaning of the Equal Protection and Due Process Clauses of the Fourteen Amendment.

Due to this Court's recognition that *Porter v. McCollum* constituted an "evolutionary refinement and development" of the *Strickland* analysis, it violates Mr. Franqui's right to equal protection and due process by depriving him of the same benefit that Mr. Porter received at a 1986 capital sentencing proceeding, *i.e.*,

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[25]This Court's decision denying George Porter's ineffective assistance claim issued in 2001. *See Porter v. State*, 788 So. 2d 917 (Fla. 2001). This was well before this Court's 2006 decision addressing Mr. Franqui's ineffective assistance of counsel claims. And this Court's 2001 decision in *Porter v. State*, which was part of this Court's jurisprudence at the time of its decision to deny Mr. Franqui's ineffectiveness claims, was found to be contrary to or an unreasonable application of federal law by virtue of the "evolutionary refinement" in *Porter v. McCollum*.

[26]It is equally arbitrary if one uses the date of this Court's decision denying a capital defendant's ineffective assistance of counsel claim. This Court issued *Porter v. State* in 2001, while *Franqui v. State* issued in 2007.

the refinement and development of the *Strickland* analysis announced in *Porter v. McCollum.*[27] *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (fairness requires the recognition of "the principle of treating similarly situated defendants the same"). Under the Eighth Amendment, to deprive Mr. Franqui of what Mr. Porter received for no apparent reason other than whether Mr. Franqui's first Rule 3.851 motion had been denied by this Court when the decision in *Porter v. McCollum* was rendered is arbitrary and capricious and violates of *Furman v. Georgia*, 408 U.S. 238 (1972).[28] Indeed, there will be a number of similarly situated death sentenced individuals in Florida who merely by virtue of the timing of their federal habeas petitions and because their federal habeas petition has yet to be finally resolved, who will receive the benefit of the decision in *Porter v. McCollum* and have that decision applied by the federal court in

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[27]Mr. Franqui recognizes that the U.S. Supreme Court did not call its decision in *Porter v. McCollum* an "evolutionary refinement." That is this Court's description of *Porter v. McCollum.* The U.S. Supreme Court in *Porter* indicated that this Court's decision in *Porter v. State* was contrary to or an unreasonable application of clearly established federal law, *i.e. Strickland v. Washington*.

[28]Chronology cannot be used to justify in any rational manner the application of the "evolutionary refinement" set forth in *Porter v. McCollum* to a 1986 capital sentencing proceeding and the capital defendant's right to effective representation during that proceeding, while depriving Mr. Franqui of the benefit of the "evolutionary refinement" during his 1998 capital re-sentencing proceeding. Permitting the "evolutionary refinement" of the *Strickland* standard to apply to a 1986 capital sentencing, but not to a 1998 capital re-sentencing means the shape and the scope of the right to effective representation arbitrarily waxed and waned between 1986 and 1998.

determining whether this Court properly applied clearly established federal law under the principles of *Teague v. Lane*, 489 U.S. 288 (1989). *See Johnson v. Sec'y, Dept. of Corrs.*, 643 F.3d 907 (11th Cir. 2011); *Cooper v. Sec'y, Dept. of Corrs.*, 646 F.3d 1328 (11th Cir. 2011).[29] *See also Sochor v. Sec'y, Dept. of Corrs.*, 685 F.3d 1016(11th Cir. 2012)(while denying habeas relief after conducting *de novo* review of an ineffectiveness claim, the 11th Circuit specifically found: "As measured against the decision of the Supreme Court of the United States in *Porter II*, the Supreme Court of Florida unreasonably applied *Strickland* to decide the issue of prejudice in *Sochor IV* when it failed to consider or discounted entirely the mental health evidence that Sochor had presented in the postconviction evidentiary hearing.").

Therefore, while Mr. Franqui recognizes the Court's recent opinion in *Walton* resolved the more generic issue of whether *Porter v. McCollum* constituted new Florida law within the meaning of *Witt v. State*, he argues in Section C of this argument that to deprive him of the benefit of the "evolutionary refinement," would violate his rights under the Eighth and/or Fourteenth Amendment. The failure to give him the benefit of the "evolutionary refinement" would inject an arbitrary factor into his death sentence in violation of *Furman*

[29]The penalty phase at issue in *Johnson* occurred in 1980, while the penalty phase at issue in *Cooper* occurred in 1984. Both Mr. Johnson and Mr. Cooper received the benefit of the Eleventh Circuit's consideration of the "evolutionary refinement" of the *Strickland* standard that this Court found was set forth in *Porter v. McCollum*.

v. Georgia. The failure to give him the benefit of the "evolutionary refinement" would arbitrarily distinguish his right to effective representation at a capital sentencing proceeding from the right to effective representation that was accorded to George Porter at his 1986 capital sentencing proceeding.[30] Making such a distinction between Mr. Porter's right to effective representation in 1986 and Mr. Franqui's right to effective representation in 1998 would constitute a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Mr. Franqui's right to equal protection and due process must mean that at his 1998 re-sentencing proceeding, he was entitled to the same Sixth Amendment right to effective representation that was accorded to Mr. Porter. Accordingly, regardless of this Court's resolution of how *Witt v. State* applies to *Porter v. McCollum*, depriving Mr. Franqui of the benefit of the "evolutionary refinement" found to have occurred by virtue of the decision in *Porter v. McCollum* violates Mr. Franqui's Eighth and/or Fourteenth Amendment rights.

B. Mr. Franqui should receive the benefit of *Porter v. McCollum* under *Witt v. State*

While recognizing that this Court's decision in *Walton v.*

[30]Besides Mr. Porter, Mr. Johnson received the benefit of the *Porter v. McCollum* standard as to his 1980 penalty phase proceeding, and Mr. Cooper received the benefit of the *Porter v. McCollum* standard as to his 1984 penalty phase proceeding. And even thought the Eleventh Circuit did not grant Mr. Sochor relief, he received the benefit of the *Porter* standard when that court found that this Court had unreasonably applied *Strickland* when it considered whether Mr. Sochor received ineffective assistance at his 1987 trial.

State determined that *Porter v. McCollum* does not qualify as new Florida law under *Witt v. State*, Mr. Franqui nonetheless argues that this Court should reconsider that decision.[31] In *Walton*, this Court found that evolutionary refinements of constitutional law do not qualify under *Witt* for retroactive application while substantial changes do qualify. Yet, beyond using the conclusory label ("evolutionary refinement") to describe *Porter v. McCollum*, this Court failed to define what is an evolutionary refinement and how to distinguish such refinement of a constitutional standard from a substantive change. At no point did this Court address this Court's treatment of *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Espinosa v. Florida*, 505 U.S. 1079 (1992), and explain why the change in Florida law brought about in those two decisions was more than the evolutionary refinement that was brought about by *Porter v. McCollum.*[32]

Mr. Franqui presented his *Porter v. McCollum* claim to the circuit court in a Rule 3.851 motion in light of this Court's ruling in *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), in which the U.S. Supreme Court found that this Court had misread and misapplied

[31]Mr. Franqui must also present this argument to this Court in order to exhaust it for federal purposes.

[32]Standardless distinctions can only be described as arbitrary. This Court in *Walton* provided no standards by which *Porter v. McCollum* can be distinguished from *Hitchcock v. Dugger* and *Espinosa v. Florida*.

Lockett v. Ohio, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions). At the State's urging, the circuit court refused to find that fairness principles dictated that *Porter v. McCollum* should be treated just like *Hitchcock v. Dugger* and *Espinosa v. Florida*, as new Florida law within the meaning of *Witt v. State*.

In *Witt*, this Court held that changes in the law could be raised retroactively in postconviction proceedings when the need for fairness and uniformity dictated. Specifically, this Court held that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring **fairness and uniformity in individual adjudications**." 387 So. 2d at 925 (emphasis added). "Considerations of **fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases**." Id. (quotations omitted)(emphasis added).

While referring to the need for finality in capital cases on the one hand, citing Justice White's dissent in *Godfrey v. Georgia* for the proposition that the U.S. Supreme Court in *Godfrey* endorsed the previously rejected argument that "government, created and run as it must be by humans, is inevitably incompetent to administer [the death penalty]," 446 U.S 420, 455 (1980), the Court found on the other hand that **capital punishment "[u]niquely . . . connotes special**

concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d at 926 (emphasis added).

This Court summarized its holding in *Witt* to be that a change in law can be raised in post-conviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id*. at 931.

After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the U.S. Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the U.S. Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the U.S. Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the U.S. Supreme Court issued its decision in *Hitchcock,* death sentenced individuals with an active death warrants argued to this Court that they were entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt,* this Court agreed and ruled that *Hitchcock*

constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger,* 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).

In *Lockett v. Ohio*, the U.S. Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586, 604 (1978). This Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court decided that *Lockett* did not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. *See Downs*, 514 So. 2d at 1071; *Thompson*, 515 So. 2d at 175. In *Hitchcock*, the U.S. Supreme Court held that this Court had misunderstood what *Lockett* required. By holding that the mere opportunity to present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the U.S. Supreme Court held that this Court had in fact violated *Lockett* and its underlying

principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *Downs*, 514 So. 2d at 1071.

Following *Hitchcock*, this Court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs,* this Court found a post-conviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071.[33]

[33]The U.S. Supreme Court did not indicate in its opinion that it was addressing any other case or line of cases other than Mr. Hitchcock's case. Indeed, the U.S. Supreme Court expressly stated:

> Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. See, e. g., *Cooper v. State,* 336 So. 2d 1133, 1139 (1976) ("The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding . . ."), cert. denied, 431 U. S. 925 (1977). Respondent contends that petitioner has misconstrued Cooper, pointing to the Florida Supreme Court's subsequent decision in *Songer v. State*, 365 So. 2d 696 (1978) (per curiam), which expressed the view that Cooper had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the

Clearly, this Court read the opinion in *Hitchcock* and saw that the reasoning contained therein demonstrated that it had misread *Lockett*.

The same principles at issue in *Delap*, *Downs*, *Thompson* are at work here. Just as *Hitchcock* reached the U.S. Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so to *Porter* reached the U.S. Supreme Court on a writ of certiorari issued to the Eleventh Circuit. Just as in *Hitchcock* where the U.S. Supreme Court found that this Court's decision affirming the death sentence was contrary to *Lockett*, a prior decision from the U.S. Supreme Court, here in *Porter* the U.S. Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Strickland*, a prior decision from the U.S. Supreme Court. Just as *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejected this Court's analysis of *Strickland* claims. Just as this Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis that Mr. Hitchcock received, so to those individuals that have raised a *Strickland* issue like the one Mr. Porter had raised and have lost should receive the

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> sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law.

Hitchcock, 481 U.S. at 396-97.

same relief from that erroneous legal analysis that Mr. Porter received. And just as this Court's treatment of Mr. Hitchcock's *Lockett* claim was not simply an anomaly, this Court's misreading of *Strickland* which the U.S. Supreme Court found unreasonable appears in a whole line of cases that dates back to the issuance of *Strickland* itself. Yet in this Court's opinion in *Walton v. State*, there was no mention of *Hitchcock*, let alone an explanation of why *Porter v. McCollum* was less substantive than *Hitchcock*.

Another decision from the U.S. Supreme Court finding that this Court had failed to properly apply Eighth Amendment jurisprudence was *Espinosa v. Florida*. At issue in *Espinosa* was this Court determination in *Smalley v. State*, 546 So. 2d 720 (Fla. 1989), that the U.S. Supreme Court decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988), a case involving a death sentence imposed in Oklahoma, did not apply in Florida because of differences in the capital sentencing schemes the two states used:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

Smalley v. State, 546 So. 2d at 722. In *Espinosa*, the U.S. Supreme

Court determined that *Maynard v. Cartwright* did apply in Florida and that the Florida standard jury instruction on "heinous, atrocious or cruel" aggravating circumstance violated the Eighth Amendment for the reason explained in *Maynard*.

Following the decision in *Espinosa*, this Court found that the decision qualified under *Witt v. State* as new Florida law which warranted revisiting previously rejected challenges to the "heinous, atrocious or cruel aggravating circumstance. *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling"). As a result, *Espinosa* was found to qualify as new Florida law under *Witt*. Yet in *Walton v. State*, this Court did not mention *Espinosa*, let alone provide an explanation of why *Porter v. McCollum* was less substantive than *Espinosa v. Florida*.

It is arbitrary for this Court to treat *Porter v. McCollum* differently than it treated *Hitchcock* and *Espinosa*, both of which were found to qualify as new law under *Witt*. This Court should reconsider its decision in *Walton v. State* and find that *Porter v. McCollum* qualifies under *Witt* and warrants reconsidering previously denied ineffective assistance of counsel under the proper and correct *Strickland* standard which was applied by the U.S. Supreme Court to George Porter's penalty phase ineffectiveness claim and resulted in

collateral relief in his case and ultimately a life sentence.[34] Refusing to reconsider Mr. Franqui's ineffective assistance of counsel and apply the now recognized proper standard of review would arbitrarily deny him the benefit of the clearly established federal constitutional law which Mr. Porter received. Such a result would itself establish that Mr. Franqui's death sentence was arbitrary and violated *Furman v. Georgia*, 408 U.S. 238 (1972).

C. Depriving Mr. Franqui of the benefit of *Porter v. McCollum* would be arbitrary within the meaning of the Eighth Amendment under *Furman v. Georgia* and the Equal Protection and Due Process Clauses of the Fourteenth Amendment

To deny Mr. Franqui of the benefit of *Porter v. McCollum*, a benefit that Mr. Porter, Mr. Johnson and Mr. Cooper have received, is in essence to strip him of his Sixth Amendment rights as defined by the United States Supreme Court. According to the U.S. Supreme Court, what this Court calls an "evolutionary refinement" actually dates back to *Strickland* itself. The U.S. Supreme Court in *Porter v. McCollum* found that this Court's failure to properly understand and apply *Strickland* was unreasonable.

Certainly, the manner in which the retroactivity rules

[34]It was also applied by the Eleventh Circuit in granting penalty phase relief to Mr. Johnson (involving a 1980 penalty phase) and Mr. Cooper (involving a 1984 penalty phase). *Johnson v. Sec'y, Dept. of Corrs.*, 643 F.3d 907 (11th Cir. 2011); *Cooper v. Sec'y, Dept. of Corrs.*, 646 F.3d 1328 (11th Cir. 2011). And while the Eleventh Circuit ultimately denied relief to Mr. Sochor, he nonetheless received the benefit of the standard when that court found that this Court had unreasonably applied *Strickland* under *Porter v. McCollum*. *Sochor v. Sec'y Dept. of Corrs.*, 685 F.3d 1016 (11th Cir. 2012).

operate currently has as at least as much to do with who gets executed and who does not, as does the facts of the crime and the character of the defendant.[35] The manner in which this Court applies its retroactivity rules is arbitrary and violates *Furman*. The very purpose of the standard enunciated in *Strickland* and applied in *Porter v. McCollum* was and is to insure that a constitutionally adequate adversarial testing occurred and that it produced a constitutionally reliable result. This Court's action in allowing Mr. Porter as to his 1986 sentencing, Mr. Johnson as to his 1980 sentencing, and Mr. Cooper as to his 1984 sentencing, to receive the benefit of a standard designed to guarantee a constitutionally adequate adversarial testing has produced a sufficiently reliable result within the meaning of *Furman*, can only be described as arbitrary. It again injects arbitrariness into Florida's death penalty system.

Over thirty years ago, the U.S. Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972)(per curiam). At issue in *Furman*

[35]The ABA Report issued on September 17, 2006, addressing Florida's capital sentencing scheme, identified numerous defects and flaws in the Florida capital sentencing scheme that inject arbitrariness into the decision-making process. One of the flaws specifically identified by the ABA Report was the arbitrary way that this Court had deprived death sentenced individuals with the benefit of new decisions designed to produce more reliable death sentences. The ABA Report cited a number of the areas "in which Florida's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures." ABA Report on Florida at iii.

were three death sentences: two from Georgia and one from Texas. The Petitioners relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. *Furman*, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); *Id*. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); *Id*. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); *Id*. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *Id*. at 365-66 (Marshall, J., concurring)("It also is evident that the burden of capital punishment falls upon the poor, the

ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted). As a result, *Furman* stands for the proposition most succinctly explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. *Id*. at 310.

However in the manner in which Mr. Porter, Mr. Johnson, and Mr. Cooper have received the benefit of *Porter v. McCollum* while this Court in *Walton* declared the change in Florida constitutional law brought about by *Porter* to have been merely an "evolutionary refinement," it is now clear that in Mr. Franqui's case an arbitrary factor has infected the process. His execution will be as arbitrarily imposed as if he had been "struck by lightning". *Id*. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and

unusual").

According to this Court, the *Strickland* standard as applied in Florida evolved in *Porter*. This acknowledgment means that Florida's present day *Strickland* analysis is something that is now different than it was before the decision in *Porter v. McCollum*. We know that this Court's standard that came before was an unreasonable application of federal law, because that was what the U.S. Supreme Court held in *Porter*. We know that the new present day Florida standard can yield different results than were obtained under the old discarded standard, because it yielded a different result for George Porter, Terrell Johnson, and Richard Cooper, and required their death sentences to be overturned. Knowing all that, it cannot be denied that the newly evolved and refined *Strickland* standard that this Court has held was announced in *Porter* may require a different result for Mr. Franqui if and when his ineffective assistance of counsel claims are again reviewed under the *Porter* standard.

Knowing that, the issue now becomes whether, in order to avoid the expense of another proceeding, the State is constitutionally permitted to execute someone in the face of constitutional doubt. *Furman* has already spoken to this. The question is whether this Court being found in a capital case to have reached a decision unreasonably applying a federal law that it applied in other cases, is not something that merits a second look in those other cases before they result in the State taking life. Again,

Furman has already spoken to this. An unconstitutional execution was poised to happen in *Porter* based on an unreasonable *Strickland* analysis; is it not possible that one is poised to happen in this case? *Furman* has already addressed the injection of arbitrariness into death sentences. These questions and issues strike at the heart of the State of Florida's decision to have the death penalty, because if it is going to employ that absolute and irrevocable punishment, it must expend the resources to be absolutely sure it does not do so arbitrarily, such as under circumstances where the constitutional claim of a condemned defendant is resolved under a standard subsequently refined to eliminate unreasonableness in the analysis. We know this because *Furman* says reliability is an essential component of a constitutional capital sentencing scheme.

The question is not, do we or do we not want to be sure before we execute someone, because *Furman* has already provided the answer to that question. Quite simply, arbitrariness cannot be permitted to infect a constitutional sentence of death. In order to comport with the requirements of the Eighth and Fourteenth Amendments and to comport with the requirements of *Furman*, Mr. Franqui's ineffective assistance of counsel claim must be evaluated under *Porter v. McCollum* and what this Court called an evolutionary refinement of the *Strickland* standard for measuring whether a capital defendant received his Sixth Amendment right to effective representation.

D. Application of *Porter v. McCollum* to Mr. Franqui's claim

Porter error was committed in Mr. Franqui's case. Mr. Franqui previously raised and litigated an ineffective assistance of resentencing counsel claim. Mr. Franqui's resentencing counsel had experience as a criminal defense lawyer, but had not previously represented a capital defendant in a penalty phase proceeding (2PC-R. 62). In 1993, counsel had obtained a report from a mental health expert, Dr. Toomer, regarding an psychological evaluation of Mr. Franqui. Indeed, Dr. Toomer was called to testify in Mr. Franqui's Hialeah case by counsel in that case to present evidence of the mental health mitigation regarding Mr. Franqui. Dr. Toomer noted in his 1993 letter that during his evaluation of Mr. Franqui psychological testing was done on which Mr. Franqui scored an IQ of less than 60 (which is squarely within the range of mental retardation and lower than 97.8% of the population). Dr. Toomer found that Mr. Franqui had a limited ability to reason abstractly and discriminatively, and further demonstrated behaviors symptomatic of schizophrenia, paranoid type. Dr. Toomer noted that Mr. Franqui is easily influenced and has an impaired level of overall functioning (2PC-R. 62).[36] Dr. Toomer's report also reflected that Mr. Franqui had been

[36]Dr. Toomer's testimony was presented at the penalty phase in Mr. Franqui's Hialeah case. His conclusion in that case that Mr. Franqui was mentally retarded led to an hearing under *Atkins v. Virginia*, 536 U.S. 304 (2002). Even though this Court based upon the record from that evidentiary hearing concluded that competent and substantial evidence supported the circuit court's denial of Mr. Franqui's mental retardation claim and thus not entitled to the benefit of *Atkins*, ample evidence of mental impairment was presented and demonstrated to be readily available. *Franqui v. State*, 59 So. 2d 82 (Fla. 2011).

rendered unconscious in an automobile accident and was wheelchair bound from that accident for seven months (2PC-R. 62). However, counsel failed in a profoundly egregious way: he lost the report (2PC-R. 63). He simply lost the report and did not present it at the resentencing.[37] Such undeniably relevant and useful evidence cannot be said to be immaterial to Mr. Franqui's penalty phase. There can be no valid strategic explanation for such an error.

When this Court considered Mr. Franqui's ineffective assistance of counsel claim based upon the failure to present mental health evidence to Mr. Franqui's re-sentencing jury, this Court stated:

> 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.

Franqui v. State, 965 So. 2d at 33. Thus, according to this Court, Mr. Franqui's registry counsel had not raised and litigated the claim in the circuit court and evidence had not been presented to and heard

[37]The fact that counsel had lost the report by the time of the re-sentencing was noted by counsel when at the judge sentencing, the presiding judge inquired of counsel whether intended to present testimony from "one of the doctors." Re-sentencing counsel responded, "Unfortunately, Judge, the situation is that we have not been able to find a report." This colloquy was quoted by this Court in its opinion affirming the denial of Rule 3.851 relief. *Franqui v. State*, 965 So. 2d at 32.

by the circuit court on the claim.

Nevertheless without any evidentiary development on the claim, this Court proceeded to rely upon the colloquy appearing in the re-sentencing record between the sentencing judge and Mr. Franqui's resentencing counsel which occurred at the judge sentencing regarding whether testimony from a doctor would be forthcoming. Relying on this colloquy which included counsel's statement that the mental health expert's report could not be found and the judge asking Mr. Franqui if he "agree[d]" with counsel's decision "not to have me consider the testimony or the report of that doctor", this Court stated: "the record reflects that Cohen and Franqui made a joint strategic decision not to present this evidence at resentencing." *Franqui v. State*, 965 So. at 33.[38] This Court then observed: "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." *Id*. at 33 n. 8.[39] This Court then

[38]However, the record is silent as to what counsel had told Mr. Franqui about the missing report from Dr. Toomer, as to whether Mr. Franqui understood that Dr. Toomer could have been called as a witness to testify about before the resentencing jury even if his report had been lost, and/or what other steps had been taken to present mental health mitigation before Mr. Franqui's resentencing jury. No explanation appears in the record beyond this brief colloquy at the judge sentencing as to why mental health mitigation was not presented to the resentencing jury.

[39]This statement clearly shows that this Court in considering Mr. Franqui's claim improperly discarded and discounted Dr. Toomer's opinion testimony for the same erroneous reasons that it had rejected Dr. Dee's opinion testimony in *Porter*. This Court committed *Porter* error in the consideration Mr. Franqui's appeal of the denial of Rule

concluded "that Franqui is not entitled to relief on this claim." *Id*. at 33. Apparently, this Court relied upon the fact that the judge in the Hialeah case had not credited Dr. Toomer's testimony without regard to whether the resentencing jury might have found the unpresented mental health mitigation warranted a life recommendation in the North Miami case.

Indeed in the North Miami case, Mr. Franqui was sentenced to death by a resentencing jury who did not hear the most important mitigating evidence in trial counsel's possession and which would have allowed for an individualized capital sentencing determination. Counsel failed to present the readily available mental health mitigation.

On this ineffectiveness claim, this Court first set forth that it found the claim procedurally barred. Then alternatively noting that the same judge in the Hialeah case had rejected Dr. Toomer's testimony without considering how his testimony, or any other mental health expert's testimony, may have been heard by the resentencing jury. This Court's brief and summary analysis did not comport with *Porter*, which made clear that the *Strickland* standard when properly applied requires cumulative, probing and fact-specific consideration of the mitigating evidence that trial counsel failed to present.

3.851 relief. It deferred to a judge's credibility ruling and ignored the jury's role in resolving credibility and factual issues at a capital penalty phase trial.

In light of *Porter's* explanation that this Court had not been giving sufficient consideration to *Strickland* claims, this Court's resolution of Mr. Franqui's ineffectiveness claim must be reconsidered. This Court's notation of a possible strategy based upon a colloquy that occurred at the jury sentencing and failed to explain or address how Dr. Toomer's report got lost and what other options had been explored to develop and present mental health mitigation before the resentencing jury, did not and could not possible constitute a resolution of the matter when no evidentiary development had occurred. Instead, it is clear that this Court's affirmance of the denial of relief was premised upon the judge's rejection of Dr. Toomer's testimony when he presided at the sentencing in the Hialeah case and heard Dr. Toomer's testimony. To completely discount Dr. Toomer's testimony in such a fashion is starkly in violation of *Porter*.[40]

[40]The State attached Dr. Toomer's 1993 letter to Mr. Franqui's trial counsel to its response to Mr. Franqui's 2010 Rule 3.851 motion (2PC-R. 148-51). This letter is in fact Dr. Toomer's report regarding his evaluation of Mr. Franqui. In it, Dr. Toomer discusses Mr. Franqui's chaotic childhood and notes that "[a]t age sixteen, the subject indicates he was struck by an automobile and rendered unconscious. As a result of this injury, he was confined for approximately six to seven months in a wheelchair. He indicates having residual visual problems which may be related to that injury." (2PC-R. 149). Dr. Toomer indicated that "[t]he diagnostic impression consists of cluster of associated diagnoses including hypomanic conditions, manic depressive disorder, manic type, borderline personality disorder and schizophrenia, paranoid type." (2PC-R. 150). Dr. Toomer found that "Leonardo Franqui suffers from extreme mental and emotional disturbance and severe impairment of cognitive functioning. History and the results of this evaluation reflect behavior symptomatic of serious mental deficits." (2PC-R.

The US Supreme Court made clear in *Porter* that this Court's prejudice analysis in *Porter v. State* was insufficient to satisfy the mandate of *Strickland*. In the present case as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the *Strickland* claim. It failed to perform the probing, fact-specific inquiry which *Sears v. Upton*, 130 S.Ct. 3259 (2010), explains *Strickland* requires and *Porter* makes clear that this Court failed to do under when considering Mr. Franqui's ineffective assistance of resentencing counsel claim. At the heart of *Porter* error is "a failure to engage with [mitigating evidence]." *Porter*, 130 S. Ct. at 454.

The US Supreme Court found in *Porter* that this Court violated *Strickland* by "fail[ing] to engage with what Porter actually went through in Korea." *See id*. That admonition by the US Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence, be it heroic military service, a traumatic childhood, substance abuse or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis. To engage is to embrace, connect with, internalize–to glean and intuit from mitigating evidence the reality of the experiences and conditions that make up a defendant's humanity.

Implicit in the requirement that trial counsel must present

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151).

mitigating evidence to "humanize" capital defendants, *id.* at 454, is the requirement that courts in turn must engage with that evidence to form an image of each defendant's humanity. It stands to reason that nothing less than a profound appreciation for an individual's humanity would sufficiently inform a judge or jury deciding whether to end that individual's life. And it is that requirement–the requirement that Florida courts *engage with humanizing evidence*--that is at the heart of the *Porter* error inherent in this Court's prejudice analysis and in the deference this Court said was owed to the circuit court's denial of relief in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). The US Supreme Court has recognized that "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence . . . ." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)). Such information was simply not provided to the jury in this case.

This Court did not engage with the mitigation facts relevant to the instant claim. This Court, choosing instead to discount and discard mental health testimony rather than to evaluate the facts and sincerely scrutinize the question of whether low intelligence scores and/or mental impairment, among other things, would be something a sentencing jury may find important, committed clear *Porter* error.

Mr. Franqui's substantial claim of ineffective assistance of counsel has not been given serious consideration as required by *Porter*. Mr. Franqui requests that this Court perform the analysis of this claim which has as of yet been lacking in this case. The ineffectiveness analysis must focus on the jury as *Porter* requires, not the presiding judge, and probe the way the unpresented mitigation might have caused the jury to reach a different result in the case. Mr. Franqui requests that this court perform the analysis of this claim which has as of yet been lacking in this case.

Mr. Franqui's sentence of death must be vacated and the matter remanded for a penalty phase that comports with the Sixth Amendment.

ARGUMENT II

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. FRANQUI'S CLAIM THAT NEWLY DISCOVERED EVIDENCE OF A *BRADY/GIGLIO* VIOLATION WARRANTED RULE 3.851 RELIEF AND THE REVERSAL OF MR. FRANQUI'S DEATH SENTENCE AND THAT MANIFEST INJUSTICE WARRANTED INVOCATION OF THE COURT'S INHERENT EQUITABLE POWERS AND THE ISSUANCE OF RULE 3.851 RELIEF

Rule 3.851 is the proper vehicle for seeking relief when new evidence not available at the time of trial, either alone or in conjunction with favorable evidence not presented at trial due to either the State's unreasonable failure to disclose it under *Brady* or defense counsel's unreasonable failure to discover it under

Strickland demonstrates that confidence is undermined in the reliability of the outcome that occurred in its absence. Rule 3.851 relief is also warranted when the new evidence meets the standard recognized in *Jones v. State*, 591 So.2d 911 (Fla. 1991), or if considered cumulative with *Brady* and/or *Strickland* evidence, shows that confidence has been undermined in the outcome. *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004). Where neither the prosecutor nor the defense attorney violated their constitutional obligations in relationship to evidence the existence of which was unknown at trial, a new trial is warranted if the previously unknown evidence would probably have produced a life sentence had the evidence been known by the jury. Where such new evidence would probably have produced a different result, a new trial is required.

In the Rule 3.851 motion at issue in the current appeal, Mr. Franqui pled that Abreu's affidavit and collateral testimony in collateral proceedings in Pablo San Martin's case established that the State possessed undisclosed favorable information which was not disclosed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and/or allowed Abreu to provide false or misleading testimony to go uncorrected in violation of *Giglio v. United States*, 405 U.S. 150 (1972). Even if a court found that the State was unaware of that Abreu had not testified truthfully and/or was not aware of information impeaching Abreu's testimony, impeachment evidence may qualify under *Jones v. State* that may establish a basis for Rule 3.851 relief. *See*

State v. Mills, 788 So. 2d 249 (Fla. 2001); *State v. Robinson*, 711 So.2d 619, 623 (Fla. 2d DCA 1998). Evidence which qualifies under *Jones v. State* as a basis for granting a new penalty phase must be considered cumulatively in deciding whether in fact Rule 3.851 relief is warranted. *State v. Gunsby*, 670 So.2d 920 (Fla. 1996). When all of the exculpatory evidence that the jury did not hear is considered including that which was as a result of prosecutorial failings under *Brady* and/or defense counsel's failings under *Strickland*, it is clear that confidence must be undermined in the reliability of the outcome of the trial under *State v. Gunsby* and *State v. Mills*. Moreover, even if Mr. Franqui is held to a higher burden of proof, the evidence that the jury did not hear establishes that a different result would have probably resulted. *Jones v. State*. When all of the evidence is considered, a manifest injustice is demonstrated. *State v. McBride*, 848 So. 2d 287 (Fla. 2003).

Recently, the Eleventh Circuit in circumstances like those presented here recognized that the State's failure to disclose its possession of favorable evidence or information regarding a prior conviction that is used to established an aggravating circumstance in a capital case violates *Brady*. *Blanco v. Sec'y Dept. of Corrs.*, __ F.3d __, 2012 WL 3081313 (11th Cir. July 31, 2012). The State was obligated to disclose information in its possession which could have been used by Mr. Franqui to impeach the weight of the prior conviction, particular favorable evidence or information that there was no

pre-existing plan in the Hialeah case for Mr. Franqui to commit murder. Abreu's collateral testimony, while not negating or undermining a felony/murder conviction, nonetheless significantly reduced Mr. Franqui's moral culpability and the weight to be accorded the aggravating circumstance.

In his Rule 3.851 motion at issue in this appeal, Mr. Franqui alleged that the affidavit had been executed by Pablo Abreu, a co-defendant in the Hialeah case and who testified against Mr. Franqui in that case, established that the State was unaware of information that would have reduced the weight accorded that conviction at Mr. Franqui's resentencing in the North Miami case (2PC-R. 71). Abreu's role in the criminal prosecution of Mr. Franqui in the Hialeah case was explained by this Court as follows:

> 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.

Franqui v. State, 699 So. 2d 1312, 1324 (Fla. 1997).

The Abreu affidavit that Mr. Franqui pled in his Rule 3.851

motion at issue in the present appeal had been filed by Pablo San Martin in a Rule 3.51 motion in the Hialeah case (2PC-R. 71). In the affidavit, Abreu indicated that much of his testimony in the Hialeah case was false and the State had known it was false, specifically that part of his testimony wherein he indicated that there had been a plan for Mr. Franqui to commit the homicide. Mr. Franqui pled in his Rule 3.851 motion that, at a postconviction evidentiary hearing in the Hialeah case, Abreu, currently serving a life sentence for his participation in the instant case, testified that he reached a plea agreement with the State in exchange for testifying against both Mr. Franqui and San Martin (2PC-R. 71). According to Abreu, the "plan" he, Franqui, and San Martin had was merely to steal two cars and to take money (2PC-R. 71). The cars were stolen the day before the actual robbery (2PC-R. 71). Abreu and San Martin were to take the money, and Mr. Franqui was to "grab" the security guard (2PC-R. 71). In the van shortly before the robbery went down, Abreu testified that Mr. Franqui said that he would "take care" of the security guard, but not kill anyone; it was never part of the plan to shoot or kill anyone (2PC-R. 71). Mr. Franqui further alleged in his Rule 3.851 motion, Abreu imparted this information to the trial prosecutors before he testified (2PC-R. 71).

Mr. Franqui further alleged that Abreu, while testifying at the collateral evidentiary hearing, recalled testifying against Mr. Franqui and San Martin, and repeated that, prior to his testimony,

he met with his attorney and the prosecutors, and discussed the fact that there was no prior plan to kill anyone when the cars were stolen or when the robbery was first discussed (2PC-R. 71-72). In his collateral testimony, Abreu testified, "[f]rom the very beginning I said that we didn't know that we were going to kill anybody" (2PC-R. 72). Mr. Franqui further alleged that Abreu swore in his collateral testimony that Mr. Franqui only began to shoot in self-defense to shots being fired at them during the robbery, and that Mr. Franqui's statement about "taking out" the bodyguard referred to the fact that Mr. Franqui would shoot back if the guard shot at him first (2PC-R. 72). Abreu in his collateral testimony clarified the context of Mr. Franqui's statement:

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

(2PC-R. 72). Abreu in his collateral testimony also reiterated that when he spoke with the prosecutors about his anticipated testimony

in the Hialeah case, he "told them what happened, what happened" (2PC-R. 72).

Mr. Franqui submits that, based on the evidence presented at the postconviction evidentiary hearing in the Hialeah case by Pablo San Martin, a new penalty phase proceeding is warranted as to Mr. Franqui death sentence in the North Miami case because the State used the conviction in the Hialeah case to establish an aggravating circumstance in the above-entitled case, without disclosing *Brady* material that would have reduced the aggravating weight of the Hialeah conviction at the resentencing in the North Miami case. At the very least, an evidentiary hearing is required on this claim. In his testimony in the Hialeah postconviction evidentiary hearing, Abreu indicated that he had told the State the his testimony was not actually what happened and the State withheld this materially exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Indeed, the information presented through Abreu's testimony establishes that the State, at Mr. Franqui's resentencing in the North Miami case, withheld *Brady* material and knowingly presented false evidence, in violation of due process and *Giglio*, and its progeny.

Abreu's affidavit and collateral testimony could have been used at the resentencing in the North Miami case that the only reason for the shooting in the Hialeah case was self-defense. Abreu's collateral testimony was that his trial testimony was false in that

case when he had directly and unequivocally testified that Mr. Franqui had premeditated the murder.

The testimony provided by Abreu at the evidentiary hearing was mitigating as to the resentencing in the North Miami case and would have reduced the weight given to the State's reliance on the Hialeah conviction as aggravation at the resentencing in the North Miami case. The State's failure to disclose favorable information violated *Brady* and undermines confidence in the outcome, thereby warranting Rule 3.851 relief. At a minimum, an evidentiary hearing was required on Mr. Franqui's claim.

Abreu has testified in collateral proceedings that contrary to what the resentencing jury was led to believe there was no intent to kill. Abreu made clear in his postconviction testimony that Mr. Franqui had no such plan. Rather, the only discussion about shooting anyone was in the context of self-defense if the bodyguard shot first:

> Q Mr. Franqui's statement to you that, basically, the reason he would shoot at the bodyguard was for self-defense purposes; is that correct?
>
> A Of course because his life was going to be in danger, also.
>
> * * *
>
> Q And of course Mr. Abreu and Mr. San Martin were required to do the same thing too because people started shooting at you too; is that correct?
>
> A Once we stepped out of the van with revolvers in hand to go take the money away they began to fire, so we fired back.
>
> Q Would it be correct for me to say that neither Mr. San Martin, Mr. Franqui nor you intended to just shoot

anyone for just any reason at all; would that be correct?

A Well, we were going to do a robbery, I mean we were armed.

Q But there were no intentions to shoot someone by you, Mr. San Martin, or Mr. Franqui?

A Well, we spoke that someone was going to be dead because we were going to defend our lives.

Q And that is a matter of self-defense in your mind?

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

(2PC-R. 74-75).

In light of Abreu's testimony that Mr. Franqui never in fact stated any pre-arranged intention to kill, and that he (Abreu) told the prosecutors this prior to the penalty phase. Mr. Franqui submits that a new penalty phase proceeding is warranted so that a jury, hearing appropriate evidence, can conduct the requisite and proper weighing of aggravators and mitigators.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. FRANQUI'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENTS UNDER *ATKINS V. VIRGINIA*

Mr. Franqui suffers from substantial limitations in his mental functioning. In particular, Mr. Franqui has functional impairment to the extent and to a degree that establishes he suffers from substantial limitations of present functioning and/or has significant subaverage general intellectual functioning. Mr.

Franqui was evaluated by Dr. Jethro Toomer in 1993 who found Franqui had a history of learning disabilities, academic failure, and "very serious deficits in overall psychological functioning and cognitive processing." (2PC-R. 149). Dr. Toomer concluded that Mr. Franqui had deficient intellectual abilities and neuropsychological deficits, particularly in memory and executive functioning.

Psychologist Jethro Toomer obtained test a score on a Revised Beta showing an IQ of less than 60 (2PC-R. 148). Dr. Toomer concluded that this was "reflective of very serious deficits in overall psychological functioning and cognitive processing skills." (2PC-R. 149). This placed Mr. Franqui in the mentally retarded range. Unquestionably, Mr. Franqui did poorly in school and dropped out in the 8th grade. According to Dr. Toomer's 1993 evaluation, Mr. Franqui had difficulty communicating, he suffered a number of deficits, and his insight and judgment were impaired. On the basis of Dr. Toomer's 1993 letter to Mr. Franqui's trial counsel summarizing his evaluation of Mr. Franqui, this Court determined that in the Hialeah case an evidentiary hearing was warrant on the mental retardation claim that was presented by Mr. Franqui's attorney in that case.[41] *Franqui v. State*, 14 So. 3d 238 (Fla. 2009).

Mr. Franqui acknowledges that after this Court remanded the

[41]Mr. Franqui's registry counsel in the Hialeah case is Todd Scher. However, Mr. Scher cannot represent Mr. Franqui in the North Miami case because he is registry counsel for one of Mr. Franqui's co-defendant's in the North Miami case, Ricardo Gonzalez.

Hialeah case for an evidentiary hearing on the *Atkins* claim that circuit court concluded that Mr. Franqui was unable to prove his mental retardation as is necessary to obtain the benefit of *Atkins*. The circuit court's denial of the mental retardation claim was affirmed by this Court on appeal. *Franqui v. State*, 59 So. 3d 82, 94 (Fla. 2011)("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."). However, Mr. Franqui was represented by different counsel in the mental retardation proceeding in the Hialeah case than represents him in the North Miami case. Further, a different judge presided over the Hialeah collateral proceedings than the one who is presiding over the North Miami case. Accordingly, the resolution of the *Atkins* claim in the Hialeah case cannot control as to the North Miami case, any more than the imposition of a death sentence in the Hialeah case, meant that a death sentence was to be imposed in the North Miami without the need of full penalty phase proceeding.[42]

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the US Supreme Court

[42]The State had a death sentence in place in the Hialeah case when it chose to proceed with a resentencing proceeding in the North Miami case in order to impose a completely separate death sentence on Mr. Franqui who was already under a sentence of death. Given the State's decision to pursue separate death sentences in separate case, Mr. Franqui is entitled to the full panoply of due process rights as to each death sentence, including an evidentiary hearing on his mental retardation claim.

considered whether mentally retarded individuals are constitutionally subject to execution. The Court ruled:

> "We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in light of our `evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution `places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id*. at 2252 (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

As a result of *Atkins v. Virginia*, and in light of Defendant's substantial limitations of present functioning and/or significantly subaverage general intellectual functioning, his death sentence stands in violation of the Eighth and Fourteenth Amendments to the US Constitution and Article 1, Section 17 of the Florida Constitution. Mr. Franqui's death sentence must be vacated. At a minimum, a remand for evidentiary development is warranted.

Mr. Franqui submits that pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), an evidentiary hearing is required under the circumstances presented here. Dr. Toomer testified in the Hialeah case as that transcript shows that Mr. Franqui scored on psychological testing an IQ that was less than 60, and which placed him into the mentally retarded range (2PC-R. 149). As a result, Mr. Franqui's death sentence violates the Eighth Amendment. At a minimum, an evidentiary hearing is required on this claim.

CONCLUSION

In light of the foregoing arguments, Mr. Franqui requests on the basis of Argument I that this Court vacate his unreliable sentence

of death and remand for a new penalty phase, on the basis of Argument II, that this Court remand to the circuit court for a full and fair evidentiary hearing on his *Brady/Giglio* and/or newly discovered evidence claim, and, on the basis of Argument III, that this Court remand to the circuit court for a full and fair evidentiary hearing on his mental retardation claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Sandra Jaggard, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on August ___, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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