IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,069

THE STATE OF FLORIDA,

Petitioner,

-vs-

SALVADOR F. MUSTELIER,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

RESPONDENT'S BRIEF ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3078

HENRY H. HARNAGE
Assistant Public Defender
Florida Bar No. 140835

Counsel for Respondent

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INTRODUCTION

The respondent, Salvador F. Mustelier, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The petitioner, the State of Florida, was the plaintiff in the trial court and the appellee in the Third District Court of Appeal. The symbol "App." will be used to refer to portions of the appendix attached to this brief. The symbol "ST." will be used to refer to portions of the supplemental transcript filed in the Third District Court of Appeal. All emphasis is supplied unless otherwise indicated.

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STATEMENT OF THE CASE AND FACTS

The respondent accepts the state's statement of the case and facts with the following additions for a more complete presentation of the issue before this Court.

At the beginning of the trial, the state maintained that it was not seeking the death penalty. (ST. 2). Defense counsel responded affirmatively to the Assistant State Attorney's question: "Has Mr. Mustelier agreed to have a six-person jury?" (ST. 2).

The entire proceeding required a translator from English to Spanish (ST. 3) and there is no indication of any additional question being directed to either the translator or to the defendant concerning the number of jurors trying the defendant for first degree murder.

The record is devoid of any questions to the defendant as to his waiver of being tried by a twelve-person jury for this capital offense. The defendant did not execute either a written or oral waiver of a twelve-person jury.

The district Court opinion (App. 1) reversed for a new trial on the authority of three of its recent decisions (appended to this Brief at pages 2 through 4). Those three authorities, for the purposes of the appeal of this defendant/respondent, collectively held that: 1) the record was devoid of any showing of a personal waiver of the requisite jury size and 2) the state's waiver did not obviate the need for a twelve-person jury; the opinion then certified the latter to this Court, as a matter of great public importance. (App. 1).

QUESTION PRESENTED

IRRESPECTIVE OF THE PROSECUTION'S PRETRIAL "WAIVER" OF THE DEATH PENALTY IN A FIRST-DEGREE MURDER CASE, THE DEATH PENALTY REMAINS A LEGALLY POSSIBLE PUNISHMENT AND, THEREFORE, A TWELVE-PERSON JURY IS PROCEDURALLY AND STATUTORILY MANDATED.

SUMMARY OF ARGUMENT AND ARGUMENT

IRRESPECTIVE OF THE PROSECUTION'S PRETRIAL "WAIVER'' OF THE DEATH PENALTY IN A FIRST-DEGREE MURDER CASE, THE DEATH PENALTY REMAINS A LEGALLY POSSIBLE PUNISHMENT AND, THEREFORE, A TWELVE-PERSON JURY IS PROCEDURALLY AND STATUTORILY MANDATED.

Any defendant standing trial for first degree murder is entitled to jury deliberation by twelve persons. The only exception to this entitlement is the defendant's knowing, intelligent, personal, waiver of a twelve-person jury.

The elements of a capital crime, and attendant procedural protections, are determined by the legislature; the prosecution cannot usurp this legislative determination and, then, also bind the sentencing decision.

Where, a twelve person jury is required absent a legally sufficient waiver, and where, as here, no such waiver is obtained, conviction by less than the requisite jury number is improper. Reversal of the conviction was appropriate, and a remand for further proceedings, as the Third District determined, is necessary.

This precise issue is presently pending before this court for consideration in the cases of ***State*** v. ***Jones,*** Case No. 73,999, ***State*** v. ***Rodriguez-Acosta,*** Case No. 73,997 and ***State*** v. ***Griffith,*** Case No. 73,998. [The District Court opinions are appended to this Brief as App. 2, 3, and 41.

By separate motion filed simultaneously with the filing of this brief, the defendant herein has sought leave to adopt, as

his Summary of Argument and Argument, the Brief on the Merits of Respondent Jones. [served on May 31, 1989, by Harvey Sepler, Assistant Public Defender for the Eleventh Judicial Circuit]. Respondent Jones' Brief on the Merits in Case No. 73,999 is appended hereto. (App. 5-32).[1]

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As stated in the appended Brief, p. 19, fn. 13 [App. 28], the 'waiver' issue is not part of the certified question and, in any event, the state's argument is not persuasive.

By way of slight amplification to that already argued in the appended *Jones'* Brief [App. 28] the following additional reasons are provided for rejection of the state's contention that there need be no record showing of the knowing and voluntary nature of the purported waiver:

> (A) the ***Dumas*** decision [439 So.2d 246 (Fla. 3d DCA 1983), rev. *den.*, 462 So.2d 1105 (Fla. 1985)] -- upon which the state most heavily relies -- is not applicable because: (1) trial record evidence in ***Dumas*** included both the stamped notation "waived trial by jury", and Dumas' signature above the stamped notation waiving jury trial (the authenticity of Dumas' signature above the stamped waiver was not challenged); (2) there was no allegation in the district court that the waiver (as evidenced by his signature) was not knowingly or intelligently given -- as contrasted with the altogether silent record here; (3) despite the opinion's allowance for the 'presumption of regularity of proceedings', the same majority opinion states: "In direct appeals there is no reason for the presumption of regularity [of proceedings] and there is considerable doubt that it has any application." *Id.*, n. 5. at 250; and
>
> (B) there is nothing in this record to indicate the defendant Mustelier's counsel speaks Spanish, so as to allow the presumption that the defendant -- who speaks very little English -- learned of, and notwithstanding, waived his right to a twelve person jury.

CONCLUSION

Based on the foregoing analysis and authorities, the respondent/defendant requests this honorable Court to affirm the decision of the Third District Court of Appeal in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3078

BY: _____
HENRY H. HARNAGEL
Assistant Public Defender
Florida Bar No. 140835

CERTIFICATE **OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 20 day of June, 1989.

HENRY H. HARNAGE
Assistant Public Defender