IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,702

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

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INTRODUCTION

The Appellant-Defendant will be referred to as “San Martin” or "SM".

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

The North Miami Police Department will be referred to as “NMD. " The Hialeah Police Department will be referred to as “HPD. " The Metro-Dade Police Department will be referred to as “MDPD, " and the Metro-Dade Police Headquarters will be referred to as “MDPH. " The Florida Department of Law Enforcement will be referred to as "FDLE." The Miami Police Department will be referred to as “MPD. "

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 Kislak National Bank will be referred to as “KNB. "

The Republic National Bank will be referred to as "RNB."

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

STATEMENT OF THE CASE AND FACTS

At the beginning of the pre-trial hearings on the respective defendants' motions to suppress and for trial severances State agreed to a severance of the trial of Fernandez from the other defendants because the confession of Fernandez was different than those of the other three (TR-6).

The court noted that Frangui had filed a motion opposed to a dual jury trial (TR-9). Frangui's counsel argued that his cases should be severed from Gonzalez and Fernandez but State said that the next question was whether the remaining three defendants should be severed from each others because of the confessions (TR-13, 14). State argued that SM's and Frangui's confessions were virtually identical (TR-14). State noted that SM was a non-shooter. Frangui argued that he needed a severance from Gonzalez because of differences in Frangui's and Gonzalez's statements as to who shot when, who shot Bauer, and who shot first, and Frangui argued that the State redactions of these statements were insufficient (TR-1519). Frangui further argued that the purpose of redactions under the Bruton case and under the Florida criminal procedure if one of the defendant's statements is admissible against another, all references to the non-declarant defendant must be eliminated (TR-19). The court said that the issue is "the unavailability of the declarant. The court said that the next question was, "the issue of reliability that is necessary to have it introduced as substantive evidence directly against him" (TR-20, 21).

SM's counsel argued that not only did State want to redact out the names from the statements, but some of the facts to make the statements "stronger" by making them identical (TR-37). Frangui's counsel argued that only one day would be saved by the use of dual juries and that, "(T)he minimal savings of time to the court is just not worth the potential for prejudice in this case" (TR-38). State argued that statements of Frangui, SM and Gonzalez all interlocked

except for a few "insignificant" points (TR-44). State further argued that Frangui and Gonzalez agreed that they both fired at the police officer and that they both agreed as to which guns and that the culpability of Frangui and Gonzalez was the same even though one of them didn't fire the fatal bullet. State also argued that not only should the statements come in, but they should come in as evidence against the makers and the non-makers of the said statements (TR-45).

Frangui's lawyer argued as to the difference between the defendants' respective statements as to who initiated the scheme to commit the robbery, and SM's attorney adopted this argument (TR-53, 54). State then announced that there would be no redaction of Fernandez's statement because he was being severed from the others and there was no redaction of SM's statement (TR-55). State then started explaining the redactions in Frangui's statement. Gonzalez's counsel stated he had no objection to redacting from Frangui's statement the assertion that Gonzalez may have been involved in the stealing of cars, but Frangui's counsel argued that the jury should have the statement in toto and that it should be the jury that clears up any confusion (TR-56). After further argument, the court agreed with State and said that it would eliminate the alleged confusing language by Frangui (TR-57).

State then said it wanted to eliminate the inconsistent portions of Frangui's statement with Gonzalez's statement (on page 20 of Frangui's statement) as to who said, "don't' move, freeze" (TR-57, 58). State then expressed the opinion that it didn't make any difference who fired the fatal shot because they were all there to do an armed robbery and the court agreed that who shot the fatal shot was unimportant but said that out of an abundance of caution it was only taking out the "....two parts where the differences is he (sic) shot first the other one is saying he shot first (sic)" (TR-59, 60). SM's counsel specifically joined in the objection to this redacting (TR-60).

Following colliguy concerning redacting from Gonzalez's statement that he heard Frangui

scream, "don't move, freeze," the court said:

> "So redact, so that it would read the guy pulls out a gun, Excuse me the guy pulls a gun out, which would refer to the officer." (TR-6 1, 62)

Gonzalez's counsel then objected that State only wanted to redact from Gonzalez's statement concerning who said what or who fired first, "but nothing concerning" who was carrying which weapon and State and Gonzalez's counsel disagreed whether there was, in fact, an inconsistency in Frangui's and Gonzalez's statements on this point (TR-62). The court said the inconsistency was unimportant.

State said it was redacting from Frangui's statement his answer that he didn't know where Gonzalez's gun came from, so that his statement would be consistent with Gonzalez's statement, which recited that Gonzalez got his gun from Frangui (TR-63, 64). Following more argument regarding redacting, SM's counsel objected to "any redactions" (TR-65, 66). The court announced that it was redacting, i.e., "everything through the admission that the nine millimeter was used in the robbery in the murder in Hialeah and the robbery on Bird Road, will be redacted" (TR-66). SM's counsel made the point that all three confessions are harmful to him and that the inconsistencies therein would therefore be beneficial to him (TR-68). Gonzalez's attorney argued that Defendants' attorneys should be able to argue the inconsistencies in the statements to develop reasonable doubt, but the court gave no indication that it heard such argument (TR-75).

State then said that it "took out" how Gonzalez stated that Frangui yelled out "don't move" in Spanish, because that is the main portion that we took out of Frangui's statement, which recited that Gonzalez said or yelled this, to which Frangui's counsel and SM's counsel objected, which objections were overruled (TR-74, 75). The court then announced these additional redactions over the objection of SM's attorney (TR-75, 76).

The court said the statements met the governing criteria set forth in the case law (TR-76, 77). It granted a severance of Fernandez from the other three defendants but that the other motions to sever were denied and the court said it would use dual juries (TR-77).

Thereafter in response to Fernandez's contention that State could only claim Felony Murder, the court said: "They could conceivably argue premeditation as a principal" (TR-88).

The court then began its hearing on the suppression issue (TR-95, 96). Frangui's counsel said he would be arguing that Frangui's Fourth Amendment privacy right was violated by Frangui and his wife being put into a room with Det. Nabut secretly monitoring their conversation, and that Frangui was entitled to counsel after his first appearance under the Sixth Amendment when Dets, Nabut and Nazario contacted him (TR-97, 98). State then added:

> "If there is not going to be any other new arguments other than the argument heard by this Court and (sic) the previous case, I will stipulate to Dets. Greg Smith, Crawford and Sgt. David River's testimony concerning the statements given by Defendant Frangui at the Metro Dade Police Headquarters." (TR-101)

SM's counsel then stipulated to everything that was testified to at the suppression hearing in the Lopez case except the ruling there (TR-101-103). The court referred to his 20-page suppression order in the Raul Lopez case and ruled that the testimony taken in that case would be considered in lieu of testimony in the instant case (TR-101-104).

Frangui's counsel argued that since Frangui had had his first appearance on January 19th, any statements he gave thereafter to Nabut and Nazario should be suppressed because he was denied the right to counsel. State said it wouldn't be seeking to introduce any Frangui statements made after January 19, 1992, and the court noted that, "The 9th (sic) is the initial appearance in the Bauer . . . . case." There followed a colliguy concerning SM's statements made after the 19th and the court said it had previously ruled that the execution of a blanket right to counsel form in the City of Miami robbery case did not give defendants Sixth Amendment right

to counsel standing in the other cases (TR-109). However, the court added that if at the January 19th hearing the defendants invoked their Sixth Amendment right to counsel right in this case, statements made thereafter may not be admissible (TR-110). State argued that these statements should be admitted because Nabut's and Nazario's "purpose in going back on the 21st.... was,... to discuss the Hialeah murder and what happened with the firearms used there, which he told them and, "(H)e draws a map" (TR-110). State then said, "Unfortunately for Mr. San Martin when we pulled those guns out, those guns match the projectiles taken from Officer Bauer's body...." (TR-110, 111). The court noted that at that time there was no intent on the part of the involved Hialeah police to ask questions about the Bauer case, and that the arrest in the Lopez case was in February and in the Bauer case was in May. Frangui's attorney asserted that he had standing to challenge SM's statement because, "there is a joint trial and San Martin's statements are going to be admissible against Mr. Frangui." State said that SM made statements to Dets. Nabut and Nazario at ICDC concerning the guns being in the ocean and then that they threw them in the canal under the bridges (TR-108).

SM's counsel then insisted that all testimony vital to these issues, including what right to counsel forms had been executed by which defendant or defendants, be taken anew in this case, but the court impliedly denied the defendants any relief because of the foregoing stipulation regarding using the suppression hearing testimony from the Lopez case (TR-115-117).

SM's attorney said that Frangui's attorney had just handed him an invocation of SM's rights signed on January 19, 1992, which he said is "the typical public defender's form" (TR-117). The court then said, "Everything up to the confession is agreed." The court then announced in advance that its ruling would be the same as it was in the Lopez case (TR-118, 119).

The taking of testimony in connection with the robbery suppression issues to be litigated

in the instant case then began with the State calling Hialeah Robbery Det. Nazario. He testified: In connection with the Lopez case, Det. Nabut and he went to see SM at ICDC on January 21, 1992. He had previously spoken to SM on January 18, 1992, on which date other officers had Mirandized him (TR-119,120). He spoke with SM "primarily in Spanish. " He Mirandized him (which the witness describes in detail) (TR-121-124). SM was strictly interviewed regarding the Lopez case on the 21st, and, "(W)e specifically were after the location of the weapon used in the Hialeah shooting, and that he thought they asked SM about nothing else (TR-125, 126). On cross Nazario said: He had spoken to SM at the MDPH on the 18th, which same date he also spoke to MDPD Det. Santos, who was investigating the Bauer case, about whether SM had been Mirandized (TR-128, 130). He was, i.e., Det. Nazario, "pretty much there (i.e., at MDPH) the whole day and into the night" (TR-130, 131).

Thereafter the following question and answer appears in the transcript, to-wit:

> "Q. And being that he was a suspect in all cases you tell us you did not share information with Det. Santos?
> A. There were I believe over a hundred people involved in the investigation and,. , . " (TR-132)

Det. Nazario further testified on cross: They were all part of the same investigation. He was not present when Santos interviewed SM because he was interviewing other people (TR-133). State objected that ". , . . the court said we stipulated to everything that occurred on the 18th.. . .(T)hat is irrelevant and immaterial as to what happens on the 21st. " The court then ruled against SM's counsel being able to question this officer concerning the task force (TR-134, 135).

Nazario further said: He thought that SM was arrested for the Bauer murder on the 18th. He said he was aware of the fact that persons arrested usually went to court the next day and that then a public defender would be appointed. Nevertheless Nazario said he did not ask SM whether he had a lawyer in the Bauer case. He did not know that SM had invoked his right to

not be questioned when he went to see him on the 21st and he didn't ask him if a lawyer had been appointed for him. At this juncture, the court sustained a state objection to this line of questioning by SM's counsel (TR- 135- 149).

Thereafter there was a suppression hearing pertaining only to Def. Gonzalez's confession with the motion to suppress same being denied and with that defendant's motion to have suppressed the proceeds of an alleged unlawful search also being denied (TR-227). Thereafter the court observed that the law was clear "that the State does not have to choose between premeditated and felony murder" and that, "they don't even have to charge it in the alternative" (TR-234).

Thereafter the defense motions for individual voir diring were denied, although the court did allow that it would individually question any panelists who had heard of the case (TR-244-250).

The court at the outset of its voir diring questioned individually those panelists who said they had heard of the case. Panelist Ms. Viera was instructed by the court that sympathy was not to play a role in the reading of a verdict (and it so instructed other panelists before her (TR-269).

Thereafter the general voir diring before the entire panel commenced (TR-391). At a later point the judge attempted to "rehabilitate" Ms. Viera by telling her that he is the one who does the sentencing and that what the jury does is only "an advisory sentence on an advisory opinion and that.. . .the jury does not sentence the defendants to anything" (TR-275). However, since Ms. Viera persisted in asserting that she would not vote for the death penalty she was ultimately excused for cause.

During continued voir diring in the presence of the entire panel the lead prosecutor extensively discussed and questioned panelists about the alleged state of the law concerning the

felony murder rule and concerning principals (TR-526-530). He then got into the same sort of jury influencing regarding premeditation as is illustrated by his question of a panelist and the response thereto, to-wit:

> "Mr. Velez: Premeditation doesn't necessarily have to do with the moment itself. Does it?
> Mr. Rosenberg: No, you are right." (TR-535)

Thereafter such prosecutorial prostelicizing as to premeditated continued unabated (TR-536-539).

When SM's counsel finally objected that the lead prosecutor's explanation of the difference between premeditated and felony murder was an incorrect statement of the law, the court overruled such defense counsel (TR-540, 541). And on and on went the prosecutorial prostelicizing. In this regard, the lead prosecutor stated to a panelist in the presence of all the other panelists:

> "Mr. Rosenberg: He knew of the burglary. I don't got to prove the intent to the underlying felony." (sic)(TR-452)

Thereafter panelist Mr. Piere-Louis clearly indicated that the lead prosecutor had confused him as between guilt and penalty phases (TR-454). Nevertheless the lead prosecutor continued prostelicizing panelists as to his theories of the case (TR-545-548). And then the lead prosecutor suggested to panelist Onifer that he was "having a problem" because Onifer appeared to not agree with him, and the lead prosecutor purported to help him out of his problem (TR-548, 549)

There followed truly inexcusable prosecutorial preconditioning by the lead prosecutor, which had nothing to do with death qualifying the jury (TR-549, 550). Thusly he told one panelist regarding his theory of felony murder, to-wit:

> It's not going out and deciding how to kill, it's a consequence of what you decided to do beneath the murder. Had you not been

there to do the burglary, no one would have died.. , .can you vote guilty for the guy in the car for the murder, even if the guy dies of heart attack .. . . Okay, so you do have an intent to commit it, a burglary of the house, right? Okay you have the intent" (TR-550).

Thereafter the following appears in the transcript:

"Mr. Rosenberg: Even if he doesn't pull the trigger he's guilty of murder.
Mr, Burroughs: Yes. " (TR-560)

Thereafter the following appears in the transcript:

"Ms. Andani: And they can be found guilty of felony murder first degree murder, different?
Mr. Rosenberg: Correct. As a matter of fact, it doesn't even matter whether you come back and make a decision whether you found him guilty of felony murder or premeditated murder, it is still first degree murder.. . .on the verdict form." (TR-569)

The lead prosecutor really got into a can of worms with panelist Rocha, confusing her to the extent that she thought that four persons had to sign the advisory verdict. He also got her to say that if the AC's outweighed the MC's she could sign the verdict form as foreperson.

And thereafter the lead prosecutor told one panelist:

"Mr. Rosenberg: All right. Don't add facts to me. I am the fact adder. " (TR-577)

And after that he told a panelist that it didn't make any difference as to whether the shooter should get death for "(F)irst Degree Murder or First Degree Felony Murder" because of the law of principals (TR-586, 587).

Thereafter the lead prosecutor said:

". . . .and mitigating that is for you to determine why you should sentence a non-shooter to the same which you sentence a shooter, that is your recommendation may be there is or there is (sic) a reason maybe this isn't a reason." (TR-593)

Then he asked the following question and got the following answer:

"Mr. Rosenberg: Okay. You would judge each individual

aggravating and mitigating correct?
Mr. Slater: Yes.
Mr. Rosenberg: And it wouldn't effect the guilt phase verdict, would it in any way?
Mr. Slater: No." (TR-594)

Following the selection of the "B" jury, i.e., the one of the two dual juries that was to hear SM's, Frangui's and Gonzalez's trial, Frangui argued in liminie to prevent State from including in its opening statements "any statements that Officer Bauer made after he was shot." State said the statements were, "(O)kay my God, I have been shot," and "are you all right?" He said that these were hearsay exceptions as "excited utterances" and the "spontaneous rule. " The court wanted to know what the relevancy of these statements and the lead prosecutor said that he must prove that Bauer was acting as a law enforcement officer "beyond a reasonable doubt" by showing that he was in full uniform and carrying a firearm (TR-862, 862). The court denied this motion in liminie because, despite the stipulations to the contrary, all the defendants said Bauer was a security guard, and because the probative value of this evidence outweighs the prejudicial effect (TR-867).

Respective counsel then made their opening statement to the "B" jury (TR-873-891).

State then called its first trial witness, Dorett Ellis. She testified: She was an employee of the KNB and went to the bank on the date of the crime to put money in her checking account, She was in her car in the drive-thru and saw two guys sitting in a bluish grayish car, Chrysler model. She didn't get a full view of them but they looked "Latinish." After the officer walked out of the bank with the tellers, two men jumped out of cars and "they ran in front of the car and they started firing a gun. They fired simultaneously and it could have been 3 or 4 shots and the officer went down. The men then ran back to their car. They drove off toward the south. She left the bank property thereafter but came back. Each of the two men in the vehicle had a gun. She saw no other involved vehicles. She could not identify either of these two persons

that she saw at the bank in the courtroom (TR-891-898).

The next State witness was Elijah Battle, who said as follows: On the date of the KNB robbery he was riding in a bus going north on N. W. 7th Avenue to go to work. He was sitting on the left side of the bus. He heard three gunshots from his side and then saw an older model Chevrolet "screeching out" of the KNB which went south and made another right. The bus driver didn't stop. He saw one person in the car from the bus who was the driver but he was up high and couldn't see the passenger inside. He would classify the driver as a white Latin-young male. The car was speeding. He also saw a red Cougar and a Bronco. He said he recognized the car that he saw in a photo shown him by the prosecution.

The next State trial witness was Lasonya Hadley. She testified as follows: She was one of the two KNB female bank tellers who were involved in this case. She arrived at work at 7:45 a.m. and waited for her co-worker, Michelle, to arrive. She had that day's money in a tin canister which contained between $15,000 and $20,000. After getting the money ready, they would wait for the police officer-guard, who was not the same police officer every day. The police officers were always dressed in uniforms and were always North Miami officers. They always carried guns. Bauer was a nice fun-loving man. When she got to work she noticed an older guy in the parking lot. After checking Bauer unlocked the door and she went out followed by Michelle and Bauer was saying, "Jesus, Jesus, it's going to be a busy day for you guys." After she got to the booth and as she was putting in the key to enter the booth, she heard people getting out of cars. She opened the door and dived in the booth and glanced back to see where Bauer was and she saw him trying to get his gun out. She saw two men coming towards her and when they entered the drive-in area she saw the guns. By the time they were inside she noticed four men. Each one had a gun. She went for the alarm and laid there waiting because she still had the money in her hand. Then she heard three or four shots and then she heard

Bauer cry out. She got up and went outside to him and picked up his head and put it in her lap. Bauer asked her if she was all right and that made her feel good (TR-930-941).

At this point co-defense counsel renewed his objection as to what Bauer said and it was again denied (TR-941). She added that Bauer said "not to worry, that he was just shot in his leg." She further said: Bauer's waist up on top of her lap and that he bled all over her. Michelle and the branch manager came out and waited for police. She knew that Bauer was worse than he thought because of all the blood but she didn't tell him. Her money was not taken.

On cross Lasonya Hadley testified: She could not identify any of the robbers (TR-945).

The next State witness was Michelle Chin Watson. She testified as follows: She was the second teller of KNB who got caught up in the robbery, etc., and killing of Bauer. She testified: Their procedure was that they would wait for each other and for the police officer to arrive to lead them out the back door. They had a different police officer every day. On this Friday it was Officer Bauer. He wore a uniform and wore a gun in his waistband. They walked out and she heard a yell, but it didn't come from Bauer. She continued forward when she saw the men. She said that "right now" she couldn't remember seeing anything in the men's hands. She kept walking until she started hearing shots, And at that point she stopped where she was and got down on the floor, Her cash drawer was in front of her, her head was down, and she didn't remember hearing shots while she was in that position. Someone came up and took the cash box that was in front of her off the floor, but she just saw hands and feet. She stayed where she was until she heard cars driving away and then she went over to Bauer. She heard Bauer say "(O)h, God," and he talked to her about where he thought he had been shot. She was scared. She gave no one permission to take her cash drawer.

The next State witness was Patricia Raber Pereira. She testified: She was a NM police

officer, On the date of the KNB robbery she was on patrol and heard a call go out that an officer was down at the KNB. She immediately went there and saw Bauer on the ground lying on his back. Bauer was still alive. Another officer was trying to take off his clothes. She took off his gun belt and his knife fell off the holster. They did this because they knew that it would be important for them to save some time for "rescue" to work on him. Bauer's gun was out of the holster and he was lying in a pool of blood by his head (TR-956-958).

State next called Det. Pierce, a crime scene detective. He testified as follows: He arrived at the KNB at 8:20 a.m. and stayed there for five minutes when he had to leave to respond to another crime scene at N. W. 10th Avenue between 134th and 135th Streets involving two vehicles found there. Two gray Chevrolet Caprices were found at the second crime scene and when he arrived both engines were running, but there were no keys in the ignitions and each had a broken rear vent window. They searched the KNB scene for projectiles and casings. He found "one pretty good size projectile and fragments throughout the floor there. " He found one casing. He then identified various other items he collected at the scene including Bauer's .9 millimeter gun, his Velcro belt and keys, his handcuffs, and his watch (TR-969-1015).

Pierce further testified: Bauer's .9 mm gun was an automatic. He thought that 15 casings would fit with Bauer's gun but he was not a gun expert. There were 15 cartridges in Bauer's clip. Bauer's gun was a semi-automatic weapon and it had not been fired at all. He removed 16 bullets from Bauer's gun, including one live round in the chamber. Fire Rescue cut Bauer's shirt. He could tell from the shirt that the projectile "may" have entered Bauer's body, "(R)ight along the neck area.. . .the back of the shirt." On cross Pierce testified: To the best of his knowledge the robbers fled with one cash box from the teller who didn't get inside her teller booth. He didn't know how many weapons were involved in this crime. Det. LaPorte performed gun residue tests on two people, Leonardo Perdomo and Miguel Valenzia. He was

in charge of all crime scene work in behalf of the NMPD but the MDPD was also involved He did not personally attempt to lift latents at the KNB, but he requested that it be done. There were some possible latents that were lifted from the bank area that went down to MDPD Crime Lab for analysis. He submitted a projectile, other than the one designated "A", the caliber of which he didn't know. Both of the two Chevys had what appeared to be a butterfly-type of ring lying on their respective floors. He didn't see any tools in the cars (TR-1078). The casing he found at the KNB was a FC .9 millimeter. He didn't process the two Chevys for fingerprints---- he impounded the Chevys and had them sent to the ME's office.

The next State witness was Rafael Armengol, who testified that he was the owner of one of the stolen Chevys. He testified as to the condition of his car after it was returned to him (TR-1088-1099).

The next State witness was Elias Cantero, who was the owner of the other stolen Chevy and he, too, testified as to the condition of his vehicle when he regained possession of it.

The next State witness was MDPD Crime Scene Tech. Garejo, who testified: He photographed one of the two Chevys and collected trace evidence from the interior of the seats and impounded some items to be chemically processed for latent fingerprints. He took latents from that car. "We" lifted 15 prints of cellophane tape, These latents were then introduced in evidence (TR-1101-1108). He further said that the right rear vent window was shattered; there was still some glass in the frame; and the ignition switch had been tampered with and had "popped. "

The next State witness was MDPD Crime Scene Officer Charles, who testified: He processed the other Chevy, which had been broken into through the vent window. He recovered twelve latents. He believed the ring was missing from the ignition. Of the twelve latents collected on August 3rd, two were collected from a .35 mm film can, which was in the car,

After the car was superglued, the steering wheel was examined for fingerprints, The steering wheel was not examined for gun powder residue. No gun powder residue was found in the car, but latents were found both on the 3rd and the 8th. The three prints on the 8th were on a piece of chrome molding in the trunk (TR-1127-1147).

State next called Special Agent William Lee of the FDLE, who testified: He participated in the investigation in the KNB robbery and the murder of Officer Bauer, and as a part thereof he conducted surveillance regarding Gonzalez. He said he was surveiling defendant Gonzalez (TR-1319-1321). At this juncture SM's counsel objected to Lee giving any testimony as to what he heard Gonzalez say as hearsay, but the court overruled this and the court denied same, saying:

> "Accept my finding on the motion for severance where they are sufficiently similar as to being introduceable as independent evidence against each defendant, so you're basically preserving your motion to sever at this time. " (TR-133 1)

San Martin's motion for a cautionary instruction was also denied (TR-1331).

On cross Lee testified: There was a massive manhunt in this case with a large task force possibly including police from NM, NMB, Medley, Hialeah, CG, the FBI and the DEA. He had a lot of police officers at his disposal. He was told to wait for someone to come transport Gonzalez to Metro-Dade Police Headquarters (MDPH). Three officers in one car accompanied Gonzalez to MDPH but he was not arrested and he went to MDPH freely and voluntarily. He told Gonzalez he could get back in his car and drive away, but he did not know why Gonzalez was not allowed to park his own car (TR-1340). He didn't recall the car being moved and parked. At least three to four cars were involved in stopping Gonzalez carrying at least seven police officers (TR-1331-1346).

State next called NMPD Homicide and Investigative Det. Richard Spotts, who testified

that he was also involved in the apprehending of Gonzalez, and that Gonzalez said, "Sure, no problem. ", about his being taken to the station. Gonzalez was not coerced or promised anything to make a statement and he was not handcuffed nor under arrest. There was conversation between Gonzalez and him regarding his vehicle (TR-1347-1354).

Then SM's attorney presented another hearsay objection which was denied, as was his request for a cautionary instruction (TR-1354).

Det. Spotts then testified: Gonzalez made an inquiry as to whether his car would be all right. At MDPH Gonzalez said, "I got bad luck because I knew I would get stopped driving this car. " After that, SM's counsel's additional hearsay objection was denied (TR-1357-1362).

Thereafter SM's counsel objected that Gonzalez's statement shouldn't be received because it was hearsay and irrelevant to SM, but the court denied this saying:

> "The statements are viewed by the Court as a whole, as opposed to individual sentences or individual expressions. The Court's ruling will be the same. " (TR-1359, 1360)

State next called NMPD Det. Donald Diecidue. He described arresting Gonzalez and, at this point, SM's counsel objected that the Miranda form used with reference to Gonzalez was hearsay as to San Martin, but this objection was denied (TR-1384). The card was then received in evidence (TR-1385-1389). He said that Gonzalez said that he had met Frangui around Christmas of 1991, and that Frangui told him he had a bank robbery job he wanted him to be part of but that the bank had security (TR-1390).

Gonzalez's counsel then objected to Diecidue's testifying as to his client's pre-interview statement, but this was overruled and Diecidue then testified as to the details of Gonzalez's alleged pre-trial interview (TR- 1389- 1392).

Thereafter the taped statement of Gonzalez was played to the jury (TR-1405-1442).

Thereafter Officer Diecidue resumed the stand and started testifying about a diagram of

the KNB scene and what Gonzalez had indicated thereon, with SM's counsel again asserting a hearsay objection, which was again denied (TR-1443).

Thereafter respective counsel became involved in a lengthy discussion regarding whether some of the information about the planning and conducting of the robbery testified to by Gonzalez during his formal statement may well have been "fed to him during the warm-up session" (TR-1461). Thereafter when Gonzalez's attorney tried to get him to admit that in excess of 1000 officers worked on the task force, Diecidue said that he didn't know that that was so, but that they had over 1000 leads.

Diecidue said that one of the reasons why he did not begin Gonzalez's recorded statement until 12:45 a.m., after briefing him at 11:00 p.m., is because they were having an interview that was not "memorized" nor being video or audio taped; that, "we did a pre-interview so to speak. " He said that they didn't tape the pre-interview because, "we just don't do that" (TR-1470, 1471). Diecidue also said that "we" are trained in how to secure confessions, but he said he was never taught not to record the pre-interview.

On cross by Frangui's counsel, Diecidue said that they didn't do a photo line-up with Frangui's picture in it; rather they just showed Gonzalez a single photo of Frangui. He said he didn't believe they showed him a photo of SM during the pre-interview (TR-1492, 1493).

State thereafter recalled Det. Spotts, who testified: He secured a consent to search form signature from Gonzalez and he and SA Lee went to Gonzalez's residence where they found the money from the KNB robbery on a top shelf of his bedroom closet. He said he believed it was in the amount of $1200.00 (TR-1522-1526). Spotts said that they then returned to where Gonzalez was; re-Mirandized him; and asked him about the money with Gonzalez saying the robbers had divided it. State then played a tape of the formal re-interview of Gonzalez (TR-1535). On cross there were more questions and answers as to what Gonzalez is supposed to

have said, which inculpated SM and Frangui in the involved crime, as well as Gonzalez (TR-15351546).

State next called MDPD Homicide Det. Mike Santos, who testified: SM agreed to accompany him and FDLE SA Dorothy Ingraham to MDPH. They arrived there at 12: 30 p.m. and SM was placed in the interview room, which is "6 by 6 or 8 by 8, " with a table and a couple of chairs (TR-1572). He spoke to SM in Spanish after Mirandizing him (the Miranda card was received in evidence after the denial of a SM objection). He confronted SM with the fact that Fernandez had implicated him and that then, "he wanted to provide me with the details about what happened. "

Thereafter Det. Santos told the jury the alleged details of the pre-interview or informal statement that he contended SM made to him. Santos stated that his police notes were destroyed after he made out his police report, which he said is what "we" do, i.e., to destroy the notes (TR-1589).

Santos thereafter continued with the alleged details of SM's pre-interview confession to him (TR-1589-1607), and after that the tape of SM's formal confession was played to the jury (TR-1609-1631).

State next called MDPD Homicide Det. Jared Crawford, who testified: He, accompanied by Det. Greg Smith, first came into contact with Frangui on January 18, 1992, at 11:15 a.m. and Frangui agreed to go with them to MDPH. There Frangui was put in an interview room and he was Mirandized (TR-1652-1660).

State next called MDPD Homicide Det. Gregg Smith, who said he and Crawford did a pre-interview interview of Frangui and that after they completed that and their police reports, they destroyed their pre-interview notes. He testified that during the pre-interview, Frangui at first denied any involvement in the KNB robbery, and even knowing the other defendants, but

that after they told him that "other individuals" were in the MDPH, he then recanted his denial. He said that Frangui told him the other defendants were all involved, but that only he and Def. Gonzalez were armed. He said that Fernandez first broached the matter of engaging in this robbery to him after a black male friend had given him, i.e., Fernandez, the idea (TR-1664-1670).

Det. Smith thereafter testified as to the details of Frangui's pre-interview interview, including the stealing of the two gray Chevrolet Caprices by Fernandez and SM; the casing of the bank on two occasions, with SM being involved on the second occasion; and the planning and execution of the actual robbery (TR-1670-1673).

Officer Smith testified that he conducted three pre-interview interviews with Franqui with the first taking from 12:57 p.m. until 4:15 p.m.; the second lasting from 4:15 p.m. to 4:45 p.m.; and the last one starting at 5:15 p.m. (TR-1685, 1686). He described a sketch of the KNB and the parking lot of which he drew a part and Frangui drew a part. He said Frangui refused to sign it. SM's objection to the introduction of the sketch was denied (TR-1686, 1687).

On cross Det. Smith testified: When he arrived at MDPH, the place was swarming with police officers and agents from jurisdictions other than Metro-Dade, including FDLE, North Miami and Hialeah (TR-1690, 1691). As was standard procedure with MDPD, he used no recording device while conducting the pre-interview of Frangui (TR-1692). He admitted he had been wrong in testifying that Frangui had initially denied knowing SM, and that in fact Frangui admitted from the beginning that he knew SM (TR-1693). Officer Smith said that he believed he told Frangui----before Frangui recanted his denial of involvement----that all the other defendants had implicated him, but thereafter Officer Smith conceded that he wasn't aware at the time that SM had confessed. Thereafter appears the following question and answer:

"Q. (By Atty. Cohen) Okay. So you----if you would have said----

Pablo San Martin implicated him that would have been an inadvertent statement.
A. No, I would have said it on purpose." (TR-1693-1695)

Officer Smith conceded during continued cross by Frangui's counsel that while he was in the interview room with Frangui from 12:50 p.m. until 3:35 p.m., things were going on in the investigation which he didn't find out about until later (TR-1697).

He said that prior to going in and speaking to Frangui no one had made him aware as to whether any other of the defendants had admitted involvement in the robbery, etc. (TR-1699). The officer again admitted that he discussed the facts of the involved crimes on at least three separate occasions before subjecting Frangui to the formal interview (TR-1700, 1701). He said that Frangui refused to give him a formal statement but that he changed his mind when he, i.e., Officer Smith, was not around and he, i.e., Officer Smith, admitted he did not know the circumstances whereunder Frangui changed his mind.

At this point the "B" jury heard the testimony of HPD Det. Albert Nabut. He testified as to the details of a statement that Frangui gave him on January 18, 1992, which details included the robbers meeting at SM's house on the morning of January 3, 1992; the casing of the KNB on previous dates, which included SM; the details of the robbery itself; and the alleged fact that SM and Abreu told him the guns had been thrown "in the water somewhere" (TR-1712-1723)

The prosecution next recalled Det. Gregg Smith who gave the following testimony. After turning Frangui over to Det. Nabut he, i.e., Det. Smith, was recontacted by Metro-Dade Police headquarters at 9:45 p.m. and he reentered the interview room where Frangui was located at 11:40 p.m. with a court reporter, and took Frangui's formal statement (TR-1723-1725).

At this juncture the transcript of the formal confession was introduced in evidence and published to the jury over the objections of SM and one other defendant (TR-1725). The formal

statement also inculpated SM and, in connection therewith, he had Frangui identify a single photo of SM (TR-17251754).

State next recalled Det. Nabut who testified as follows: He met with SM on January 21, 1992, and Mirandized him in Spanish. During the course of this Officer's testimony, the following was said:

> "Q. Did he tell you that he wanted to speak to you without a lawyer being present?
> A. Yes, he did. (TR-1757)

Nabut said that he then told SM that Frangui had told him that he, i.e., SM, and "his cousin" had thrown the weapons away, and that he wanted SM to accompany him and police divers to recover the weapons. He said that SM initially told him he had thrown the weapons in the ocean, but changed this to having thrown them in a river, this change being made after SM was asked to accompany them. He said that SM drew a diagram of where the guns had been thrown, which was admitted in evidence over SM's objection (TR-1758-1760). Nabut said that SM refused to sign the diagram because he didn't want people in jail to know that he was cooperating with the police (TR-1761, 1762). Nabut said that he and Metro-Dade divers went to the place indicated by SM on the "map" (TR-1763).

At this juncture respective counsel and the court got into a discussion of how far SM's counsel could go in crossing Nabut as to whether Nabut knew SM had a lawyer when he questioned him. The court took the position that SM could not go into that subject, both because it had nothing to do with the issue of voluntariness and because Nabut's questioning SM had to do with the Lopez case, for which he had not yet been charged. In this regard the court noted that it had already ruled that that interrogation did not affect this case as concerns the Sixth Amendment right, because it was not "offense specific" in that SM had not yet been charged with the Lopez murder (TR-1764-1767). The court also noted that it had already "decided"

against SM on the contention that the police task force had been formed, and that, "(E)verybody was cooperating together. "

Thereafter SM's lawyer argued that, "regardless voluntariness (sic), I can always argue that the man didn't have a lawyer and the part of the voluntariness of it because the lawyer is appointed to this man when he goes to court the next day to protect his rights, the man signed as an invocation of rights." SM's lawyer added:

> "This man was arrested on one case, which is the Kislak case. They held off on the arrest on the Hialeah case for whatever reason. " (TR-1769)

Based on the above argument, SM's counsel was adamant that he had not "opened the door" on the Hialeah case (TR-1770).

The prosecutor added that since he thought "the notice from the Public defender's office was signed on the 28th day of January, 1992," he did not know if a lawyer had actually been appointed. SM's lawyer, in response, insisted that the arguing prosecutor knew the public defender notice had been signed on "the 19" (TR-1771, 1772).

The court ruled that it was adhering to his earlier ruling that the Sixth Amendment issue went to admissibility and not voluntariness (TR-1772). It further ruled that the questioning by Det. Nabut, "was not a violation of Mr. San Martin's Sixth Amendment right, because he did not have a lawyer appointed on the Hialeah murder, because he was as yet unarrested" (TR-1772). The court added that, "(S)ince the Sixth Amendment is "offense specific" I ruled already there was no violation of the Sixth Amendment" (TR-1773). In trying to wrap up this very important argument, the court held that SM's counsel had not as yet opened up "any doors to inquire about this other crimes, " and that "voluntariness" separate and apart from the right to counsel question was the only issue SM could raise to the jury (TR-1773-1775).

Cross of Nabut then resumed with him testifying as follows: When he spoke to SM on

January 21, 1992, at the ICDC facility, he asked him if he wanted a lawyer and the answer was in the negative. Regarding his notes made during this interview he did not have them with him so he was unable to tell if they were all incorporated in his police report. He arrived at ICDC at 4:25 p.m. and the interview lasted 15 or 20 minutes. SM drew the map but he didn't sign or "draw anything on the map" because he refused to do so" (TR-1776-1778). He, i.e., Det. Nabut, spoke to Abreu at the Dade County Jail at 5:50 p.m. on January 20, 1992, about the location of the guns, but he first learned about the location of the guns from SM and not Abreu (TR-17781781).

Thereafter the "A" jury was returned to court to participate in the trial with the "B" jury and State called as its witness one of the KNB tellers, Michelle Chin Watson, She testified as follows: There was $17,000 in the cash tray on the date of the robbery and of that $250.00 was marked as bait money, bait money being that which the serial numbers have been recorded for possible tracing purposes in case of a robbery (TR-1782-1784). Three or four times a year North Miami police officers would not show up for work or be late and the civilian-dressed bank manager would escort the drive-thru tellers to their booths (T-1784).

Det. Nabut then testified that he went to the location where the guns were situated to point same out to the Metro-Dade divers and that it was SM who told him where that location was (TR-1785-1789).

State next called MDPD Underwater Recovery Officer Oscar Rogue. Officer Rogue identified a photo of the area where the guns were located, and he described the equipment he used, which included a camera. He said that Officer Guas went in the water with him and that that officer had the camera, He said they got into the water at 10:00 p.m. and found a gun at 10:45 p.m., which was wrapped in plastic. He said photos were taken underwater showing where the gun was found, which photos were admitted into evidence over SM's objection.

Rogue said the second "item" was found about 10 minutes after the first. Despite the fact that Defense objected to a State question as to what he was told to look for, State asked the question again and got the desired answer that Rogue was told to look for "items (that) would be in plastic" by Det. Nabut (TR-1796-1799). He said the guns in the plastic were placed in a bucket of water, brought up, and turned over to MDPD Tech. Huckstein (TR-1800). He said the guns were found within 10 to 15 feet of each other. He said he followed "normal procedure" and did not "write down or mark" any of the items found in the water; nor did he do anything else with them (TR- 1806).

The next State witness was MDPD Crime Scene Det. John Huckstein. His testimony was: He took possession of the firearms after they were taken out of the canal and that----leaving the "items" in the bucket of water----he transported them to the (or a) "ID or Fingerprint Section. " He said that on January 8, 1992, he went to Mid-Town Towing to examine two Chevrolet Caprices and that he took "latents on a latent card" from the chrome strip located in the trunk of one of the vehicles. The latents were admitted into evidence without Defense objection.

State called MDPD Crime Scene Technician Thomas Charles and he testified: On January 18, 1992, he viewed a Buick Regal on N.W. 25th Street, Miami, where it was parked on the roadside, which he said he thereafter processed at the ME's office to where it had been moved. He said his notes indicated that the vehicle had been spray-painted white (TR-1818). He said he lifted latents off that vehicle and the latent card and various photos of the Buick, the emblems, etc., were received in evidence.

The next witness was MDPD Fingerprint Tech. Richard Laite. He said he had brought with him cards containing the standard fingerprints of Defendants Fernandez, SM, Frangui and Gonzalez (TR-1824-183 1). He said the fingerprint cards contained the "recording of the ten

fingers" of the individual and that the bottom of the card contained "an inking of the four fingers and thumbs taken simultaneously. " The witness described going to the ME's office on January 3, 1992, and participating in the taking of latent fingerprints from two Chevrolets. He said he got fifteen latents off of "car FIV13C" and that eight of them were of value, and that five of them compared with the standard fingerprint card of co-defendant Fernandez (TR-1832-1835). He said that one latent matched a print on the Frangui standard print card from that same vehicle. Regarding the other Chevrolet, "JMI86J", the witness said that he submitted twelve latents and that seven were of value, but that none of these compared with the standard prints of any of the defendants, He said that he submitted latents taken from "within the vehicle in the laboratory, " and that of the 48 (sic) submitted, seven compared to Frangui's standards (TR-1836-1838). Laite then testified that he got no fingerprint evidence from either of the guns or from any of the money (TR-1839). He said he found no latents of SM on either Chevrolet (TR-1840-1850).

State witness Elijah Battle was then recalled and he said that when he was in the courtroom "last Thursday afternoon" he recognized a person in court as the driver of the "Chevy" coming toward the bus he was on. At this point the witness identified co-defendant Frangui as being that person. He said he didn't identify anyone who was in the courtroom when he first testified as being involved in the robbery because no one asked him to do so (TR-1850-1862).

State next called MDPD Firearms Examiner Robert Kennington who was accepted as a firearms examination and firearms comparison expert. In a response to a State unobjected to leading question, Kennington said that firearms have "fingerprints" too, which "fingerprints" are machining marks made at the time of the gun's manufacture and which remain there for many years and debris pricked up in the carrying or abuse of a gun which adds additional marks. He

said that a fired bullet is “primarily unique” to a certain caliber of gun. Kennington said he also examined clothing to determine “if a pattern exists of gun powder” and, in this regard, he said that if a person is close enough to the barrel of a gun when it is fired that person will have his clothing burned, or have “a ring of gun powder residue” thereon. He said that “beyond 30 inches you would not expect to find a pattern” (TR-1863-1867).

With reference to the instant case, Kennington said that he examined Bauer’s shirt and T-shirt and that he found no pattern of circular powder marks on either. He said he examined Bauer’s pants as well and that he found a suspect bullet hole but no powder pattern, which would mean the barrel of the gun had to have been more than 30 inches away (TR-1867-1869).

Kennington said that he was also furnished projectiles and casings marked on C, D, and M and that he marked them. He said that "C" is a part of a semi-jacket hollow point piece bullet and it had come apart from the lead case, then center part of the bullet. He said that "C" was a .38 revolver bullet (TR-1870).

Regarding "D" Kennington testified that it consisted of, "(H)eavily mutilated fragments, " which he said was not inconsistent with a revolver bullet; it was consistent with a semi-automatic bullet, including .9 mm bullets; and inconsistent with a .38 and a .357 (TR-1871). Regarding "M" , which Kennington said was “a casing, " it had “a headstamp” indicating a .9 mm gun (TR-1870-1872).

Kennington testified that "M" was consistent with the fragments making up "D" . He said that "C" could not have been fired in a .9 mm gun but that, rather, it had to be fired from a .38 gun (TR-1872, 1873).

Tech. Kennington next identified the two guns which had been turned over to him. Both guns were received in evidence over SM’s objection. Kennington said when he first saw the gun constituting SE #82 it was rusty, but not as rusty as it was when he was observing it in court

while he was testifying. He said that "82" was a S&W .357 Magnum and that it fired or was capable of firing .38 caliber projectiles (TR-1874-1876). Regarding the other gun which had been received in evidence as SE #18, Kennington said that it was a S&W .9 mm, Model 39, gun. He said that "81" was a semi-automatic pistol and that "82" was a revolver, with the main difference being that with respect to a revolver the casings remain in the gun until manually removed, while in a semi-automatic gun the casings are ejected when the gun is fired through an ejection port or hole on the side of the gun. He said the ejection distance is 12 to 15 feet away (TR- 1876- 1878).

Kennington testified that when "81 ", the semi-automatic gun was submitted to him, "it was wet with water in a bucket" and that it was submitted to him without a magazine. He said he tested the semi-automatic with a magazine supplied by him (TR-1879-1880).

Kennington next apparently testified about two projectiles, but try though the undersigned writer did, he could not make heads or tails out of the confusion of lettered identified exhibits in the last question on page 1880 of this transcript. In any event, whatever bullet or bullets was or were being referred to were received in evidence (TR-1881). Kennington said that the item marked "NV" indicated that "it's of no comparison value for purposes of determining whether it was fired in a particular weapon." In response to another totally leading but unobjected to State question, Kennington said that items "A, B and NV" were all taken from the body of Officer Bauer (TR-1881). He said that "A" was a .38 caliber revolver bullet; "B" was a .9 mm bullet; "C" was a .38 caliber bullet; "D" was consistent with a .9 mm bullet; and that "M" was a casing from "exclusively a .9 mm cartridge" (TR-1883).

Getting down to his alleged bottom lines, Kennington testified that, "(I)n the microscopic comparison with test fired bullets that I found projectile "A" was fired from the .357 Magnum which is a .38 caliber (TR-1884). He said that "B" was a positive match to the S&W .9 mm

"to the exclusion of all other weapons in the world" and, in response to another State unobjected to leading question, he said that the same test, i.e., to the exclusion of all other weapons in the world, applied to the test firing comparison of it to SE #82. He said the same concerning "C" when test firing compared to the S&W .38. He said that the fragments in either Officer Bauer's body or at the scene were consistent with having been fired from the .38, but an actual comparison couldn't be made. He said the "D" fragments could not have been fired in the .38, but were consistent with having been fired in a .9 mm pistol (TR-18851886).

Kennington said that "M"----which is a casing----was fired from the .9 mm gun in evidence "to the exclusion of all other guns in the world" (TR-1887). He said that "A" and "C" were fired separate bullets about which were fired from the same gun, SE #8 1. There follows another exchange between the prosecution and Tech. Kennington and rather than undersigned counsel commenting for a third time herein, the following is taken from the transcript, to-wit:

> "Q. How about the .9 millimeter? What can we say about D and E? Can C be a part of B or is D a part of another bullet?
> A. I can answer that easily by examining B. B is an entire bullet. There is no part missing from it, It weighs exactly what it should weigh before firing, so it cannot be a part of E." (TR-1888)

On cross by SM, Kennington said that from the evidence before him there were a minimum of four shots fired (TR-1891).

State next called Dr. Jay Barnhardt, a physician who worked as a forensic pathologist in the ME's office. He said he performed an autopsy on Officer Bauer and testified regarding same as follows: At the hospital the doctors had "introduced some catheters and T.V.s and tubes in order to support, or at least try to save his life" (TR-1896). He found a gunshot wound in Bauer's left thigh, which involved an entrance wound but with no associated exit wound. He found a "brush burn or abrasion or scrape" on the back of his right hand, a small abrasion or serape on the top of his left shoulder. He found a gunshot wound on the back of Bauer's head

between the hairline and the midline and the directionality of the bullet that made that wound was downward "and ends up in the front of the chest in this notch where the ribs join with the abdominal organs" (TR-1897-1902).

Dr. Barnhardt said that both the wound to the back of the neck and the one to the hip were entrance wounds with neither bullet having exited the body. Specifically regarding the gunshot wound to Bauer's neck, he testified that it went through the heart and ended up where the ribs meet the abdomen. He said the gunshot wound to the hip would not have caused death but that the one to the neck or back of the head area would have, and that it was very unlikely Bauer could have survived because that bullet produced two holes in the heart and destroyed the heart's ability to function, He said the JMH doctors put stitches in the holes in the heart. He said the cause of death was the gunshot wounds. He said he went to the scene of Bauer's killing and observed the column near the teller booths which appeared to have projectile damage. He said the gunshot wound to Bauer's hip would have been painful enough to put Bauer down to the ground (TR-1903-1910).

Dr. Barnhardt further testified that it was consistent with both the way he found both the projectile and the directionality of the bullet that entered his neck area, that he went down after being shot in the leg and that "in some fashion towards the shooter.. . .either face down or back down and is shot in this position in the back of the neck" (the quoted language is from the prosecutor's totally leading question) (TR-1910, 1911).

At this juncture the State rested its case and the court then entertained and denied the motions for directed verdicts of acquittals of all defendants (TR-1912).

Thereafter after conferring in the jury room all defense counsel announced that they would not put on any evidence or testimony at guilt phase (TR-1929, 1930). Thereafter in the presence of both the "A" and the "B" juries, each defense counsel rested his respective client's

case (TR-1952).

Thereafter followed one of several jury charge conferences, during the course of which co-def. counsel objected to the charging of the jury as to premeditated murder based upon the premise there was not a sufficiency of evidence for the jury to consider same. This was denied (TR-1966-1974) . The court announced it would read the Principals charge (TR-1979).

Thereafter "(T)he Gonzalez, San Martin and Frangui trial" resumed and counsel for co-def. Gonzalez and co-def. Frangui made their final guilt phase arguments to the "B" jury after which that jury was taken from the room. The court then read a question that had been sent him by the "A" jury, to-wit:

> "Is the jury supposed to make a distinction between felony or premeditated murder in the First Degree Murder Charge. No provision on the verdict sheet for either felony or premeditated murder. " (TR-2159)

Following argument of respective counsel in the Fernandez case, the court said he would instruct the jurors as follows:

> "All right, then the final answer is again, to the first part is the jury supposed to make a distinction between felony or premeditated on the First Degree Murder charge, my answer is no. The second part has no provision on the verdict sheet for either felony or premeditated the, sentence and I am simply sending them, the verdict form is complete and requires no additional information, signed by me. . , . " (TR-2 163)

Thereafter "B" jury reentered the room and the counsel for SM commenced his final guilt phase argument (TR-2163-2175). After the prosecutor made its final argument to the "B" jury, SM's counsel started into his rebuttal summation (TR-2244), during the course of which the court sustained State's objection to SM's counsel arguing to the jury that State was being permitted to use Gonzalez's and Frangui's statements against him, but that he did not have the right "to confront these statements.. . .to cross examine these two men as to the circumstances.. . . "

(TR-2245). It is instructive to further note herein that the lead prosecutor's response to this was:

> "Mr. Rosenberg: Objection, Judge it can still be used against them. " (TR-2245)

A further interruption with SM's counsel was made by the lead prosecutor when he objected to it being argued (or partially argued) that the killing of Officer Bauer was not a reasonable and foreseeable consequence of SM's other actions in going to the bank, etc. To this objection, the court said:

> "The Court: It is what the law says in felony murder. Sustained, sustained. " (TR-2248)

There followed another attempt by SM's counsel to make his argument with prosecutor Rosenberg again interrupting him to assert:

> "Mr. Rosenberg: Objection, it's not for the felony murder." (TR-2249)

The court then read its guilt phase charge to the "B" jury (TR-2255). After the "B" jury retired, it sent in a note requesting "all three statements which have been prepared here," including the taped statement of co-defendant Gonzalez and the typed statements and apparently of the sketch of the bank property. The jury also requested "a copy of Elijah Battle's first statement" (TR-2299). Thereafter followed discussion of this request between the court and counsel. The request for the statements was apparently granted and, in this regard, a tape recorder was furnished the jury to listen to the taped statement of Gonzalez (TR-2301).

The jury then returned with its verdicts which were as follows: Co-def. Gonzalez was found guilty of First Degree Murder with a firearm and that the victim, Steven Bauer, was a law enforcement officer; Armed Robbery of the KNB and Michelle Chen with a firearm; Aggravated Assault of Lasonya Hadley with a firearm; Grand Theft; and Burglary. Co-defendant Frangui was found guilty of all charges in the exact manner as Gonzalez. Defendant SM was likewise

found guilty of all charges, but unlike as was the case with respect to the verdicts returned against Gonzalez and Frangui, he was not found to have carried a firearm (TR-2307-23 10). The court then adjudicated each of the defendants guilty on all of the counts (TR-2316, 2317).

Three months and some days later the court, counsel and the jury met anew to begin the penalty phase advisory trial of defs. Gonzalez, Frangui and SM (TR-2329). At the outset thereof the court took up SM's motion for a penalty phase severance from Gonzalez and Frangui (TR-2330). Counsel for SM announced that she would be waiving three statutory mitigating circumstances (TR-2330, 233 1) .

After extensive legal argument, the court denied the motions of all three defendants' counsel for a penalty phase severance.

State then called its first sentencing phase witness, Craig Van Nest. He testified as follows: On January 14, 1992, while employed by and during the course of his employment for K & W Auto Parts, he was scheduled to make a stop at Eloy Motors in Miami. As he was driving along a brown Previa van came alongside of him and motioned him over and thereafter someone in the front seat of the van flashed a badge at him. He did not stop because he did not think the badge was real and he continued on until he found where Eloy Motors was located. He then exited his vehicle with parts for Eloy, and as he was about to go into Eloy he turned around and saw, "some gentlemen going through the driver's side of my vehicle" (TR-2365). He thereafter ran back to the driver's side of his van. At some point he noted that "initially" there were two people in the van. The larger of the two men accused him, i.e., Van Nest, of stealing auto parts and then this man produced a gun and, "pushes the fellow to,that was looking through my vehicle gets out" and "(H)e" had that bag, which contained, "a camera, a wallet and cigarettes and all that stuff" (TR-2366, 2367). Thereafter the larger guy hit him with a gun on the back of his head (TR-2367). The larger guy then pulled him up and spun him around and

thereafter he, i.e., Van Nest, saw a third guy. The next thing that happened was that he, i.e., Van Nest, was pushed into the Previa van. Two of the persons got into the Previa van with him and the other one got into his delivery vehicle. The man who had been going through his delivery vehicle and who had grabbed his bag had the gun (TR-2368-2370). At this juncture Van Nest pointed out Frangui in court as the one who was holding the gun in the van and he said Frangui was in the back cargo part of the van with him (TR-2370). Thereafter when Van Nest was asked by the lead prosecutor if he saw the person who was driving the Previa van in the courtroom, he said, "no, " but thereafter after the prosecutor suggested to him that the driver was in the courtroom by saying to him, "I think it's difficult for you, and after the said prosecutor asked him to stand up and look around, Van Nest said, "oh, I am sorry right there," and he identified SM as the driver (TR-2370, 2371).

Thereafter Van Nest said that the gun, which he said had been held by Frangui "went off" after Frangui had put it down to apparently try to move it to the front of the van. He said that the driver----SM----then looked around to see why the gun went off; that then they heard a siren; and that "within a couple of moments, the van skidded to a halt and that it hit a fence. He said that both Frangui and SM opened the respective side doors of the van and took off. He said that a police officer arrived on the scene immediately thereafter, and that on that same day both Frangui and SM had been caught and returned to the area where the van was where he identified them (TR-2372-2375).

On cross Van Nest testified: It did not appear to him that anyone wanted to shoot him. The driver of the Previa van----SM----didn't do anything but drive the van. SM never had a gun nor a badge. SM never went through his bag and SM never spoke to him, including never asking him for money. When SM looked around he had a look of fear in his eyes. When they heard the siren, Frangui was barking as if giving instructions to SM (TR-2375-2379).

State next called Det. Boris Mantecon, a City of Miami robbery detective. He testified as follows: He investigated the Van Nest case and on January 14, 1992, he spoke with Frangui, SM and a third person named Carlos Vasquez. After he Mirandized SM (whom he pointed out in the courtroom), the latter told him that he had known Frangui about a year and a half and Vasquez about a week. SM told him that Frangui had called him and "partially told" him they were going to take over a van the next day. Vasquez and Frangui picked him up at 8:30 the next morning; promised him an unspecified amount of money from the van; and that SM told him how they stopped the van after Vasquez flashed a police badge at the victim. SM told him Vasquez had a gun and he was the one who struck the victim over the head with a gun. SM said Vasquez gave the gun to Frangui after Vasquez had pushed Van Nest in the van. SM told him about Frangui pushing the gun forward and the gun's going off and about seeing a marked police "unit" and then panicking, running into a fence, and running away from the van (TR-2381-2387).

Det. Mantecon next told the jury that he Mirandized Frangui and that Frangui gave him a confession in which he admitted purchasing a gun for fifty dollars to participate in a robbery. He said that Frangui then told him the following: He admitted that Vasquez struck Van Nest over the head with the gun. He admitted taking the gun with him inside the van and the gun going off as he pushed it away to the front. SM was driving the van. The gun was a S&W .357 Magnum four-inch revolver, which was loaded (TR-2387-2391).

On cross, Det. Mantecon testified that both Frangui and SM had been consistent in telling him that Vasquez had initiated the robbery; that Vasquez supplied the money for the gun; that Vasquez carried the gun during the robbery, "(T)o a certain point; " that Vasquez flashed the badge; that Vasquez initially confronted Van Nest and demanded money; and that Vasquez hit Van Nest (TR-2392-2394).

On further cross, Mantecon said that SM had been introduced to Vasquez by Frangui; that SM had been called and told they were going to rob a van; that SM had nothing to do with a badge or a gun; that SM didn't speak to Van Nest or touch him; and that all SM did was to get into the Previa van and follow Vasquez; and that when SM saw the police car and when the gun went off SM was terrified. The officer was then asked whether when he had arrested SM, "he had literally defecated in his pants." He said he was not aware of that (TR-2394-2397).

The next prosecution witness was Pedro Santos, who testified as follows: He was 72 years old and in November of 1991 worked as a security guard at the Republic National Bank (RNB). He carried a gun. In the morning when that bank opened, he would be given a bag to take to the drive-thru. On the day in question, he was coming out of the bank sometime after nine and as he was approaching the drive-thru a man jumped out of the passenger side of a white car that had approached to within 10 to 12 feet from him and told him to drop that or you'll die and the man then fired a shot at him. He then went to pull out his gun and the man then sprayed bullets at his feet, "inside my feet" (TR-2397-2404). When asked what he did, Santos said:

> "Well, at that moment imagine fire one shot to get, try to get me, he wanted to kill me and when he sprayed the bullets, he just you know fled. " (TR-2404)

State next called Det. Nazario of the Homicide Unit of the Hialeah Police Dept. (HPD). He testified that he investigated----or participated in the investigation----of a robbery of a Republic National Bank (RNB) in the City of Miami. He took a statement from SM (whom he identified in the courtroom) in which SM is supposed to have said identified Frangui as having been another participant in this crime. SM allegedly also told him the following: As they went in the Denny's Restaurant across the street from the RNB they saw a guard walking across the parking lot with a bank bag and then decided they would rob this bank guard at some time

thereafter. They skipped the next day because it was Thanksgiving and waited until the Friday thereafter to do the RNB robbery (attempt). They used two vehicles, to-wit: a white Z28 Camaro and a blue Buick Regal with Frangui driving in the Buick and SM being a passenger in the Camaro. The driver of the Camaro was the third person involved in this crime. He, i.e., SM, was armed with "a nine millimeter." When they spotted the security guard, he, i.e., SM, exited his vehicle and demanded the bag from the guard and to show the guard he was serious, he fired twice at his feet, but the guard returned fire so he, i.e., SM, aborted the robbery, returned to his vehicle and they fled the scene (TR-24052412).

Det. Nazario thereafter said "they" located the Camaro and SM's fingerprints were found on it. After he Mirandized Frangui, he told him the details of the RNB robbery including that SM was involved and that SM exited the White Z28 vehicle with "a gun" (not being satisfied with this answer the lead prosecutor "testified" in his next question that the gun was a .9 millimeter weapon) (TR-2412-2418). He said Frangui further told him: He, i.e., Frangui, exited his vehicle because "I think he even believes he hears that San Martin demands the bag from the guard, the guard laughs at him and that San Martin fires at him, " He, i.e., Frangui did not know whether the gun fired at SM (TR-2418).

On cross Det. Nazario testified: Frangui had given a formal statement but SM refused to do so because he was afraid others would find out he was helping the police. Frangui was "overseeing everything that happened" (TR-242 1-2423).

State next called Det. Nabut who testified about the December 6, 1991, attempted robbery incident which resulted in the death of Raul Lopez. Nabut testified: There were three victims in this crime including Danillo Cabanas, Sr., Danillo Cabanas, Jr., and Raul Lopez. Mr. Cabanas, Sr., was in the check cashing business and on the day of the attempted robbery, he had gone to the Republic National Bank (RNB) in Hialeah to get his working cash for the

following week. Because Cabanas, Sr., had had a previous robbery attempt made upon him, he took along his son, and Raul Lopez to serve as sort of a back up security guard. The defendants had previously watched Cabanas, Sr., go through his Friday routine at the bank, On the date of the attempted robbery, Cabanas Sr. and Jr., left the bank in one car and Raul Lopez followed them in another vehicle, Taking the route they customarily took for the bank, these two vehicles took 41st Street west to 20th Avenue, which is a service road onto which they turned south to go to Okeechobee Road. As they reached 41st Street there was a Chevrolet Suburban in front of them and this vehicle slowed down and came to a stop as it reached 41st, Street with two men getting out of the Suburban with guns. Cabanas, Jr., attempted to drive past these two men when he saw a second Suburban in his rear-view mirror, which drove past his vehicle. The two men from the first Suburban started shooting into the Cabanas vehicle and, as well, someone from the second Suburban started shooting. After this exchange of gunfire, the would be robbers fled the scene in the two Suburbans, and the Cabanas' then found a badly wounded Raul Lopez lying in the pavement. Lopez said he was having trouble breathing and never said anything else after that. He died of a gunshot wound to the chest. The gun that killed him was a .357 revolver. A .9 mm projectile was found, which was recovered in the bed of the truck after going through the front windshield, the back window, and downward into the bed of the truck (TR-2424-2435).

Nabut testified in detail as to Frangui's having made informal and formal statements admitting his involvement in the Raul Lopez case, which statements inculpated SM (TR-2435-2445).

Det. Nabut thereafter testified that he was able to match up the gun that killed Raul Lopez as being one found in a canal near the Dolphins Expressway and that that was the same gun that killed Officer Bauer (TR-2445, 2446). He said through matching up projectiles to a

.9 mm gun found in the said canal, he was able to determine that that gun was used to fire "towards either Danillo Cabanas, Sr., or Danillo Cabanas, Jr., or Raul Lopez" (the quotes are the prosecutor's) (TR-2446).

On cross Det. Nabut said that he didn't do the analysis of the projectiles and guns; that Abreu had been convicted in the Lopez case as well as Frangui and SM; that SM had voluntarily spoken with him; that SM was an introverted individual; and that he didn't think that SM was a very intellectual person or someone who was very articulate (TR-2453-2456).

The next prosecution witness was Det. Mike Santos of the MDPD Homicide Division. He testified that he questioned SM concerning his involvement in the Lopez case. He then testified as to the details of what SM was supposed to have told him (TR-2468).

On cross by SM's counsel, Det. Santos testified: Fernando was the one who knew about the Cabanas's and he planned the robbery. He was wrong in his direct testimony in the instant trial in saying that SM had told him that nobody in the Blazer fired and that, rather, what SM told him was that the driver of the Blazer shot at him, with his returning or shooting two shots and then fleeing the scene (TR-2468-2470).

Thereafter the State rested (TR-2479).

The judge then opined that the disparate sentencing issue was a non-statutory mitigation and he further elucidated, to-wit:

> "If you look at the record of the last case that just happens to be the only non-statutory mitigating factor which I believe the jury should be instructed on. Beyond that I believe all non-statutory mitigation should be argued by the defendant. I just happen to feel very strongly about this." (TR-2604)

SM's counsel then told the court she wanted to have introduced letters from SM to his mother, sister and aunt, which letters went to the matters of remorse, rehabilitation, and, "as to a belief in God, " Following opposing argument, the court denied the request to have the

letters introduced in evidence and in its dissertation in the transcript on the subject, it, i.e., the court, observed that while SM had professed remorse at penalty phase in the Lopez case, he had not demonstrated the same to Dr. Mutter, and that some or all of the letters in question were dated after his sentencing order in that case. During the course of this discourse, the court stated:

> "In my sentencing order I wrote about during the defendant's interview with Dr. Mutter he told Dr. Mutter that he didn't intend to kill anyone, he just fired his gun in the air. This is gross hypocrisy, and the court rejects this as a mitigating circumstance. Oddly enough shortly after that order is when the defendant writes letters, considerably before the time of this trial expressing that remorse. " (TR-2608)

Thereafter the court refused to allow SM's counsel to have the aforedescribed letters made a part of the record (TR-2621). SM's first penalty phase witness was Dr. Antonio Lourenco, a medical doctor, psychiatrist, and neuro-psychiatrist. He testified as follows: He "met" SM on October 7,1993, at the request of Dr. Jorge Herrera, Ph.D., a neuropsychologist, who asked to test SM "on my machines" for "brain dysfunctions," "brain lesions" and for "any disturbances in his brain that could be an explanation for his behavior" (TR-2629-2634). He said that SM told him he had had trauma to the eye; he thought to the left one. He said that SM was "practically in a state of panic at the beginning when I did this history." He said he was "anxious" and he "would scrutinize this place all the time and look for.. . . what's going on. " He said SM complained of having had dizzy spells of some sort (TR-2635). He said SM also gave him a history of head trauma (TR-2636).

Dr. Lourenco said he had administered SM an EEG. He said that after explaining to SM this procedure and then telling he was going to start it, SM "panicked" and then the doctor said as follows:

> "He fainted, almost fainted. He was, his eyes started revolving a

> little bit. He tried to, he wasn't cuffed, So he tried to raise his hand to pull out the helmet. He was, I reassured him. I tapped him, his shoulder. I told him it was a doctor's office, that he was not in jail. And asked him what happened, and he acknowledged later that he thought he was being electrocuted." (TR-2639)

The doctor then described the details of how he tested SM. Thereafter he said that this test revealed that he, i.e., SM, had "an abnormal amount of low power" or "electrical power of the brain" in the "low front" or "temporal area" of the brain, and that in lay terms this meant that part of the brain was not working fully or that it was inhibited (TR-2641, 2642).

In response to counsel's question as to why SM revealed this finding, Dr. Lourenco said:

> "The explanation is a brain injury, can be a brain injury for lack of circulation like it happens in people, problems of arteriosclerosis for example and ademia, that means lack of blood or in a person of his age, usually it's due to trauma, a concussion that left like a scar in the brain." (TR-2642)

He said that he also found "impulses in the frontal area, in the midline and frontal areas" which he said "usually come from deep areas of the brain" and which constitutes a disfunction in that area (TR-2642).

Dr. Lourenco said his third finding was that SM had a "maturity" of the brain. He described a "maturity" as meaning that, "the brain keeps giving, keeping an image of its function as if the person was still a child." He said he also found "asymmetry.. . .in the invoking potential, " which he said meant that "the stimulation of the left eye became very late compared to the right eye" there being more than a 20% difference but is "really high." He said that this is usually caused either by multiplesclerosis that takes away part of the optic nerve in the neurons in the brain or can be done by a trauma (TR-2642-2646).

Based on testing he performed on SM, Dr. Lourenco said that "in the cognitive test the determinations were of poor quality. " He said he performed this test several times and that the results were "variable enough to say that there was an inconsistency.. . .in the responses, " which

he said indicated that the brain waves were not under "adult control" (TR-2646, 2647). He said that SM's responses deviated from "pattern normality," which he said meant that SM's brain was responding from the posterior area rather than from the vertex or central organization. He said that a person with this abnormality "usually has difficulties.. . .in using his brain for perception, for thinking, for controlling the emotions and so on" (TR-2649).

Dr. Lourenco said he rendered SM "the visual evoke the responses test," which revealed that he got normal response in the right eye but an abnormal response in the left eye, which abnormality was that the left eye response was very slow. He said that what this causes is that the possessor of this abnormality "perceives reality" at different speeds in the respective eyes, which he called a confusion of the brain (TR-2650, 2651).

Dr. Lourenco said that SM "had a lot of difficulty concentrating," which he said was meant that, "an abnormal, unusual part of the brain was assigned to the task and was variable," or "a lack of integrity in the cognitive process." He said that, "(C)ognitive means knowing, meanings (sic) thinking means processing" and that "lack of integrity" meant being "disturbed . . . .disrupted. . . .not healthy" (TR-2651, 2652).

Dr. Lourenco said he submitted SM to a "hyperventilation" test and that the results were that there was no evidence of a "(m)etabolic alteration" of the brain, which term he described as the "biochemistry" (TR-2654).

The doctor said that his bottom line was that SM had, "an old lesion like a scar in the left side of the brain," which meant that he had poor impulse and stress control, poor judgment, thinking disturbances "like delusions and hallucinations." He said that persons with his pathology tended to be moody, to become very depressed, to be very excitable and irritable, to be very angry and to not properly "measure the consequences what they can do in that moment." The doctor implied that SM was "a concrete thinker," which he described as being one "that

cannot distinguish the gray areas between black and white" (TR-2655). He said that such a person could do very well in a controlled environment (TR-2655, 2656).

Dr. Lourenco testified on cross as follows: He didn't know at what age SM had the scissors stuck in his eye. He knew that SM had a problem with the left eye but didn't know if he had received hospital treatment therefor. His clinical impression of his EEG testing was that, "there is a mildly abnormal study. " He didn't know at what age the trauma to the head occurred (TR-2665-2671). The prosecutor thereafter attempted to make the point that the doctor's computer help was inadequate because SM's medical history was not furnished to it, but Dr. Lourenco said that he didn't need to have such information placed into the computer (TR-2671-2676).

On redirect Dr. Lourenco said that with respect to the measuring he did he would not have had to have ask SM anything because what he was measuring was brain waves and brain function (TR-2676-2694).

SM's counsel called Dr. Jorge Herrera, a psychologist "practicing in the field of psychology (and) (N)euro-psychology. " The court accepted Dr. Herrera as an expert in the field of neuropsychology . Dr. Herrera testified: He did a neuropsychological evaluation of SM in August of 1993. He took a history from him and after that administered him a battery of tests involving approximately 18 instruments, In addition he reviewed reports of Drs. Donita Marina, Charles Mutter, and Antonio Lourenco, and that he had referred SM to Dr. Lourenco for EEG testing. He said he did not request either a Cat Scan or an MRI because "the EEG.. . .is the best measure we have of the functioning of the brain. " He saw SM on two occasions, August 20 and 24 of 1993.

Dr. Herrera then testified that he took a history from SM and that SM told him the following: He came to the United States in 1980 from Cuba and had been in either the sixth or

seventh grade in that country. In the United States he was "socially promoted" to the eighth and ninth grades. While he was growing up he suffered "three important traumas." The first of these was the eye injury which he suffered when he was five (which Dr. Herrera said caused him to have no functional vision in the left eye) (TR-2716, 2717). Dr, Herrera said that SM's second injury was suffered when he was fifteen and which involved his falling off his bicycle and hitting his left frontal area. He said that SM did not lose consciousness during this injury but he did after he suffered the third injury, which also consisted of him falling off his bicycle. He said that SM did not remember the exact nature of the injuries he suffered in that fall and that he received no emergency treatment (TR-27 18-2720). This doctor said he administered SM eighteen tests, one group of which having to do with higher cerebral or frontal lobe functions, which he said had to do with intelligence. He said that these tests require "abstract thinking" as versus "concrete thinking, " which he described as "stimulus bound" or "immediately" thinking, Regarding this part of his testing, Dr. Herrera said that he found SM to have an IQ intelligence quotient of 75 which he said was consistent with Dr. Donita Marina's finding, which was reached by a totally different manner of testing, that his IQ level was "in the range of the 70's" (TR-2720-2724).

Dr. Herrera said that this meant that SM's intelligence level "would be in the range of mild retarded or borderline intellectual functioning. " He said that the result of the Wisconsin Card Sorting Test, which he administered to SM, indicated "a range of performance.. . .like those of individuals who have.. . .mild brain injury (TR-2724).

Dr. Herrera said that SM's language pattern was not very fluid and that his verbal fluency was not very good. He said that his testing revealed that SM was moderately impaired as to the frontal temporal lobe, which area has to do with impulse control. He said he administered the Trail Making test and that he did well in the first part but that the second part

was seriously impaired, which was suggestive to him of frontal lobe damage in the left hemisphere (TR-2724, 2728).

Dr. Herrera said that he administered a memory test to SM and that his visual memory was good but that his verbal memory was impaired. He said he also administered SM motor tests which, "can address what is happening in frontal lobes." He said that SM's motor functions were pretty good except for strength and that he didn't appear to be very strong physically, especially in the hands. And, finally, he said he administered SM the Mennerola Multiphasic Personality Inventory (MMPI) which revealed no psychopathological findings at that time (TR-2728-2732).

Dr. Herrera said that as a result of all this testing, his findings were that SM has borderline intelligence; that he has impairments related to the functioning of his brain; and that, "he is somebody who probably would be very easily led and misguided or guided." He said that SM had "concrete" as versus "abstract" thinking, which means that, "(H)e cannot deal with things that are beyond the here and now." He said that an example of this is that SM stayed away from sexual relations because he was afraid of contacting diseases, which meant that he was acting on one particular piece of information. He said that he agreed with Dr. Lourenco's conclusions regarding SM having a disfunction of the left temporal lobe (TR-2732-2735).

Dr. Herrera said that his opinion regarding SM's capacity for understanding and appreciating the criminality of his conduct when he was involved in the KNB robbery was that, "I believe that he knows that what he did was not right, but I don't think that he really understood all of the circumstances and unfortunate consequences that came out of the behavior. " Dr. Herrera said that it was his opinion that SM was easily led although such misleading did not reach the level of coercion (TR-2735, 2736). On cross and with reference to SM's other crimes, Dr. Herrera admitted that SM knew right from wrong and that he knew

stealing was wrong. He said that SM did not have a mental disorder, "as identified by,. . .the MMPI screening, " but he said that he did find an "organic mental disorder" through other instrument testing (TR-2744-2749). Dr. Herrera reiterated that while SM understood the short range consequences of his criminal acts, he did not understand the long term consequences (TR-2749-2752).

During the continuation of the lead prosecutor's effort to demean Dr. Herrera's position regarding whether SM appreciated the consequences of his actions, Dr. Herr-era said that----with reference to the Raul Lopez case----he did not know whether when SM fired his gun he understood that someone could get hit by the bullet (TR-2754-2757).down (TR-2757-2762).

SM's counsel next called Sgt. Kevin Gaberlavich, a floor supervisor at the Dade County Jail. He testified as follows: SM had never been written up for the use of force, although there is a notation in his file that he was holding onto a door but that other than such notation there was no indication of disruptive, aggressive or violent behavior. San Martin's behavior was like "an average inmate, " in that he did what he was supposed to do (TR-2764-2770).

Estella Garcia next testified and she said: SM is her nephew. After she left Cuba in 1962 and came to Miami, SM's parents and their family, including Pablo and his four siblings, lived with her----beginning in 1980---for four months. SM's father, Luis, was lacking as a father because, "he had no discipline" and because, "(H)e's an alcoholic." SM's father knew about this trial and said he was going to testify but he hadn't done so, SM's mother, Francisca, is a "very good mother, " but she didn't have the will to control her children. The mother was not very well educated. The father did not help the mother raise the children. SM was 13 years old when he came to the United States and while he lived in her home, "he was a very good boy, that's the truth." After SM's family moved out of her house, she noticed on the Christmas eve before he was arrested that SM "looked very bad" and she added that she didn't like his

friends She said SM "had completely changed," which included him being "very nervous." She saw SM in jail and learned he had found God and SM had written a letter to her (TR-2770-2784).

The next witness was SM's sister, Daisy. She testified: She was 23 years old and that SM was four years older than her. Their family was very poor in Cuba and they all lived in one room. Their father was almost never home because he was getting drunk but the father did work. The father "sometimes" hit SM more than he hit the rest of them, SM got into trouble for skipping school. When the father would come home drunk and watch TV, he would become angry and hit SM and tie him to the table, or to the chair of a table, with a chain. The father didn't live with the mother any longer because after SM went to jail the father started drinking more and the father and mother separated. They were always fighting before that. SM was a good brother to her. Before SM's arrest, he was, "a bit nervous but he would not talk much." She would ask him what was going on but he denied anything was and would stay in his room. After SM's arrest, he wrote her and told her to work and be good and to go to church. Before his arrest SM didn't read the Bible or go to church, but afterwards he did both of these things (TR-2784-2791). On cross this witness said that her brother did not tell her about any of the crimes in which he had been involved. He also said that as she was growing up her family always ate but "not that much" and that SM was the only one of her brothers and sisters who had gotten into trouble (TR-2791-2793).

The next witness was SM's mother, Francisca San Martin, who testified as follows: SM was born in 1967 when Castro was already in power. Food was not plentiful in Cuba and sometimes she would have to steal "the lard;" use the "oil;" and sell "the lard" in order to be able to buy "other things and to buy some clothing. . . . " She wasn't allowed to go to church in Cuba. As a small child, SM was not like the rest of the children and he would not stay still

"and things like that." She took him to a psychologist said that he was "just nervous and just to give him food." Her "older one" was also "like that," but she never took him to a psychologist. SM did not get in trouble a lot when he was a child but when she would tell her husband SM had gone out to play with the other kids, the husband would either kick him with his foot or hit him with a belt, or tie him up by chaining his foot to a chair. The husband drank after getting off work and would come home thereafer (TR-2794-2798). When SM was four years old he poked his eye with a pair of scissors. She took him to the hospital but, "(H)e lost that eye, he can't see through that eye. " SM has to use glasses and he didn't like school because they always made fun of his eye. After she came from Cuba with her family she lived with her husband's sister, Estella, for six or seven months and she had no problems with him at that time. SM went to school until he was seventeen, but he didn't want to and sometimes he skipped school. His grades weren't good (TR-2798-2804).

When they went to visit a cousin, SM fell and cracked his head and her husband took them to a clinic. He also fell from a bike onto the sidewalk when he was fifteen or sixteen years and that he was knocked unconscious. She said she didn't take him to the doctor. SM had always been affectionate with her; he helped her; he got along with his older brothers and his father; and he was affectionate with the father, Before SM got arrested, he was nervous, dizzy and he felt bad. She never thought he'd get involved in something bad. She had told him to stop hanging around with "the other people." SM's friends----or at least Frangui----would show up at the house and that they would go out often. Her son had repented, "(A)nd he's with God" (TR-28052809).

Counsel for SM then rested her penalty phase case (TR-2813).

Thereafter the court colliqued each of the defendants on their respective decisions to not testify at penalty phase (TR-2876, 2877).

Respective counsel then presented their final arguments (TR-2994-3 111).

The jury then advised as to its "recommendation," which was as follows: The jury by 9 to 3 recommended death for Frangui and by 7 to 5 it recommended death for Gonzalez. The jury recommended a life sentence of SM (TR-3 116). Sentencing hearings before the court were set for Frangui and Gonzalez but when SM's counsel advised that it was not necessary to have a hearing in his case, the lead prosecutor advised that he did want to be heard, "but only as to San Martin" (TR-3119, 3120).

At a later date when the matter of the sentencing of the respective defendants came on before the court, for SM's counsel moved to have State precluded from calling Dr. Mutter. The court then took up the matter of the request by SM's counsel for the appointment of an expert for the purpose of preparing such counsel to prepare for Dr. Mutter's testimony before the court at actual sentencing. This was denied (TR-3 13 1-3 134). During continued argument about this issue, SM's counsel contended that since State did not call Dr. Mutter to testify before the advisory jury, it should be precluded from calling him before the judge. The judge's non-responsive response thereto was that he didn't want to hear psychiatric testimony but would hear anything other than that (TR-3136).

Thereafter on a subsequent date SM's counsel announced that SM had withdrawn his motion for recusal of the judge, and the court noted that SM so stated on the record (R-787). Then the lead prosecutor withdrew his previously given assent to SM's counsel being able to take Dr. Mutter's deposition (R-788).

State then called Dr. Mutter, who testified: He said he examined SM on one occasion, which was on October 25, 1993, and, in addition, he was fnrnished and read SM's confession in the instant case and he read his own testimony from the trial in the Lopez case, plus reviewing "other records. " In response to an unobjected to State leading question (ASULQ).

Dr. Mutter said that "brain mapping," such as done by Dr. Lourenco did not tell him anything about SM's felonies. After initially giving their answer, the doctor then hedged and conceded that there were "a number of neurologists that think this is very useful" (R-789-792).

Dr. Mutter said that it was his opinion that SM understood the consequences of his actions and that assuming he was of low borderline intelligence, that would not diminish his being able to know the consequences of his actions (R-792, 793). Dr. Mutter then added:

> "It was my opinion that this man did not show any signs of any major mental disorder, whether it would be like a psychosis or some condition that rose to the level that would impair his ability to understand what was going on or what he was doing in terms of right and wrong issues. . . . It was my opinion that he did know the differences (between right and wrong) and understood it" (R-793)

Dr. Mutter stated that SM was acting in a "goal directed" manner when he participated in the KNB robbery, etc., as was purportedly evidenced by his, i.e., SM's, ". . . . stealing the car to make an approach to take money" (R-794). He said that SM evidenced understanding the consequences of his actions by the fact that he participated in a robbery to get money. He said that SM was very remorseful when he saw him and that he had turned to religion (R-795).

On cross, Dr. Mutter listed all the things he had read in connection with SM, which included police reports, interviews with SM's family members, or depositions of a family member and of Dr, Herrera. In SM's confession and Dr. Mutter's testimony at the Raul Lopez trial (R-796). He said that he thought there was no evidence of any physical child abuse to SM. He said that although he read all this information, his opinion was mainly as a result of his examination of SM, which he said last 50 to 55 minutes. He said he was not in dispute with Dr. Lourenco's finding that SM had a brain lesion in his left temporal region and that he was not in dispute with the fact that SM was of low borderline intelligence and he said that this latter condition made him "limited in terms of his inability to access and process certain more

sophisticated information (R-799). He said that SM was more a concrete thinker than an abstract thinker but that concrete thinkers still know right from wrong (R-800-803). When SM's counsel backed Dr. Mutter into a corner by bringing out through him that in the Lopez case he fired in the air----after being shot at or, so he though----rather than just running away and wasn't that an instance of bad judgment on his part, Dr. Mutter repeated that his bad judgment was getting involved in something he knew he shouldn't have. He said that he felt that SM's reasoning was impaired, "but not to a level that prevented him from really knowing that what he was doing could get him negative consequences" (R-802, 803). At a later point in his testimony, Dr. Mutter equated knowing right from wrong to the understanding the consequences of your actions (R-806).

The court then inquired of Dr.Mutter as to what the physiological (sic) effects were of having a lesion to the left temporal lobe and the doctor's response was that that condition could affect emotional control and behavior and that if the lesion were severe enough it could cause an epilepsy or seizure but, the doctor added, SM did not give any hinting of seizures, The doctor was unclear in his testimony as to whether brain mapping showed the lesion to be small or large. He said that SM expressed remorse both when he examined him in October of 1993 and in his statement he had given to the police. He said that in his interview of SM, he verbally expressed remorse that someone was killed (R-813-815).

SM's counsel next called Dr. Lourenco. He said that he had spoken with SM's mother as well as interviewing SM before going to court to give his instant testimony. Following his description of the additional information he elicited and/or secured, Dr. Lourenco testified that he was of the opinion that he when he was involved in the Bauer case, he was under the domination of Frangui. He also expressed the opinion that was he was chronologically not an adult and emotionally below the puberty level, "(L)ike around 12, 13, maybe less" (R-816-833).

On a subsequent date the court sentenced SM. In intoning the sentence the court rejected all claimed and some unclaimed statutory and non-statutory mitigating circumstances, finding only two non-statutory mitigating circumstances to exist, one of which was that the defendant had turned to religion but the court added that, "(I)n light of the aggravating circumstances in this case, however, the court gives this mitigation little weight" (TR-3243). The second non-statutory MC the court found was that he had had little parental guidance but again recited it was giving this little weight.

Finally, the judge said that he was not following the jury's recommendation that SM be given the life sentence and he gave him the death sentence (TR-3247). He also sentenced him terms of years on all the other counts and ruled that they would all run consecutive to each other and to the death sentence (TR-3250).

This appeal followed.

SUMMARY OF THE ARGUMENT

POINT I

The trial court steadfastly refused to sever SM's trial from those of co-defendants Frangui and Gonzalez even though it knew that the statements/confessions of all three would be introduced at their joint trial and that the statements/confessions of Frangui and Gonzalez were inculpating in the extreme to SM; that there was no way that SM could confront Frangui and Gonzalez about their statements/confessions if they chose not to testify; and that thereafter the court compounded the error by failing to redact from those two statements any reference to SM or to his existence but instead redacted out portions of those statements/confessions which were inconsistent with each other to make them admissible in the joint trial; and that the statements/confessions of Gonzalez and Frangui, as redacted, were so admitted as direct evidence against SM, all of which violated his constitutional confrontation right, due process and

fair trial right, and his right to not be subjected to cruel and unusual punishment.

POINT II

The tactics used by the police in securing so-called pre-formal statements/confessions from SM and pre-formal and formal statements/confessions from Frangui, 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 Frangui's statements/confessions because State was contending that SM was responsible for Frangui's killing of Raul Lopez as a principal.

POINT III

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 IV

There was an insufficiency of evidence to sustain the conviction of SM for premeditated murder because the prosecutor utterly failed to prove that SM killed anybody, intended to kill anybody, fired a gun, or that he ever carried a gun and that since the State didn't require the jury to specify on its verdict specific findings with reference to capital premeditated murder and capital felony murder, there is no way of knowing whether the jury found him guilty of capital premeditated murder.

POINT V

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.

POINT VI

The court erred at guilt phase in allowing prosecution witnesses to testify before the jury that Officer Bauer's last words were to the effect that he hoped the two involved bank tellers were all right and that he thought he was just shot in the leg.

POINT VII

Compounding its error in allowing State to have introduced as evidence directly against SM the statements/confessions of Frangui and Gonzalez, the court allowed State to have introduced as evidence directly against SM all sorts of documentary evidence which had nothing to do with SM.

POINT VIII

After the prosecutor failed to call its witenss, Psychiatrist Dr. Charles Mutter, to testify before the sentencing advisory trial regarding the alleged lack of mental health mitigators applicable to SM, and after the sentencing advisory jury recommended a life sentence for SM, the court erred in allowing State to call Dr. Mutter as its witness at the sentencing hearing before the court and as a rebuttal witness to the testimony of SM's medical witness before the sentencing advisory jury.

POINT IX

Compounding its error in allowing State to call Dr. Mutter as a witness before the court at its sentencing hearing, the court refused to grant SM's counsel's request for leave to retain the services of a mental health expert to assist such counsel in rebutting the so-called rebuttal testimony of Dr. Mutter.

POINT X

The court grievously erred in overriding the sentencing advisory jury's recommendation of life for SM in that it refused to consider the several statutory and non-statutory mental health mitigating circumstances tendered in behalf of SM, such refusal clearly being based on the court's misconception that all mental health mitigators amount only to a question of whether the defendant knew right from wrong.

POINT XI

The death penalty is both unconstitutional under both the United States and State of Florida Constitutions----even though that has not yet been declared----and it is morally unconscionable.

POINT XII

The sentence of death imposed by the court below----contrary to the sentencing advisory

jury's life recommendation----is disproportionate to all Florida cases wherein the death penalty has been imposed and, specifically, it is disproportionate to the life sentence given Pablo Abreu, who like SM carried no gun.

POINT XIII

The court below committed reversible sentencing error in considering, weighing and finding applicable the aggravating circumstance set forth in Sect, 921.141(5)(j), to-wit: That the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties, because the evidence unequivocably showed that Officer Bauer was not engaged in the performance of his official duties at the time he was shot. Further, the entire sentence should be vacated and set aside, because of the lower court's consideration, etc., of this inapplicable statutory aggravating circumstance.

ARGUMENT

POINT I

THE TRIAL COURT'S REFUSAL TO SEVER THE SAN MARTIN'S GUILT PHASE TRIAL FROM THAT OF CO-DEFENDANTS GONZALEZ AND FRANGUI, AND IN CONJUNCTION THEREWITH ITS ALLOWING STATE TO HAVE REDACTED SO-CALLED INCONSISTENCIES FROM THE FORMAL STATEMENTS OF CO-DEFENDANTS FRANGUI AND GONZALEZ AND ITS REFUSAL TO INSTRUCT THE JURY THAT IT COULD ONLY CONSIDER EACH DEFENDANT'S CONFESSIONS AGAINST THAT DEFENDANT, VIOLATED HIS CONFRONTATION RIGHT, HIS DUE PROCESS RIGHT, HIS FAIR TRIAL RIGHT AND HIS RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE BILL OF RIGHTS TO THE U.S. CONSTITUTION AND BY THE DECLARATION OF RIGHTS TO THE CONSTITUTION OF THE STATE OF FLORIDA.

There was simply too much emphasis on judicial economy and too little emphasis in

safeguarding the constitutional rights of a person on trial for his life----Pablo San Martin.

Decisions in this regard made by the court below in the purported interest of judicial economy included to have a dual jury trial, the incorporation by reference of testimony heard in a previous trial, State of Florida v. Pablo San Martin, Case No, 92-6089C, and the decision of the trial judge to handle the trial in the instant case when he should have realized that he was far too prejudiced from presiding over the trial in the aforedescribed other case, but most important of all, the unyielding obstinance of the court below in refusing to sever SM's trial from those of co-defendants Gonzalez and Frangui and, for that matter, in failing to sever the trials of each of these three defendants from the other two.

As a result of this last decision, the failure to sever SM's trial from the trials of Gonzalez and Frangui, the very questionably-obtained statements/confessions of Gonzalez and Frangui were admitted in evidence in the joint trial of the three, and since neither Gonzalez and Frangui took the stand at the guilt phase trial, his counsel was unable to cross-examine these confessing co-defendants with the constitutional result that SM was denied his right to confront his accusers as guaranteed by the Sixth Amendment to the U.S. Constitution and by Art. I, Sect. 16, Constitution of the State of Florida.

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that the admission of a co-defendant's statements/ confessions at a joint trial violates the defendant's right to confrontation under the Sixth Amendment if that statement/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' statements/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 statements/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 statements/ 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 statement/confession with a proper limiting instruction, where the statement/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 by the court upon the recommendations of the prosecution, but it certainly wasn't done to eliminate any reference to SM's name and it, i.e., this redacting, most certainly did not eliminate any reference to his existence. To the contrary, the so-called pre-interview statements of both Gonzalez and Frangui and, as well, their formal "on the record" statements/confessions were filled with references to San Martin and his alleged part in the involved crimes.

As is evident from the discussions of the redacting of the statements/confessions at the trial and as well from the copies of the very obvious whited-out portions of the Frangui "formal" statements/confessions in the Record (R-193, R-195, and R-201), it is clear that the purpose of the court-approved redacting was to eliminate inconsistencies in the respective formal statements/confessions so as to facilitate their all being introducible in this joint trial. As SM's counsel argued vainly to the court, having all the statements/confessions redacted to the point that there were no or very few inconsistencies deprived such counsel of whatever chance he would have had of attacking the credibility of the parts of the co-defendants' formal statements/confessions.

What this type of redacting amounts to is that the court is doing something akin to what the former Soviet Union history rewriters used to do, i.e., it is rewriting the substance of what

a confessing defendant said and then having that submitted to the jury as the true substance. This is what happened in Bryant v. State, 565 So.2d 1298 (Fla. 1990) and as was done by this Court there, such redacting of the truth to a non-truth should be struck down as an impermissible breach of the admonition on the walls of many courtrooms in this state, to-wit: "We who labor here seek the truth."

If, as was held by a California appellate court, to-wit: People v. Fletcher, Calif. Ct. App. 4th Dist., No. DO1 8243 (1994), the eliminating of all references by a non-testifying co-defendant's statement/confession to another defendant is not always enough to avoid a violation of that defendant's Sixth Amendment Confrontation Clause right, as interpreted by Bruton, supra, how can it possibly be that a trial court can redact out substantive inconsistencies from the written statements/confessions of non-testifying defendants. The Kansas Supreme Court dealt with this problem and it held that the redaction of a non-testifying defendant's statement to cure a Sixth Amendment problem will not work if the redacter substantial changes the statement. State v. Rakestraw, Kan. Sup. Ct., No. 68,712 (1994).

But there is even another dimension to this whole affair, and that's that the court below compounded the unfair harm that had already been done to SM by refusing to sever his trial from those of Frangui and Gonzalez and by eliminating the inconsistencies in those co-defendants' statements/confessions, which was that it allowed the co-defendants statements/confessions to come in as direct evidence against SM.

A co-defendant's statement/confession must be excluded even when that statement/confession only corroborates the defendant's own confession, Cruz, supra. Further, an instruction that the jury should disregard the confession as evidence against the other defendant is insufficient to render it admissible. Bruton, 391 U.S. at 137, and Samuels v. Mason, 13 F.3d 522, 526 (2d Cir. 1993).

Still another facet of this mix is the question of whether the statements/confessions of Frangui and Gonzalez would have been admissible against SM in a severed trial where he alone would be the defendant. Undersigned counsel for SM suggests to the Court that the answer is a clear "no" for the Indictment in this case does not include among its several charges a conspiracy count, and such counsel submits to the Court that the only way Frangui's and San Martin's statements/confessions could have been properly received in evidence in a single trial against SM would have been if he had been charged with having been a party to a criminal conspiracy, and then if all the prongs of Section 90.803(18)(e), Fla. Stats., had been met the said statements/confessions would have been subject to admission under the co-conspirator admission exception to the Hearsay rule.

In United States v. Sitton, 308 F.2d 140 (9th Cir. 1992), the court held that no severance was necessary where the evidence would have been admissible in a separate conspiracy trial. It is SM's contention that it was the State's burden to make such a showing in the court below and that this simply was not done.

In deciding that a motion for severance is a discretionary matter for a judge, the courts of Florida have nevertheless recognized that severance is likely to arise in the course of trial. Menendez v. State, 368 So.2d 1278 (Fla. 1979). "The objective of fairly determining a defendant's innocence or guilt should have priority over other relevant considerations such as expense, efficiency and convenience. " Crum v. State, 398 So.2d 810 (Fla. 1981); Green v. State, 408 So.2d 1086, 1087 (Fla. 4th DCA 1982).

Rule 3.152(b)(1)(i), Fla.R.Crim.P., provides for severance before trial:

> "(U)pon a showing that such order is necessary to protect the defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of one or more of the defendants. "

However, when joinder of defendants or offenses causes an actual or threatened deprivation of the right to a fair trial, severance is no longer discretionary. United States v. Boyd, 595 F.2d 120 (3d Cir. 1978); Baker v. United States, 329 F.2d 786 (10th Cir. 1964). It is mandatory.

It is well recognized that joinder of defendants requires a balancing of the right of the accused to a fair trial and the public's interest in the efficient administration of justice. United States v. Zicree, 605 F.2d 1381, 1386 (5th Cir. 1980). No defendant should ever be deprived of a fair trial because it is easier or more economical for the government to try several defendants in one trial rather than in multiple trials. United States v. Boscai, 573 F.2d 827 (3d Cir. 1978). As the Court stated in King v. United States, 355 F.2d 700, 702 (1st Cir. 1966), "(a) joinder of offenses, or of defendants, involves a presumptive possibility of prejudice to the defendant. . . ."

For all these reasons the court below should have severed SM's trial from the other defendants and because this wasn't done his Federal and State Constitutional bundle of involved rights, i.e., the right to due process, the right to not be subjected to cruel and unusual punishment, and the simple basic right to a fair trial, were simply out to lunch for him.

POINT II

THE COURT ERRED IN ALLOWING THE PROSECUTION TO HAVE USED AS EVIDENCE AGAINST DEFENDANT SAN MARTIN HIS PURPORTED STATEMENTS/CONFESSIONS TO THE POLICE AND TO HAVE USED AS EVIDENCE AGAINST HIM THE PARTS OF FRANGUI'S AND GONZALEZ'S STATEMENTS/CONFESSIONS TO THE POLICE THAT WERE INCULPATING RESPECTIVELY, TO THOSE TWO DEFENDANTS, OR TO EACH OF THEM 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 was the case with the severance issue, this issue----the suppression issue----is another place where the interest of the court below in effecting judicial economies took precedence over the matter of the defendants' fair trial rights and other related federal and state constitutional protections. There simply was no excuse for testimony elicited at the suppression hearing in the earlier trial involving defendants SM and the statements/confessions he gave on January 18, 1992, i.e., the Raul Lopez case, No. 83-611 of this court, being considered as having been elicited in the instant case covering SM's statements/confessions given on January 18, 1992 (see "Order" at R-301).

So there is nothing to be found in the Record in this case to support the findings and fact and conclusions of law relative to the suppression hearing testimony of the State's witnesses and SM's witnesses concerning all aspects of the events leading up and involved in SM's alleged giving of pre-interview statements/confessions, followed by his formal interview on January 18, 1992, which, unlike the pre-interview interview, was reduced to writing with the result that was that testimony that has to be looked to is in the Raul Lopez case record, so the transcript references here will be to the transcript in that case. However, with reference to SM's statements/confessions given on January 21, 1992, the suppression testimony is in this Record, so reference will be made to the pages of the transcript in this appeal.

Metro Homicide Det. Mike Santos said he went to ICDC on January 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 SM 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-281, 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 January 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 Raul Lopez killing (TR-383-386).

SM obviously has admitted his involvement in this case, too, but that was not dealt with except by oblique reference thereto at the suppression hearing in the Lopez case. It was, of course, dealt with in great detail at the trial in the instant case after SM's suppression motion had been denied.

The same cross-case confusion also exists with reference to co-defendant Frangui, and it was with since the testimony about him in the Lopez case came first, that is where the revelations about the gathering of a massive police task force to find Officer Bauer's killer or killers first was described in court. This task force included probably officers from Metro-Dade,

North Miami, Hialeah, Miami, North Miami Beach, the FDLE, and probably the FBI, and clearly it is the sine qua non to its being formed that a police officer 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). The 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).

Then they 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 Robber 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 as 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 Dets. 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 shown 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, or leaving the room, or having otherwise not watched or 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-36). 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/confessions

about the Bauer case, the Hialeah case, and the Bird Road bank robbery case, and in that order (TR-367).

The only thing different about Gonzalez's statements/confessions was that unlike SM and Frangui, he was hauled out of jail by the police task force; rather, he was stopped while in his car and allegedly willingly accompanied the police to the police station. Gonzalez challenged this and rightly contended that he was in fact not free to simply walk away or drive his vehicle away from the scene and, indeed, the court below agreed with Gonzalez's position on this facet of the issue but the court went on to conclude that since there was probable cause to have detailed him, he was de facto under arrest.

However, as was the case with SM and Frangui, and the giving of their statements/confessions, it is also being contended that under the totality of the circumstances Gonzalez's statements/ confessions were not the product of a free will and were, in fact, involuntarily secured from him.

The motions to suppress the inculpating statements/confessions of the respective defendants were denied, and the jury heard over and over again what each of the three defendants had to say about their own and each other's role in the killing of Officer Bauer.

The court should have suppressed statements/confessions of all three defendants in their entireties because it cannot be said that they were the products of rational minds. As was made clear to the gathering of officers on January 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.

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 U.S. Supreme Court established procedural safeguards or the prerequisite requirement for the introduction of person's statements/confessions 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 SM or Frangui 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 statements/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 three defendants' inculpating statements/confessions, 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.W. 385 (1987), 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. Twomev, 404 U.S . 477 (1972). Succinctly stated, 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.

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 anv criminal cases pending or contemplated, " a copy of which was shown as having been furnished the State Attorney's office on January 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 Gonzalez's and Frangui's statements/ confessions, just as he does to his own because of the court's refusal to charge the jury that the statements/confessions 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 those co-defendants' motions to suppress their inculpating statements/confessions, 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 Sect. 777.011 (TR-l-5), then if under the law SM can be responsible everything Frangui and Gonzalez 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 each of them 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).

And with reference to SM's statement or statements/ confession or confessions, 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/confession 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/confessions 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/confession.

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, particularly with reference to murder cases. If a capital case defendant is going to have to suffer having his own statement/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 his suppression motion and of the suppression motions of both Frangui and Gonzalez and to do thereat what the court below said should be done with reference to how to consider the admissibility of the statements/confessions of the respective defendants, which was to consider them as a whole (TR-1359, 1360), but which is clearly not it into reference to the police procedures utilized to secure the defendants' confessions.

With reference to his statements/confessions to the police on January 21, 1992, regarding the location of the guns, it is San Martin's contention that because the taint of what was done to him on the 18th, these latter statements/confessions should have suppressed as well, because the giving of the statement/confession on the 21st was inarguably the product of the giving of the statements/confessions three days before. United States v. Hem-v, 447 U.S. 264 (1980), and Wong Sun v. United States, 371 U.S. 471 (1963).

With further reference to SM's statements/confessions to the police on January 21, 1992, the lower court itself made an implied finding that SM asked for a lawyer, which he didn't get. Further, it recited that it was also SM's contention that, "....although Nabut never threatened him, he was afraid he would be beaten if he did not answer the detective's questions (R-315). Regarding the former, the court said that since the Sixth Amendment right to counsel request applied to another case, it did not comply with the "offense specific" requirement of McNeil v. Wisconsin, 501 U.S. 171 (1991). Specifically, the court below stated to-wit (in its suppression order herein):

> "Clearly under the Sixth Amendment Frangui's claim fails since the invocation of right to counsel at issue here was executed in the armed robbery case and not in the present case." (R-309)

At a later point in its Suppression Order the court below stated:

> "As concerns San Martin's fifth (sic) amendment right to counsel, the same analysis conducted above in Frangui's situation is applicable to San Martin." (R-17)

It is SM's contention here that the "offense-specific" rule does not apply here because while the January 21st inquiry of SM about the location of the guns was----at least subjectively in Det. Nabut's opinion----about the Raul Lopez case, this is not the black and white distinction the court below made about the "invocation of the right to counsel here (being) executed in the armed robbery case and not in the present case" because while there were two different crimes

involved, the guns at the bottom of the canal were----according to the prosecution in both cases----used in the commission of both crimes.

Further in McNeil (501 U.S. at 178) the Court reasoned that because the Fifth Amendment is in a sense broader than that afforded by the Sixth Amendment, for a suspect to invoke the broad right he must affirmatively express "a desire for the assistance of an attorney in dealing with custodial interrogation by the police" (McNeil, 501 U.S. at 178).

And since the U.S. Supreme Court has noted that because the "average person" cannot be expected to comprehend the subtle distinctions between the Fifth and Sixth Amendments right to counsel, the two rights should be given coextensive protection in terms of the applicable standards for waiver. Michigan v. Jackson, 475 U.S. 625, 633 on 7 (1986). Any statements/confessions obtained in violation of a defendant's right to counsel are inadmissible in the prosecutor's case in chief. Michigan v. Harvey, 475 U.S. 344 (1990).

That the statements/confessions of SM, Frangui, and Gonzalez were received in evidence in the first place----and then repeated over and over again----in light of how they were obtained, was a true travesty of justice.

POINT III

THE COMBINATION OF THE PROCEDURE FOLLOWED IN THIS CASE OF SO-CALLED DEATH QUALIFYING THE JURY; THE MISUSE OF THIS PROCEDURE BY THE PROSECUTION TO PROSELYTIZE THE PROSPECTIVE JURORS AS TO THE STATE'S VIEW OF THE CASE; THE REFUSAL OF THE COURT TO GRANT THE DEFENSE REQUEST FOR INDIVIDUAL OR SEQUESTERED VOIR DIRING; AND THE ELIMINATION FROM THE JURY BY EITHER PEREMPTORY AND CAUSE CHALLENGES OF ALL PERSONS WHO DO NOT BELIEVE IN THE DEATH PENALTY RESULTED IN SAN MARTIN'S BEING DENIED THE DUE PROCESS OF LAW, THE EXERCISE OF HIS RIGHT TO A FAIR TRIAL, AND HIS RIGHT TO NOT HAVE INFLICTED UPON HIM CRUEL OR UNUSUAL PUNISHMENTS AS PROVIDED FOR AN PROTECTED BY

THE U.S. CONSTITUTION AND THE CONSTITUTION OF THE STATE OF FLORIDA.

The procedure utilized in the court below for "Death Qualifying the prospective jurors absolutely resulted in the selection of a jury that was "uncommonly willing to condemn a man to die." Such a jury violates federal constitutional standards and it is at least instructive that in the same decision declaring such a jury to be prohibited, the court also recognized that a state does have a legitimate interest in administering its capital sentence statute. See Wainwright v. Witt, 469 U.S. 412 (1985).

It is SM's contention here that the court below failed to properly control the conducting of the voir dire examination by lead prosecutor with the result that under the guise of death qualifying the jury he was really misusing the death qualification procedure to predispose the members of the jury panel to find SM and the other two defendants guilty of first degree murder and then to sentence them to death.

The most glaring example of this was the extent the lead prosecutor went to predispose the future jurors to find SM, the only non-shooter in this case, guilty as a principal to the actions of one or both of the other defendants, and after going on and on with such voir diring, the lead prosecutor finally got everybody mixed up as to the differences in the concepts of guilt liability as a principal and guilt liability under the felony murder rule (TR-526, 530).

The purpose of voir dire examination is to have a jury selected that will fairly and honestly try the issues in the case. Voir dire is considered by many trial attorneys to be the single most important part of a criminal trial. It is obviously easier for the trial judge to control the voir dire examination in an non-capital criminal trial to insure that the attorneys do not misuse the examination to try to predispose the prospective jurors to return the desired verdict because of the absence of the factor added in a capital case trial to "death qualify" the jury.

However, it is SM's contention that because of the far greater seriousness of what's at stake in a capital case trial, the responsibility placed upon the judge to protect the purity of the voir dire process is also concomitantly at a higher level,

And no matter how many trial seminars that lawyers go to where they are taught how to educate the prospective jurors to start out with a voir dire examination of the jury panel designed to predispose it to favor the result desired by the voir diring lawyer, that doesn't make this practice a proper one. This prosecutor overdid it in the extreme and the harm was compounded and made much worse because the trial judge refused to grant the Defense request for individualized or sequestered voir diring (R-244, 245 and thereafter).

With reference to this question, it is perhaps noteworthy that while the applicable provision of the Florida Rules of Criminal Procedure, i.e., Rule 3.300(b), provides that, "(T)he court may then examine each prospective juror individually or may examine the prospective jurors collectively," the law used to be that the court in a criminal case was required to examine each juror individually unless the parties consented to the jurors being examined collectively" (See former Florida Statute 913.02). That was a change not only that the legislature probably didn't have the constitutional power to make; worse yet----with reference to a capital case----it was a bad change.

It is SM's contention that the refusal of the court below to grant the Defense request for the individualized voir diring, which while obviously not constituting error with no other factors being considered, was very much in error when the court so ruled without ever intending to reign in the overzealous proselytizing that was about to occur. This was but another instance in this case where the court was more interested in effecting judicial economies than it was in giving the defendants----on trial for their lives----the fairest trial possible.

And when all of the above is coupled with the reality of what happens in the selection

of a capital case jury, which is that all prospective jurors who outright oppose the death penalty are removed for cause and all or most of those who don't like the death penalty but say they would recommend it if appropriate are taken off by the use of State peremptory challenges, it leaves a very unlevel playing field for the to compete to try to save his life.

Undersigned counsel is well aware of the United States Supreme Court's holdings in Wainwright v. Witt, supra; 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; nor would they prohibit the relief here being sought.

What is involved here is the Defendant's impartial jury right. A juror, to be impartial, must use the language of Lord Coke, be indifferent as he stands unsworn. Reynolds v. United States, 98 U.S. 145, 154; 25 L.2d 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 the prosecutor's and each other's beliefs on the death penalty over and over again.

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. Illinois, 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).

That is what happened here and Pablo San Martin prays that this Court will give him appropriate relief under any or all of the following provisions of the Declaration of Rights of the Constitution of the State of Florida, to-wit: Art. I, Sect. 2 (To Defend Life); Art. I, Sect.

9 (Due Process); Art, I, Sect. 16 (Fair Trial); and Art. I, Sect. 17 (The Prohibition of Cruel and Unusual Punishments).

POINT IV

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 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, 408 U.S. 238 (1972), 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, 408 U.S. 238 (1972), 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, which compounds the confusion to whether the conviction would be based on felony murder or premeditated murder.

POINT 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 STEVEN BAUER AND THEREFORE SAN MARTIN CANNOT BE PUT TO DEATH BECAUSE IT IS INDETERMINABLE FOR THE JURY'S VERDICT WHETHER SAN MARTIN WAS BEING FOUND GUILTY OF PREMEDITATED CAPITAL MURDER OF CAPITAL FELONY MURDER.

There was not a single shred of evidence----direct or circumstantial----that SM killed Steven Bauer; that he shot at him; or that he even carried a gun. Further, it was not at any time in this trial the contention of the State that SM fired a gun that killed Bauer or even shot him.

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).

So 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 invalid AC invalidates a death sentence even where three other AC's were found to be applicable, the whole guilt phase result needs to be vacated as being violative of SM's federal and state constitutional rights to due process, a fair trial, and his protection against having cruel and unusual punishment imposed upon him. 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. And, in this regard, while the "B" jury did not send a question out to the court asking how it was to distinguish between premeditated murder and capital felony murder, the "A" jury did and the answer the court gave was no help at all (TR-2159).

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).

Further, in this regard, it is SM's contention that Enmund v. Florida, 458 U.S. 782 (1982), governs as to whether San Martin can have the death penalty imposed upon him under the facts of this case, which were that he shot nobody and didn't even carry a gun, and that therefore he cannot be given the death penalty for alleged premeditated murder. The fact that the State has charged him with being a principal does not change this situation as it pertains under Gurganus and Enmund.

With reference to the holding in Tison v. Arizona, 481 U.S. 137 (1987), that one can have the death penalty imposed upon them for having participated in a major way and acted with

reckless indifference, it is SM's contention that that case applies, if it applies at all which is not being conceded, to the first degree felony murder charge against him.

For these reasons SM prays the Court to vacate his conviction for first degree murder and to vacate the sentence of death that has been imposed upon him.

POINT VI

THE COURT ERRED IN ALLOWING THE STATE'S TWO WITNESSES WHO WERE PRESENT WHEN THE INVOLVED CRIMES WERE COMMITTED TO TESTIFY AS TO THE LAST WORDS OF OFFICER BAUER.

The argument here is short and sweet. Both of the two bank tellers who were present when the involved crimes were committed, Lasonya Hadley and Michelle Chin Watson, testified as to the alleged last words of Officer Bauer.

Hadley said that Bauer said words to the effect, "... not to worry, that he was just shot in his leg" (TR-941-945).

Watson said that she heard Bauer say, "Oh God," and she said that he talked to her about where he thought he had been shot (TR-945).

Prior to these alleged statements of Bauer being testified to by the two tellers, Co-Defense counsel had moved in liminie to have them excluded and, in this regard, the prosecutor said the statements were, "okay, my God, I have been shot" and "are you all right?" State opposed the motion in liminie claiming that these statements constituted the hearsay exceptions of "excited utterances" and the "spontaneous rule. " And, in addition, State argued it needed to have the statements admitted to establish that Bauer was a police officer and not a security guard. The court, obviously buying this argument and doing so even though Defense counsel had apparently all stipulated that Bauer was a police officer, because----according to the court---- the probative value outweighs the prejudicial effect.

This argument of State was ridiculous in the extreme under the attendant circumstances, because the alleged last words of Officer Bauer did not in any manner relate to the issue of whether he was a police officer and therefore there was no way this alleged probative value could have outweighed the clear prejudicial effect of these words.

POINT VII

THE COURT ERRED IN REFUSING TO GRANT THE OBJECTIONS OF SAN MARTIN'S COUNSEL THROUGHOUT THE GUILT PHASE TRIAL TO STATE BEING ALLOWED TO HAVE INTRODUCED AS EVIDENCE AGAINST SAN MARTIN EVERY PIECE OF DOCUMENTARY EVIDENCE THAT CAME IN AGAINST CO-DEFENDANTS FRANGUI AND GONZALEZ.

It wasn't just the statements/confessions of Frangui and Gonzalez that came in as direct evidence against SM, it was also every other piece of documentary evidence pertaining to either Frangui or Gonzalez and the court below had ample opportunity to prevent this from happening because SM's counsel kept a drum beat of objections almost every time this happened throughout the guilt phase trial

But as though these objections were totally devoid of merit, the trial court routinely denied them without giving any reasons for such rulings. And so, sketches not made by SM, Miranda cards or sheets not pertinent to SM, fingerprint cards or sheets not involving his fingerprints, and an array of other evidence not applicable to him were received in evidence and the jury was not told one time that any of this evidence was to not be considered against SM.

There can be no doubt that all of these items of documentary evidence constituted hearsay for the rule is clear that if an out-of-court statement (or nonverbal conduct of a person if it intended by him as an assertion) is offered to prove the truth of the facts in the statement, it is hearsay. Ehrhardt, Florida Evidence (1993) at p. 541.

The error here was clearly a by-product of the trial court's refusal to sever these

defendants for trial purposes and it just compounded that error.

POINT VIII

THE COURT COMMITTED SENTENCING ERROR IN ALLOWING THE PROSECUTION TO CALL PSYCHIATRIST DR. CHARLES MUTTER AT THE SENTENCING HEARING BEFORE THE JUDGE ALONE AFTER THE PROSECUTION FAILED TO CALL HIM AS A WITNESS BEFORE THE PENALTY PHASE ADVISORY JURY.

Having lost the battle before the Sentencing Advisory Jury with respect to SM, State requested a hearing before the court before it passed the actual sentence at which it called as a witness Forensic Psychiatrist Dr. Charles Mutter, whom State did not call as a witness before the penalty phase advisory trial, that prosecutor's contention to the contrary notwithstanding (R-787).

Since the only thing that was in contention at the sentencing hearing before the judge was what mental health statutory and non-statutory mitigating circumstances applied to him and since the doctor called by SM's counsel, Dr. Lourenco, did not testify until after Dr. Mutter testified, what the State was really doing was presenting rebuttal evidence to the mental health mitigators contended for in behalf of SM before the jury. It is SM's very fervent plea to the Court that to have done so was really stretching the meaning of the language in R. 780(a) and (b), which subsections read as follows:

> "(a) Evidence. In all proceedings based on Section 921.141, Florida Statutes, the state and defendant will be permitted to present evidence of an aggravating or mitigating nature consistent with the requirements of the statute. Each side will be permitted to cross-examine the witnesses presented by the other side. The state will present evidence first.
> (b) Rebuttal. The trial judge shall permit rebuttal testimony." (Emphasis added)

It is SM's contention that it is not the intendment of the above two subsections of Rule 3.780 that the prosecutor can call a witness at the sentencing hearing before the judge to rebut

the mitigation testimony elicited in behalf of the defendant at the sentencing advisory jury trial.

More specifically, it is SM's contention that the last paragraph of subsection (a) reciting that, "(T)he state will present evidence first," does not justify the warping of the meaning of rebuttal evidence so as to allow the State to attack the case presented before the jury as to mitigation.

This procedure----if it is allowed to stand----makes a complete mockery of the concept that Florida capital case sentencing courts are supposed to give great weight to the recommendations of their sentencing advisory juries, See Tedder v. State, 322 So.2d 908 (1975).

POINT IX

THE LOWER COURT DENIED SAN MARTIN A FAIR SENTENCING HEARING BY REFUSING THE REQUEST OF SAN MARTIN'S APPOINTED COUNSEL TO ALLOW HER TO RETAIN THE SERVICES OF A MEDICAL EXPERT WITNESS TO HELP HER PREPARE TO CROSS-EXAMINE STATE WITNESS FORENSIC PSYCHIATRIST DR. CHARLES MUTTER BEFORE THAT SENTENCING HEARING AND/OR TO TESTIFY IN REBUTTAL TO DR. MUTTER.

It is clear from the Record that the decision of the prosecution to call forensic psychiatrist Dr. Charles Mutter as a witness at the final sentencing hearing to be held before the judge was sprung on SM's counsel at the last moment (TR-3128, 3 129). Thus SM's counsel was put into the box of having to ask the court to allow her to retain the services of another mental health expert to assist her in preparing to cross Dr, Mutter and/or to testify in rebuttal to Dr. Mutter.

The court turned her down (TR-3 130-3 134).

In this instance the court's motive was again the effectuation of judicial economy. Said the court, in pertinent part, in denying this request, to-wit:

> "... .the Court is at the end in terms of allowing any additional experts to testify. " (TR-3 134)

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 Maver v. Chicago, 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."

POINT X

THE COURT ERRED IN OVERRIDING THE RECOMMENDATION OF THE SENTENCING ADVISORY JURY THAT SAN MARTIN BE GIVEN A LIFE SENTENCE WITH THE POSSIBILITY OF PAROLE FOR THE REASON THAT IT APPLIED AN IMPROPER TEST IN DETERMINING WHETHER ANY MENTAL HEALTH MITIGATORS EXISTED WITH RESPECT TO HIM, FINDING ONLY TWO NON-STATUTORY NON-MENTAL MITIGATORS MITIGATING CIRCUMSTANCES TO EXIST WHICH WERE SO INSIGNIFICANT THEY COULDN'T POSSIBLY OUTWEIGH ANY AGGRAVATING CIRCUMSTANCES UNDER ANY CONDITIONS.

The court below cited this Court's decision in Dixon v. State, 283 So.2d 1 (Fla. 1973), relative to proportionality review but fell short in following Dixon when it came to the matter of determining whether any mental health mitigators existed with respect to SM.

In Dixon, supra, this Court stated:

> "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. Sect, 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. "

The plain fact of the matter is that the court below totally refused to consider anything whatsoever about SM as a mental health mitigator, statutory or non-statutory, except that he knew what he was doing and that was the end of it. In this regard, the lower court stated, in pertinent part, in the Sentencing Order in the Lopez case, which was made a part of the Record in this case, that (with reference to the claimed statutory mitigating circumstances there that SM was under the influence of extreme mental or emotional disturbance):

> "Life is made up of a long series of choices all of us must make. People ultimately are judged by the choices they make. The defendant, San Martin, is no exception." (TR-128)

It is also apparent from the said Sentencing Order in the Raul Lopez case (TR-719-741), that he was greatly impressed with and influenced by the findings of forensic psychiatrist Dr. Charles Mutter in that case that there were no mental health conditions that SM had or suffered from that rose to the level of a mitigating circumstance.

Evidencing this is the following language of the judge from the Raul Lopez Sentencing Order, to-wit:

> "The defendant argues in paragraph number two (2) at page 6 of his sentencing memorandum that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. The defendant presented the testimony of Dr. Jorge Herrera, a forensic neuro-psychologist, who testified that based upon tests he administered to the defendant he determined that the defendant is suffering from 'mild organicity.' His findings were confirmed by Dr. Antonio Lourenco, a neuro-psychiatrist, who mapped the defendant's brain. Dr. Lourenco found that San Martin has a lesion in the left temporal lobe of his brain. Both doctors agree that the defendant's brain damage is 'mild.' The court accepts the findings of Dr. Lourenco as true and correct. There is nothing in the record which refutes his findings, The question before the court is whether to accept the conclusion of Dr. Herrera, that the defendant's admittedly mild organicity substantially impaired his ability to appreciate the criminality of his conduct. Here again a quantum leap is made which seeks to hurdle the ever present obstacle of logic. At this juncture it is once again important to note that the defendant's other expert, Dr. Marina, does not opine that this mitigating factor applies to this defendant. Likewise Dr. Charles Mutter disagrees that this mitigator exists. The court agrees with the well reasoned judgment of Dr. Mutter." (Emphasis added)

However, the "well reasoned judgment" of Dr. Mutter as applied to SM at the sentencing phase of both this case and the Raul Lopez case is fatally flawed, which might not be a failure on his part as a psychiatrist but certainly is in his capacity as a forensic psychiatrist. Where he

has missed the boat is that he obviously does not know the difference between what constitutes "insanity" at the guilt phase of a capital case (or, for that matter, of any criminal case) and what constitutes a mental health mitigation at the sentencing phase of a capital case.

In this regard and expanding upon the above-quoted language from Dixon, supra, this Court stated the following in Maxwell v. State, 603 So.2d 490,491 (Fla. 1992), to-wit:

> "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. "

This holding in Maxwell, supra, is, of course, a restatement of what the U.S. Supreme Court stated in Lockett v. Ohio, 438 U.S. 586 (1978), which was that a mitigating circumstance is any aspect of the defendant's character or record and any of the circumstances of the offense that reasonably may warrant the imposition of a sentence less than death.

What Dr. Mutter and the judge in this case have done is to apply the McNaughton test to all claimed mental health mitigators which resolved in advance that none of them were applicable to SM. With Dr. Mutter there was only one test, did he know right from wrong when he did wrong and then based upon his flawed understanding of what constitutes a mental health mitigator, he rejected consideration of the contended for statutory mental health mitigator that the capacity of SM to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired (TR-792-795).

Dr. Mutter further testified at the sentencing hearing in the instant case that assuming that SM had "a borderline capacity for intelligence" that wouldn't "in and of itself" prevent him from knowing the nature and consequences of his action (TR-793). On cross, Dr. Mutter said he was not in dispute with the contention that SM had low borderline intelligence or with the finding

of Dr. Lourenco that SM had a lesion to the left temporal lobe (TR-798-800). He also said he had no quarrel with the contention that SM was a "concrete" thinker, but he refused to concede one inch on his thesis that none of these conditions had any effect on SM's appreciation of the consequences of his actions (TR-801).

Specifically, regarding "concrete" thinking, Dr. Mutter said:

> "Concrete thought is one clinical test that's used. When we use concrete tests we are speaking of people who----paranoid people who have severe organic----or people with intelligence limits are also concrete in thinking, but that's only one marker, one sign. But this has nothing to do with right and wrong." (TR-801)

It is SM's contention that the judge indulged in the same kind of right-and-wrong-is-the-only-test type of thinking when he rejected all the claimed statutory and non-statutory mental health mitigators in both cases. In the Raul Lopez case the judge recited in his Sentencing Order that he considered the testimony of Psychologist Dr. Donita Marina there that SM had a borderline intelligence IQ of 77, but that he failed to accept that this was so even though Dr. Mutter didn't quarrel with this finding. However, in both Raul Lopez and the instant case, the judge did find that Dr. Lourenco was correct in his conclusion that SM had a lesion on his brain but he nevertheless found that not a single mental health mitigator had been established in either case.

SM contends that this finding flies in the face of the holding in Skipper v. South Carolina, 470 U.S. 1 (1988), which laid down the mandate that under no circumstances could the sentencer give no weight to a relevant mitigating circumstance by consideration of the evidence regarding same. 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.

In Zant v. Stephens, 462 U.S. 862, 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."

There was no such narrowing here (with respect to SM) of the class of persons convicted of capital murder who are death penalty eligible, because the court below imposed an impermissibly higher standard of proof as to the contention of SM's first degree murder conviction should be mitigated by reason of some or all of his claimed mental health mitigators.

Further the court below gave little or no consideration to the life recommendation of the sentencing advisory jury, concerning which it apparently felt that that had been the result only because SM's counsel had made such an effective final argument to the advisory jury (TR-3734).

The court below in its Sentencing Order acknowledged its responsibility under the holding of White v. State, 403 So.2d 331 (Fla. 1981), to give great weight to the recommendation of the advisory jury but, unfortunately for Pablo San Martin, the Record in both the involved cases shows that this simply wasn't done.

When the judge got through rejecting all the statutory and non-statutory mitigating circumstances in the instant case, he left SM with two, that he had received God and had changed for the better in jail, and that he had had little parental guidance. However, the court below went on to say that he gave both of these little weight (TR-770, 771).

The reality is that no matter how much weight the court below gave to these two non-statutory mitigating circumstances, they would stand almost no chance when arrayed against the aggravating circumstances the court found, which would not necessarily have been the case had the court found and given some weight to some or all of the mental health mitigators being contended for by SM, but in the arena where SM was competing he never got beyond go with

this judge with his mental health arguments.

The judge in this case evidenced that he didn't think much about non-statutory mitigating circumstances to begin with for he didn't feel they were important enough to have been specifically charged about to the advisory jury and that it would suffice if the lawyers simply argued about them to the advisory jury

Pablo San Martin prays the Court to vacate the death sentence that the court has imposed upon him contrary to the recommendation of the sentencing advisory jury

POINT XI

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, Americans 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 the real solutions to the nation's crime problem will not be found during his lifetime and very likely will ever be found. The law and order thumpers want everyone to have the right to have any kind of gun ever invented, and then when kids raised in America's ghettos 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, 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 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 not only unconstitutional; it is unconscionable.

Clarence Darrow told the court in his successful argument for the lives of Defendants Loeb and Leopold to be spared that he had hoped to live to see the day that the death penalty would no longer be imposed in America, but he realized then that he wouldn't. One wonders if that day will every come to the most powerful nation in the world but, then, hope springs eternal.

POINT XII

THE COURT BELOW ERRED IN SENTENCING SAN MARTIN TO DEATH WHICH WAS A DISPROPORTIONATE SENTENCE IN THAT HE KILLED NOBODY, INTENDED TO KILL NOBODY, AND FIRED NO GUN.

Aside from the question of whether SM was convicted of capital premeditated murder, capital felony murder, or a combination of the two, the sentence of death proposed upon him by the court----after the sentencing advisory jury had recommended life----was disproportionate to other death sentences imposed by this Court in that there those sentenced actually killed someone or intended to do so, while here neither of these factors were present and, as a matter of fact, SM fired no gun and didn't even carry a gun.

Specifically, the sentence of death is disparate as compared to the life sentence received

by Pablo Abreu, who like SM carried no gun. Under the mandate of Dixon v. State, 283 So.2d 1 (Fla. 1973), San Martin prays the Court to objectively review this matter to ascertain whether, in fact, the imposition of the death penalty here constitutes a proportional application of the ultimate sentence .

POINT XIII

THE COURT ERRED IN CONSIDERING AND FINDING APPLICABLE THE AGGRAVATING CIRCUMSTANCE SET FORTH IN SECT. 921.141(5)(j), FLA. STATS,, THAT "(T)HE VICTIM OF THE FELONY WAS A LAW ENFORCEMENT OFFICER ENGAGED IN THE PERFORMANCE OF HIS OFFICIAL DUTIES.

Just as it was ridiculous for State to have argued that Officer Bauer's dying words overheard by the bank tellers were necessary to the State's burden of proving that Bauer was in fact a police officer, it was equally absurd for it to have argued the applicability of the aggravating circumstance that "(T)he victim of the capital felony was a law enforcement officer engaged in the performance of his official duties," for there was no way in God's green earth that it could be concluded that moonlighting as a bank security guard constituted the performance of official police duties.

It is therefore San Martin's plea to this Court that the considering and finding of this aggravating circumstance was clear error and that under the holding in Espinosa v. Florida, 120 L.Ed 2d 854 (1992), the weighing of this inapplicable aggravating circumstance should be held to have fatally tainted the entire sentencing process.

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 judgments 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 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128, this 28th day of December, 1995.

Respectfully submitted,

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