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

REPLY BRIEF OF APPELLANT

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POINT I

THE TRIAL COURT'S REFUSAL TO SEVER THE SAN MARTIN GUILT PHASE TRIAL FROM THAT OF CO-DEFENDANTS GONZALEZ AND FRANQUI, 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.

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 FRANQUI'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.

It is an unfortunate truth that both the Attorney General and the trial court have concocted a rationale justifying the receipt in evidence of the confessions of Co-Defendants Franqui and Gonzalez as direct evidence against Defendant San Martin that can only accurately be described as pure sophistry.

In this regard, the Court below in a written order set forth in toto, or almost in toto, in its brief herein (AGB-3-6) describes in great detail all of the alleged similarities between the confessions of San Martin, Franqui, and Gonzalez and concludes therefrom that said confessions "are indistinguishable as concerns the material issues in the case." (AGB-4).

Based upon this finding, the Court below then recited its conclusion of law as follows:

> "The court first finds that the defendants herein are 'unavailable' as contemplated by the United States Supreme Court in Lee, supra (referring to Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed 2d 514 [1986]).
>
> "The court further finds that the confessions of the defendants Frangui, San Martin, and Gonzalez contain indicia of reliability necessary to allow their introduction during a joint trial as direct evidence against each of the three defendants. Their motions for severance are accordingly DENIED...." (AGB-6)

In urging that this ruling be upheld, the Attorney General attempts herein to distinguish the involved holding below from that in Lee v. Illinois, supra, in the following language, to-wit:

> "Because the statements in Lee differed in material aspects, e.g., the roles of the defendants in the crime and this issue of premeditation, and because the surrounding circumstances did not provide any indicia of reliability, the Court found that the statement should not have come in. (AGB-41)

Following a case citation that would appear to be totally irrelevant to the discussion at hand, the Attorney General further recited:

> "Further, this court will look for the circumstances surrounding the making of the out-of-court material in determining its reliability. Lee, Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed 638 (1990)."

Thereafter, the Attorney General spends the next eight pages of his brief herein listing all the alleged similarities between the confessions of the three defendants, and after that he argues that after

a lengthy evidentiary hearing was held below with reference to the defendants' motions to suppress (the confession), the confessions were properly received as direct evidence against all three defendants because defense counsel had not established that their receipt was clearly erroneous. (AGB-49)

But addressing the question of whether the lower court was correct in denying the motions to suppress because of alleged constitutional improprieties in the manner in which they were secured was not the same as dealing with "the circumstances surrounding the making of the out-of-court statement in determining its reliability." In this regard, it is undersigned counsel's interpretation of the holding in Lee that since under Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed 2d 476 (1968), the introduction of a co-defendant's extra-judicial statement that inculpates the other defendant violates that defendant's Sixth Amendment right to confront the witnesses against him. (Lee at 476 U.S. 538, 539) And, since under Ohio v. Roberts, 448 U.S. 56, 65 L.Ed 2d 597, 100 S.Ct. 2531 (1980), a defendant's confession which inculpates a co-defendant is presumptively unreliable, the court below as a condition prerequisite to admitting the confessions of Franqui and Gonzalez into evidence at the trial below-----particularly as direct evidence against San Martin----- had to have found not only that there was a sufficient interlocking of facts as between the confessions of each of the said co-defendants, on the one hand, and that of San Martin, on the other, but also that the circumstances surrounding the making of each of the co-defendant's statements bore a sufficient "indicia of reliability" to rebut the presumption of unreliability that attaches to a co-defendant's confession (Lee at 476 U.S. 543, citing Ohio v. Roberts, supra).

More specifically, it is San Martin's contention that under Lee both bases for establishing the reliability of a co-defendant's confession needed to be established by the state, i.e., the circumstances

surrounding the giving of the confession and the significant interlocking between the co-defendant's confession and that of the defendant.

Succinctly stated, this first "indicia of reliability" being called for by Lee for a Bruton exception was not established below and, in this regard, the fact that the court there refused to grant the suppression motions of each of the three involved defendants cannot under a correct interpretation of the law be found to constitute such a finding because the burden upon the prosecution to establish that the circumstance in which each of the confessions were secured indicated their reliability was a higher burden than the prosecution bore on the suppression issue, such burden being higher because of the prosecution's need to rebut the presumption of unreliability of a co-defendant's statement.

In this regard, it is interesting to note that despite the trial judge's pattern of reducing all the rulings he deemed important to lengthy written orders complete with legal analysis and citation of authority therefor, including the holding in Lee, he nevertheless wholly failed to recognize his first prong to the application of the "indicia of reliability" exception to following the Bruton holding that the confession of a non-testifying co-defendant which inculpates another defendant is inadmissible in a joint trial because such violates the said other defendant's Sixth Amendment Confrontation Clause right.

Further, although the court below and the Attorney General in its brief herein cite with approval the holding in Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed 102 (1987), that holding very clearly and inarguably does not auger well for the Attorney General's position on this issue.

In Cruz, the court held that the Sixth Amendment Confrontation Clause barred the admission

of a non-testifying co-defendant's confession which incriminated the joint trial defendant even though the jury was instructed to not consider the confession as evidence against the defendant and even through the defendant's own confession, which corroborated the co-defendant's confession, had been received in evidence against the defendant.

In a majority opinion authored by Justice Scalia, the Court, after noting the Sixth Amendment right extended to state court defendants under the Fourteenth Amendment, as held earlier in Pointer v. Texas, 380 U.S. 400, 404, 13 L.Ed 2d 923, 85 S.Ct. 1005 (1965), recited, in pertinent part:

> "[5] Ordinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt. Therefore, a witness whose testimony is introduced in a [*pg. 170] joint trial with the limiting instruction that it be used only to assess the guilt of one of the defendants will not be considered to be a witness 'against' the other defendants. In Bruton, however, we held that this principle will not be applied to validate, under the Confrontation Clause, introduction of a non-testifying co-defendant's confession implicating the defendant with instructions that the jury should disregard the confession insofar as its consideration of the defendant's guilt is concerned.....While "devastating" practical effect was one of the factors that Bruton considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 U.S., at 136, 20 L.Ed 2d 476, 88 S.Ct. 1620, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor was one of the justifications for excepting from the general rule the entire category of co-defendant confessions that implicate the defendant in the crime. It is impossible to imagine why there should be excluded from that category, as generally not 'devastating,' co-defendant confessions that 'interlock' with the defendant's own confession. [T]he infinite variability of inculpatory statement (whether made by defendants or co-defendants), and of their likely effect on juries, makes [the assumption that an interlocking confession will preclude devastation] untenable. Parker v. Randolph,

> 442 U.S., at 84, 60 L.Ed 2d 713, 99 S.Ct. 2132 (Stevens, J., dissenting). In this case, for example, the precise content and even the existence of petitioner's own confession were open to question, since they depended upon acceptance of Norberto's testimony, whereas the incriminating confession of co-defendant Benjamin was on videotape. In fact, it seems to us that 'interlocking' bears a positively inverse relationship to devastation. A co-defendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms----in all essential respects----the defendant's alleged confession."

The confessions of the co-defendants should not have come in in the first place in a joint trial with San Martin and, even more certainly, they should not have come in without an instruction that they were not to be considered as evidence against San Martin.

This was harmful error in the most serious type of case known to the criminal law, i.e., a capital case, and it was clearly not harmless beyond a reasonable doubt. For this reason alone, a guilt phase trial reversal should be unhesitatingly ordered by this Court. See Chapman v. California, 386 U.S. 18 (1967).

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.

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 OR CAPITAL FELONY MURDER.

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.

There is somewhat of a scrambling of apples and oranges in both the initial brief of San Martin herein and the Brief of Appellee State of Florida covering the arguments under the above points, so undersigned counsel will herewith attempt to unscramble same.

This scrambling occurs at the guilt phase portion of the trial as between what is necessary to prove guilt of first degree premeditated murder, on the one hand, and first degree felony murder, on the other. It occurs again at the penalty phase of this trial regarding which of the said two types of capital or first degree murder are subject to the death penalty and which, if either, is not subject to the death penalty. And, finally, this scrambling occurs again in an overlapping of these concepts as between their effect at guilt phase and their effect at penalty phase.

The holdings in Enmund v. Florida, 458 U.S. 782, 73 L.2d 1140, 102 S.Ct. 3368 (1982); Tison v. Arizona, 481 U.S. 137, 95 L.Ed 2d 127, 107 S.Ct. 1676 (1987), both involve consideration of capital or first degree felony murder convictions with the former holding that the death penalty cannot be imposed on a person who aids and abets the commission of a felony during the course of which a murder is committed by another and the latter case narrows this by holding that in a felony

murder case the death penalty was federally constitutionally an allowable punishment for one who participated in the commission of a felony during the course of which a killing took place by one of the person's co-participants and where the non-killer was a major participant in the felony and acted with reckless indifference to human life.

In one of the state cases cited by the Attorney General, Hall v. State, 403 So.2d 1321 (Fla. 1981), this Court did hold that a non-killing participant in a first degree murder case can be convicted of such offense and sentenced to death as a principal or aider and abettor, but the language of the case is unclear as to whether first degree premeditated murder-----as versus first degree felony murder-----was involved.

The holding in another of the cases cited by the Attorney General, Foxworth v. State, 267 So.2d 647 (Fla. 1972), is really not applicable to the issue at dispute here because while it involves a first degree premeditated murder conviction, it does not involve the death penalty and, as was stated hereinabove, the imposition of the death penalty in the instant case is a critical part of the infirmity that undermines the constitutional efficacy of the result achieved in this case.

Likewise, the holding in James v. State, 453 So.2d 786 (Fla. 1984), is not relevant to the issue in dispute here if for no other reason than that decision is totally unclear as to whether first degree felony murder was charged along with first degree premeditated murder. In this regard, the James decision recites that the indictment charged first degree premeditated murder but then at a later point it recites and discusses an instruction to the jury regarding felony murder. The James decision does serve one useful purpose here, however, it makes the point undersigned counsel is trying to make that Florida courts tend to treat the two forms of capital murder as identical twins.

Trying to reach a bottom line in this thicket of confusion, undersigned counsel for San Martin

submits to the Court that if----as the Court held in Gurganus v. State, 451 So.2d 817 (Fla. 1984)---- one is to be found guilty of premeditated murder, such person must necessarily be found to have had a fully formed conscious purpose to kill which existed in his or her mind a sufficient length of time to permit reflection, then it follows a priori that another person cannot be sentenced to death for having vicariously committed premeditated murder. What must be done directly cannot be done indirectly, for the contrary to be true is an irreconcilable contradiction in terms and logic.

So the bottom line is logic, that San Martin cannot logically be put to death for the crime of premeditated first degree murder, and since it cannot be ascertained whether the advisory jury found him guilty of premeditated first degree murder, or both, the law cannot countenance him being executed for the latter as the trial judge specifies should be done in his sentencing order, when there is the possibility-----however slight-----that the jurors convicted on the premeditated murder charge but acquitted on the felony murder charge.

The simple act of the trial judge's submitting a special interrogatory verdict to the jury at guilt phase wherein the jurors would have reported their advices as to guilt or lack of guilt as to each of the two forms of first degree murder would have avoided this can of worms but, unfortunately, the court below did not risk erring on the side of rendering this capital case defendant the fullest justice on this call, opting instead to rely on State's argument----both here and there----that requiring a capital case guilt phase jury to report its specific findings as between premeditated and felony murder is unnecessary under Florida law. As was argued in this appeal in San Martin's initial brief, if such is a per se principle of law in this state, it needs to be charged so as to at least not to be applicable in this case where it works an unconstitutional hardship on this capital case defendant.

In addition, San Martin submits to the Court that it should strike down the guilty first degree

murder verdict and judgment since it is unascertainable as to which of the two forms of first degree murder he was found guilty of, it may have been as to the premeditated murder charge, and if that was the case, there must be a reversal because such finding would have denied him the equal protection of the law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and by Art. I, Sect. 9, of the Constitution of the State of Florida, i.e., the State Due Process Clause, since a defendant who acted alone in killing another person and committed the acts charged as to San Martin in the instant case could at most be found guilty of second degree murder. Obviously, one cannot be found guilty through being a principal or aider or abettor when there is no one else to be a principal to or to be aided or abetted.

But, more importantly, this Court should strike down the sentence of death imposed on San Martin for these reasons even if for the efficacy of the verdict and judgment were to somehow withstand the constitutional and legal deficiencies argued hereinabove under these points. The advisory jury was right as to what the sentence should be.

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.

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.

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 MITIGATING CIRCUMSTANCES TO EXIST WHICH WERE SO INSIGNIFICANT THEY COULDN'T POSSIBLY OUTWEIGH ANY AGGRAVATING CIRCUMSTANCES UNDER ANY CONDITIONS.

From the point of view of arguing the above points in the most logical sequence, the overall argument proceeds from the latter point, which is that the trial court below completely emasculated the whole concept of considering claimed mental health mitigators as a basis for imposing the life sentence over the death sentence by its accepting and adopting the thesis of State's mental health expert, psychiatrist Dr. Charles Mutter, that no claimed mental health mitigator was even worthy of consideration if it did not include that the defendant did not know right from wrong or that he did not comprehend the consequences of his actions when the involved killing took place.

In this regard, the Attorney General impliedly concedes the efficacy of this argument here being advanced in behalf of San Martin by turning to alleged inconsistencies as between San Martin's mental health experts rather than facing head-on the uncontestable point that both Dr. Mutter and the sentencing judge demonstrated their adherence to the contention that not knowing right from wrong or not knowing the consequences of one's actions are the only true mental health mitigators. And this the bottomline of the Attorney General and of the court below is clearly

contradictory of the holding of this Court in Dixon v. State, 283 So.2d 1 (Fla. 1973) that, "(M)ental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance."

And the fact that the court below based its denial of the San Martin's claimed mental health mitigators on this incorrect assumption as to the state of the law as advanced by Dr. Mutter is persuasive in and of itself as evidence of that court's disdain of the life recommendation of the advisory jury----rather than giving that recommendation the great weight it should have been given----since that court in effect gave its approval to the prosecutorial decision to not even allow the advisory jury to hear the testimony of its vaunted mental health expert by relying in this regard almost completely on evidence not heard by the jury. What a farce this made of the alleged great importance of the advisory jury's recommendation and, in this regard, none of the decisions cited by the Attorney General go to the point that the sentencing court was so bamboozled by Dr. Mutter's contention as to what constitutes a mental health mitigator and/or that court was so blinded by its own concept of what the law in this area should be, that it didn't even find that the claimed mental health mitigators existed. And it reached this conclusion by its claimed adherence to the law and to what it found the facts to be.

The old saying that the object of words is to conceal thoughts would seem to be very applicable to the many written orders, especially including the sentencing order, entered into the record by the judge below, who of his own volition presided over the involved resentencing proceeding below and who overrode the jury's recommendation of the life sentence for a defendant who neither killed nor intended to kill to impose a death sentence upon him.

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

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.

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.

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.

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.

San Martin has nothing to add in this Reply Brief as to the arguments made under these points and reavers and reaffirms those arguments.

CONCLUSION

For all of the reasons herein cited it is respectfully submitted that the Court grant to this Defendant the relief he asked for in his Initial Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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 21 day of June, 1996.

Respectfully submitted,

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