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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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.

As is revealed by its restatement of what Defendant's Point No. 1 is about ---- the AG's restatement being the first of his restatement of all of the Defendant's points on appeal ---- by the summary of his argument going to Point I, and by the argument itself, he either misconceives the gravamen of the Defendant's argument or he simply has chosen to ignore such and to recast the matter to accord with his wishes. The thrust of Defendant's argument under this point is not that the State Attorney's office exercised its peremptory challenges in a manner contrary to present Florida law; nor is it in the main that the refusal of he trial court standing alone to grant the defense request for individual or sequestered voir dire prevented the defendant from having a fair trial; rather the argument is that the confluence of the circumstances of not having individual voir diring; of going through the process of death qualifying the individual jury panel members in the presence of the other members of the panel; and the extent of the so-called death qualifying process under Florida law resulted in Defendant being denied a fair trial, due process and the right to be free of cruel and unusual punishment in violation of the applicable State and federal constitutional provisions.

As to the unfairness of the process whereby prospective jurors, who oppose the or having doubts about the morality of the death sentence, Defendant rests upon the arguments

made in his initial brief and would simply add thereto that the Attorney General himself makes the point as to how unfair this system is by reciting as a part of its argument:

> "Thirteen of the seventy-four jurors summoned expressed reservations of some kind regarding the death penalty. Of those thirteen, one juror served." (AGB-34)

Pablo San Martin's sentencing trial was heard by a jury of eleven persons who had no reservations about imposing the death penalty if such were deemed appropriate by them under the circumstances, and by one juror, who had expressed a reservation about the death penalty, and the members of this pro-death panel heard endless pro-death posturing by the prosecutor during the joint voir dire process, plus the opinions they heard from their colleagues that they favored the death penalty, etc., which opinions outweighed those of the panelists with death penalty concerns by sixty-one to thirteen.

It needs not the citation of one authority for the point to be made that the process described in this argument which was used in this Defendant's trial was so stacked against him receiving any semblance of a fair trial that he had no reasonable chance to receive the alternative life sentence.

It is bad enough that 39 states of the United States and the federal government still impose the bestial, ungodly penalty of death on human beings, when most of the civilized countries have long ago ended the killing of human beings, but it is just intolerable when the way the death penalty is imposed, as in this case, is so unfair .

There is no good reason why the court below refused to have the jury panelists voir dired individually; there is no good reason why the capital case trial procedures should be so rigged to insure that very few persons ---- if any ---- who oppose the death penalty or have

reservations about it, will every serve on death penalty juries; and there is no good reason why the death qualifying process should be a proselytizing opportunity for the state to convince panelists that the death penalty is a routine standard affair and to do so to each prospective juror in the presence of the entire panel.

The combination of these circumstances here resulted in Pablo San Martin's trial being unfair from the moment it began. This system is a true travesty of justice and no matter how many places the Attorney General argues this or that narrow point was not preserved for appellate purposes and no matter how many times the Attorney General cites this or that case for some minute or obscure point, he can no more make this procedure look fair than can one make a garbage dump smell good with a can of air spray.

There is one additional case that this Defendant would cite under this point. It is State v. Dixon, 283 So.2d 1 (Fla. 1973), in which this court justified in substantial part its upholding of the post Furman v. Georgia, 408 U.S. 283 (1972), Florida's death penalty sentencing procedure by the fact that a defendant charged with capital murder is allowed to have himself defended at four different stages of the post - conviction trial court level and then a fifth time before this court.

This Court stated in Dixon, in pertinent part:

> "Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes . . .
>
> "... It is necessary at the outset to bear in mind that all defendants who will fact he issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After

> his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty ---- each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.. . .
>
> "Review of a sentence of death by this court, provided by Fla. Stat. § 921.141, F.S.A.. is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution. (Emphasis supplied)

When this mandate imposed upon this Court is coupled with the duty imposed upon it to provide "automatic review" (See § 921.142(5), Fla. Stat.), it is clear that both this Court (in Dixon,) and the Legislature of this State have envisioned a more substantive and less procedural technical appellate review where the death sentence has been imposed. That kind of review as to the deleterious effect upon fairness caused by the confluence of circumstances described hereinabove should clearly result in the striking down of the death sentence imposed upon the Defendant, Pablo San Martin.

POINT II.

> THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT SAN MARTIN'S OFT-ASSERTED MOTIONS FOR A TRIAL SEVERANCE FROM FRANQUI 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.

Here again the Attorney General's restatement of this Point focuses on that one aspect

of San Martin's argument thereunder, that narrow point being that Co-Defendant Franqui's confession was properly admitted against San Martin and in support thereof the Attorney General cites to the holdings in Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 9 L.Ed2d 514, and Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d, (1987), as authority for the alleged proposition that "(F)ranqui's confession was properly admitted against the Defendant." (AGB-45)

San Martin's succinct response to this assertion is that it is not supported by those cases. Neither of them deal with the question of whether a confessing defendant's confession was directly admissible against a co-defendant.

Furthermore, and to the alleged contention that Franqui's confession was properly admitted as evidence against San Martin, neither do two other cases cited by the Attorney General, to wit: Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d, 284 (1969) and Grossman v. State, 525 So.2d 833 (Fla. 1988) have any relevance thereto, because in both of those cases there was a limiting instruction given to the respective jurors that they were to consider the confession of the defendant who made it only against that defendant and not against the co-defendant. The Attorney General has thus falsely placed his reliance upon those cases as supporting his further contention that any error inherent in the trial court's receiving of Franqui's confession as evidence against San Martin was harmless beyond a reasonable doubt (See AGB-45).

Even more remote from the facts in the instant cause is the case of Idaho v. Wright, 497 U.S. 505 (1990) (See AGB-40), which case deals with the admissibility of a two and a half year old child's hearsay statements in a child sex abuse criminal case.

Without conceding for even an instant that the admission of Franqui's confession into this joint trial with San Martin with a limiting instruction could be considered against San Martin directly, San Martin urges upon the Court that such would have been a vastly different landscape than was the case here with Franqui's confession coming in with no limiting instruction and it is simply unacceptable in a case where the death penalty had been asked for that the State gloss over the differences in the two situations in the cavalier manner that it has.

The fact that two criminal case defendants are tried together in a joint trial does not in any way mean that all of the evidence adduced against one defendant is admissible against the other and indeed the failure of the trial court to give appropriate limiting instructions could and should result in a reversal because of the requirement that for a conviction to be constitutional it must have been based upon evidence admissible against the particular defendant ---- and no other evidence ----and that evidence alone must prove guilt beyond a reasonable doubt.

Finally, San Martin would call to this Court's attention that while the Attorney General did cite the holding of the landmark United States Supreme Court case in the involved area, to wit:, Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702; 95 L.Ed.2d 176 (1987), in an obscure footnote as standing for a point unrelated to the admissibility of the Franqui confession against San Martin, he neglected to also inform the Court that ---- as was the case in all other cases cited by him under this point ---- that a limiting instruction was given there. It was the failure to give the limiting instruction which really tainted the whole process dealt with under this point.

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 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.

Under this point the Attorney General makes the totally - devoid- of - authority assertion that San Martin is without standing to challenge the admissibility of Franqui's confession (AGB-47). And not only does he not cite any case law or any other type of authority to support such assertions, he also, completely ignores San Martin's contention that because the State did, inter alia, vicariously seek his conviction as a principal, aider and abettor under § 777.011, Fla. Stat., San Martin has standing to directly challenge the admission of Franqui's confession.

Nor has the Attorney General in a meaningful substantive way addressed himself to the outrageously overbearing tactics used by the police in securing the confession of both Franqui and San Martin, which was described in detail in San Martin's initial brief, and by fluffing up this vapid argument by citing various and sundry cases stating for various and sundry propositions not relevant to the overall thrust of San Martin's initial brief argument he adds nothing worthy of consideration.

Under this point, the Attorney General makes reference to the alleged failure of

Franqui to challenge the voluntariness of his confession in his direct appeal to this Court. Undersigned counsel represents to the Court that he has not been forwarded a copy of Franqui's brief in that appeal and that his client should not be bound in any manner to a fact not supported by the record in this appeal.

POINTS IV AND V.

> 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 AN INSUFFICIENCY OF EVIDENCE TO SUSTAIN THE CONVICTION OF SAN MARTIN FOR PREMEDITATED MURDER BECAUSE THE ONLY PLAN THE EVIDENCE SHOWED TO BE WORTHY OF BELIEF WAS THE PLAN TO COMMIT AN ARMED ROBBERY.

The Attorney General said it ---- "no one testified during the guilt phase that the Defendants overtly planned to kill their victims." (AGB-56)

This admission speaks far louder than all the cases cited by the Attorney General dealing with numerous aspects of what constitute "premeditated murder," including the spurious reference to a case correctly but inapplicably (here) holding that "premeditated murder may be formed in a minute." (AGB-57)

The Attorney General attempts to obscure the differences between premeditated, murder and felony murder as is illustrated by his following argument, to-wit:

> "Even assuming arguendo that the Defendant did not personally have the intent to kill Lopez he was a full and complete participant in the attempted robbery. " (AGB-58)

The Attorney General obviously feels very secure in interchangeably arguing

premeditated murder and felony murder but this may well not be a secure feeling he can rely upon forever for eventually this Court or the United States Supreme Court will come around to recognizing as a truism that these two types of murder are not the same and that the evidence needed to establish each is not all the same.

In Zant v. Stephens, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235, 248, quoting Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859, 883 (1976), the Court stated, in pertinent part that the procedure to determine whether the death penalty should be imposed "must suitably direct and limit the decision-maker's discretion so as to minimize the risk of wholly arbitrary and capricious action."

This next step very badly needs to be taken ---- and it is long overdue ---- because clearly this ephemeral haziness as between premeditated murder and felony murder really does create the strong possibility that this jury, as well as other juries faced with sorting out between these two types of death- eligible murders, acted in an arbitrary and capricious manner

POINT VI.

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

Here the Attorney General speculates that the involved comment made to the jurors that San Martin refused to give a signed statement after giving an informal statement was harmless error if it were error at all.

As was argued in the initial brief, the very alleged fact that there was an "informal statement" made to the police by San Martin is put in doubt by the fact that he refused to give a formal statement. Clearly these very aggressive police officers could have concocted the informal statement. The truth is the truth and the truth is not made more truthful by rehearsing, i.e., coaching, an in-custody accused to give the right answers before taking his real statement. If an accused waives his Miranda rights and chooses to give a statement, there is simply no reason why the interrogating police should not immediately call in the notary public, have the defendant sworn, and on an ad hoc basis take his statement, preferably by having it recorded,

This was not done here because this isn't the way the police do it but this is the way it should be done. Absent this, the suspicion lingers that there was no informal statement given and that the police tried to cover their own contention that there was one by saying that San Martin only refused to give a formal statement.

Shades of the LA P.D.

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.

San Martin here adopts the pertinent arguments about premeditated murder and felony

murder under Points IV and V.

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'S REPRESENTATIVE WHO PREPARED THE AUTOPSY OF THE BODY OF RAUL LOPEZ.

Undersigned counsel for San Martin, who was appointed to handle this case, succinctly replies here that his client was denied federal and state due process and equal protection in that San Martin's trial counsel was not allowed to engage the services of a jury selection expert, when if he had been represented by the Dade County Public Defender's Office his counsel could have done so without having to seek the permission of the court.

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.

Dr. Mutter's opinion as expressed to the jury ran afoul of what this Court stated in

Dixon, supra., to wit:

> "Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla. Stat. § 921.141(7)(f), F.S.A. Like subsection (b) this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state."

at page 10.

This testimony of Dr. Mutter and his overall testimony makes it clear that no matter what mental condition a capital defendant had when he committed the criminal act he is supposed to have committed, such would not constitute a mitigating circumstance to him because that person knew what he was doing and he knew right from wrong.

Dixon, supra. says otherwise. Dr. Mutter's opinion was harmfully erroneous in the extreme and because it is unclear as to the extent the jury relied upon it in recommending death, this Court should reverse this death sentence and substitute a life sentence.

Further, in this regard, it is to be presumed that this court below gave great deference to the jury's recommendation of life. Tedder v. State, 322 So.2d. 908 (Fla. 1975).

POINT X.

> THE COURT ERRED AT PENALTY PHASE IN CHARGING THE JURY THAT IT SHOULD CONSIDER AGGRAVATING CIRCUMSTANCE (5)(I), 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 IN CONSIDERING AND FINDING THE APPLICABILITY OF THIS AGGRAVATING CIRCUMSTANCE.

San Martin stands on the argument in his initial brief under this Point.

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.

Marauard v. State, 641 So.2d 55 (Fla. 1994) and the cases cited therein as authority for the holding that defense counsel was properly prevented from arguing to a capital case sentencing advising jury as to what sentence the defendant could have received from a co-joined armed robbery conviction as an add on to the life with a minimum of 25 years for the sentence, to wit: Nixon v. State, 572 So.2d 1336, 1345 (Fla. 1990) cert. denied. U.S. , 112 S.Ct. 164, 116 L.Ed.2d 128 (1991), are no longer governing because of the decision of the United States Supreme Court in Simmons v. South Carolina, 512 U.S. ___, 114 S.Ct. , ____ 129 L.Ed.2d 133 (1994). Further, the Attorney General's effort to have this Court find the Simmons case holding inapplicable to this case should not be countenanced because the true meaning of Simmons is clear and is that a death qualified capital defendant should be allowed to argue to the jury what his maximum period of incarceration could be if he were given life over death. The lower court's ruling in this regard clearly ran afoul.

POINT XII.

SAN MARTIN WAS DENIED HIS DUE PROCESS, FAIR TRIAL, AND PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT RIGHTS BY THE PROSECUTION BEING ALLOWED TO PLACE BEFORE

THE SENTENCING JURY EXTENSIVE TESTIMONY REGARDING SAN MARTIN'S INVOLVEMENT IN TWO OTHER ALLEGED VIOLENT FELONIES, BUT WITH HIS COUNSEL NOT BEING ALLOWED TO ATTEMPT TO MINIMIZE HIS ROLES IN THESE TWO OTHER VIOLENT FELONIES.

The State may be confused as to the procedure San Martin's appellate counsel complained about under this Point but it is surely not confused as to the substance of the claim.

It simply cannot be fair that the State was allowed to contend for the applicability of the aggravating circumstances of involvement in two prior violent felonies but that San Martin's counsel was not allowed to fully argue to the jury that his such involvement was not as reprehensible as the State claimed.

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.

The refusal of the Court below and all of the cases argued by the Attorney General to the contrary notwithstanding, it is San Martin's most fervent plea to the Court that the refusal of the trial court to grant his counsel's request for a specific jury instruction covering each claimed non-statutory mitigating circumstance constituted an unconstitutional failure to suitably direct and limit the decision-maker's discretion so as to minimize the risk of a wholly arbitrary and capricious decision on the part of the advisory jury , whose result was entitled to be given great weight by the judge in passing the actual sentence. See Tedder, Zant and Gregg, supra.

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, IT'S 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 RIGHTS AND HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY SHIFTING THE BURDEN OF PROOF TO HIM TO SHOW WHY HE SHOULD NOT BE GIVEN THE DEATH PENALTY.

San Martin stands on the argument in his initial brief on this Point.

POINT XV.

THE SENTENCE IMPOSED UPON DEFENDANT PABLO SAN MARTIN VIOLATED HIS RIGHT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND UNDER ART. 1 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.

A. There is really nothing that can be added to the contention of San Martin's counsel that the imposition of the death penalty on is client would be cruel and unusual punishment proscribed by both the federal and state constitutions.

Death is clearly the cruelest and most unusual punishment that can be imposed upon San Martin, but until this Court or the United States Supreme Court invokes the admonition of the fictional Captain Jean Luc Picard of the U.S/S Enterprise, to wit: "Make it so," this constitutional protection will continue to be unfulfilled.

B. DEFENDANT SAN MARTIN'S SENTENCE WAS NOT PROPORTIONAL,

As is recited in the Attorney General's brief, " (A)bsent demonstrable legal error, this Court accepts that the aggravating and mitigating circumstances found by the trial court as the basis of proportionality review. State v. Henry, 456 So. 2d 466, 469 (Fla. 1984).

There was such demonstrable legal error here in the failure of the trial court to either find that San Martin 's intelligence level was somewhere between low normal and below normal or alternatively, having impliedly made such a finding, in refusing to give any weight thereto, which situation was a clear violation of law. Skipper v. South Carolina, 476 U.S. 1 (1986) and Eddings v. Oklahoma, 455 U.S. 104(1982).

Dr. Dorita Marina testified that San Martin's I.Q. score was 76, which she said was in the borderline or below average range of intellectual functioning. (TR-2945) Dr. Jorge Herrera testified that San Martin had a very low average intelligence, which was lower than average and at the borderline of intellectual functioning. (TR-3024)

Dr. Charles Mutter, who was called by the prosecution, conceded that San Martin had borderline low intelligence although he didn't concede much else. (TR-3287)

And the prosecutor himself said (of San Martin):

> "His I.Q. was in the borderline range. Sure they are not rocket scientists.. . . " (TR-3417)

Despite this unanimity or consensus as to the very low intellectual functioning level of San Martin, the best the court below could muster was that he heard Dr. Marina testify regarding this but that, in general, he had "great difficulty accepting the conclusions of Dr. Marina. " (R-l 100) He, thus, made no finding in this regard and wound up finding the sole mitigating circumstance to be that he had been a good family member. (R-l 113) What a

farce.

Further demonstrating the sentencing judge's perception of what constitutes or does not constitute a valid mental health mitigator was his recitation ---- ala.the opinion of Dr. Mutter --- 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. (R-1104)

The judge was obviously not following the mandate in Dixon, supra., to wit:

> " Mental disturbance, which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance.. . . "

As undersigned counsel has previously recited herein, he has not been furnished the briefs in the separate Franqui appeal, but he wonders whether the court below considered it as a mitigating circumstance that Franqui was found to be mentally retarded by the State's doctor, Dr. Mutter. (TR-3309)

It is inconceivable that San Martin's intelligence level was so sub-normal and that the court never even considered it this as a mitigating circumstance. This is what makes this case out of proportion, and the decisions cited by the Attorney General do nothing to dispel this gross deficiency in the sentencing order. If for no other reason the sentence of death put on San Martin should be reversed.

POINT XVI.

THE STATE IS 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 HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT.

San Martin stands on the argument contained in his initial brief.

CONCLUSION

For the foregoing reasons the Defendant, Pablo San Martin, again prays that the Court vacate and set aside the guilty verdict entered against him, the judgment thereon and the death sentence imposed upon him, and to grant him such other relief as the Court deems he should have in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief was mailed this 16 day of October, 1995 to Randall Sutton, Esq., Post Office Box 013241, Miami, Fla. 33101.

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