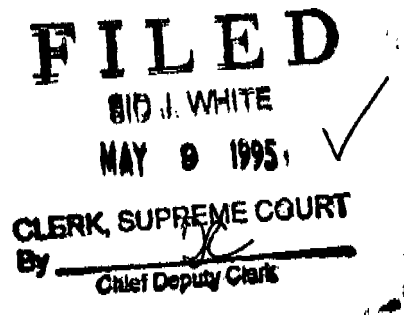
IN THE SUPREME COURT OF FLORIDA



CASE NO. 83,611

PABLO SAN MARTIN,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT

Lee Weissenborn
Florida Bar No. 086064
Attorney for Appellant
235 N.E. 26th Street
Miami, Florida 33137
Phone: **305-573-3160**

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO

POINTS INVOLVED ON APPEAL

INTRODUCTION

The Defendants will be referred to as “SAN MARTIN”, or "SM", and “FRANQUI”.

At some points in this brief, aggravating circumstances will be referred to as “AC’s” and mitigating circumstances will be referred to as “MC’s”,

The Miami Police Department will be referred to as "MPD". The Hialeah Police Department will be referred to as “HPD”. The Metro-Dade Police Department will be referred to as “Metro”. The Florida Dept. of Law Enforcement will be referred to as "FDLE".

Jackson Memorial Hospital will be referred to as “JMH”.

“ICDC” refers to a facility of the Dade County Jail system for which those identification initials are used.

The City of North Miami will be referred to as “NM”. The City of Miami will be referred to as “Miami”.

The Republic National Bank will be referred to as “RNB”.

The Dade County Medical Examiner’s office will be referred to as the “ME”.

Whenever a gun is referred to as a “Smith and Wesson”, the initials “SW” will be used.

The mitigating circumstances of “Cold, Calculated and Premeditated” will be referred to as "CCP".

STATEMENT OF THE CASE AND THE FACTS

This case was initiated by the returning of an indictment by the Dade County Grand Jury charging Pablo San Martin and two others, Leonardo Frangui and Pablo Abreu, with first degree murder with respect to the killing of one Raul Lopez; with attempted first degree murder with respect to Cabanas, Sr., and Cabanas, Jr.; with attempted robbery with a firearm; two counts of grand theft, third degree; and unlawful possession of a firearm during a criminal act (TR 1-6).

Thereafter at pre-trial hearings the court heard as to the admissibility in behalf of state of the involved autopsy report prepared by Dr. Hougen, a medical examiner, and State's being allowed to have another medical examiner, Dr. Rao, render opinions at trial based on findings in Dr. Hougen's report (TR-5-9). Co-defense counsel reminded the court that it had previously denied his request to be allowed to go to Denmark to take Dr. Hougen's deposition----the, doctor having moved there----and when this request was renewed, the court stated that it, "would put that down at the bottom of the list in terms of order" (TR-9). The court thereafter granted the State's motion to substitute medical examiners (TR-10).

Thereafter Defense motions to have the death penalty declared unconstitutional were denied as were Defense motions to prohibit the questioning of prospective jurors as to their feelings regarding the death penalty and to preclude challenges for cause (TR-18-20).

The court denied a Defense motion that authority be granted for a jury selection expert to be hired to assist at voir dire (TR-31).

The court thereafter began hearing on the motions in limine. It's first ruling was that State would not have to choose between premeditated first degree murder and first degree felony murder (TR-37).

There followed discussion between the court and counsel regarding the report of Dr. Hougen, the medical examiner who actually performed the autopsy on the body of the victim, Raul

Lopez. Frangui's counsel pointed out to the court a discrepancy in that report which was that, on the one hand, Dr. Hougen recited that he removed a bullet from Lopez's body while, on the other, the doctor showed on a diagram of Lopez's body a bullet entrance wound and a bullet exit wound (TR-44,45).

Thereafter followed further colliguy between counsel regarding Defense's desire to depose Dr. Hougen with one of co-defense counsel stating to the court that the only reason Defense was not being allowed to depose the said doctor was because, "the county won't pay" (TR-51,52).

The court next took up the confession suppression motions filed in behalf of the defendants and State called as an evidentiary witness Detective Diecidue, a homicide investigator for the North Miami Police Department. He testified: As the lead investigator regarding the killing of NM Police Officer Steven Bauer, he received information from one Lazaro Fernandez regarding a bank robbery involving one Fernando Fernandez and other persons in which an officer was shot (TR-57-61).

The State's next witness at the pre-trial hearing on the motions to suppress was Metro Officer Jarrett Crawford of the Homicide Cold Case Squad (TR-84-86). He testified: On January 18, 1992, he went to the "ICDC" facility of the Dade County Jail system to interview Frangui accompanied by Detective Gregory Smith (TR-87,88). Miranda rights were read to Frangui who did not request a lawyer. Frangui understood English. He had advance knowledge that Frangui was being held on an unrelated robbery charge and he was unconcerned as to whether Frangui had previously invoked his right to counsel (TR-93-97).

State's next pre-trial hearing witness was Metro Homicide Detective Gregory Smith, also of the Cold Case Squad. He testified: On Jan. 18, 1992, he went with Det. Jarrett to see Frangui in jail after he had attended a meeting with his supervisor and Det. Boris Mantecon of the MPD Robbery Section (TR-104,105). He had received information that Frangui and SM were involved

in a robbery in Miami and went to see Mantecon to find out if Frangui had waived his rights. He learned that the rights had been waived and that while Frangui did not give a formal statement, he did provide Mantecon with an informal statement inculpating himself in the said robbery (TR-105,106). When he accosted Frangui at ICDC, Frangui agreed to accompany him to the Metro-Dade Homicide Office (TR-106,107). He added that Frangui was anxious to leave ICDC for awhile, but that he was promised nothing to get him to do so (TR-107).

Det, Smith said Frangui wasn't asked any questions regarding the killings of Raul Lopez or of Officer Bauer (TR-168). He said that Frangui was taken to the robbery office and put in an interview room. He said there were discussions with Frangui to secure basic information before he was Mirandized (TR- 108,109).

Det. Smith testified that Frangui didn't appear to be under the influence of anything and that there were no threats or other coercions made (TR-109-116). Smith then further testified: After the Miranda form was signed by Frangui, Det. Crawford left the room and I, "carried on the interview at that time" (TR-110,111). He was in the interview room with Frangui for two and a half hours by himself. He took a break at 3:35 p.m. and then had contact with his supervisor, Sgt. David Rivers. During the interview Frangui was concerned regarding the fatal bullet which killed the police officer (TR-111-113).

Det. Smith further testified: When the information regarding the fatal bullet that killed the police officer was conveyed to Frangui, Frangui "... .hugged him and cried." Up to this point all he discussed with Frangui was the murder of Officer Bauer (TR-113-115). At 6:45 p.m., he entered the interview room with HPD Detectives Nabut and Nazario. Frangui never said he wanted a lawyer or that he wanted to stop being interviewed. When Frangui was asked whether he would give a sworn statement regarding Officer Bauer, he said he did not wish to do so. He told the Hialeah officers that Frangui had already waived his rights.

Det. Smith then testified: Frangui initially denied being involved in the Hialeah killing but said he wanted a lawyer and that he, i.e., Frangui, didn't want to speak with him. After Frangui denied his involvement in the Hialeah killing, Det. Nabut displayed to him a number of photos, including two of truck-like vehicles, and then, "he started talking about the incident and how he was involved in stealing the Suburbans" (TR-118,119). He never saw Detectives Nabut or Nazario threaten or hit Frangui. Frangui was fed and appeared to be alert after he left him with Nabut and Nazario. He had subsequent contact with Frangui after he left the homicide office and went home at 8:00 p.m., returning thereto when he was beeped and told that Frangui desired to make a statement. He got back to the homicide office at 9:45 p.m., and Frangui's formal statement was concluded at 11:40 p.m. Frangui was awake and alert (TR-119-121).

On cross examination, Det. Smith testified: He left for ICDC prior to 11:00 a.m. He was aware that Frangui had probably been to court within 24 hours of his arrest and that counsel are appointed at such initial appearances, but he wasn't aware that Frangui actually had been appointed counsel to represent him. He really didn't care about the case for which Frangui was in custody; rather, it was his intention to interview him concerning "something unrelated" (TR-122-125). He wasn't aware of any other pending cases against Frangui. Although he wanted Frangui's help, he didn't read him Miranda rights or tell him that he was a subject in any other criminal activity. He did not check the jail records to see if Frangui had visitors between Jan. 14th and 18th. Frangui denied any involvement in the Bauer case at first but Det. Smith was aware that one of his co-culprits had implicated him (TR-125-129).

State called as its next pre-trial hearing witness, Sgt. David Rivers, a Metro homicide officer since 1981. He testified: He supervised the Cold Case Squad. He was beeped at 7:30 a.m. and was told there were breaks in the Bauer case and he responded to the Headquarters Building. A briefing was held at 9:30 a.m., with a number of persons present, including agents or police

officers from the FBI, Metro, North Miami, City of Miami, and Hialeah. At that briefing he received information regarding suspects in the case including Fernando Fernandez. Later that morning he had conversations concerning SM and Frangui with Det. Mantecon, who told him he had arrested them and that SM had waived his rights in Spanish. He assigned Det. Mike Santos to SM and Detectives Crawford and Smith to Frangui. Frangui was brought to the Metro Headquarters, and he saw him late in the afternoon. He told Frangui that his gun had not fired "the fatal round" that killed Officer Bauer. He made no promises except telling him it would go better for him if he told the truth, but that it would be up to the judge as to what happened to him. He said Frangui had told him he had not killed Bauer but, rather, had just intended to participate in an armed robbery. He said Frangui admitted he had a gun when he participated in the NM robbery. Det. Crawford remained "there throughout the afternoon" on his order (TR-133-140).

On cross Sgt. Rivers impliedly admitted he discussed the death penalty with Frangui (TR-140). He said that in excess of twenty persons attended the Task Force meeting. On redirect he testified that an assistant state attorney was at the meeting, including when the decision was made to take Frangui and SM out of jail (TR-140-144).

State next called witness Det. Albert Nabut of the HPD, Homicide Division. He testified: He was the lead investigator regarding the death of Raul Lopez which occurred on Dec. 6, 1991, and on Jan. 18, 1992, when he and Det. Nazario came into contact with Frangui. He met Frangui at 6:45 p.m., at the Metro headquarters, and Det. Smith told him Frangui had already been Mirandized. He asked Frangui if he had anything to do with Hialeah murder and Frangui shook his head indicating a negative response. When they showed Frangui photos of the involved Republic Bank building and of the alleged involved Suburban vehicles, he immediately admitted he had knowledge thereof and said he would talk to them and not lie. There was no harassment of Frangui. He spoke to Frangui mainly in English because Det. Smith was in the room, but he

jumped back and forth between Spanish and English. Frangui started talking "to us" after Smith left the room. They were inquiring about the murder of Raul Lopez in Hialeah, but Frangui kept bringing up other crimes (TR-144-151).

Sgt. Nabut further testified: They spoke with Frangui from 6:45 p.m. to 9:00 or 9:30 p.m. Frangui agreed to give a sworn statement for the Raul Lopez case, the Steven Bauer case, and the Bird Road RNB case. They allowed Frangui to meet alone with his wife or girlfriend, Vivian, but upon learning there was a monitor in the room into which he, Det. Nabut, went, he listened to their conversation. He never heard Frangui tell his wife he wanted a lawyer (TR-15 1-155).

Det. Nabut further testified: He was present when the recorded statement of Frangui concerning the killing of Lopez was taken and when the formal statement was read back to Frangui (TR-155-156). At this juncture, Frangui's said statement was received in evidence as to Frangui alone (TR-156).

Sgt. Nabut thereafter testified: Frangui never asked for a lawyer. He was also present for the taking of Frangui's statement concerning the killing of Steven Bauer, during the course of which he also didn't ask for a lawyer. Frangui's statements were taken in the following order, to-wit: (1) the Hialeah case; (2) the RNB case; and (3) the Steven Bauer murder.

In his sworn statement to him Frangui admitted his involvement "in the murder of Raul Lopez", but he was not placed under arrest therefor on that date, i.e., Jan. 18, 1992 (TR-156-158). He next spoke to Frangui on Jan. 20, 1992, at the Dade County Jail and "we" again had him waive his rights, but "(H)e refused to do so in writing", although he was willing to talk to them (TR-159,160). He wasn't sure if he Mirandized Frangui in English. He did not tell Frangui he'd receive only a 15-year sentence if he cooperated. He went to the Dade County Jail the next day, i.e., Jan. 21, 1992, to discuss the Hialeah case with him, and Frangui was again Mirandized but not arrested. The last time he saw Frangui was right before Thanksgiving on which occasion,

"(H)e wanted to talk to me, wished me and my family a good Thanksgiving." He recommended to Frangui that he contact his attorney and that was the last contact he had with Frangui (TR-159-166).

Sgt. Nabut next picked out Defendant SM in the courtroom and said he had interviewed him on Jan. 21, 1992. Sgt. Nabut then testified as follows: SM was not arrested for the Hialeah murder as of the time he interviewed him on Jan. 21st. Det. Nazario went with him at such time and SM agreed to speak to them, but he did not execute a waiver form although he verbally waived his rights in Spanish. That was the last time he spoke to SM, and on that date he went to speak to him regarding the Lopez murder. SM drew a sketch upon which he described where the guns or the two guns used in the Hialeah murder had been thrown away" (TR-167-171). There were no promises or threats made to SM. They interviewed co-deft. Pablo Abreu a total of three times. Abreu, who was SM's cousin, at first denied his involvement in the Hialeah robbery but later confirmed as accurate information SM had given them as to the location of the guns (TR-17 1-179). During additional colloquy between respective counsel, it was brought out that there was no notation in Nabut's notes that he read Miranda rights to Frangui on Jan. 18, 20, and 21, 1992 (TR-194,195).

Nabut testified on cross: Frangui changed versions of what had happened from denial to admission. He didn't recall telling Frangui he was doing the right thing and that things would be easier for him. Frangui made no statements to him indicating why he had changed his mind, but did so within a few seconds after being showed police photographs. He was aware that Frangui was in jail for armed robbery, but he had no idea Frangui had already had an initial appearance, although, admittedly, he was aware that initial appearances in armed robbery cases usually occurs within 24 hours of arrest at which time counsel are usually appointed. He spoke with Frangui for two to two and a half hours before Frangui gave a formal statement. He availed himself of a

monitor in the room where Frangui and his wife were talking, although I didn't know it was there beforehand. It would be wrong to say that he heard them discussing that Frangui wanted a lawyer. However, he did hear Frangui say concerning the Bauer case, including saying that he hadn't shot him. Frangui did not give consent to the monitoring of his conversation with his wife (TR-195-207). Frangui spoke with him for two and a half hours before the recorded statement was taken and there was no discussion of the death penalty nor any discussion of the fact that he was "implicated" in the murder of a police officer. They just showed him the photographs.

Sgt. Nabut further testified on cross: He didn't arrest Frangui until after he was indicted because he wasn't going anywhere, and because although they had probable cause, they hadn't completed their investigation because he was still trying to find the firearm. He knew that Frangui had been transported from jail to the Metro Dade Police Station, but he didn't know why. He first contacted SM on Jan. 21, 1992, and it was his idea to do so. He confronted SM with the confessions of others, with Det. Nazario speaking to him in Spanish. They had no recording devises with them during this first interview with SM. He went directly to the question of where the weapons were located, making it clear to SM that they knew he was involved. He Mirandized SM in Spanish. He had no specific recollection of how SM responded to the first Miranda right but he was sure he understood his rights. When they asked SM about the location of the guns, they told him they had his prior statement of the 18th. SM was always respectful to he and his colleagues. They found him to be quiet and almost an introvert. He answered their questions, "but didn't really carry on with elaborate conversations and explanations and stuff." He did not volunteer anything (TR-195-257). At the beginning SM claimed that the gun was out in the ocean, and when he asked SM if he would take them there, SM stared at the floor for thirty to forty seconds. SM then told him, "(I)t's not in the ocean. It's in the river", and he had a fluctuating eye stare (TR-257-264).

Homicide Detective Mike Santos of the Metro Homicide Division was State's next witness. He testified: He was involved with the Task Force that investigated the death of Officer Bauer and he assisted the HPD in connection with the death of Raul Lopez. On Jan. 18th he was advised of a development in the Bauer investigation by a Sgt. Jiminez, the information being that NM detectives had learned that SM was involved in the death of Bauer. He went to ICDC with FDLE Special Agent Dorothy Ingraham. SM agreed to go to the Metro Homicide office. They spoke in Spanish. Once there he "unhandcuffed" SM, put him in an interview room and read him his rights in Spanish, with SM initialling each right and purportedly understanding each right. During breaks in the questioning of SM, they had meetings with other officers and based on information they were getting at these briefings, they went back to re-question SM, with SM having dinner and something to drink in between. In this regard, SM was brought to the station between eight to nine a.m., and they had their meeting with the Hialeah detectives beginning at 12:30 p.m. Det. Nabut told them SM was "implicated" in the murder of Raul Lopez and that other suspects had so "implicated" SM. At Nabut's request he continued questioning SM concerning the Lopez murder with no promises or intimidations being involved (TR-264-275).

On cross Det. Santos testified: He knew nothing regarding Frangui being taken from jail. He knew that when he went to pick up SM he was already under arrest for the Miami armed robbery and kidnapping case. The gathering of the Task Force that morning did not constitute a normal routine. His orders were to bring SM to Metro headquarters, but only if he would come voluntarily. There was no conversation with SM in the car (TR-281-282). SM was "(U)nhandcuffed" at the station. He believed he told SM initially that he had been implicated in the Bauer murder with no mention at that time of the Hialeah murder. From 12:35 p.m. until 8:00 p.m. they talked to SM about only the Bauer murder and sometime after 8 p.m. they began to talk to him regarding the Hialeah murder. They relied on the rights waiver form he had executed in

connection with the Bauer murder, which was done at 12:30 p.m. He spoke to Det. Nabut sometime after 8:00 p.m. regarding the involvement of SM in the Hialeah case. Thereafter he told SM he had been implicated in the Hialeah murder through the statements of other persons, and SM then proceeded to answer questions about the Lopez killing. He had no independent memory of what SM told him and was relying solely on his police report. This last phase of the questioning and interviewing of SM lasted "(A) couple of hours." He understood SM perfectly. SM volunteered no information (TR-275-297).

Co-defendant Leonardo Frangui next testified as follows at the pre-trial motions hearing: He was twenty-two years old and came to the U.S. in 1980; he had an eighth grade education in the U.S.; he was in ICDC on Jan. 18, 1992, in connection with an armed robbery case; and he had been there approximately four days. His public defender had told him to not speak to anybody. Detectives Smith and Crawford came to him at ICDC and told him he had to go with them. They didn't read Frangui the Miranda rights at ICDC. They put Frangui in a room at Metro headquarters, and he was handcuffed to a table. Frangui told Det. Crawford he recognized a photo of SM, but said he didn't know the other persons in the photos shown to him. Crawford told him SM had been arrested by him earlier. Det. Crawford told him he already knew what was going on and it was not going to make any difference if he held back.

Frangui further testified: Det. Crawford asked him about the murder of Bauer and he told him he knew nothing. Crawford then got angry and smashed the table and kicked and struck him. He didn't know how many times he was struck. Crawford read him Miranda rights and then Detectives Nabut and Nazario came into the room. Nabut asked him about the North Miami case. He had been in the interview room six to seven hours when Nabut came in. Nabut told him there were a hundred officers who would beat him up if he didn't cooperate. After thereafter giving the police a statement about the NM killing, they asked him about the Hialeah case and the RNB

robbery case. During this questioning he was allowed to speak to his wife, Vivian, and he told her to contact his lawyer, Eric Cohen. At the conclusion of giving the recorded statement regarding the Hialeah case, he said he gave it voluntarily but that was not the truth; rather, he gave the recorded statement because he was scared and didn't want to face Det. Crawford again. His statement in that recorded statement that he was treated well was also untruthful (TR-348-372) When Smith and Crawford came to see him on Jan. 18, 1992, they wanted to question him concerning a robbery regarding to which he had already confessed (TR-374-375). He lied in an earlier statement he had given concerning the murder of Lopez when he said he was armed with a .357 magnum when it wasn't a .357. With reference to that statement, he didn't remember whether he understood he had the right to make corrections even though he had signed a statement which itself contained language saying he could make changes to the statement. Eric Cohen had become his lawyer after he had been arrested for the Miami robbery (TR-372-383).

Pablo San Martin next testified in his own behalf at the suppression hearing and said as follows: He was born on July 23, 1967, and came to the U.S. from Cuba in 1980. He went through the eighth grade. On Jan. 18, 1992, while he was being held in ICDC, Det. Santos came and took him out and to the police station to be interviewed. He was Mirandized but did not understand his rights and while reading them he said he wanted a lawyer (TR-383-386).

Following SM's testimony, the court heard of respective counsel on the motions to suppress of both SM and Frangui. Frangui's main arguments were that he couldn't be questioned in perpetuity regarding several cases after only being Mirandized regarding the first one and that his having executed a written invocation of his right to not answer questions constituted a refusal to waive his rights (TR-406-411). SM's lawyers argued that his statements should be suppressed because Det. Santos remembered little of the details thereof; because the inquiring by Nabut and his partner was spotty and incomplete; and because although SM had not been physically beaten,

he was afraid that he would be, which adversely affected his state of mind (TR-411-413).

The matter of taking the missing medical examiner's (i.e., Dr. Hougen) deposition came up again and Co-defense counsel objected to doing so over the phone because of the taking the oath problem.

The court next reaffirmed its prior position that a ruling as to one defendant is a ruling as to all defendants unless they opt out (TR-454-455).

The next pre-trial matter to be taken up was the defendants' respective motions for a trial severance from each other, with the prosecution proposing redactions to the confessions of the respective defendants purportedly dealing with other crimes. State argued the defendants' statements were not inconsistent with the exception that there were differences "regarding who actually shot the victim, the deceased in this case," but that as redacted the "statements are again entirely consistent on this point" (TR-457,458). With reference to his saying therein that Frangui fired repeatedly several times, State contended such was not inconsistent with what Frangui said, but rather something in addition thereto (TR-459). Further, State argued that each defendant's statements should be admitted in evidence against all the other defendants (at this point, Abreu was still a defendant). State argued that while there were "substantial" discrepancies in the statements, they nevertheless were admissible----as redacted----because they were interlocking and because this aspect of them supplied the reliability feature necessary to withstand the Confrontation Clause challenge. Further, State argued that there was no confrontation necessary if the statements came in as a hearsay exception. Finally, State argued that the statements of the three defendants were in fact consistent and that the physical evidence corroborated the statements of the defendants, which physical evidence State described as the bullet that was removed from the body of the victim, and one of firearms found in the canal which could have fired it, i.e, a .38 revolver, along with a gun that couldn't have fired it, i.e., a 9 mm pistol. With reference to the 9 mm pistol, State contended

a

that this was the type of gun fired by Abreu and SM. State then partially retreated from its earlier saying: ". . . .it is the state's position that the interlocking nature of the confession by itself is sufficient to establish reliability and regardless of the physical evidence whether there is any corroborative (sic). . . . " (TR-457-463).

Frangui's counsel argued that since SM never described the firearm that Abreu was carrying, "as do neither of the co-defendants"; since Abreu specifically said he didn't fire "the shot" because he fired "at one of the passengers and one of the occupants"; and since SM shot at the other occupants of the Blazer, "they could not have fired the fatal shot that killed the occupant of the brown pick-up truck that was in the rear," which would, of course, prove that his client was the killer. Such counsel further argued that all of the defendants were denying the responsibility.

Following further and extensive argument, the court stated: "Anybody who gives an exculpating statement mandatorily must be removed from the same trial" (TR-472).

Following further argument on this point, an obviously frustrated court then exclaimed:

"I shot, they shot, I didn't shoot the man that died." (TR-472-476)

The next pre-trial motion considered by the court was that for leave to retain the services of a jury selection expert. That motion was denied (TR-513,515).

The court announced that with reference to the appointment of defense experts, their compensation was subject "to approval of the fee schedules that these individuals are going to provide you" (TR-516). The court said its previous denial for a jury selection expert applied to all defendants (TR-52 1-529).

The Defense trial severance motions were denied. The court next took up State's motion to exclude statements by Frangui that Fernandez and SM "were the leaders and planners of this robbery. . ..and that it was Fernando Fernandez who had fired the .357 at the deceased and not Frangui (TR-556-560).

Defense lawyers agreed that the court could discuss the penalties for first degree murder with jurors.

Thereafter SM's attorney moved for sequestered voir dire and the court indicated it would deny same because it was the NM case that got all the press and not the instant case. The court added that it would deal with jurors individually who indicate they have heard of this case (TR-562-565). SM's counsel responded that this motion was based on the grounds other than publicity, and that more specifically it was based on not "tainting of the entire panel on death qualification issues and that it is based upon avoiding the peer pressure concept". The court denied SM's motion for the individual voir diring of the jury (TR-567-568).

Following voir dire, the jury was empaneled.

Followed by the opening statements of respective trial counsel, State called as its first trial witness Danilo Cabanas, Jr., who testified: The deceased, Raul Lopez, was a friend of his family; his father, Danilo Cabanas, Sr., had a check cashing business and he helped him in such business (TR-1734-1735). At this point State attempted to question Cabanas, Jr., about an incident that involved his father which occurred in August of 1991 and over a Defense hearsay objection, the court allowed Cabanas, Jr., to tell the jury about a robbery of his father occurring at such prior time. Cabanas, Jr., then testified that "my father was held up at gunpoint right at the bank" (TR-1735-1737). He said that as a result thereof, he and his father started going together to the bank and that Raul Lopez started accompanying them for security reasons. He said that they did this every Friday and that Raul would drive his vehicle to the bank and he and his father drove their's (TR-1735-1738).

Cabanas, Jr., then testified further as follows: They always carried guns for protection. On the date of the killing of Lopez they started out to the bank in their Blazer, and Lopez was going to meet them there. Lopez and he waited for his father outside the bank and his father came out

of the bank with between twenty and twenty-five thousand dollars. His father was carrying the money in a small brown bag and in his big pockets because he was afraid of being robbed again. His father went right to the truck which he, i.e., Cabanas, Jr., drove, and Lopez drove his truck behind them. He drove away from the bank and made a left at 44th Street heading toward the Palmetto Expressway with Lopez remaining behind them. He made a left-hand turn onto 20th Avenue, which is the perimeter road right by the Palmetto Expressway and which has one lane each way. He noticed a truck in front of their vehicle as he was approaching its intersection with 41st Street, which was going slow and then it hesitated. He then saw this other truck coming very fast in the left lane, i.e., the lane for oncoming traffic (TR-1738-1742).

Cabanas, Jr., then testified: ". . . .at the same moment that the truck in front of me stopped he got there and stopped also blocking my way" (TR-1742). (There follows the first of an incredible number of Cabanas Jr.'s answers to State unobjected to leading questions, which will hereinafter be referred to by the identifying initials as "ASULQ".) There was no way Lopez could have escaped based on the way the two trucks were stopped. All of a sudden the doors in the truck opened and its occupants started shooting at them. They had masks on. The truck coming in the left lane on the opposite side had two tones of gray, a dark gray and a lighter gray. His father pushed him aside and the father returned fire with a gun he got from the hump of their Blazer. He had no idea where Raul Lopez was nor any idea as to what happened to him. The shooting lasted a few seconds, but it seemed like a lifetime. The people in the truck in front of him got back into their truck and left. He didn't see the truck in the left-hand lane leave, but when the shooting had stopped the would be robbers weren't there. His father had fired both of their guns and following his first instinct, he, Cabanas, Jr., reloaded one of the guns. His father went around to where Lopez's person was located and he, i.e., Cabanas, Jr., saw Lopez lying in the street (TR-1742-1747).

Cabanas, Jr., further testified on State direct: He stopped a car on 20th Ave., and then the police arrived and he went back to Lopez, who told him he was short of breath. He served as an interpreter for Lopez to the policemen because Lopez didn't speak any English. He turned Lopez and put him on his, i.e., Cabanas, Jr.'s, thighs until the rescue came and took Lopez away. He and his father were there during the entire investigation, Lopez's gun was lying in the street and his father picked it up and put it in the Blazer so it would be out of the way. He gave the police Lopez's gun, as well as his gun (ASULQ). Lopez's driver's side window was up and his driver's door was closed, but he didn't recall whether the passenger side window was up or down. Lopez's truck and their truck were touching, but there had been no collision between them. He drove Lopez's truck to the police station and there was no blood in Lopez's truck and no blood trail from that vehicle's doors to where his body was situated (TR-1747). While they were at the robbery scene, two police on motorcycles requested that they go and identify two Suburbans parked at a different location from the scene of the shooting. These were the two trucks that were used in the attempted robbery of he and the murder of Raul Lopez and they were parked in the service lane (TR-1754)(ASULQ).

Cabanas, Jr., then identified some State photos which included one of Lopez's truck. It was received in evidence. This photo accurately depicted the configuration of that truck (TR-1754-1756)(ASULQ). Cabanas, Jr., said that "Raul was found back here in the back of this truck" (TR-1756). Completing his State direct testimony, Cabanas, Jr., testified that Lopez was in anguish; that he opened up Lopez's shirt and observed the entry point of a bullet on his arm; and that he didn't move him so as to not injure him (TR-1754-1757).

Cabanas Jr., testified on cross: Lopez was a prudent distance behind him or a couple of car lengths. Two men got out of Suburban in front of him, and as far as he recalled, one man got out of other Suburban. He was not sure as to how many people were in the second Suburban, nor was

a

he sure whether the person he saw get out had a gun, nor on which side he got out, "(B)ecause it happened so fast" and because the other two men were shooting at his father (TR-1757-1761). The man who got out of the second Suburban was wearing a mask. None of the three robbers said anything to him. Nothing was demanded or taken from him. The money was in the Cabanas's truck at the time of the attempted robbery (TR-1761-1764). Although he was crouched down, he was looking at everything that was happening. He remembered seeing two guys with masks and he never saw their faces. When it was all over, he had no idea whatsoever who the robbers were. He said "we" had two 9 mm guns, a Browning and a Star (Tr-1764-1771).

State's second trial witness was Hialeah Police Dept. (HPD) Crime Scene Technician Jim Olsen, who testified: He was dispatched to the crime scene and took photographs there. The driver's side vent window on the blue over white Suburban was broken and the column was broken probably by a screwdriver so that they could get to the mechanism therein to start the vehicle (TR-177 1-1779). He didn't know if any fingerprints were secured. He found three spent casings on the passenger side door of the blue and white Chevy, which he described as ". . . .a 9 mm" (TR-1779-1789).

Technician Olsen's testimony was interrupted in order that State could call Yung K. Huk to the stand. State witness Huk testified as to the details of his 1979 Chevy Suburban being stolen on a day in December, 1991, including telling the jury that the steering wheel was not cracked when he left the Suburban that morning; that he counted thirteen bullet holes on the truck; that he found that the left side of the vent window was broken; and that there was a stocking in his Suburban which was not there when he left the vehicle. He said he didn't recognize the defendants in the courtroom and that he never gave them permission to use his Suburban. He remembered that the Suburban was stolen on a Wednesday because that was the day he would go to Bible study (ASULQ)(TR-1789-1793).

State recalled Tech. Olsen, who testified regarding three casings he found on the roadway and regarding the chain of custody of the three casings. He said that he observed three holes in the rear window of the blue and white vehicle and that he recovered one spent casing from the inside passenger floorboard. Following more chain of custody testimony, he described "A-3" as a spent 9 mm casing. " He then further testified: He observed a ladies' stocking (ASULQ). He noticed a mark on the back tailgate of the blue and white Suburban (ASULQ). He pointed out a "strike mark" on the blue and white Chevy in the photo and "the projectile that I recovered from the same vehicle, "which was right below the ricochet" (ASULQ).

Following introduction of a photo of "a spent projectile....as opposed to a casing," which Olsen said was found outside the blue and white Suburban below the door and the frame (ASULQ), he began testifying regarding the two-tone gray Suburban, and he told the jury the number of the Georgia tag that was on this vehicle. He said that the driver's door to it was closed, the driver's side window was up, and that there were no bullet holes in it. However, he said that he noticed a mark or indentation on the back tailgate of the said vehicle (ASULQ). The photo's were introduced in evidence. He said that he impounded the projectile found below the richochet and that he recovered another spent projectile (TR-1793-1821).

On cross Olsen testified: He did not have expertise in identifying entry holes from exit holes on the vehicles and that no one ever attempted to make that determination. He didn't have any photos showing the driver's side window of the gray on gray vehicle closed. There were fragments found underneath the hole.. . . inside the storage area. He responded to the Palmetto site only and not to the scene of the crime and when he arrived he was unable to determine how many people had been in either of the two abandoned vehicles (TR-1821-1839).

State next called Metro Homicide Detective Greg Smith to the stand and he testified: That he came into contact with Frangui on Jan. 18, 1992, and secured basic information about his

personal particulars from him. His testimony regarding the details of his Mirandizing Frangui was essentially the same as it was during the pre-trial hearing.

State then interjected the name of Fernando Fernandez into trial over a Defense objection that the court had "already ruled twice preliminarily preventing us from bringing up various issues concerning Fernando Fernandez" (TR-1847-1919). The court----after noting that it remembered Defense's motion in limine to keep out anything about Fernando Fernandez----denied Defense's objection to State's bringing up the subject of Fernando Fernandez. During the course of this the prosecution said:

> "The exculpating self-serving statement made that Fernando Fernandez was the shooter. Fernando Fernandez's involvement in this case is going to come about thirty-two times in the statement by Frangui. " (TR-1919-1924)

Det. Smith thereafter testified there were some problems as to what was said to and by Frangui because he, i.e., Det. Smith didn't speak Spanish. Defense then renewed the motion for a trial severance as well as renewing the motion to exclude the involved statement of Frangui. Both motions were denied (TR-1924). State then passed out copies of Frangui's statement to the jurors (TR-1924-1929).

HPD Det. Nabut was State's next witness and he testified: He was a homicide investigator and the lead investigator in the shooting of Lopez. He responded to the scene of the shooting and Lopez's body had already been removed. Two Suburbans had been abandoned next to the Palmetto Expressway. This case was unsolved between Dec. 6, 1991, and Jan. 18, 1992. He went to Metro headquarters on the latter date where he met with Frangui. Frangui spoke fluently both Spanish and English. Frangui initially denied any knowledge of the murder of Lopez, but when he showed Frangui an aerial photo of where the Suburbans had been abandoned, the latter immediately said he'd be a man and he admitted he knew what they were talking about. They then

conducted a pre-interview of Frangui during which Frangui said that he learned through Fernando Fernandez that the Cabanas had a check cashing business. Frangui further told him that "they" knew of the Cabanas' Friday money securing procedure and that he, i.e., Frangui, knew about this procedure for three to five months before the date of the attempted robbery, during which period of time he had been casing the Cabanas's going through their Friday money securing procedures (TR-1929-1935)(ASULQ). Nabut said that Frangui also said the following during the pre-interview interview: Fernando Fernandez told Frangui he couldn't rob them right away because they just had been robbed "and now they're a little more careful about things" (TR-1936). Frangui said they stole two Suburbans, a blue and white one and a gray and white one, and said where they stole them from. Frangui said that on the morning of the shooting "they actually watched for and waited for the victims to leave the bank" after leaving a getaway vehicle with flashing lights turned on on the Palmetto Expressway, and that they were going to use two Suburbans to do the robbery (TR-1937)(ASULQ). Frangui said he had a .357 and a .38 cal. revolver; that SM had a 9 mm semiautomatic pistol which jammed sometimes; and that Abreu had a TECH 9, i.e., 9 mm semiautomatic which looked like a small machine gun; that they would meet the Cabanas' at a four-way stop; and that they then carried out their plan (TR-1938-1939). He said that Frangui further told him: that the rounds Frangui remembered entering Lopez's vehicle went through the front windshield thereof; that he was in the blue and white Suburban; that Abreu and SM were in the gray and white Suburban, with Abreu being the driver; that they wore stockings (ASULQ); and that Frangui couldn't give "a definite number" of shots he fired (TR-1937-1941).

The court then restated the earlier Defense objections to the introduction of Frangui's statement and reasserted his ruling denying same (TR-1941-1942).

The State next sought to have introduced the formal Frangui confession and then at a sidebar requested by State concerning deletions, including a missing numbered page, State told the

court it didn't want it to look like that it caused the deletions to be made. In this regard, the court noted that, "(T)his was redacted because due to the evidence of the other crimes" (TR-1942-1945).

The court instructed the jury that the deletions were made by consent of the parties and they were not to speculate regarding same. SM's counsel then said he had not consented to the deletions (TR-1947).

Det. Nabut then began reading Frangui's formal confession to the jury. He said that Frangui made inked grammatical corrections. He said that Frangui said the following in his formal statement: He was present when Fernando Fernandez "showed me what car he was driving and what business they were working in" (TR-1952-1953). Fernando Fernandez showed him where Cabanas' businesses were "about five, six months before" (TR-1954). Fernandez was not to participate in the robbery, he was just to get part of the money. Fernandez was to get $6,000, and he, i.e., Frangui, would get $25,000. "Both Pablos" went with him to steal the two vehicles (which vehicles he described). A screwdriver was used in stealing the vehicles (he described how). They went to SM's house after stealing the vehicles. They took Suburbans because they were easier to take. On the date of the shooting they met at SM's house and then went to where the two Suburbans were parked on Palm Avenue behind the building. They drove to the bank. SM drove the blue and white van and he parked it and got into the van with Abreu, and he, i.e., Frangui, followed in the gray over gray Suburban to where Abreu had left his van parked on the side of the expressway. The two of them then got into the gray Suburban and went back to the bank where SM became a passenger in the blue and white. The "businessmen" were in a white and red Blazer. He didn't see any other car behind the "businessmen." Abreu got in front of them and they got behind them. They went to the side of the businessmen's vehicle to block it. SM was going to point the gun and demand the money and Abreu was to use his vehicle to block the businessmen's car. A brown truck came from behind and hit the Blazer and "the guy.. . .came

Out with a gun shooting. He immediately added that he didn't know if it was him shooting (TR-1953-1971).

Det. Nabut further said Frangui said: He was ducking down because SM and Abreu were shooting and the bullets were going in all directions. He, i.e., Frangui, fired a shot through the window "outside of the car" towards the truck.. . . ". . . .just to the windshield" (TR-1972-1973). People were still shooting when he departed the scene, including SM and Abreu. He reached the vehicle on the expressway first (TR-1973). At this juncture, State interrupted the reading of Frangui's formal confession to try to clarify who was shooting where (TR-1974).

Thereafter Det. Nabut continued reading Frangui's formal confession, as follows: SM stayed on his side on the left side of his vehicle and he and Abreu shot both at the businessmen and at the brown truck. After they drove onto the expressway where the getaway car was, they took their guns with them. He didn't use a mask, but the two "Pablo's" had women's stockings on their faces. Abreu drove them to SM's house and he got in his car and left. The guns were all left at SM's house (TR-1973-1979).

There followed a discussion between the court and counsel of the previously granted motion in limine of the prosecution concerning Frangui's (in jail) statements of Jan. 20, 1992, with State arguing that the motion in limine was granted because the said statement was self serving. The court responded that there is no such objection and that the reason was hearsay.

Frangui's counsel vigorously contended that he should be allowed to bring in that there was another statement made by Frangui that existed, but the court rejected such in the following language:

> That is no purpose. I will not allow it. So you will not bring out any testimony concerning the existence of other statements the nature of which is inadmissible. " (TR-1985)

On cross Nabut testified: Frangui said during both interviews that there was no plan to

shoot anybody. There was a difference in his two statements as to whether he rolled a window down. Frangui said during his pre-interview statement that the person in the brown truck fired at him. Frangui didn't know names of the "businessmen." Although Frangui said they followed the Cabanas' the Friday before, he was surprised when the brown truck showed up on the day of the shooting. He asked a Broward officer to come down and process the Suburbans for latents and the results were that they were negative in that there were no latents of value. Nabut said that neither of the Cabanas' were able to pick out Frangui in photo lineups (TR-1985-1991).

On cross by SM's attorney Det. Nabut testified that there were no fingerprints on the two Suburbans tied to SM (TR-1992).

The next State witness was the Records Custodian of Jackson Memorial Hospital, through whom that hospital's record covering the deceased, Lopez, was received in evidence (TR-1994-1996).

State next called HPD Traffic Homicide Officer Mark J. Tansley who testified as follows: He came up on an apparent slight accident on the date of the shooting while on routine patrol, observing two men in his lane waiving him down. He then saw a person lying in the southbound lane on West 20th Avenue just north of West 41st Street. There was another person who had been shot, who was breathing. He couldn't understand what the injured person was saying, that person being in a lot of pain. He saw what appeared to be an entrance bullet wound under his right arm in his lung area on the right side of his torso. He could not find an exit wound. One of the Cabanas had minor facial lacerations which he attributed to flying glass. He saw what appeared to be numerous bullet holes in the front vehicle. He didn't change the condition of either the front vehicle or the brown truck. He put out a description of the two vehicles. There had been a low impact accident and speeds of five to ten mph (TR-1998-2013).

The prosecution next called Danilo Cabanas, Sr., who testified through an interpreter, as

follows: He is 70 years old and retired. He was robbed at gunpoint in Aug., 1991, in the parking lot of the same bank and after that robbery Lopez and Cabanas, Jr., accompanied him----with Lopez following in his own vehicle----during the Friday money pick-ups (TR-2013-2020). Cabanas, Sr., described the incident as follows: One of the persons from the vehicle in front of them came out of the passenger side with his weapon in his hand. He pushed his son down and ducked down to pick up his weapon. Their attackers shot through the windshield. If he had not been ducking a bullet would have gotten him. He picked up his weapon and started shooting so he wouldn't be killed. The shooting went on 20 to 30 seconds. There were two trucks standing in front of them. The shooting stopped when the would-be robbers left in a truck. Lopez was on the ground. He picked up Lopez's weapon from underneath the pickup truck and threw it inside the truck. He gave Lopez's gun to the police when they arrived (ASULQ). He also gave them his weapon (ASULQ). Lopez was taken to JMH in the hopes of saving his life (TR-2020-2025)(ASULQ).

On cross, Cabanas, Sr., testified: He first noted the blue and white Suburban on the road next to the expressway. He didn't know how many persons were in the truck to his left. The person shooting at them had a mask on, but he didn't know if the people in the gray truck had masks on. No one demanded money from him. He didn't know if Lopez fired a gun. He was never shown photos and asked to identify any of the people involved in the shooting (TR-2025-2030).

State then called Nurse Boyd as its next witness and she testified as follows: She is a registered nurse at JMH. She is a circulating nurse and one of her duties is to handle and/or document the discovery of any foreign objects. She was part of the surgical team that was attempting to save Lopez's life (ASULQ). A bullet was found during operative procedures being performed on Lopez. At this point she described what the surgeon and others did to the bullet,

although she admitted she had no independent memory thereof. She said she took a photostatic copy out of the bullet book, which State offered in evidence and which was received over Defense hearsay and improper chain of custody objections (TR-2031-2045). However, Defense objection to the receipt in evidence of the alleged fatal bullet itself was sustained upon chain of custody grounds, with the court saying, "I presume that Kennington is the missing link" (TR-2045-205 1).

State's next witness was Associate Dade Medical Examiner Valarie Rao, who testified: She is a licensed physician board certified in clinical pathology and anatomic and forensic pathology. She did not perform an autopsy on Lopez's body; rather Dr. Hans Hougen did it. She had reviewed the entire file on Lopez and the protocol and the photos. Defense's re-objection to Dr. Rao testifying from the protocol was then denied (TR-2051-2064). Dr. Rao then described the external description of the victim under the aforedescribed number. She described to the jury the medical intervention Lopez received and said there was evidence of a gunshot wound externally on the victim below the right shoulder. A photo of Lopez's body showing this wound was then received in evidence over previous Defense objections. She described to the jury from this photo how the bullet entered the victim's body and she described how the surgeon struggled to get a tube in through Lopez's ribs, saying, "(T)hat is the gunshot wound (indicating)....(T)hat is the chest tube" (TR-2064-2066). Referring to a laser print close-up photo of the entrance wound, Dr. Rao said that such a wound differed in characteristics from an exit wound. She described the path the bullet took, and said it ended in the stomach (TR-2068-2070).

Dr. Rao further testified: The bullet wound was consistent with the victim being conscious after being shot and with his being able to speak. It was also consistent with a person who bled a lot but that, "(A)fter the hospital had treated the victim, I don't know if any blood was left in the body" (TR-2070). A bullet which enters but does not leave the body is called a penetrating gunshot wound (TR-2071). Dr. Hougen was a resident at the time the Lopez body procedure was

performed (TR-207 1).

The prosecution at this point tried to bring out that Dr. Hougen made a mistake in his body diagram in a question to Dr. Rao, arguing that Dr. Rao was qualified to say there was no exit wound even though Dr. Hougen had said the opposite. Following argument over the admissibility of the Hougen record and whether Dr. Rao could testify, the court allowed the record in and permitted such testimony (TR-2077,2078).

Dr. Rao then testified that, "(I) am of the opinion that this was a.. . .(P)enetrating gunshot wound.. . . " and that in her opinion Dr. Hougen's diagram was in error in showing an exit wound (TR-2078,2079)(ASULQ). Dr. Rao then further testified: What Dr. Hougen marked as an exit wound was where the chest tube was located (TR-2079)(ASULQ). The surgeon put a note in the hospital chart that he recovered a bullet (ASULQ). The surgeon on more than one occasion wrote down that there was no exit wound (ASULQ). The surgeon called it a penetrating wound in his protocol (TR-2079-2080)(ASULQ). The surgeon said a bullet was recovered from the abdominal cavity, which was consistent with a penetrating gunshot wound (TR-2080). Dr. Rao then described the mechanism of Lopez's death including her having an opinion that the victim died from gunshot wound "to the chest and abdomen," meaning that, "(T)he path went through the chest and then into the abdomen" (TR-2080-2081)(ASULQ). Dr. Rao testified on cross: She didn't examine the victim's body and had no independent memory of it. Dr. Hougen was not licensed to practice anywhere in the United States. She signed the protocol even though she had nothing to do with the autopsy, and she didn't read it before she signed it, which was ten days later. The reason why she signed the protocol and the death certificate was because Dr. Hougen was not licensed in Florida and that was the way it was done with unlicensed staff doctors (TR-2083-2087). Dr. Rao said that her opinion was based upon Dr. Hougen's findings, the laser photos and the medical records from JMH. She said she didn't check with the doctors at JMH

who did the surgery. She said that there are exit wounds that can look like the surgical tube wound on Lopez's body (ASULQ), She said she couldn't determine what type of weapon made the gunshot wound (TR-2088-2091).

Prior to the next State witness, Metro Homicide Det. Mike Santos, testifying, Frangui's counsel renewed his motion for a trial severance from SM. This motion was denied (TR-2091-2093). Det. Santos then testified: He was not involved in the initial investigation on Dec. 6, 1991, but on Jan. 18, 1992, the HPD asked him to assist them in their investigation of the shooting of Lopez. He asked SM to accompany him to the Metro Police Station. He speaks Spanish fluently. At this juncture, the court refused to instruct the jury that it could only consider SM's statement as evidence against SM, and it denied Frangui's motion for severance and a mistrial (TR-2104-2112). Santos said that SM waived his Miranda rights in Spanish, and that he gave his statement voluntarily and without an attorney (TR-2093-2104). Det. Santos then further testified: He told SM about the information he had received from Det. Nabut. SM immediately acknowledged his involvement in the death of Lopez and proceeded to tell him what happened, including the following: That four months before the date of the crime Fernando Fernandez told him about the man with a check cashing business who got $75,000 at the bank, and that at a meeting he and Frangui attended, Fernandez planned the robbery (TR-2113-2115). His first interview with SM was designed to see what information he had (TR-2114-21 15)(ASULQ). He only took notes at this interview (TR-2115-2116)(ASULQ). SM indicated they put a plan into effect a few days before the date of the crime, which plan included stealing vehicles big enough to confront the Blazer (TR-2116)(ASULQ). SM said they stole the trucks from the area of S.W. 8th Street and LeJeune Road after considering stealing them in area near the Mall of the Americas. SM told him that they left the trucks by an apartment building in Hialeah to be picked up the next day and left with Abreu (TR-2116-2117). SM said "the man's bodyguard" was driving the brown

truck. SM said the brown truck pulled up behind him and that he exited the passenger side of the Suburban with a 9 mm pistol, with Abreu exiting the driver's side with a small machine gun (TR-2117-2121). Det. Santos then said that SM was the one who initiated the robbery because he ordered the man from the Blazer to not move (TR-2121). He said that SM further told him: The man in the Blazer raised his hands into the air. The driver of the Blazer opened fire with he and Abreu returning fire. He fired twice and Abreu fired several shots toward the victim but he wasn't "really sure" if Frangui fired because his view of Frangui was obstructed. He fired at the passenger of the Blazer but not at the pickup truck. After these shots were fired, they all got back into the stolen Suburbans and fled the area and went to the side road along the Palmetto Expressway where they abandoned the Suburbans and went to SM's house in the getaway car. They took the weapons to some location in Miami Beach and threw them off a bridge into the water. SM couldn't take him to the place where the guns had been dumped (TR-2121-2123)(ASULQ). Det. Santos repeated his earlier testimony that as a matter of procedure he conducted pre-trial interviews (TR-2124-2125). He said that SM refused to give a formal statement (TR-2125). At this point SM's counsel moved for a mistrial because of such answer but the prosecution began citing cases in opposition thereto which it had armed itself with in advance. The motion for a mistrial was denied (TR-2121-2127).

On cross Det. Santos testified: He made no effort to ascertain SM's education level. His attitude toward SM was confrontational. He didn't have recorded SM's refusal to participate in a formal interview (TR-2127-2129).

State next called HPD Det. Nabut, who testified: The hole in the passenger door of the truck was through and through as was demonstrated by the photos (TR-2131)(ASULQ). He came into contact with SM on Jan. 21, 1992, and he was aware SM had already confessed to Det. Santos. He Mirandized him. He questioned SM regarding the location of the weapons, who

initially said that they were out in the ocean, but later said they were in a river near his house (TR-2137)(ASULQ). SM drew a sketch or sketches and he, i.e., Det. Nabut, wrote thereon, "Defendant refused to sign" (TR-2139). Nabut then testified that he labeled some of the markings on SM's sketches, including the directions, which sketches SM refused to sign, and including the location of the 9 mm and .357. He also wrote in "Diagram by San Martin" and his partner, Ralph Nazario, signed it (TR-2139). The diagram was received in evidence (TR-2139). Det. Nabut said that SM went to "that location" (on the Miami River) on Jan 22, 1992, with police divers (TR-2141)(ASULQ), and that the weapons were found there (TR-2141).

State next called Metro Dade Police Det. Oscar Rogue to the stand and he testified: He was a member of the Police Divers Underwater Recovery Unit, and that on Jan. 22, 1992, he was requested by HPD "to conduct an evidence search in the canal which was located underneath a bridge" (TR-2145). A HPD detective advised me "items we were searching for would be in a plastic bag" (TR-2149)(ASULQ). He came across several plastic bags, one of which had a weapon in it (TR-2149)(ASULQ). The first weapon discovered was an automatic and the second was a revolver (TR-2150)(ASULQ). Photos taken by him of the bags underwater were received in evidence. He put the plastic bags in water after taking them out of the canal so as to keep them intact "for processing either for fingerprints" (TR-2153-2154)(ASULQ). The court admitted the guns as well as the photos, overruling a Defense chain of custody objection to the guns (TR-2156). Det. Rogue further testified on cross: He recorded no serial numbers when he seized the weapons. He was certain that the handguns in court were the same one's he found in the river, but he admitted that this assumption concerning the chain of custody was based on how the system worked. He then admitted he couldn't be sure if the two weapons in court were the same ones he pulled from the river. Defense then moved to strike the weapons from evidence, which motion was denied (TR-2156-2160).

At this point the judge made another reference to having to "sanitize" this particular exhibit "if the time comes when we have to send all this stuff back to the jury" (TR-2163).

State next called Dr. Michael Hellinger, a fellow in colon and rectal surgery, who was a resident at JMH and a member of the Trauma Team, He testified as follows: The victim had trouble breathing, he was disoriented and hypotensive. He had a large entrance wound to the chest and his belly was big and bloated. Three tubes were placed in his chest because the breath and heart sounds indicated blood in the chest. He had an independent recollection of this patient. Lopez had no holes on the left side of his chest when he placed the tube in it. They cut him open in the operating room (TR-2181-2182)(ASULQ). A chest x-ray "identified a bullet on the left side of his side just below the diaphragm" which bullet he saw (TR-2181)(ASULQ). In the operating room they identified other injuries and from what they could determine, "the bullet had come through his right chest and through his diaphragm going from the back of the liver and up to the front of the liver" with the bullet lodged in the area of his left diaphragm in the abdomen, The way the bullet went through his body would be consistent with someone being shot by the shooter being to the back and to the right of the person (TR-2182,2183)(ASULQ). Upon explaining that area on the left side they found a bullet (TR-2183)(ASULQ). He specifically remembered the bullet being found, but he didn't remember which of the invovled four surgeons actually took it out. He remembered seeing the bullet removed from the patient and being given to a scrub nurse but he didn't remember if he did it himself. This nurse would have handed it to the circulatory nurse. This patient did not survive. He died of a hemorrhage. That meant he bled to death (TR-2183-2186)(ASULQ).

State's next witness was Metro-Dade Crime Scene Technician Robert Kennington. At the outset of his testimony he defined various terms to the jury, including "revolver", "semi-automatic pistol", "casing", and "fired projectile" (TR-2188-2196). He then testified: It's possible to

compare a casing found at a crime scene with a gun, and that an identification can be made on occasion to the exclusion of every other gun in the world (TR-2197)(ASULQ). He received casings, fired projectiles and live rounds in this case in addition to projectile fragments and jackets (TR-2197-2198)(ASULQ). He reviewed a 9 mm Browning gun and a 9 mm Star gun, which were represented as victims' guns, and subsequent to that he reviewed two weapons that were represented as having come from the bottom of a canal, these latter two guns being a .357 calibre Smith & Wesson (S & W), a revolver, and a Model 3913 S & W automatic. The submergence of the barrel of the .357 caused it to be rusty (TR-2198)(ASULQ). The .357's serial number had been intentionally removed by somebody but he still would be able to bring back the serial number by a process of pouring reactive acid on it. This process does not create "future potential problems in terms of the ID in the damage to the gun in terms of future test bullets." (Quotes are ASA's) (TR-2199)(ASULQ).

State then summarized that Kennington had previously testified he had reviewed casings, fired projectiles and live rounds, most of these having been submitted to the HPD. State asked, "Did you receive however one projectile from the hospital?" (TR-2199). There followed a colloquy between Frangui and the court regarding State trying to bootstrap "Bullet G" (i.e., the bullet allegedly taken from Lopez's body) into evidence through Kennington when the chain of custody thereof had not been established (TR-2200).

State then started trying anew to have Bullet "G" introduced in evidence, but Kennington could only say that the sealed container with a stopper on it, ". . . .was typical of a hospital item and that it had a word D label on it" (TR-2203). Then when State offered Bullet "G" into evidence, the court had the jury taken out and voir dired Kennington regarding the container of the said bullet. Kennington said he could describe the container but he admitted he had no personal knowledge regarding "that item" prior to it betting to him but that his markings were on the bullet,

with there being no other markings on it. He reviewed the bullet on Jan. 20th and put his markings on it on Jan. 28th. He said that when he reviewed the container, the cap was yellow and it was translucent, but he didn't recall whether it was tapered or whether it had a stopper (TR-22052206). There followed colloquy between Frangui's counsel and the court regarding where the alleged break in the chain of custody occurred, and Frangui's counsel responded that at the point where Nurse Boyd "testified that she had no independent recollection of the incident; however, from her review of the records she left the bullet in a container" (TR-2206-2207). Frangui's counsel argued that the chain of custody was not complete and that it was the State's burden to establish that it was, to which the court responded that he didn't think there was any evidence of tampering and that, "(I) think at best that's not the bullet that they dug out of Mr. Lopez" (TR-2207-2208). The court then announced that it was satisfied that the chain of custody had been established and it overruled the Defense objections and Bullet "G" was received in evidence (TR-2208-2210).

Kennington further testified: Either the .357 or the .38 special could have fired 38 cal. projectiles. The gun found in the water was double action, which means only one pull of the trigger is required to fire it. The trigger pull in double action guns requires a pull of 10 to 13 lbs., which "is an effort" and which is synonymous with a 10 lb. bag of flour having been hung from the trigger to pull. Kennington then identified the other weapons found in the water, including a S & W automatic pistol, which he said received less water damage. He said he test fired the S & W and noticed it was subject to frequent jams, and that the cartridge of the S & W, which is manually ejected, will pick up markings of certain spring loaded items inside and as well as other markings. He said that when the S & W jams you have to clear it (TR-2210-2216)(ASULQ). He said there was an 8 to 10 pound trigger pull on the 9 mm S & W (TR-2216).

Regarding the victims' weapons, Kennington testified: The first one was a ten folio .32 cal.

with seven bullets in the magazine and one in the chamber; it was fully loaded. It had not been fired recently because there was lint in the barrel. None of the projectiles, live rounds, casings, etc., which were part of the State's evidence were from a .32 cal. gun (ASULQ). They, i.e., Metro Police, didn't use HPD's lettering system but, rather their own, and the bullet which was labelled by them as Bullet "G", is a .38 special cal. made by Remington. This bullet is no longer a popular bullet. It is a semi-jacketed hollow point bullet and it is designed to permit the bullet to expand upon hitting a body which is to permit more tissue damage in a body and to cause more damage, which characteristic is inconsistent with the victim's gun (TR-2221)(ASULQ). These characteristics are also inconsistent with the 9 mm gun found in the water, this gun being a Tech, 9 weapon. He was not submitted a Tech. 9 gun, but he had no problem saying Bullet "G" could not have been fired from that type of gun (TR-2222)(ASULQ). Bullet "G" is consistent with having been fired from the .357 Magnum, but he could not say conclusively that that bullet was fired from that gun to the exclusion of every other existing S & W Model 19, .357 (TR-2222)(ASULQ). He noticed damage to the barrel of the .357 as a result of its being submerged. Water rust can damage identification potential, but bullet "G" could have been fired from the .357 "and the calibre of such bullet was consistent with it having been fired from that weapon, the .38" (TR-2223)(ASULQ).

Kennington further testified: Lands and grooves were the same between the test fire and Bullet "G", lands and grooves being "a spiral" with the bullet having a corresponding number of lands and grooves. Besides the calibre and the number of lands and grooves being consistent with that Model 19.. . .the twist of the grooves was also consistent (TR-2224)(ASULQ). The width of the grooves was also consistent (TR-2224)(ASULQ). There was nothing inconsistent about the test fire after the gun had been submerged and the bullet that had been removed from the body of the victim (TR-2224-2225)(ASULQ). What permitted him to say that, to the exclusion of every other

gun in the world, this was the gun that was fired, were individual characteristics, including microscopic imperfections in the tool that made the gun at the factory, which was also consistent with these missing characteristics having been either obliterated or altered by the submerging of the barrel in the water (TR-2225)(ASULQ). The bullet that was fired was a .38 special Remington Peters bullet, which is the same make calibre as Bullet "G" and it is a copper jacketed hollow point bullet, the same as "G" (TR-2226)(ASULQ). The weight of the projectile is similar to the weight of "G" (TR-2226)(ASULQ). He could say with certainty that the same gun that fired Bullet "L" fired Bullet "G", Bullet "L" being the bullet that was test fired in the same gun that allegedly fired the bullet that killed Lopez (TR-2227)(ASULQ).

Following Kennington's testimony, State and both Defendants rested and Defense made their judgment for acquittal motions and renewed the previously made motions, all of which the court denied (TR-2284-2286).

Following the jury charge conference, argument of counsel to the jury, and the reading of the court's instructions, the jury retired and after deliberating found both defendants guilty of all charges (TR-2292-2484).

At the beginning of penalty phase State argued in behalf of its motion in limine to prevent the defendants from arguing the possible penalties on the non-capital counts and, in this regard, State asked the court "to preclude any argument concerning the court's abilities to stack consecutive sentences", and the court granted the said motion (TR-2527-2528).

The court then granted State's motion to preclude Defense from arguing to the jury deterrence; concerning execution by electrocution; and Lingering Doubt (TR-2534).

The court then granted State's motion in limine to preclude Defense from arguing that only torture murders, or "Ted Bundy" cases, i.e., "the most heinous and violent murders" should be punishable by death (TR-2536).

The court thereafter ruled that Defense could not argue that State wanted "to kill" the Defendants because it is "a ghoulish " (TR-2538-2539).

Both Defendants moved for a penalty phase trial severance which was denied (TR-2549-2550).

State's first penalty phase witness was Craig Van Nest, who testified: He was a driver for KW Auto Parts; he delivered parts and he carried cash with him all the time. On Jan. 14, 1992, he was scheduled to make a stop at Eloy Motors in Miami, and while driving west on S.W. 8th Street he noticed a vehicle travelling in his direction pull up alongside him with the driver there producing a supposed police badge and motioning him to stop. He did not believe the driver was a police officer. He arrived at Eloy Motors in about fifteen minutes and he thought "the Previa" had sped off and that was the end of it. However, when he walked away from his truck he turned and looked to make sure it was safe before getting to Eloy Motors and, "(A)gain, the Toyota Previa was right beside my van." He observed one person looking through the driver's side of his van; a second one standing toward the rear of his van; and a third man standing off to the side. He then ran back to his truck and a "burly fellow" produced a gun and told him, "you know what is going on here, you're stealing auto parts" (TR-2555-2558). He saw another man emerge from his van with a bag carrying cigarettes, a gun, and a camera. The man with the gun grabbed him on the back of his neck and within a second the gun came down on the back of his head, momentarily stunning him and injuring him, causing him to bleed. He was forced into the middle of the Previa van and into the middle of the cargo area so he could not see out the window. At this juncture, Van Nest pointed out SM as being the driver and Frangui as being the gunman (TR-2558-2561).

Van Nest further testified: Both the driver----SM----and the man behind him----Frangui---- fled on foot and within a couple of seconds police officers showed up (TR-2564-2565). He, i.e., Van Nest, later sought help from a doctor after the paramedics treated him (TR-2565)(ASULQ).

He identified Frangui and SM to the police (TR-2566)(ASULQ).

On cross by SM's attorney, Van Nest testified as follows: SM did not produce the badge. SM was not one of two men who accosted him. SM was not "the fat guy" who produced the gun, leaned him against the van and hit him. All SM did was to get into the driver's seat and drive away. Frangui was yelling back and forth to the driver---SM----and he assumed Frangui was yelling directions to SM in Spanish. SM was terrified (TR-2569-2572).

On redirect of Van Nest by State, he testified as follows: The look of terror on SM's face was not when he, i.e., Van Nest, was pushed into the van; rather it was only after the gun was shot in SM's direction (TR-2557)(ASULQ).

The next State penalty phase witness, Miami Robbery Detective Boris Mantecon, testified: He was assigned to investigate the armed robbery of Craig Van Nest and he responded to the scene of that robbery at S. W. 5th Street, and there recognized the Toyota Previa that was used to kidnap the victim. A third person involved in this robbery, Carlos Vasquez, had been convicted of this crime "as well" (TR-2551)(ASULQ). The prosecutor then had this witness identify the photo of SM and after that he had him point out SM in the courtroom (TR-2577). After he Mirandized SM, SM told him the following: He knew Frangui "for about a year and a half." He was called by Frangui the night before the robbery, who told him that on the following day they were going to take over a van (TR-2578)(ASULQ). Frangui promised SM money to participate in the robbery. After they spotted the van, it was Carlos Vasquez who flashed the badge. They knew what they were looking for because the KW Auto Parts van was supposed to be carrying a lot of money. Vasquez and Frangui went up to the victim and he----SM----stayed in the Previa. Vasquez hit Van Nest on his head with a gun and then gave the gun to Frangui. SM then took over the driving of the Previa and Vasquez took the victim's van. They were planning to meet at another location. SM saw a police unit and started driving and Frangui pushed the gun toward

front and gun went off. SM started fleeing the police who chased them. They crashed the van and SM and Frangui fled (TR-2578-2581).

Det. Mantecon then testified that he took Frangui's statement and said that he, too, admitted his involvement in the Van Nest robbery, describing the details thereof. He said that Frangui later took police to where he had hidden the .357 S & W Magnum he had taken with him when fleeing from the van. This gun was then admitted into evidence. Mantecon said it was loaded when it was impounded (TR-2581-2587). Mantecon completed his direct by testifying that neither of the defendants confessed to him "on the 14th" that they had committed the Republic Bank robbery and ambush in Hialeah which he did not know about at the time (TR-2587).

State had introduced in evidence a certified copy of the convictions in case 92-1680 for Armed Kidnapping and Armed Robbery of Craig Van Nest (TR-2599).

State next called Pedro Santos who testified: He is 71 years old and was a Security Guard at RNB on 87th Avenue and Bird Road in Miami on November 29, 1991. As was his daily routine, he took a bag with slips from the bank building to where tellers were located, with smaller bags being inside the outside bag for money to be put in by the tellers. He observed a white car on that day while he was approaching the tellers, which car was coming out of a nearby Denny's Restaurant parking lot. The person in the passenger seat of the white car told him, "let that go or you'll die", and he then fired a shot at him. Thereafter that person got out of the car and pointed a revolver at him and then fired at him with "a .38 revolver" (TR-2600-2616). He was afraid of being harmed. The bullets were hitting the ground in front of him and fell at his feet. He didn't know if the shooter emptied his entire gun of bullets but, for whatever the reason, the shooter ran to the car and he and his colleagues fled. Their car was abandoned in a residential area. He was not shot (TR-2610-2612).

State next called HPD Detective Ralph Nazario who testified: He was the lead investigator

in the RNB case, which involved charges of **attempted robbery, attempted** armed robbery, and attempted first degree murder. The FBI also investigated that case. He took statements from Frangui and SM. He took an oral statement from SM, who told him he didn't want to be known as a snitch in jail. He spoke to SM on Jan. 18, 1992, and at that time he was aware that other officers had Mirandized him. SM told him that he, Frangui, and one Ricardo Gonzalez, were sitting at Denny's Restaurant and saw a man with a bag and decided to rob him, but that they waited until the next day when they stole "a Z28." They used a stolen vehicle so they wouldn't be detected in their own vehicle and they used a screwdriver to steal it, This witness continued describing what had allegedly happened during the attempted armed robbery, but at this point in this transcript it is not clear whether he was still purporting to say that SM exited the stolen car and demanded the bank bag from the security guard and as to whether SM was carrying a 9 mm pistol (TR-2617-2623).

At this point the prosecutor showed the officer the gun that was already in evidence and then elicited from the officer that the said gun was used in the RNB "heist" and the Hialeah "heist" (TR-2623-2624). Det. Nazario continued to give his narrative version of what happened----without identifying the source thereof----as follows: When the security guard laughed at them, SM wanted the security guard to know he was serious so he fired two rounds at the security guard's feet after which "he aborted the robbery and started to run back to the van" (TR-2623). The security guard shot at SM but he missed him (TR-2623). They dumped their vehicle about ten blocks away and Frangui picked them up. Frangui gave a stenographic statement (TR-2624). Frangui waived his Miranda rights and "it was read again during the statement" (the quotes are the prosecutor's)(TR-2625)(ASULQ).

The State then used the procedure of Det. Nazario reading the questions and with him reading Frangui's answer, and the statement was thusly read to the jury and in it Frangui identified

SM as the one of the three would-be RNB robbers who used a gun. Frangui also recited that SM and the third person, "Ricky" did the stealing of the car that was to be used in that robbery. He said that SM had a 9 mm gun. On cross by Frangui, Det. Nazario said SM's and Frangui's statements corroborated each other in reciting that Frangui was not involved in stealing the vehicle used in the robbery; that Frangui was not driving the said vehicle when it arrived at the RNB; and that Frangui did not shoot a gun (TR-2634-2635). On cross by SM's counsel, Det. Nazario testified: The gun used in the Bird Road RNB attempted robbery was "the jammer weapon" (TR-2638).

A version of the Information covering the RNB attempted robbery----with certain counts redacted because they did not charge prior violent felonies----was received in evidence upon stipulation of counsel (TR-2639).

The court and respective counsel then held their charge conference (TR-2641).

The court took up the cold, calculated and premeditated manner without any pretense of moral or legal justification AC, and State said it expected Abreu to say that Frangui told others at a meeting that he would take care of the security guard, and more specifically, that "(D)uring the course of the crime Mr. Frangui advises his co-defendants that he's in fact done it (sic) killed the bodyguard" (TR-2665-2666). Co-defense counsel then argued that both Abreu in his statement and Frangui in his statement said that the victim fired first and that, "I think that rises of (sic) at least a pretense of moral or legal justification." The court indicated that it would rule with Defense on this issue unless Abreu testified that the guard's murder was actually planned beforehand (TR-2667-2668).

Frangui's counsel then argued that since Frangui had very low IQ there was case law indicating he shouldn't have the CCP AC allowed to be used against him (TR-2668-2669).

The court said that Frangui's proposed instruction #6 stating words to the effect, that "If

you find the AC's do not justify the death penalty, your recommended sentence must be one of life imprisonment without possibility of parole for 25 years," was not the law and that, rather, it is the law that if a single AC is found and is "unrebutted", the sentence is death (TR-2684). Frangui further argued that the above-described argument of the Court would be unconstitutional, "because what you are saying is an automatic death penalty statute.. . . " (TR-2685). The court denied Frangui's proposed instruction saying, ". . . .you guys don't make it any easier, you put so many spins on these instructions" (TR-2685).

Co-defense counsel then presented his anti-burden shifting AC's and MC's proposed instruction which was denied (TR-2688).

The court announced that it would not charge the jury as to any non-statutory MC's, saying that it would be sufficient if Defense counsel argued them (TR-2690-2691).

Following up on its earlier ruling that the court would not charge the jury on non-statutory MC's, the court refused to grant Frangui's proposed instruction designating as a non-statutory MC that he suffered from mental problems, the court saying in this regard: "These are all non-statutory and they can be argued" (TR-2693). Thereafter the court refused to grant a number of non-statutory MC's proposed in behalf of Frangui (TR-2693).

After denying the proposed co-defense instructions, the court refused to grant the following proposed SM instruction, to-wit:

> "The fact that you have found the defendant guilty of first degree murder is not, of itself, reason to recommend the death penalty. Indeed the death penalty is reserved for only the most aggravated of first degree murderers. " (TR-2694-2695)

Thereafter the court denied more of SM's proposed instructions, including a mercy instruction, with the exception of the one telling the jurors that they should give separate consideration to each defendant (TR-2698-2699; 2705-2708). SM then called Abreu as a Defense

witness and Abreu testified regarding SM's father having had a drinking problem and regarding SM not being able to see out of his left eye (TR-2764-2765). The State then rested its Penalty Phase case (TR-277 1).

The first Defense Penalty Phase witness was Det. Nick Fabregas who testified that Abreu had said during his pre-interview interview that "the shooting involved in this case" was not planned although the robbery was (TR-2772-2773).

Thereafter, Juan San Martin, SM's brother, testified in his behalf (TR-2825, et seq.). On direct Juan said that SM shouldn't be sentenced to death because he didn't kill Lopez (TR-2834). On cross he said that his brother was a very nervous person who was "not smart enough to do his own thinking", but he added that he didn't think he was retarded. He said that his brother is a follower and he admitted having discussed this matter with his family before testifying (TR-2825 2898).

Javier San Martin, SM's nineteen year old brother, testified that SM had lived with him all his life and that he was always a good brother to him. He also said that SM was not a violent person (TR-2843-284s). On cross, Javier testified that he grew up in a happy family; that the only one who got into trouble was SM; that SM was a normal person; that he followed SM's leadership lots of times; that he had no idea that his brother was committing crimes in late 1991 and early 1992; that during this period of time SM's conduct changed in that he was staying away from home longer; and that SM had bought an IROC-Z automobile and carried a lot of money on his person.

Daisy San Martin, SM's 22 year old sister, testified that SM was always a good brother; that she never saw him acting violently; that Frangui was a friend of his from junior high school days; that SM was a follower, and that her parents were separated but not because the father was an alcoholic, which he wasn't (TR-2849-2853). She testified that SM was not mentally retarded

but that "he was small....somewhat nervous"; and that SM had told her he hadn't killed anybody or tried to do so (TR-2856-2860). She testified that when SM was a child, he stuck "the scissors in his eye, and afterwards one day riding a bicycle he cracked his head" (TR-2860).

SM's grandmother, Pauline Martinez, next testified that SM was a good person. Such counsel next called SM's mother, who testified: Her entire family came to the United States through Marie1 as a family unit in 1980; SM had the accident with the scissors when he was four and he doesn't see to well out of that eye; he fell of his bicycle when he was 16 or 17 which had rendered him unconscious; he had never been violent; he was always a somewhat nervous person; he was not capable of killing anyone; and that although she was separated from her husband who drank with his friends, the husband never abandoned her (TR-2865-2870). On cross, SM's mother testified she didn't know that in late 1991 and early 1992 that SM "was doing....all these crimes" (the quotes are the prosecutors) and that there was nothing in his behavior that led her to believe something was wrong (TR-2870-2874).

Following her testimony, SM's counsel called Dr. Dorita Marina, a psychologist, who testified as follows concerning SM: He went through the 6th grade in Cuba and by the 8th grade he was getting failing grades. She looked at Dr. Laurenco's report concerning SM, which report was then introduced in evidence without State objection (TR-2925-2926). She said that SM had engaged in no sexual relations before he was twenty-five, which was "not following the normal developmental milestones" (TR-2927). The court instructed Dr. Marina that she could discuss the prior armed robbery and armed kidnapping convictions, but that "there will be no mention of the previous (27 year) sentence" (TR-2934). Dr. Marina then further testified: SM's IQ score was 76, which placed him in the borderline or below low average range of intellectual functioning (TR-2945). Based upon his being given the Achievement Test (arithmetic only) and the Bender Gestalt Test, "there was some indication of emotional difficulty which means poor planning, poor

judgment, impulsivity" and "(I)mmaturity would fit with those" (TR-2946). She did "a quick and dirty neuropsychological screening test and that showed no evidence of organicity (TR-2947). She then described giving SM other tests, including the Rorschach or inkblot tests which indicated schizophrenia, but she said she wasn't diagnosing him as being schizophrenic; rather that he had a coping disorder "which indicates that this man has difficulty solving everyday life problems" (TR-2950). After describing various other tests she gave SM, including the DSM Revised, Dr. Marina testified that his "most comprehensive IQ score would be 77, which would place him between borderline low average and mental retardation (TR-2945).

Dr. Marina said the bottomline regarding SM was that he was functioning within the borderline range intellectually, meaning he had one of several types of borderline personality disorders, ranging between normal or neurotic on the one hand and being psychotic on the other, and that a person in this borderline range is often confused and consumes "a lot of psychic energy defending an inflated sense of worth, which actually the person doesn't believe" (TR-2954). Dr. Marina further testified that she gave SM the Minnesota Multiphasic Personality Inventory (MMPI), which involved a seven hour session, and that the "F" factor was high,. the "F" scale being "a scale of confusion and it makes the rest of the test not valid" (TR-2952). She conceded that this result could indicate malingering, but said she didn't think that was the case (TR-2953). Dr. Marina said that Dr. Laurenco's report regarding SM showed asymmetry in the left temporal area, which is an organic problem with the brain. Dr. Marina said that in her opinion SM suffered from extreme mental duress, etc., at the time of the happening of the involved crimes (TR-2960-2961).

After Dr. Marina's cross-examination began, State discussed the future dangerousness of SM (TR-2971-2973).

On further cross Dr. Marina said that the findings of Dr. Laurenco constituted "a mildly

abnormal EEG of questionable denial significance (TR-3000).

Thereafter, State blurted out in front of the jury that Dr. Marina had found only one MC, which SM's counsel pointed out that wasn't so, and that rather it was only one statutory MC that she testified about (TR-3016). On further cross of Dr. Marina by State, she was asked if she found applicable to SM the AC regarding diminishment of his capacity to appreciate the commonality of his conduct and to conform to the essential requirements of the law, regarding which Dr. Marina had not testified on direct. She said that she did not think his ability to know about right from wrong had been impaired (TR-3011).

On redirect of Dr. Marina by SM's counsel she testified that there was no doubt in her mind but that SM suffered from organicity----because of his hypomanic manner (TR-3021-3022).

SM's next penalty phase witness was Dr. Jorge Herrera, a neuropsychologist, who testified: SM is very low average; he is lower than just low average; and he is at borderline intellectual functioning (TR-3024). He has a lesion to the left temporal lobe. The EEG done by Dr. Laurenco resulted in a finding that, "there's asymmetry in amplitude.. . . being very decreased in the left temporal region., . .(a) low alpha wave produces" (TR-3065). The statutory MC of the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the essential requirements of the law applied to SM (TR-3069-3070). On cross, Dr. Herrera testified that he didn't find applicable to SM the statutory MC of his having been "under the influence of extreme mental or emotional disturbance, " because he didn't find any "psychopathology", i.e. "mental disorder, " but that he found applicable the MC of "substantial impairment" due to an accident or accidents suffered by SM (TR-3081-3082).

The next State witness was Dr. Jethro Toomer who testified only about Frangui and who---- succinctly stated----he determined Frangui to be retarded and suffering organic impairment (TR-3126-3158).

Thereafter State called psychiatrist Dr. Charles Mutter, who testified that he examined both SM and Frangui. State then took Dr. Mutter through the litany of mitigating circumstances which were not applicable to SM (TR-3348-3349). While conceding that SM had "some intellectual impairment.... on the borderline ranges, " Dr. Mutter opined that such was not moderate or severe and that it did not substantially impair him from knowing the nature and consequences of his acts, "or present him with an extreme or emotional disturbance." Dr. Mutter added, ".... he was nowhere near that" (TR-3254).

On cross Dr. Mutter referred to SM as a patient (TR-3273). Dr. Mutter said he believed he got the information from "Mr. Kastrenakis" that there had been "this planning" for six months (TR-3277). Dr. Mutter then further testified: Prosecutor Kastrenakis also told him about the "machine guns" (TR-3278). His main objective was to try to find any mental disorder or organic brain damage present that would cause substantial impairment affecting whether the respective defendants knew what they were doing and had the capacity to form the intent to do (TR-3280). He agreed that SM has borderline intelligence, but said it didn't rise to the level of him not knowing what he was doing (TR-3287). He added that for such to rise to that level, the intellectual capacity has to be "limited substantially" (TR-3288).

In response to SM's counsel's asking him regarding the applicability of the two statutory MC's found applicable to SM, respectively, by Dr. Marina and Dr. Herrera, Dr. Mutter said the key issue was whether SM knew what he was doing, which he said he did (TR-3289).

Thereafter the court sustained State's objection to SM's counsel asking him if it was a MC that SM was non-violent before Nov. 1991, and the court denied Frangui's motion for a mistrial because of Dr. Mutter's misstatements as to what the law is (TR-3290-3292). Dr. Mutter said that SM's limited intellectual capacity makes him "suggestible" (TR-3294). Dr. Mutter then said as follows from Dr. Laurenco's report regarding SM, to-wit:

> "There was an abnormal pattern.. . .on an EEG of questionable clinical significance. This. . . . shows mild abnormal EEG study of midline frontal slow alpha waves of unclear clinical significance.. . . however developmental abnormality or delay; for the temporal regions with markedly decreased power on the left side.. . . (which) means there is a delay of impulses that could be due to the eye injury.. . . it could be to the eye or it could be due to some other kind of lesion.. . . there could be a lesion there. (TR-3296-3297)

Regarding Frangui, Dr. Mutter said that the Beta test showed Frangui to have an IQ of less than 50, which would be in the retarded range (TR-3309).

Co-defense counsel then argued that Abreu's testifying in front of the jury that he pled because his lawyer said he'd get the death penalty required a mistrial because what the jury had heard was the advice of a professional attorney telling his own client that if he went to trial he'd get the death penalty. The following motion for a mistrial was denied (TR-3337-3338).

Frangui's counsel then renewed his motion for a penalty phase severance because of irreconcilable penalty phase defenses, etc. The motion for severance was denied (TR-3339).

Co-defense counsel objected to the court's entire charge (TR-3342).

Thereafter the court and counsel debated the applicability of the "cold, calculating and premeditated" (CCP) AC with SM's counsel arguing that it is preserved for "..... a careful plan or pre-arranged design to kill," and the court inquired as to whether that was what Abreu had testified to (TR-3348-3349). Co-defense counsel argued that what the two defendants did was different than "an execution", and that it was the prosecution which literally led Abreu into saying that there was a plan to kill the security guard (TR-3351). Co-defense counsel also argued that the giving of the CCP instruction would be improper if there was a reasonable hypothesis the other way (TR-3352).

The court announced it would give CCP. The Court then stated it would give the instruction that reads: "If you find the AC does not justify.. . .the death penalty, your advisory

sentence should be one of life imprisonment without parole," with Defense contending that that instruction improperly shifts the burden being denied in the process (TR-3354).

Co-defense counsel requested a verdict form "which requires the jury to make a finding with regard to each MC, and whether found by some jurors, all jurors, or no jurors. The court impliedly denied this by saying: "These are the verdict forms I am preparing.. . . " (TR-3363). Defense then rested the penalty phase case (TR-3367).

Thereafter prosecutor Kastrenakis started his penalty phase summation. At the outset, Kastrenakis said:

> "First, they find themselves, . . . no longer being presumed innocent of anything. " (TR-3380)

Kastrenakis then told the jury that if the AC's outweigh the MC's, their duty was to recommend death (TR-3383).

State then argued in favor of the applicability of its statutory AC #1, i.e., "being previously convicted of a felony involving the use or threat of violence to some person" (TR-3384). He told the jury that the planning----by Frangui----began six months before the date of the instant crime and that SM ". . . .is a party to the planned murder of Raul Lopez" (TR-3387).

Thereafter Kastrenakis referred to SM agreeing to a plan "to eliminate another human being for sure,. . .a Raul Lopez (sic) (TR-3388).

State argued its 4th claimed AC, to-wit: Cold, calculated and premeditated manner without any pretense of moral or legal justification" (TR-3405). State then made another reference to "the plan to murder another human being" saying "this was not an impulsive murder" (TR-3405).

In its penalty phase summation, the prosecution picked right up on Dr. Mutter's thesis and suggested to the jury that no mental health mitigation contention should be accepted by them except the question of whether the respective defendants knew the difference between right and

wrong (TR-3407-3409).

Prosecutor Kastrenakis then told the jury:

> "Pablo San Martin's (sic) argued to you through his attorneys that you should spare his life because my bullet wasn't the actual bullet that killed Raul Lopez. Great. He tried to kill Danilo Cabanas Senior and Danilo Cabanas Junior but for the Grace of God he didn't and you should cut him a break.
> What you are punishing through your recommendations. His intent was to kill. His intent was to be the party, part of the plan that was to kill, knowingly eagerly he got involved in that plan." (TR-3410,3411)

Later on State told the jury it was not disputing the fact that SM had "a mild disfunction in his left lobe of his brain.. . .that is a scientific finding" (TR-3414). However the prosecutor went on to argue that SM's two doctors, Drs. Marina and Herrera, reached more different----and sometimes conflicting opinions----than they did similar ones, allegedly particularly with respect to the question of whether SM suffered from organicity (TR-3414-3417).

Thereafter, the prosecutor told the jury:

> "His (San Martin's) IQ was in the borderline range, Sure, they are not rocket scientists. Rocket scientists wouldn't be out doing this kind of crime spree. " (TR-3417)

The prosecutor said: "Religion has no place in this courtroom in your decision making. This is a legal decision. You all said in voir dire that you would consider only the aggravating and mitigating circumstances and come to a legal recommendation" (Emphasis added). Co-Defense counsel's objection to this misstatement of their function was denied (TR-3418).

Kastrenakis then argued the future dangerousness of the defendants in the oblique manner of contending that defense counsel were arguing future dangerousness (TR-3419).

More specifically he argued in this regard with reference to SM:

> "He has tried to kill four people in his life. . . . Mr. Santos, the Cabanas's and he was a party to the murder, the intentional murder of Raul Lopez. " (TR-34 19)

Thereafter, over the objections of Frangui's counsel, Kastrenakis repeatedly referred to Dr. Toomer as "a hired gun" (TR-3422).

Kastrenakis then further said:

> "In the world of Dr. Toomer we accept the word of an eleven time convicted felon as true over the interviewing of an uncle, father-in-law, no matter how ridiculous the position is. That's the world of Dr. Toomer, folks, welcome to it." (TR-3422)

Further on in his argument Kastrenakis referred anew to the defendants having allegedly planned the armed robbery of the victims and the shooting of their security guard for more than six months (TR-3425).

Kastrenakis then attacked Defense counsel personally, saying of them:

> "These are the same lawyers who argued to you that they confessed to a crime they didn't commit." (TR-3428)

At the conclusion of Kastrenakis's penalty phase opening summation, co-defense counsel moved for a mistrial based on prosecutorial misconduct upon which motion no relief was granted (TR-3429-3430).

Frangui's counsel presented the first Defense summation, When such counsel tried to argue to the jury that if Frangui got life he would have to serve a minimum of twenty-five years and if his sentences were to run consecutively, an additional twenty-two years on the prior convictions, State objected and the court sustained same. Then the court refused to allow SM's attorney in his summation to go behind the prior convictions and get into the details of the involved offenses. In this regard, the court told SM's attorney, "You cannot challenge the (prior) conviction." SM's attorney responded that he wasn't challenging the prior conviction but only "minimizing" it (TR-3468-3469).

During the course of the summation of SM's attorney, State objected in the presence of the jury as follows: "Mr. Kastrenakis: Objection. That is not the evidence what Det. Santos said"

(TR-3474). Thereafter State made another **speaking** objection (TR-3474). At this juncture during the summation of SM's attorney, he argued the greater culpability **of** Frangui with Frangui's counsel attempting to reserve a motion which the court disallowed (TR-3475). Shortly thereafter there was another State speaking objection and this time the Court remonstrated the prosecutor for same (TR-3477).

Reduced to not having had any of his claimed non-statutory MC's charged upon, SM's counsel was almost pitiful in pointing out to the jurors that " ' . . . they are all as individually important as the statutories that are listed in any other aspect of the defendant's character or record or any other circumstance of the offense" (TR-3488).

Thereafter when SM's counsel in his summation made reference to the difficult decision the jury had to make, the judge----in sustaining another State speaking objection----told the jurors that it was he who would do the actual sentencing (TR-3491).

Frangui's counsel then made his summation to the jury; the court instructed the jury; and after deliberating, the jury recommended the death sentence for SM by a vote of nine to three and the death sentence of Frangui by the same vote (TR-3520,3521).

On a subsequent date the court took up the matter of the sentencing by it of the two defendants. One of SM's attorneys, Fernando de Aguero, testified as a witness in his behalf and he told the court that he had tried to negotiate a life plea for SM "similar to what was offered to Mr. Abreu" (TR-355 1).

On cross prosecutor Kastrenakis asked de Aguero if it wasn't true that SM was present when NM police officer Bauer was shot and that SM had taken a cash tray from one of the security people, while Abreu's role was limited to being a getaway driver (TR-3551-3553).

State next called the wife of the victim and, as well, Daniel Cabanas, Jr., and presented to the sentencing judge the victim impact evidence it was afraid of presenting to the advisory jury

(TR-35783581).

In his sentencing order (TR-1095-1117), the court found the existence of and the applicability of the following statutory aggravating circumstances:

> "The defendant was previously convicted of another capital felony or of a felony involving a threat of violence to the person."
>
> "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit or in flight after the committing or attempting to commit a robbery."
>
> "The capital felony was committed for pecuniary gain." (The court noted that this AC merged with the AC that the capital felony was committed during the course of a robbery.)
>
> "The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral and legal justification. " (TR-1096-1099)

The court rejected the existence of the following statutory MC's, to-wit:

> "The crime for which Pablo San Martin is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. "
>
> "The defendant acted under extreme duress or under the substantial domination of another person. "
>
> "The capacity of Pablo San Martin to appreciate the criminality of his conduct or to confirm his conduct to the requirements of the law was substantially impaired. " (TR-1099)

The court specifically ruled three additional statutory mitigating circumstances as not having been established even though Defense didn't claim them (TR-1108).

The court specifically rejected all of SM's argued for non-statutory mitigating circumstances except that he was a good son, grandson and brother; that he found religion in jail; and that he displayed a good attitude while in confinement (TR-1110-1115).

The court in its sentencing order discussed the Bauer case although it specifically recited it wasn't considering it (TR-1111-1112).

The court sentenced Pablo San Martin to Death and on the other charges to two Life Sentences, plus an additional forty years, with the mandatory jail time being six years. The court then provided:

> "Each of these sentences will run consecutive of each other and consecutive to the sentence of death." (TR-1116,1117)

The defendants' respective motions for post trial relief were denied.

This appeal followed.

SUMMARY OF THE ARGUMENT

POINT I.

The process of "death qualifying" the prospective jurors, which resulted in all persons who were opposed to the death penalty and who would not recommend it being excused for cause, and for all persons who were opposed to the death penalty but who would be willing to recommend it if the facts of this law called for such recommendations, the former being taken off for cause and the latter being peremptorily challenged by the prosecutor, resulted in SM not receiving a fair trial by an impartial jury of his peers, which violated his State and Federal Constitutional Due Process and Fair Trial rights and his constitutional right to not be subjected to cruel and unusual punishment, process was made even more unfair by the lower court's refusal to grant the defense request for individual voir diring.

POINT II

The trial court denied defendant SM his Federal and State Constitutional rights by steadfastly refusing to grant SM his Confrontation Right in that he was unable to cross-examine Franqui, and because those parts of Franqui's statements favorable to SM but unfavorable to Franqui were redacted. Furthermore, by the time the State finished redacting the two defendant's statements, with the court's approval, they were no longer the statements of the defendants.

POINT III.

The tactics used by the police in securing so-called pre-formal statements from SM and pre-formal and formal statements from Franqui, which involved literally yanking them out of jail where they were incarcerated for wholly other charges and while the police knew or should have known they were represented by the Public Defender's office, and then grilling them for hours on end about the killing of Police Officer Steven Bauer, and then about the Raul Lopez killing, and finally about their alleged attempted robbery of a bank, which grilling involved overly aggressive police tactics because of the killing of one of their own, violated the Federal and State Constitutional rights of both defendants to remain silent and to be represented by counsel. Since the court below was bound to exercise every presumption against the waiver by either of the defendants of their involved constitutional rights, indulging that presumption should have caused that court to have suppressed the statements of the two defendants.

Finally, SM has standing to raise any and all arguments as to the receipt of Franqui's statements because State was contending that SM was responsible for Franqui's killing of Raul Lopez as a principal.

POINT IV.

There was an insufficiency of evidence for the lower court to have allowed the members of the jury to consider that part of the State's charge that SM was guilty of premeditated murder because there was no evidence that SM killed anyone, nor did the State contend that he killed anyone.

In this regard, there was no credible evidence that SM participated in a plan to kill during the planned robbery, such plan to kill being the figment of the mind of one of the prosecutors.

Since the lower court didn't require the jurors to specify on their verdicts their separate findings with regard to the twin charges against SM of premeditated murder, a first degree capital

murder, there is no way of knowing what they decided with regard to the premeditated charge; which is comparable to a sentencing jury at penalty phase, invalidly weighing a constitutionally infirm aggravating circumstance.

POINT V.

There was an insufficiency of evidence to sustain the conviction of SM for premeditated murder because the alleged plan that SM was supposed to have entered into with Franqui and others to kill the security guard was clearly the concoction of an overzealous prosecutor.

POINT VI.

The state deliberately brought to the jury's attention that after SM gave a preformal statement, he refused to give a formal one, which was a constitutionally impermissible comment on his right to remain silent.

POINT VII.

The adherence of the Supreme Court of Florida to the position that where the State is simultaneously charging a defendant with premeditated murder and with first degree felony murder, the advisory jury need not specify on its verdict form its separate findings with respect to each of these charges, and the lower court's refusal to make this advisory jury so specify, violates SM's right to have to be found unanimously guilty to be death penalty eligible, and in addition, is contrary to the scheme of narrowing and limiting made a part of capital case litigation after the restoration of the death penalty in changed form upon command of the United States Supreme Court, which was designed to prevent capital deaths being decided upon in an arbitrary and capricious manner.

POINT VIII.

The lower court improperly prioritized between making sure that capital case defendant Pablo San Martin had available to him the resources and expert assistance needed by his lawyer to

defend his life; and its desire to keep down the expense of his defense, when it denied the requests of his counsel for funds to travel to Denmark to take the deposition of a key witness and the defense request to secure the services of a jury selection expert.

POINT IX.

State's rebuttal doctor misled the jury into thinking that under the law the only mental health consideration that would constitute mitigation at the penalty phase of a capital case would be whether the defendant knew right from wrong when he did wrong, and the sentencing judge fell into this same error in his sentencing of SM to death, which erroneous concept of the Florida capital case sentencing scheme by the judge resulted in his admitting findings of at least two mental health mitigators but giving no weight to them.

POINT X.

The lower court improperly charged the jury that it could consider against SM this statutory aggravating circumstance----that capital felony was committed in a cold, calculated and premeditated manner----when there was no basis therefor in the evidence. The lower court then compounded this error by finding the applicability of such aggravating circumstances to SM, in violation of his Federal and State constitutional protection of Due Process, a fair trial and to not be subjected to cruel and unusual punishment.

POINT XI.

The court below committed error at the sentencing phase by refusing to allow SM's counsel to argue to the jury that if he was given life over death, he could be required to serve many more years than the mandatory twenty-five through the imposition of consecutive sentences for his past robbery case, for which he received a twenty-seven year sentence, and for the other crimes in the instant case, thereby denying SM's counsel the opportunity to present a relevant argument for life and a rebutting argument to the State's future dangerousness position.

POINT XII.

That part of Florida's statutory scheme that requires the defendant in a capital case at the penalty phase to not only prove the existence of circumstances that would mitigate his sentence, but to also have to prove that they outweigh the proven aggravating circumstances, unconstitutionally shifts the burden of proof to the defendant that he should not receive the death penalty.

POINT XIII.

The lower court unnecessarily and, more importantly, unconstitutionally, deprived SM of a fully fair trial by refusing to change the sentencing advisory jury as to the non-statutory mitigating circumstances being contended for by his counsel, leaving his counsel to have to argue them on their own.

POINT XIV.

The standard instruction in the Florida Criminal Trial Standard Jury instructions and the statutory basis therefor in Sect. 921.141, Fla. Stats., from which the instruction was taken, which casts the burden on a capital case defendant at penalty phase to have to prove to the advisory jury that he should be given a life sentence rather than the death penalty, is constitutionally infirm. The action of the court in so instructing in SM's case, denied him his constitutional rights.

POINT XV.

The death penalty is unconstitutional under the Constitution of the United States and the State of Florida because of a variety of defects in the death penalty determination scheme, and because it violates every pretense of the United States being able to claim the moral leadership of the civilized world.

POINT XVI.

The prosecutorial misconduct in this case, including but not being limited to the trial

embellishment by the prosecution of the plan referred to in the statements given to the police by both defendants and former co-defendant Abreu from being a plan to commit an armed robbery to one to commit an armed robbery and to kill the bodyguard or security guard in the process, and the repeated, rampant leading questioning the prosecutors put to its witnesses, and particularly to its ballistics and gun expert, Ted Kennington, denied SM a fair trial.

ARGUMENT

POINT I.

THE COMBINATION OF THE PRACTICE OF DEATH QUALIFYING THE JURY ON VOIR DIRE AND THE REFUSAL OF THE COURT TO GRANT THE DEFENSE MOTIONS FOR INDIVIDUAL VOIR DIRING OF THE PROSPECTIVE JURORS DENIED SAN MARTIN HIS FEDERAL AND STATE DUE PROCESS AND FAIR TRIAL RIGHTS AND HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT.

Death qualifying the jury is a part of every capital case----at least in this State----and without any question it results in persons who are morally opposed to the death penalty, but who say they would nevertheless reluctantly impose it if that is what the law and facts called for, being **"outed"** by this process and then excluded by the prosecution's use of a peremptory challenges, all of those prospective jurors who would not impose the death penalty under any circumstances having already been excluded by the court for cause. Further this "outing" is not offset by the Defense's use of its peremptory challenges because the jury that is ended up with is made up of all those persons who believe in the death penalty and would be willing to recommend it, with all persons who do not believe in capital punishment, whether they would recommend it or not, being excluded.

It is thus a very unlevel playing field upon which the capital case defendant has to participate in the dance of death and a practice that should have long ago been banned by the court or by the U.S. Supreme Court as being unconstitutional as violative of Due Process and Fair Trial

rights, and the right to not be subjected to cruel and unusual punishments.

As with any criminal penalty, a death sentence will be reversed if the jury fails to meet the due process requirements of fairness and impartiality. Witherspoon v. Ilinois, 391 U.S. 510 (1968) In Witherspoon, the Court struck down the death penalty in that case because the method of the selection of the jury resulted in its being "uncommonly willing to condemn a man to die." (Witherspoon at 522)

Undersigned counsel is well aware of the United States Supreme Court's subsequent holdings in Wainwright v. Witt, 469 U.S. 412 (1985); Lockhart v. McCree, 476 U.S. 162 (1985); and of the holding in Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988), but none of those cases addresses the totality of the complaint being vented here, which is that, because of a combination of cause challenges being exercised against prospective jurors who would not vote for the death penalty under any circumstances, and peremptory challenges being exercised by the State against jurors who said that although they opposed the death penalty they would impose it if such were called for, the jury is composed of entirely of persons favoring the death penalty, which clearly constitutes a violation of the Witherspoon holding.

Therefore, SM prays that the Court declare the procedure of death qualifying the jury, as used in the instant case, as unconstitutional, and failing that holding that in the instant case the lower court violated all of his above described constitutional rights by refusing the Defense request that the prospective jurors be voir dired individually so as to avoid the tainting effect of the prospective jurors hearing each individual prospective juror's views regarding the death penalty, ad nauseam. (TR 565-566)

What is involved here is the Defendant's impartial jury right. A juror, to be impartial, must to use the language of Lord Coke, be indifferent as he stands unsworn. Reynolds v. United States, 98 U.S. 145, 154; 25 L.Ed. 24, quoting Co.Litt, 155 (b)

It simply is not reasonable to believe that so called death qualified jurors are impartial with respect to the defendant and as to whether he should live or die, and it needs to be finally decided that such defendants do not receive a fair trial, and this is especially so when the jurors are further polluted by hearing each others beliefs on the death penalty over and over again.

Finally, on this point, SM specifically prays that the Court grant him relief under the following provisions of the Declaration of Rights of the Constitution of the State of Florida, to wit: Art. I, § 2 (To Defend Life); Art. I. § 9 (Due Process); Art. I, § 16 (Fair Trial); and Art. I,§ 17 (the Prohibition of Cruel and Unusual Punishment).

POINT II.

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT SAN MARTIN'S OFT-ASSERTED MOTIONS FOR A TRIAL SEVERANCE FROM FRANGUI IN VIOLATION OF SAN MARTIN'S CONFRONTATION RIGHT, HIS DUE PROCESS RIGHT, HIS FAIR TRIAL RIGHT, AND HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED HIM BY THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF FLORIDA.

The abuses heaped upon SM as a result of his being forced to be co-joined in a trial with Frangui denied him any semblance of a fair trial, with the first and foremost of these being that because parts of Frangui's pm-formal interview statements and of his formal statement were made known to the jury, which were inculpating directly to SM with reference to his alleged role in the Lopez killing and which were inculpating to him vicariously as a principal under § 777.011, Fla. Stats., as charged by State.

In Bruton v. United States, 391 US 123 (1968), the Supreme Court held that the admission of a co-defendant's confession at a joint trial violates the defendant's right to confrontation under the Sixth Amendment if that confession also incriminates the defendant. That is precisely the situation that pertains here.

In Lee v. Illinois, 476 U.S. 530 (1986), the U.S. Supreme Court found that the co-defendants' confessions in a murder case, while consistent in some respects, were not identical in all material respects; that they did not interlock and were presumptively unreliable; and that therefore the introduction of the confessions violated the defendants' Sixth Amendment Confrontation Clause rights,

In Cruz v. New York, 481 U.S. 186 (1987), the U.S. Supreme Court held that Bruton was inapplicable to interlocking confessions and in Richardson v. Marsh, 481 U.S. 200 (1987), that Court held that the Confrontation Clause was not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction, where the confession was redacted to eliminate not only the defendant's name but any reference to the defendant's existence.

In the instant case there was redacting done of the statements of the two defendants---- Frangui having given pre-formal and formal statements, but SM having given only pre-formal statements----which redacting was of two different types, the first being the redacting of any reference in each of the two defendants' statements as to who fatally shot Lopez, and the second being that alleged exculpatory portions of Frangui's statements were redacted out. SM was unfairly prejudiced by both types of redactions.

Regarding SM's assertion that Frangui's gun shot Lopez, this was a part of his statement that was exculpatory to him and he was entitled to have the jury hear it. With reference to the elimination of recitations in Frangui's statements that were exculpatory to Frangui, these redactions were harmful to SM in his alleged (by the State) capacity as a principal to the first degree murder of Lopez. The State Attorney's office created the dilemma of everything harmful to Frangui being harmful to SM when it advised the Grand Jury to also charge both defendants as being principals of each other under the murder count, and if either side in this case is to be penalized here, it obviously should be the one creating the dilemma.

And, finally, with reference to the confessions-redactions business, it is ridiculous in the extreme for the State to be allowed to have introduced those portions of a defendant's statement that is inculpating and to have redacted out those parts that are exculpatory. This is a clear violation of the doctrine of completeness. See Morrison v. State, 546 So.2d 102 (Fla.4th DCA 1989). See also Touette v. State, 152 Fla. 495, 12 So.2d 168 (1943).

But what really made this whole confessions-redactions business a murky affair was the court's steadfast refusal to charge the jury that Frangui's statements could only be considered as evidence against Frangui and that SM's statements could only be considered as evidence against SM. Without that instruction SM's right to a fair trial simply didn't exist. This was the very least the court should have done to grant at least a modicum of relief to the two involved death-charged defendants in this case.

And finally when the prosecutor and/or the court get into the business of redacting a defendant's out-of-court statements and/or confessions, they run the risk of making them inadmissible because they are no longer the statement of the respective defendants and when that occurs, rather than redacting, the court should be severing. See Bryant v. State, 565 So.2d 1298 (Fla. 1990).

POINT III.

THE COURT ERRED IN ALLOWING THE PROSECUTION TO HAVE USED AS EVIDENCE AGAINST PABLO SAN MARTIN THE INCULPATING PARTS OF HIS PURPORTED STATEMENTS TO THE POLICE AND TO HAVE USED AS EVIDENCE AGAINST HIM THE PARTS OF LEONARDO FRANGUI'S STATEMENTS TO THE POLICE THAT WERE INCULPATING TO BOTH DEFENDANTS, OR TO FRANGUI ALONE, WHICH RULINGS WERE IN VIOLATION OF HIS FEDERAL AND STATE CONSTITUTIONALLY PROTECTED RIGHTS TO HAVE COUNSEL, TO REMAIN SILENT, TO BE ACCORDED THE DUE PROCESS OF LAW, TO HAVE A FAIR TRIAL AND TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT.

As is clearly evidenced in that part of the transcript dealing with the pre-trial hearing on the motions of the respective defendants to suppress the purported statements they gave to the police (TR-57 et seq.), the gathering of a task force of police on or about Jan. 18, 1992, to----at least in part----secure confessions from SM, Frangui, and former co-defendant Abreu, and which included officers from Metro Dade, North Miami, Hialeah, and the City of Miami had its sine qua non----or without which not----the fact that one of their brethren, North Miami Police Officer Steven Bauer, had been murdered by one or all of these defendants.

Representatives of or later members of this police task force, to-wit: Metro Dade Homicide Detectives Gregory Smith and Jarrett Crawford of the Homicide Cold Case Division, took Frangui out of jail on the said date of January 18, 1992.

These two officers had ascertained from City of Miami Police Officer Mantecon that he had already Mirandized Frangui in connection with a robbery in the City of Miami and that Frangui had provided Mantecon with an informal statement inculpating himself in that robbery (TR-105,106). They contended that they nevertheless Mirandized him again and said that Frangui didn't request an attorney.

Det. Crawford conceded he had advance knowledge that Frangui was being held on an unrelated charge at ICDC, but that he was unconcerned as to whether he had previously invoked his right to counsel (TR-84-86).

They then took Frangui to the Metro-Dade Police Robbery Office where he was immediately thrust into an interview room for two and a half hours (TR-111).

Det. Smith indicated the Mirandizing had been at the Robbery Office. He claimed he was in the interview room for two and a half hours after Det. Crawford left. He believed Frangui had executed the Miranda form at 12:57 p.m., and said he entered the interview room at 3:35 p.m. Smith said that during the interview Frangui was concerned about the fatal bullet that had killed

Officer Bauer and said that when he conveyed information he secured from a Sgt. Rivers that the fatal bullet that killed Officer Bauer hadn't been fired by Frangui, Frangui "hugged and kissed him" (TR-113-115).

They were clearly questioning Frangui about the killing of Officer Bauer because up to this juncture in the testimony of these two officers nothing had been said by either of them about the questioning of Frangui about the killing of Raul Lopez. As a matter of fact before the Hialeah officers arrived to question Frangui, Det. Smith discussed with Frangui whether he would give a sworn statement about the Bauer killing, which he declined to do at that time (TR-116).

Det. Smith entered the interview room with Detectives Nabut and Nazario of Hialeah and they began questioning Frangui without Mirandizing him because he----Det. Smith----told the Hialeah officers he had already done so (TR-118,119). Smith said that Frangui said he wanted a lawyer and that he didn't want to speak with him (or them) about the Hialeah robbery but that after being showed photo's of the two Suburbans he quickly did so (TR-118,119).

Det. Smith said he left the Homicide office (the transcript says both that they had Frangui in the Robbery office and in the Homicide office) at 8 p.m., and after being told that Frangui wanted to make a statement, he got back there at 9:45 p.m. with Frangui's formal statement being completed at 11:40 p.m. (TR-120-121).

Det. Nabut spoke to Frangui for two to two and a half hours before he gave a formal statement and apparently before Frangui gave the formal statement, Nabut availed himself of a monitor to watch Frangui talking to his wife or girlfriend, which he had agreed Frangui could do with no one else around. He said he didn't know about the monitor until after he got inside the room where it was located but, of course, he didn't exercise his option of either turning the monitor off, of leaving the room, or having otherwise not watched of listened to what was supposed to be a private conversation (TR-200).

Frangui testified at the suppression hearing that Det. Crawford became angry at him and smashed the table, kicked him numerous times and struck him (TR-360). He said that Crawford asked him about the Bauer case and told him there were one hundred police officers who would beat him if he didn't cooperate. Frangui went on to say that he then gave statements about the Bauer case, the Hialeah case, and the Bird Road bank robbery case, and in that order (TR-367).

The story was more of the same with respect to SM. Det. Nabut said he and Det. Nazario went to the Dade County Jail facility where he was incarcerated and that SM agreed to speak with them; that he waived his rights in Spanish, but that he did not execute a waiver form. He said that SM drew sketches of where the guns that were used were thrown away, and that that was the only subject they discussed on that occasion (TR-167-171). He said that no recording device was used (TR-215). Nabut said he didn't remember how SM responded to the "first Miranda right," but that he was sure he understood it (TR-254-255). He said that SM was "always respectful," but that he only answered the questions asked and gave no further explanation or elaboration. He said that Nabut changed his original story from the guns having been thrown in the ocean to their having been put in a river and that right before he recanted in this regard, he stared at the floor thirty to forty seconds.

Metro Homicide Det. Mike Santos said he went to ICDC on Jan. 18, 1992, and requested SM to go to Homicide Headquarters, which SM did. He said further: He spoke in an interview room to SM in Spanish, including Mirandizing him in Spanish (TR-266-269). He knew SM was already under arrest for another offense in the City of Miami. The gathering of the Task Force was a routine matter and he would take breaks from questioning San Martin to meet with other officers. SM was brought to the station at 12:35 p.m., and he had his meeting with the Hialeah detectives between 8 and 9 p.m. (TR-274,275). SM was "unhandcuffed" when he got to the station (TR-28 1-282).

Det. Santos said he believed he told SM he was implicated in the killing of Officer Bauer before he mentioned anything to him about the Lopez killing (TR-282,283). He said he didn't go over the Miranda form with SM with specific regard to the Lopez killing **(TR-283).**

The police talked to SM from 12:35 p.m. until 8 p.m. and then, after that, **they** began to talk to him about the Lopez killing (TR-283-285). Det. Santos said that after he told SM he was implicated in the Lopez killing through the statements of other persons, he admitted his involvement therein and proceeded to answer in detail Santos's questions. He said that the questioning of SM by him regarding Lopez lasted a couple of hours. He said that SM volunteered no information (TR-292-295).

SM testified as follows at the suppression hearing: He came to the U.S. in 1980. He went through the Eighth grade. He was taken out of jail on Jan. 18, 1992, and taken to the police station by Det. Santos and Mirandized but he nevertheless did not understand his rights, and while he was being Mirandized he said he wanted a lawyer. He admitted his involvement in the Hialeah-Lopez killing (TR-383-386).

The motions to suppress the inculpating statements of the respective defendants was denied, and the jury heard over and over again what each of the two defendants had to say about their own and each other's role in the Lopez killing and of the role of the co-defendant. In this regard, not only was Frangui's formal statement read into evidence before the jury, with the prosecutor playing SM and Det. Nabut playing himself, so here the prosecutor got two bites out of the apple.

The court should have suppressed both statements in their entireties because it cannot be said that they were the products of rational minds. As was made clear at the penalty phase advisory trial and which----at least to some extent----should have been clear to the gathering of officers on Jan. 18, 1992, and, specifically to those who participated in interviewing Frangui and SM, Frangui was at best a high level moron and SM was at best a person with borderline low level

intelligence. They----and the Lord only knows how many more like them----came over from Cuba during the Marie1 boatlift and most probably were forcibly kicked out of Cuba by Fidel Castro while he was trying to take advantage of the opening given him by the United States to get rid of as many as possible of Cuba's criminals and mentally disturbed persons. One is reminded of the "Ship of Fools" which plied the Rhine River during the Renaissance years carrying the mentally disturbed persons cast off by German and Fleming cities (See Madness and Civilization by author Michael Foucault and published by Routledge Publishers, London).

But the mental state of the defendants was obviously of little or no concern to the police involved in the task force and in the questioning of the two defendants; rather, what was clearly and almost solely on their minds was the bringing to justice of cop killers. One wonders how well the police really serve the rest of us when they consider it far more heinous for someone to kill one of their own than to just kill a civilian, which convoluted view of their responsibility to the public is, interestingly enough, just the opposite of the wartime situation where it is considered far more nefarious to kill a civilian than to kill an enemy combatant.

The US Supreme Court established procedural safeguards or the prerequisite requirement for the introduction of person's statements in its landmark case of Miranda v. Arizona, 384 U.S. 436 (1966). Although the essence of Miranda is well known, because of the importance of that holding to the case at bar, the description of that holding by Chief Justice Warren is restated here, to-wit:

> "(T)he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.. . . (U)nless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to

exercise it, the following measures are required.. . . " Miranda, 384 U.S. at 444-445 (emphasis added).

Here there is no arrest of either of the defendants until weeks later and the lame-brained excuse for this was that since they were already incarcerated, they weren't going anywhere. Even with reference to a simple traffic stop situation, the U.S. Supreme Court has enunciated the rule that "lower courts must be vigilant that police do not 'delay formally arresting detained motorists . . . .and subject them to sustained and intimidating interrogation at the scene of their initial detention'. " Pennsylvania v. Bruder, 488 U.S.-, 102 L.Ed 2d 172, 176, 109 S.Ct. 205 (1988).

The locale of the questioning has been a critical factor in many of the cases and the police station is where questioning is most likely to be considered custodial. Dunaway v. New York, 442 U.S. 200, 60 L.Ed 2d 824, 90 S.Ct. 2248 (1979).

Most of the cases involving the question of "delay" with reference to the securing of confessions by police have to do with delay in taking the accused before a magistrate resulting in the giving of a statement, the landmark U.S. Supreme Court cases being McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), but it is SM's contention here ----as is the case with delay in taking the accused before a magistrate----that where there is a protracted hours long delay in keeping a defendant in police custody before questioning him about the crime in question, the fact that a statement was made as a result of the delay----or as a partial result of the delay----is a factor in determining the ultimate question of voluntariness. See United States v. Stage, 464 F.2d 1057 (9th Cir.1972).

And, indeed, in the instant case regarding the propriety of the securing of the two defendants' inculpating statements and thus the propriety of their being put before the jury, voluntariness is the critical issue, with the only remaining issue being the effective denial to the defendants of their right to counsel.

To determine the voluntariness of a confession, a court must inquire whether, considering the totality of the circumstances, law enforcement officers have overborne the will of the accused. Haynes v. Washington, 373 U.S. 503 (1963); Townsend v. Sain, 372 U.S. 293 (1963); and Culombe v. Connecticut, 367 U.S. 568 (1961). The factual inquiry centers on the conduct of law enforcement officers in creating pressure and the accused's capacity to resist that pressure. See Mincey v. Arizona, 437 U.S. 385 (1978), and Davis v. North Carolina, 384 U.S. 737 (1966).

Finally, regarding the issue of voluntariness, there are two procedural rules that must be considered together. First, it is the prosecution's burden to prove by a preponderance of the evidence that the confession was voluntary. Connelly v. Colorado, 479 U.S. 157 (1986), and Lego v. Twomey, 404 U.S. 477 (1972). It is SM's contention that under the totality of circumstances----that burden simply was not met. Secondly, in arriving at the pre-trial issue of voluntariness, the court is required to indulge every presumption against the defendant having voluntarily, knowingly, and intelligently waived the Miranda rights. U.S. ex rel Turner v. Rundle, 438 F.2d 839 (3rd Cir. 1971), and United States v. Hernandez, 574 F.2d 1362 (5th Cir. 1978).

Regarding the right to counsel it was simply nothing short of gross police misconduct for Frangui and SM to be pulled out of jail and questioned the way they were when literally all of the involved police admitted they knew that the defendants were either already represented by counsel, or that they probably were, and, in this regard, it does not matter a wit that that representation had to do with a separate case.

Further, Frangui had signed a Notice of Defendant's Invocation of the Right to Counsel prepared by the Public Defender's office, which was representing him in the charge for which he was being held, which recited, in pertinent part: "I hereby announce that I desire my attorney to be present before anybody talks to me about any matters relating to this case or any criminal cases

pending or contemplated, " a copy of which was shown as having been furnished the State Attorney's office on Jan. 15, 1992.

It is probable that SM executed an identical Notice, etc., but the Record on Appeal does not contain same but, rather, a similar notice pertaining to a person who has absolutely nothing to do with this case (TR-123). This was probably SM's and undersigned counsel is thus assuming he executed such a Notice.

In addition to the notice or notices having been executed, Frangui at one point said he wanted a lawyer, but since he allegedly kept talking, Det. Smith did not act on this request (TR-118,119).

An accused having expressed his desire to deal with the police only through his attorney may not be further questioned until his attorney has been made available to him, unless the accused himself initiates further communication. Edwards v. Arizona, 45 1 U.S. 477 (1981). In light of all else that occurred in the instant case, it is really very unbelievable that Det. Smith did anything at all to make sure Frangui had an attorney present and, in all likelihood, Frangui's starting to talk again was because he knew no attorney was coming.

This whole scene was the kind of situation that makes so many people so distrustful of the police.

Lastly but by no means leastly, it is SM's most urgent plea that he has the full and absolute standing to object to the admission before the jury of Frangui's confession, just as he does to his own because of the court's refusal to charge the jury that the statements of each of the defendants were to only be considered against the defendant making them. This omission of fairness in this trial gives SM "standing" to here question the propriety of the denial of Frangui's motion to suppress his inculpating statements. Further since in Count I of the Indictment, i.e., the first degree murder count, the State charges that SM is guilty as a principal under § 777.011 (TR-1-5),

then if under the law SM can be responsible for everything Frangui did----which is vigorously contested elsewhere in this brief in making one death penalty eligible----it follows a priori that SM has standing to raise every objection that Frangui could raise.

"Standing" is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it. General Development Corp. v. Kirk, 251 So.2d 284 (2d DCA, 1971). Further, Fourth Amendment "standing" is quite different than "case or controversy" determinations wherein to have "standing" a person must have an interest in the subject matter of the action. U.S. v. Padilla, 960 F.2d 854 (9th CCA), and Matter of Springer, Bkttcy., M.D. Fla., 127 B.R. 702.

And with reference to SM's statement or statements, one of the factors that the court below should have presumed is his favor as part of the totality of the circumstances was that it was probable from the evidence, i.e., that SM wouldn't give a formal statement and wouldn't sign any Miranda forms or a diagram because he thought that anything he didn't sign or swear to couldn't be used against him. This state of his mind question, of course, bears heavily on the question of the voluntariness vel non of SM and, as well, on the question of whether he acted knowledgeably.

With reference to the receipt in evidence of the aforedescribed statements to the police of both SM and Frangui there is another and additional reason why this was fatal error, and that was because of the police use of the technique of having criminal suspects subjected to so-called pre-formal interviewing before being called upon to give a formal statement.

This practice was certainly not unique to this case and indeed in undersigned counsel's experience it is the norm throughout Dade County's various police agencies. It happened with respect to Dieter Riechmarm and Ana Cardona; both of whom had their death penalty appeals heard by this court, and probably everybody else who was suspected of committing crimes, particularly the crime of murder, and it is an inexcusable overreaching police tactic that ought to

be prohibited in this State once and for all. If a capital case defendant is going to have to suffer having his own statement or confession introduced against him, it ought to be uncoached and unrehearsed if police harassment----or the appearance thereof----is to be avoided and, again, it is because of shenanigans such as this that police are so distrusted by a substantial number of Americans----Shades of Singapore justice! The police probably got the idea of conducting pre-formal statement questions from the fact that this is a procedure utilized by polygraph operators, but wherever they got it from cannot clean up this very bad police act.

Based on the foregoing, SM prays the Court to conduct a de novo review of the denial of the suppression of both he and Franqui hearings and, if it deems such appropriate, to grant him relief from these rulings.

POINT IV,

THERE WAS AN INSUFFICIENCY OF EVIDENCE FOR THE COURT TO HAVE SUBMITTED TO THE JURY THE STATE'S CLAIM THAT DEFENDANT SAN MARTIN WAS GUILTY OF PREMEDITATED FIRST DEGREE MURDER IN THE KILLING OF RAUL LOPEZ.

There was not a single shred of evidence----direct or circumstantial----that SM killed Raul Lopez. Further, it was not at any time in this trial the contention of the State that SM fired the gun that killed Lopez.

In order for a person to be convicted of premeditated first degree murder, it is necessary that the prosecutor prove beyond a reasonable doubt that the defendant had a fully-formed conscious purpose to kill, which had existed in his mind for a sufficient period of time to permit reflection, and that with that he killed another person. See Gurganus v. State, 451 So.2d 817, 822 (Fla. 1984).

The closest State came to dredging up a premeditation argument was that SM was at a meeting with Frangui and others at which Frangui is supposed to have announced that he would

kill the security guard who would be travelling with the Cabanas's and, assuming arguendo, that such occurred, such state of facts is a far cry from SM having been the hirer in a plan to commit murder.

And, of course, which is being argued elsewhere herein and which is a central theme of SM's plea for relief to this Court and as was accurately argued to the court by co-defense counsel---the only real plan to kill was in prosecutor Kastrenakis's mind.

There simply wasn't a case of premeditated murder against Pablo San Martin to be submitted to the jury and since the court rebuffed Defense efforts to have the jurors distinguish on their verdict form between their findings, respectively, as to premeditated first degree murder and first degree felony murder, there is no way to know how the jurors decided the premeditated charge, and therefore under the principle enunciated by the U.S. Supreme Court in Espinosa v. Florida, 505 U.S. ____ 112 S.Ct. ___, 120 L.Ed 2d 854 (1992), that the weighing of one involved AC invalidates a death sentence even where three other AC's were found to be applicable, the whole result needs to be vacated as being violative of SM's federal and state constitutional due process, fair trial and protection. Clearly, the consideration by the jury of a type of capital murder not proven by the evidence is just as harmful and constitutionally invalid as the weighing of an involved AC.

There has been recognized a doctrine of transferred intent with reference to premeditated first degree murder but that holds that where a defendant intended the death of one person but not the particular person who was killed by the defendant's act, the defendant can still be guilty of premeditated first degree murder. See Dawson v. State, 139 So.2d 408 (Fla.1962); Lee v. State, 141 So.2d 257 (Fla.1962), et al; and Sect. 782.04(1)(a), Fla. Stats. However, the doctrine of transferred intent has nothing whatsoever to do with a non-killing defendant being guilty of premeditated first degree murder because the co-defendant premeditatedly killed the victim.

It is the duty of the appellate court in reviewing a lower court finding or result for the legal sufficiency of the evidence to sustain it to determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S.307 (1979). It is further the contention of SM that because what he is challenging here is the sufficiency of the evidence to sustain his conviction for premeditated first degree murder, the Double Jeopardy Clause would bar his retrial on this charge. See Burks v. United States, 437 U.S. 1 (1978).

And, finally, under this point it is SM's contention that under the holding of this Court in Brumblev v. State, 453 So.2d 381, 387 (Fla.1984), and under the holding upon which Brumblev was based, in pertinent part: to-wit: Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed 2d 1140 (1982), he is protected from being put to death by the Eighth Amendment which does not permit the imposition of the death penalty on a person participating in a felony during the time a murder is committed, but which person did not kill, attempt to kill, intend that a killing take place, or contemplate that lethal force would be used.

POINT V.

THERE WAS AN INSUFFICIENCY OF EVIDENCE TO SUSTAIN THE CONVICTION OF SAN MARTIN FOR PRE-MEDITATED MURDER BECAUSE THE ONLY PLAN THE EVIDENCE SHOWED TO BE WORTHY OF BELIEF, WAS THE PLAN TO COMMIT AN ARMED ROBBERY.

This Court's function in a capital case-death penalty appeal is quantitatively different than its function in a non-capital case-death penalty appeal and it recognized that difference in State v. Dixon, 283 So.2d 1 (1973), when it reaffirmed the efficacy of the Florida statutory death penalty scheme which had been revised to conform to the mandate of Furman v. Georgia, 408 U.S. 238 (1972).

In handing down this landmark decision, which has governed in the trial and appeal of

capital cases ever since, and noting that, "(D)eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation" (Dixon at pg. 7), this Court, in support of its finding of constitutionality of the new procedure under Furman, recited that before a capital case defendant can be put to death in Florida, he is protected by a safeguarding procedure that affords him consideration in the court system at four levels and, "(R)eview of a sentence of death by this Court, as provided by Fla.Stat. Sect. 921.141 F.S.A. . . . .the final step within the State judicial system" (Dixon at pg. 8).

Further evidencing the uniqueness of this Court's role in the capital case-death penalty process is the requirement of Florida law that this Court grant a death sentenced defendant "automatic review. " Sect, 921.142(5), Fla.Stats. Undersigned counsel takes this to mean that when the death penalty is imposed, this Court will automatically review the entire record from the court below to reach a de novo determination as to whether under all the circumstances of the case in its entirety, at both the guilt and sentencing phases, as to whether death is an appropriate sentence.

Pablo San Martin, a death-sentenced appellant, urges the Court to give the serious consideration, called for by this heightened responsibility placed upon it in reviewing capital cases where the death penalty has been imposed, to the matter of whether the evidence presented by the State of the alleged robbery plan, sustained State's contention that the plan included having Frangui kill the security guard.

If this is done, SM believes that the Court will agree that, as Frangui's counsel very aptly told the court, the only plan to kill the guard was in prosecutor Kastrenakis's mind. In partial support of this thesis, SM would call to the Court's attention that there was no mention whatsoever in Frangui's previous statements to the police of the defendants planning----or even mentioning---- that Frangui was to kill the guard (TR-1938). In further partial support of the thesis being

contended for here that there was no real credible evidence of a plan to kill was the testimony during penalty phase of Det. Fabregas that Abreu had said the shooting wasn't planned; rather that the only thing planned was the robbery (TR-2755-2758). But the strongest support for SM's contention in this regard is that the one answer that there was given that there was a plan that included killing the guard was, without any question, one that was put into the mind of Abreu by prosecutor Kastrenakis's outrageously leading question (TR-2805).

This whole plan to kill business was plain and simply nothing more than a concoction of this prosecutor and if the final step set forth in Dixon is to have the meaning intended therein, this Court should declare that the State's case against SM for premeditated first degree murder was legally insufficient.

POINT VI.

SAN MARTIN'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION----RIGHT TO REMAIN SILENT ----WAS VIOLATED BY THE PROSECUTOR'S BRINGING TO THE JURY'S ATTENTION THAT AFTER GIVING HIS PRE-FORMAL STATEMENT, SAN MARTIN REFUSED TO GIVE A FORMAL ONE AND THE COURT ERRED IN REFUSING TO GRANT SAN MARTIN ANY RELIEF THEREFROM.

There was simply no excuse for it happening but the prosecution brought to the jury's attention that after SM gave an informal statement, he refused to give a formal one. (TR 2125-2127)

Worse than simply doing this, when SM's counsel moved for a mistrial after this aberration occurred, the prosecutor was armed with the case citations he felt would support his action in this regard. So the deed was done with malice aforethought.

When the Defendant told the police officer that he would stop when he didn't want to answer any more questions, he did no more than assert the rights which the Miranda decision and the Constitution had given to him; therefore, the police officer's statement to the jury that the

Defendant had done so was indefensibly improper. Peterson v. State, 405 So.2d 997 (Fla. 3rd D.C.A 1981)

And, finally on this point, it is SM's contention that since constitutional error is involved here it is the State's burden to prove that it is harmless beyond a reasonable doubt as a prerequisite to this Court denying relief. Chapman v. California, 386 U.S. 18 (1967).

POINT VII.

SAN MARTIN WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO BE ACCORDED DUE PROCESS, TO BE GIVEN A FAIR TRIAL, AND TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE FACT THAT THE COURT BELOW NEVER REQUIRED THE MEMBERS OF THE JURY TO ADVISE THE COURT WHETHER THEY FOUND HIM GUILTY OR NOT GUILTY OF PREMEDITATED FIRST DEGREE MURDER AND WHETHER THEY FOUND HIM GUILTY OR NOT GUILTY OF FIRST DEGREE FELONY MURDER.

This Court's continued adherence to the position that where the State is contending simultaneously for convictions for premeditated first degree murder and for first degree felony murder no verdict form requiring the jurors to state their verdict with respect to both (See Young v. State, 579 So.2d 721 [1991], cert. den. 112 S.Ct. 1198, 117 L.Ed 438, reh. den. 112 S.Ct. 1710; Halliburton v. State, 561 So.2d 248 [Fla.1990]; Brown v. State, 473 So.2d 1260 [Fla.1985], cert. den. 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed 585 [1985]; and Sochor v. State, 580 So.2d 595 [1991]), is a matter that this Court needs to revisit because the Court's position in this matter really flies in the face of Furman and its progeny and, as well, it makes the capital case-guilt phase unanimous verdict requirement vapid and meaningless protection.

In Burch v. Louisiana, 441 U.S. 130, 60 L.Ed 2d 96, 99 S.Ct. 1623 (1979), the United States Supreme Court held that a non-unanimous conviction by a six-person jury in a state criminal trial for a non-petty offense violated Sixth and Fourteenth Amendment rights.

In Burch this Court traced the history of its cases dealing with various aspects of this matter, including the earliest one, Duncan v. Louisiana, 391 U.S. 145, 20 L.Ed 2d 491, 88 S.Ct. 1444 (1968). Regarding Duncan, the Court in Burch said (at p. 101 of 60 L.Ed), to-wit:

> "The Court in Duncan held that because trial by jury in 'serious' criminal cases is fundamental to the American scheme of justice 'and essential to due process of law, the Fourteenth Amendment' guarantees a state criminal defendant the right to a jury trial in any case, which if tried in a federal court, would require a jury under the Sixth Amendment. "

And in addition to these considerations, the rules that have emerged since this Court's holding in Furman v. Georgia, supra, whereunder the death penalty in the United States was enabled to be continued and retained despite the pull of the Eighth and Fourteenth Amendments to a contrary position, is that the mechanism whereby the decision is made as to whether the capital case defendant is to live or die is that a conviction of capital murder is necessary, but not sufficient, to expose an offender to the risk of execution, and that additional facts must be established before a convicted murderer becomes eligible to be put to death.

In McCleskev v, Kemp, 481 U.S. 279 (1987), the Court stated:

> ". . . . there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decision-maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.. . . "

In Gregg v. Georgia, 428 U.S. 153 (1972), the court interpreted the mandate of Furman v. Georgia, supra, to impose severe and narrow limits on any discretion involved in imposing the death sentence, in the following language:

> "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.... Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (Emphasis added)

Further, this "narrowing" process does not necessarily begin or have to begin at the sentencing phase of a capital case. See Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed 2d 568 (1988). And, indeed, if this concept of discretion being suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action is to have any meaning with respect to the instant cause, the single guilty verdict with respect to the dual charges of capital murder must be struck down as violative of the aforedescribed federal constitutional provisions and, as well as being violative of the counterpart provisions of the Florida Constitution because, in fact, such verdict goes in a completely opposite direction from narrowing, suitably directing and limiting discretion.

It is therefore SM's contention that in a case such as this where the State is seeking the death penalty and where---as here----the State is claiming the applicability of two alternative theories of capital murder, the jury should be required to advise the court on its verdict form as to what its separate findings were as to guilt or innocence with respect to each of those two alternate theories of capital murder, and that if such is not done the amorphous, ethereal guilty verdict that gets returned should be stricken down as being unconstitutionally vague.

There is no difference in this situation and in SM hypothetically being convicted of capital murder in a case wherein he was charged both with premeditated murder and with rape (assuming rape was still a capital offense), with the State prosecuting as to both crimes, but with the jury only having to specify on its verdict that he was guilty of a capital crime. In addition to the foregoing, it was absolutely necessary to the protection of SM's Fourteenth Amendment Due Process right and his Sixth Amendment Fair Trial right that the jury should have been enabled to advise the court in its verdict which type of first degree capital murder it was basing its verdict upon, because the court had charged the jury as to principals, aiders and abettors, and because

under Enmund v. Florida, 73 L.Ed 2d 1140 (1982), the imposition of the death penalty is constitutionally prohibited on a person who participates in an underlying felony of a felony murder charge, but who is not shown to kill or to intend to kill, and because there can be no conviction for premeditated murder against a co-defendant against whom the evidence is insufficient to show premeditation.

POINT VIII.

THE COURT ERRED IN REFUSING SAN MARTIN'S RIGHT FOR HIS COUNSEL TO UTILIZE THE SERVICES OF A JURY SELECTION EXPERT AND BY THE REFUSAL OF THE COURT TO ALLOW THE DEFENSE TO GO TO DENMARK TO TAKE THE DEPOSITION OF THE MEDICAL EXAMINER OFFICE'S REPRESENTATIVE WHO PREPARED THE AUTOPSY ON THE BODY OF RAUL LOPEZ.

Starting right up front, the trial court's refusal to authorize Defense counsel from engaging the services of a jury selection expert denied him of a support service that would have been afforded him if he had been directly represented by the Public Defender's office, but which was denied to him because his case was handled by special assistant public defenders for conflict or other reasons and that alone denied him the equal protection of the law and should not be countenanced in the slightest by this Court.

Undersigned counsel has never worked for the Public Defender's office but it is his firm conviction that when that office handles the trial of a capital case and decides the assistance of a jury selection expert is needed, it simply hires one and, in this regard, such counsel----as one of the appellate counsel in the case of State v. Charles Street, Case No. 88-41297, Circuit Court of the Eleventh Judicial Circuit----in which Street was represented directly by the Dade County Public Defender's office, can personally attest to this Court that the services of a jury selection expert were utilized by the Defense there.

The court below's refusal in this regard was obviously based upon saving Dade County the

expense that would have been involved by Defense being allowed to hire a jury selection expert.

Likewise, this purpose was again deemed more important by the trial court than that of the defendant's being enabled to be able to fully defend himself by its later ruling that defense counsel would not be allowed to incur the expense of going to Denmark to take the deposition for use at trial of the representative of the Dade County Medical Examiner's office, i.e., Dr. Hougen, who made the mistake of showing a bullet exit wound---- in addition to showing a bullet entrance wound----on his diagram of the body of Raul Lopez (TR-2064). Dr. Hougen's mistake in this regard was without question because the medical records evidence adduced by State uncontrovertedly showed that the single bullet that penetrated Lopez's body was removed during the unsuccessful effort to save his life at Jackson Memorial Hospital. And defense counsel were unfairly hampered in their efforts at guilt phase to defend their clients by this ruling because the State's evidence as to who shot who was entirely circumstantial, and thus the need for State to have called the ballistics expert, Tech. Kennington, whose testimony was about as clear as a Rube Goldberg cartoon or an Arthur Murray how-to-dance diagram showing feet. Further emphasizing the unfairness visited upon the defendants by this ruling was the fact that State was allowed to have introduced the said diagram of Dr. Hougen and then allowed to call another representative of the Medical Examiner's Office----who didn't examine the body of Lopez----to testify for and about Dr. Hougen's exam and diagram.

These two rulings had to do with money, i.e., saving Dade County from the expense that would have been involved had the involved defense requests been granted.

The right of an indigent criminal case defendant to have access to the necessary funds to pay the costs of defending himself, i.e., costs other than his attorney's fee, is constitutionally guaranteed "and is not dependent upon the existence of Section 939.15." State v. Byrd, 378 So.2d 1231 (Fla.1979). As is stated in the Byrd case (378 So.2d at 1232):

> "The defendant has that constitutional right in accordance with the United States Supreme Court's decision in Griffin v. Illinois, 357 U.S. 12, 76 S.Ct. 585, 100 L.Ed 2d 891 (1956), as supplemented by Mayer v. Chicano, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed 2d 372 (1971). The clear intent and purpose of the statute was not to grant an indigent defendant a right but to prescribe which governmental entity in the State of Florida must pay the court costs of an indigent defendant in a criminal case.

It is especially urgent where the involved indigent defendant is on trial for his life that he have access to the necessary cost monies to defend himself, and the trial court has an "affirmative duty" to "provide the funds necessary for the production of (mitigation) evidence." Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983). In Zant the court stated (704 F.2d at 1496):

> "We interpret Lockett v. Ohio, (438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed 2d 973 [1978] and Gregg v. Georgia, (428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed 2d 859 [1976] as vehicles for extending a capital defendant's right to present evidence in mitigation to the placing of an affirmative duty on the state to provide the funds necessary for production of the evidence. Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable. [T]he cost of protecting a constitutional right cannot justify its total denial. Bounds v. State, 430 U.S. at 825, 97 S.Ct. at 1496." Emphasis not added.

Further, Due Process requires that an indigent capital case defendant have "meaningful access" to the justice system. Ake v. Oklahoma, 470 U.S. 74, 105 S.Ct. 1087 (1985). In Ake the Court stated (470 U.S. at 77):

> "We recognized long ago that mere access to the courthouse doors does not itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. "

"Meaningful access" in this case was sadly lacking.

POINT IX.

DEFENDANT PABLO SAN MARTIN'S RIGHTS TO NOT BE DEPRIVED OF HIS RIGHT TO LIFE WITHOUT BEING ACCORDED THE DUE PROCESS OF LAW AND NOT TO BE

SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE PENALTY PHASE JURY HEARING THE STATE'S MENTAL HEALTH REBUTTAL DOCTOR MISSTATE THE LAW THAT NO STATUTORY OR NON STATUTORY MENTAL HEALTH MITIGATING CIRCUMSTANCE WOULD BE APPLICABLE TO SAN MARTIN OTHER THAN THAT HE DIDN'T KNOW RIGHT FROM WRONG, AND BY THE COURT'S SENTENCING HIM TO DEATH BEING BASED ON SUCH MISREPRESENTATION OF THE LAW AND BY ITS FAILING TO GIVE ANY WEIGHT TO SAN MARTIN'S CLAIMED MITIGATING CIRCUMSTANCES CONSIDERED BY IT.

The State's rebuttal doctor, psychiatrist Charles Mutter, M.D., was clear and to the point; the only mental health factor that rose to the level of a mitigating circumstance was whether SM and Franqui knew what they were doing, meaning, whether they had the capacity to "form the (criminal) intent." (TR -3280). It didn't matter that SM had borderline low intelligence----which Dr. Mutter conceded was the case (TR-3287),----that wasn't a mitigator because it didn't rise to the level of SM not knowing what he was doing. So Dr. Mutter found no statutory or non-statutory mitigating circumstances available to SM.

Dr. Mutter may be a great psychiatrist but his knowledge of what does and what does not constitute a mental health mitigating circumstance in a capital case is sadly lacking.

A mitigating circumstance is any aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as imposing a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978)

In Maxwell v. State, 603 So.2d 490, 491 (Fla. 1992) this Court stated (at 491):

> 'Nonstatutory mitigating evidence' is evidence tending to prove the existence of any factor that 'in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed or 'anything in the life of the defendant which militates against the appropriateness of the death penalty. "

The only place where the McNaughton test, i.e. that is whether the defendant knew right

from wrong, is applicable in Florida's criminal law scheme is at trial, where the defendant raises an insanity defense as a bar to a conviction.

What the good doctor is apparently not cognizant of is that under the bifurcated trials provided for by the legislature in response to Furman v. Georgia, 408 U.S. 238 (1972), the jury after a conviction goes beyond the already resolved question of guilt and reaches its recommendations of life or death on the basis of additional aggravating and additional mitigating factors and how they match up and that under this system the fact that the defendant was not insane by the McNaughton test did not necessarily mean that for instance----as was contended by SM's counsel----that he lacked the capacity to appreciate the criminality of his conduct or his ability to conform his conduct to the requirements of the law was impaired.

With Dr. Mutter there was one test, did he know right from wrong when he did wrong and, in effect, he rejected consideration of all claimed mental health mitigators. Dr. Mutter was not alone in rejecting considerations of all of SM's claimed mental health mitigators. He had company and unfortunately for SM, the doctor's companion was the Judge himself, for he too, rejected all of SM's claimed mental health mitigators. Specifically, the Judge rejected the following mental health mitigators being claimed on behalf of SM:

> The crime for which Pablo San Martin is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> The Defendant acted under extreme duress or under the substantial domination of another person.
>
> The capacity of Pablo San Martin to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. .
>
> Pablo San Martin is in the borderline range of intelligence with an IQ of 77.
>
> Pablo San Martin's organic brain damage.

> Pablo San Martin suffers from mental problems and emotional disturbance which does not reach the level of statutory mitigating factors.

With reference to the first above quoted and rejected mitigating circumstance, which is contained in subsection 5(b) of Sect. 921.141, Fla. Stat., the court recited as follows in his sentencing order, to wit:

> "Life is made up of a long series of choices all of us must make. People are ultimately judged by the choices they make. The defendant San Martin is no exception. " (TR-1107)

With reference to the claimed mitigating circumstance that SM had a borderline range of intelligence with an IQ of 77, the Judge recited that he considered the testimony of Dr. Marina in this regard, but he failed to accept it even though none of the doctors or psychologists who testified questioned this IQ level, including Dr. Mutter. The Judge clearly substituted his opinion as to the IQ level of San Martin and based thereupon he rejected it as a mitigating circumstance (TR 1110).

And, finally, the Judge recited with reference to the claimed organic brain damage that SM suffered from, the Judge said that he "... accepts the fact that the defendant does have a lesion in the left temporal lobe of his brain." However, here again the Judge rejected this as a mitigating circumstance. What this Judge was really doing, particularly with respect to the last of the above-described claimed mental health mitigating circumstances, was finding that there was some evidence supporting these mitigating factors, but then failing to give any weight to them by claiming to reject them, which of course, flies in the fact of the holding in Skipper v. South Carolina, 476 U.S. 1 (1988), which laid down the mandate that under no circumstances could the sentencer give no weight to a relevant mitigating circumstance which had been established by the evidence. The Court below gave no weight to the fact that SM's IQ was borderline low intelligence and no weight to the fact that he had organic brain damage, and the sentence of death

imposed on SM should thus be vacated and set aside,

POINT X.

THE COURT ERRED AT PENALTY PHASE IN CHARGING THE JURY THAT IT SHOULD CONSIDER AGGRAVATING CIRCUMSTANCE (5)(A), I.E., "THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION," AND IT ERRED THEREAFTER IN ITSELF CONSIDERING AND FINDING THE APPLICABILITY OF THIS AGGRAVATING CIRCUMSTANCE.

The "premeditated manner" part of Aggravating Circumstance 5(a) follows the conjunction "and", which in turn follows the words "was committed in a cold, calculated."

So from a use of language consideration, the prosecution at penalty phase seeking to have the jury charged as to 5(a) must adduce evidence sufficient to withstand an admissibility objection that it had not been shown that the involved murder had been committed in a "premeditated manner" as the sine qua non of such aggravating circumstance being allowed to be charged upon,

Clearly, that sine qua non was not established by State as to Frangui----whom the State contended fired the fatal bullet----and thus there is no way it could have been established as to SM. In the first place in this regard, and has been argued under separate points herein, State did not prove premeditation at guilt phase sufficient to withstand the Defense motions for directed verdict on the premeditation issue, the judge's adverse ruling to the contrary notwithstanding. But, even if this Court does not agree with this argument of undersigned counsel, it is beyond argument that State failed to establish at either guilt phase or penalty phase, or at both, the premeditation element of 5(a) as the "heightened form of premeditation" spelled out by this Court in Hill v. State, 515 So.2d 176 (Fla.1987); Floyd v. State, 497 So.2d 1211 (Fla.1986); Preston v. State, 444 So.2d 939 (Fla. 1984); and Jent v. State, 408 So.2d 1024 (Fla.1981). See also Rogers v. State, 511 So.2d 526 (Fla. 1987).

In Hansbrough v. State, SO9 So.2d 1081, 1086 (Fla.1987), this Court held that aggravating circumstance 5(a) was "reserved primarily for execution or contract murders or witness elimination killings. "

Further, this Court has held with respect to 5(a) that even if in the perpetrator's mind he had a pretense of a justification for the murder, even if objectively he had no justification at all, it did not apply. Blanco v. State, 452 So.2d 520 (Fla.1984). See also Banda v. State, 536 So.2d 221 (Fla.1988); and Cannadv v. State, 427 So.2d 723 (Fla.1983). And it is also improper for the trial judge to charge re: 5(a) if there is reasonable hypothesis of its non-applicability. Gerald v. State, 601 So.2d 1157 (1992).

Simply stated, the court below had no sufficient basis in the evidence upon which to have charged the jury as to 5(a) and it was unfairly prejudicial that it did so and the imposition of the death penalty subsequently upon SM following the recommendation of the advisory jury should in all propriety therefore be vacated and set aside by this Court. In this regard, the same situation pertains here as was dealt with by the United States Supreme Court in Esninosa v. Florida, 505 U.S.___, 112 S.Ct.___, 120 L.Ed 2d 854 (1992). There that Court, where the trial court had included 5(a) among the aggravating circumstances it told the jury it could consider, and where one of them, i.e., "especially wicked, evil, atrocious or cruel" was found by it, i.e., the U.S. Supreme Court, to be unconstitutionally vague, vacated, the death sentence of the judge entered after the advisory jury had recommended same because it had to be presumed that the judge had considered that deficient prior Florida aggravating circumstance, even though the trial court itself did not find it applicable. Here the case for sentence reversal is even stronger than in Esninosa because here the judge found 5(a) to have been proven when the foundation in the evidence to support that finding simply wasn't present (TR-1095, et seq.). In this regard, it is the contention being submitted on behalf of SM that the court's reciting in the sentencing order covering this

defendant language to the effect that SM was part of a plan whereunder "Frangui would drive his car in such a way as to force the 'bodyguard's' car off the road and then Frangui would kill him" is simply not reasonably deducible from Abreu's penalty phase testimony or from any other evidence or testimony adduced by State or defense counsel.

When it comes to the decision making as to whether a capital case defendant should live or die, the prosecution's proving a pretty good case for death penalty simply is not good enough and here the State's case was not even pretty good,

For all the reasons stated above, it is also SM's contention as a part of the 5(a) aggravating circumstance question that the could below further erred in itself finding its applicability.

POINT XI

THE COURT ERRED IN PRECLUDING DEFENSE COUNSEL FROM ARGUING TO THE ADVISORY JURY AT PENALTY PHASE AS TO THE NUMBER OF YEARS TO WHICH SAN MARTIN COULD BE SENTENCED ON THE COUNTS OF THE INDICTMENT OTHER THAN THE FIRST DEGREE MURDER COUNT AND IN KEEPING FROM THE JURY THE FACT THAT SAN MARTIN HAD PREVIOUSLY BEEN SENTENCED TO TWENTY-SEVEN YEARS IN A SEPARATE CASE.

The bottom line issue to be considered by the Advisory Jury at the Penalty Phase of a capital case is whether the defendant should live or die.

It is therefore critically important that the defendant's counsel be allowed to present the strongest case for life that he or she can, and in the instance of the penalty phase trial in this case one of the best arguments that should have been available to SM was that if he got the life sentence he could be required to remain in prison many more years than the mandatory twenty-five.

The court's reasoning was that the jury at penalty phase was only concerned with the penalty for the first degree murder conviction, but this logic was flawed because it resulted in

information being withheld from the jurors that may **have affected whether voted** to recommend life or death. This reasoning does not accord with one of the central Post-Furman themes of what capital case sentencing should be all about, which is that states cannot limit the sentencer's consideration of any relevant circumstances that could cause him, her or it to decline to impose the death penalty and that, therefore, the State----or the State scheme----must allow the sentencer to consider any relevant information offered by the defendant. McCleskey v. Kemp, 481 U.S. 279 (1987); Blystone v. Pennsylvania, 494 U.S. 299 (1990); and Graham v. Collins, 113 S.Ct. 892 (1993). And since under the Florida scheme the court in passing sentence must give great weight to the jury's recommendation of either life or death (See Tedder v. State, 322 So.2d 908 [1975]), the above-described constitutional principal has efficacy with respect to the sentencing advisory jury just as it does with respect to the judge in his sentencing function. But there is still another reason why the court's refusal to allow defense counsel to argue to the jury the fact that SM could remain in prison for many more years than the mandatory twenty-five years on the first degree murder count, because of the sentences both inside and outside this case, and that was because State was allowed to put before the jury a "future dangerousness" argument. Simmons v. South Carolina , ___ US ___; ____ S.Ct. ____; ___ L.Ed2__, 55 CRL 2181 (1994).

POINT XII.

SAN MARTIN WAS DENTED HIS DUE PROCESS, FAIR TRIAL, AND HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE PROSECUTION BEING ALLOWED TO PLACE BEFORE THE SENTENCING JURY EXTENSIVE TESTIMONY REGARDING SAN MARTIN'S INVOLVEMENT IN TWO OTHER VIOLENT FELONIES, BUT WITH HIS COUNSEL NOT BEING ALLOWED TO ATTEMPT TO MINIMIZE HIS ROLES IN THESE TWO OTHER VIOLENT FELONIES.

The State's winning argument here was that the case law prohibited defense counsel from making a "lingering doubt" argument to the jury with respect to the two prior felony convictions

relied upon by the prosecution (TR-2534). There is no question but that a lingering doubt argument has been held improper by prior decisions of this Court. See Preston v. State, 607 So.2d 404 [Fla.1992]), for the proposition that "lingering doubt" is not a mitigating circumstance. However, in the process of arriving at its ruling in this case the court below went far beyond preventing a lingering doubt argument in that it also prohibited defense counsel from arguing in summation regarding details of the past crimes introduced into evidence by State (TR-3468), which, as SM's counsel vainly argued to the court, unfairly restricted such counsel's efforts to try to minimize the effects of State's past crimes conviction evidence (TR 3470). The right to fully cross-examine a prosecution witness on the subjects opened up on direct examination is absolute, stemming from the constitutional right of an accused to be confronted by his accuser. Coco v. State, 62 So.2d 892 (Fla. 1953); Knight v. State, 97 So.2d. 115 (Fla. 1957)

Further, since the aggravating circumstance in question has to do with past convictions, the practice of state being allowed to go behind the past convictions and to bring out before the advisory jury testimony and other evidence pertaining to the crimes for which those convictions were secured is of questionable validity itself. But it is really spiking the vampire that the state was allowed to do this and that defense was prohibited from fully cross-examining past crimes witnesses and then be restricted in trying to make argument to the jury designed to minimize the heinousness of the state's evidence.

This is a double whammy unfairness to the death eligible defendant and it clearly denies him any opportunity to defend himself on a level playing field with the prosecution.

POINT XIII.

THE COURT ERRED IN REFUSING TO CHARGE THE ADVISORY JURY AS TO THE SUBSTANCE OF ANY OF THE NON-STATUTORY MITIGATING CIRCUMSTANCES BEING CONTENDED FOR BY SAN MARTIN AS BEING APPLICABLE.

non-statutory mitigating circumstance, such as deterrence (TR-2134). What it is about is the refusal of the court to charge the jury as to those non-statutory mitigating circumstances respective defense counsel were allowed to claim as being applicable. These non-statutory mitigating circumstances included that SM had an IQ of 77; that he had organic brain damage; that SM didn't actually shoot Lopez; that SM confessed to his part in the robbery; that SM had remorse; that he was otherwise a good person; and that he suffered from mental problems although not rising to the level of a statutory mitigating factor (TR-1108-1115). However, it did not matter what the substance of these mitigating circumstances was for the Judge took an across the boards approach in simply refusing to instruct the jury as to the substance of any of them (TR-3016, 3061, 3357, 3382). It wasn't necessary for the Judge to instruct the advisory jurors as to the substance of the non-statutory mitigating circumstances in the Judge's opinion because defense counsel were free to argue them to the jury (TR-2134).

A defendant is entitled to an instruction as to any recognized defense for which there exists sufficient evidence for a reasonable jury to find in his favor. Mathews v. United States, 485 U.S. 58 (1988). Further a defendant is entitled to an instruction which embodies his theory of the case if there is a foundation in the evidence for it. US v. Escobar de Brigot. 742 F.2nd 1198 (9th Cir. 1984).

Further, the refusal of a trial judge to instruct the jurors as to a defendant's theory of defense is not excused by allowing the defense attorney to argue his theory of defense in his closing argument, and in the instant case situation, the effect of the judge's refusal in this regard is to demean the applicability of the contended for non-statutory mitigating circumstances and to thus treat them with less dignity than the aggravating circumstances being contended for by the prosecution. The fact that the prosecution is allowed to contend for only the aggravating

circumstances that are contained in the statute, while a capital case defendant can also claim the applicability of non-statutory circumstances, in no way diminishes that capital case defendant's right to have the advisory jury charged as to the claimed non-statutory mitigating circumstances.

POINT XIV.

IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION THAT IF THE JURY DETERMINED THERE WERE SUFFICIENT AGGRAVATING CIRCUMSTANCES TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY, ITS NEXT DUTY WAS TO DETERMINE WHETHER THERE WERE SUFFICIENT MITIGATING CIRCUMSTANCES TO OUTWEIGH THE AGGRAVATED CIRCUMSTANCES, THE COURT VIOLATED SAN MARTIN'S CONSTITUTIONAL DUE PROCESS, FAIR TRIAL AND RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT RIGHTS BY SHIFTING THE BURDEN OF PROOF TO HIM TO SHOW WHY HE SHOULD NOT BE GIVEN THE DEATH SENTENCE.

The matter of how the jurors were to consider the mitigating circumstances was debated at several points during the penalty phase case, and it was the consistent Defense contention regarding this issue that it was State's burden to not only prove the existence of aggravating circumstances warranting the death penalty but, after that, to then have to also prove that the aggravating circumstance outweighed any mitigating circumstances that had been established as existing by the Defense.

In this regard, SM concedes that there is no constitutional infirmity in his having to prove the existence of mitigating circumstances----be they statutory or non-statutory----but for him to be required to go beyond this point and then have to prove that the mitigating circumstances outweigh the aggravating circumstances is a clear shifting of the burden as to whether he should be put to death.

The law is clear that in a criminal case the defendant is presumed to be innocent and the

burden of proving the defendant guilty at all times is upon the prosecution. The reasonable doubt standard applies in both state and federal proceedings and it is a matter of clue process that the prosecution has to prove every element beyond a reasonable doubt. In Re: Winship, 397 U.S. 358 (1970).

Clearly, in Florida the State's burden in a capital case does not end after the guilt phase part of the trial is over, and the fact that the standard jury instruction in question is taken directly from Sect. 921.141, Fla. Stats., does not lessen or diminish the constitutional burden of proof throughout the trial that rests solely with the prosecution.

The situation here is analogous to that in Mullanev v. Wilbur, 421 U.S. 684 (1975), where the Court held that a state may not relieve the prosecution of proving an essential element of a crime by establishing a presumption that the defendant must rebut as an affirmative defense.

In this regard, succinctly stated, it was State's burden to not only have to prove SM guilty of first degree murder, but thereafter to go beyond that and prove the existence of aggravating circumstances to establish a heightened degree of misconduct beyond the misconduct warranting the conviction, and then after that to prove that such aggravating circumstances outweighed any mitigating circumstances, which had been established as existing by the defendant.

It is SM's contention that any procedure other than this----including the one specified in Sect. 921.141, Fla. Stats., and taken from there and put into the standard instruction----violated his Due Process and Fair Trial rights and his Eighth Amendment protection against cruel and unusual punishment.

POINT XV.

THE SENTENCE IMPOSED UPON DEFENDANT PABLO SAN MARTIN VIOLATES HIS RIGHT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND UNDER ART. I, SECT. 17, OF THE FLORIDA CONSTITUTION TO NOT BE SUBJECTED TO CRUEL AND

UNUSUAL PUNISHMENT AND IT VIOLATES ONE OF THE MOST IMPORTANT STANDARDS OF DECENCY FOLLOWED BY CIVILIZED SOCIETIES, i.e., THAT THEY DO NOT PUT HUMAN BEINGS TO DEATH.

Undersigned counsel herewith raises in behalf of his client the many arguments heretofore raised in other appeals from sentences of death, including but not being limited to the fact that the death penalty is imposed upon members of racial and ethnic minorities in far greater proportion than the percentage of the overall population, the whole of such collective minorities bears to the total population, both in Florida and in the United States; that the death penalty scheme as set forth in Sect. 921.141, Fla. Stats., fails to provide the sentencing jury with constitutionally adequate guidance in how to consider the alleged applicable aggravating circumstances and mitigating circumstances, including the jury's not being told by what vote it was to determine the existence and the applicability of each such circumstance and how to weigh them with respect to each other; that the Florida Statutory Scheme imposes a burden upon the defendant to prove that the death penalty should not be imposed; that the said scheme unconstitutionally requires only a bare majority to be necessary to recommend death; and for the other reasons enumerated hereinabove in this brief.

But there is an even more important reason why this Court should now rise to the occasion and impose another kind of death sentence, one that puts the death penalty itself to death in this State, because our nation is beset by so many problems that one cannot imagine what life here will be like fifty----or even twenty-five years----from now, with crime being number one amongst these problems. To be sure, American's favor the death penalty and indeed, one state----New York---- has just reinstated it. But, this fact to the contrary notwithstanding, having the death penalty contributes little or nothing to finding a solution to the crime problem.

Regrettably, it is this writer's opinion that real solutions to the nation's crime problem will

not be found during his lifetime and very likely will never be found. The law and order thumpers want everyone to have the right to have any kind of a gun ever invented, and then when kids raised in America's ghetto's start shooting people----including themselves----and otherwise using guns, we hear more clamor from the people who want all these guns demanding more jails and a bigger and better death penalty. This vocal group is riding high now, through their newly elected majority in the Congress. They are engaged in the process of totally dismantling the social programs now in effect, which, to a greater or lesser extent, will contribute to the tendency among the young people of America's underclass to rebel even more against the society that they have grown up believing it has turned their back on them and their families. And of course, the situation is further compounded when the more affluent either move away from the less affluent or if they can't afford that, they extend political pressure in their own communities to have streets closed off to keep the bad people out. This is happening in Dade County in such diverse areas as Coral Gables, City of Miami, Miami Springs and Miami Shores. For further evidence of the walling off of poor America from the rest of us, see the picture on the 1995 West Publishing Calendar. Our country is in a mess. So what does all this have to do with the death penalty? Just everything. Maybe if someone in our society ----a court or a legislature somewhere----could have the courage to admit the undeniable, that the death penalty makes our claim to be foremost among civilized countries a total farce, and then abolish it, we might be able then to find the additional courage needed to resolve our seemingly overwhelming problems so that we then point with pride that we live in a just and caring country. The death penalty is unconstitutional because it is unconscionable. A number of years ago a vice president of the country wanted very much to be president. His name was Hubert Humphrey. He wanted to be president so much that he doggedly supported the president----Lyndon Johnson----in continuing to prosecute a war that no longer made sense, if ever it did. The vice-president did indeed win his party's nomination----with the

President's help----but he then went on to lose the election. Many persons believed that if Hubert Humphrey had first resigned his vice-presidency and then sought the presidential nomination on an anti-war campaign, he would still have won his party's nomination and then he would have gone on to win the presidency. But, more importantly, even if he hadn't won either, he would have done the right thing on the most important issue of the day. This Court has the same kind of opportunity available to it that Hubert Humphrey walked away from.

POINT XVI.

THE STATE WAS GUILTY OF PROSECUTORIAL MISCONDUCT IN THIS CASE WHICH ROSE TO THE LEVEL OF DEPRIVING SAN MARTIN OF A FAIR TRIAL, THE DUE PROCESS OF LAW, AND OF HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT.

First and foremost, the business about the so-called "plan" to kill the security guard was probably the worst instance of prosecutorial misconduct in this case with this contention having clearly been the concoction of one of the prosecutors who threw a totally leading question and got former co-defendant Abreu to lamely answer affirmatively that the "plan" specifically included the security guard to be killed (TR-2805,3387).

This was an outrageous embellishment of what actually was said about a plan----in the pre-trial statements to the police of all the defendants' statements, including Abreu's----and that was that Frangui, San Martin, Abreu, and one or both of the Fernandez's met to plan the armed robbery of "the businessmen" with there being nothing in those statements about the plan including killing the security guard. Said the prosecutor: "San Martin.. . .is a part to the planned murder of Raul Lopez (TR-3387). In this regard, the following questions and answers appear in the transcript:

> "Q. Now you told us before that Frangui had told you he was going to run the bodyguard into the embankment and shoot him, is this his role in this thing?

> Mr. Matthewman: Objection. That's not what he said.
> The Court: The jury will remember what he said or didn't say." (TR-2727)

Another lapse of fairness on the part of the prosecution was its deliberately bringing to the jury's attention that SM refused to give a formal statement after giving an informal one, with the prosecution having cases to support the admissibility of this refusal, none of the cases being on point with respect to the factual scenario involved in this case.

The State asked Dr. Marina about the applicability of statutory MC's which she had not said in her direct testimony existed with respect to SM, which amounted to State's deliberately presenting to the jury the implied non-statutory aggravating circumstance of mitigating circumstances recognized in the statutes as not being applicable to the defendant in this case (TR-3016).

At a later point in the penalty phase trial----the prosecutor told the jury in his opening statement:

> "First, they find themselves.. .no longer presumed innocent of anything. " (TR-3380)

Then during his penalty phase summation to the jury the prosecutor said:

> "These are the same lawyers who argued to you that they confessed to a crime they didn't commit." (TR-3428)

One of the most frequent forms of prosecutorial misconduct is an attack upon his lawyer during argument to the jury.

This very slippery ambiguity----insofar as the law is concerned----really put it in the jurors' minds that since SM had been found guilty of first degree capital murder, there was no longer any burden on the State to have to prove that the defendants should be given death rather than life, and when coupled with the jury instruction that was given that each defendant had the burden of proving that the MC's outweighed the AC's this was a doubly and very unfairly misleading and

deliberately ambiguous statement of the law.

Another bit of prosecutorial slipperiness was its penalty phase summation argument telling the jurors that they had agreed during voir dire that in considering the AC's and the MC's they would come to "a legal recommendation" (TR-3418).

What in the world did the prosecution mean? This writer does not know, but the words "a legal recommendation" certainly suggested to the jurors that they should only be concerned about the law and not about the facts.

One of the most persistent forms of prosecutorial misconduct in this case was the State's constantly asking its witnesses leading questions that indicated the desired answers. When undersigned counsel was reading and outlining the transcripts herein the number of Answered Unobjected To State Leading Questions became so great that he began indicating same with the anonym ASULQ. As is thusly indicated throughout the Statement of the Case and the Facts. This practice was particularly hurtful to SM during the State questioning of its ballistics expert, Tech. Kennington, whose conclusions, as it was, were vague and confusing in the extreme (TR-2206,2224). It takes no citation of authority to support the assertion that leading questions----to a greater or lesser extent----detract from the correctness of a witness's testimony by suggesting what it ought to be, which thereby diminishes the fairness of the trial received by the defendant against whom the answers to the leading questions are directed. And, in this regard, it is the prosecution's other burden to make sure that the defendant it is prosecuting is treated fairly and justly by it. That simply did not happen in this case.

In Smith v. State, 95 So.2d 525 (Fla.1957), this Court stated (at p. 527):

> "It is not the duty of a State Attorney merely to secure convictions; the State Attorney is required to represent the State, it is his duty to present all of the material facts known to him to the jury; and it is as much his duty to present facts within his knowledge which would be favorable to the defendant as it is to present those facts which are

favorable to the State; being an arm of the court he is charged with the duty of assisting the Court to see that justice is done, and not to assume the role of persecutor," (Emphasis added)

Misconduct of counsel in the examination of witnesses, or at any other time during the course of the trial, will, on proper showing of prejudice, constitute reversible error. Further, comments of counsel cannot be considered as harmless where the evidence in the case is inconclusive. 55 Fla.Jur.2d 485, 486 (Trial, Conduct and Argument of Counsel, Section 94 In General).

In Porter v. State, 84 Fla. 552, 94 So. 680 (1922), this Court stated and held as follows:

"PER CURIUM. The charge in this case is grand larceny. The property alleged to have been stole is an automobile. The verdict was guilty as charged with recommendation of mercy of the court, By writ of error the judgment adjudging guilt and imposing sentence is here for review. Because of the inconclusive character of the proof, errors assigned in the admission of evidence respecting other similar offenses alleged to have been committed by the defendant and comments of counsel on behalf of the state during the trial regarding such alleged crimes cannot be considered as harmless errors, and it is considered that justice demands another trial of the case when a recurrence of such errors are improbable. Reversed. "

In Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed 1314 (1935), the Court stated, in pertinent part, to-wit:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor----indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so laxly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations

and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. " (Emphasis added)

The totality of the prosecutorial overreaching to secure convictions and death sentences in this case warrants nothing less than a reversal of both the judgments and the sentences.

CONCLUSION

For the foregoing reasons, the Appellant PABLO SAN MARTIN prays the court to vacate and set aside the guilty verdicts entered against him, the judgment thereon and the death sentence imposed upon him, and to grant such other relief as the Court deems he should have in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial Brief of Appellant PABLO SAN MARTIN was mailed to the office of the Attorney General, 401 NW 2nd Avenue, Suite N-921, Miami, Florida 33128, this 3rd day of May, 1995.

Respectfully submitted,

Lee Weissenborn
Florida Bar No. 086064
235 N.E. 26th Street
Miami, Florida 33137
Phone: (305) 573-3 160

LEE WEISSENBORN