IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,258

MICHAEL RHAE IRVINE,

APPELLANT,

VS.

THE STATE OF FLORIDA,

APPELLEE.

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

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Appellant MICHAEL RHAE IRVINE takes this appeal from a sentence of death imposed following his conviction of two counts of first degree murder and two counts of burglary. In this brief, Mr. Irvine, one of four defendants in the trial court, will be referred to by name, as will the three co-defendants Dee Dyne Casteel, James Allen Bryant and William E. Rhodes. Appellee will be referred to as the state.

The symbol **"R"** will designate references to the Record on Appeal which includes the record documents and transcripts of proceedings in the trial court.

STATEMENT OF THE CASE

On July 13, 1984 a ten-count indictment was returned in Dade County, charging James Allen Bryant, Dee Dyne Casteel, Michael Rhae Irvine and William E. Rhodes in Count I with burglary of the dwelling of Arthur Venecia on June 19, 1983, with intent to commit murder; in Count II with first degree murder of Arthur Venecia by cutting his throat; in Count III with burglary of the dwelling of Bessie Fischer on August 20, 1983 with intent to commit murder; and in Count IV with first degree murder of Bessie Fischer by strangling her (R 6801 to 6803).

Count V charged all four defendants with robbery, but that charge was dismissed as against all four defendants, prior to trial (R 7676; 6803; 767).

The remaining counts, VI through X, charged Casteel and Bryant with grand theft of property belonging to Arthur Venecia. Michael Irvine was not named in those counts (R 6803 to 6806).

A number of issues were raised during three years of pretrial procedural skirmishing. Some were litigated prior to trial, some during trial and others were raised continuously and repeatedly throughout the proceedings. For example, Irvine filed pretrial motions for severance of offenses and severance of defendants (R 7640 and 7645).

During trial, Irvine emphatically made numerous and repeated motions for a separate trial (R **607; 755; 785; 799; 806; 855; 859; 871; 1030; 1055; 2064; 3708; 3755; 4800; 5117;** 5664), and also included the failure to grant a severance of defendants as a ground for his motion for a new trial (R **7702).**

Irvine filed a motion to adopt all pretrial motions filed by the co-defendants (R **7657).** At trial, the court ruled that an objection by one defendant would be presumed to apply to all defendants on the same grounds (R **1092).**

Prior to trial, defendant Casteel made a motion, which was specifically adopted by Irvine, for an evidentiary hearing to determine how the state makes the decision to seek the death penalty in a particular case. Defendants contended that the state's decision is an arbitrary and capricious one, depending solely upon which prosecutor is assigned to a given case. The prosecutor admitted that the decision to seek the death penalty was by his evaluation alone (R **60, 61).** The trial judge found that if each assistant makes his own decision, the process may well may be arbitrary, and agreed to hold an evidentiary hearing (R **60, 62).** The state sought appellate relief, which was granted by this Court. Reno v. Person, **497** So.2d **1** (Fla. **1987) (R 783, 784).**

Irvine filed a pretrial motion to suppress the statements which he gave to the police in both Marion, North Carolina and in Miami. A hearing on the motion to suppress

was conducted prior to trial. The motion was denied. This issue also was raised in Irvine's motion for a new trial (R **7679, 7702, 303** to **376, 565** to **570, 578).**

Defendant Casteel filed a pretrial motion alleging that the state failed to make a prima facie showing of corpus delicti of homicide or burglary, absent the defendants' statements, which motion was adopted by Irvine (R **380** to **556, 565; 578; 581; 583).**

There also was a pretrial motion for individual voir dire of prospective jurors (R **7665).**

Because all four defendants had made statements to the police asserting varying degrees of culpability of the three co-defendants, and because the trial court refused to grant a severance, all statements had to be redacted in order to remove references to the names of co-defendants. Names were removed and replaced with **"someone"** or pronouns such as **"they."** The tape recorded statements were sent to a company in Fort Lauderdale where they were dubbed with different voices. Defendants all argued vehemently against the redaction process since it altered the evidence in such a way as to change the meaning of the statement.

Severance was denied and a joint trial commenced on June **15, 1987 (R 1119).** On July **17, 1987** the jury returned verdicts finding Michael Irvine guilty of both counts of burglary and both counts of first degree murder (R **6114** to

6115; 7692 to 7695). The other three defendants also were found guilty on all counts (R 6105 to 6113; 7521 to 7529; 7754 to 7758). Judgments of guilt were entered (R 7537; 7540; 7543 and 7546).

Advisory sentence proceedings commenced on July 30, 1987 (R 6158). During those proceedings, all defendants objected to the state's use of a large chart demonstrating for the jury, aggravating vs. mitigating factors (R 6476 to 6508). On July 31, the jury recommended the imposition of the death penalty for Michael Irvine by a vote of 11 to 1 for the death of Arthur Venecia and by a vote of 12 to 0 for the death of Bessie Fischer (R 6686; 7700; 7701).

Prior to imposition of sentence, Irvine adopted co-defendant Casteel's motion to vacate the jury's advisory recommendation on grounds of possible perjury of a state witness during the sentencing phase of the trial (R 6693 to 6709). This motion is not in the record prepared by the clerk for Michael Irvine, but it may be found in the record prepared for Dee Casteel at page 895, and at page 904 with exhibits.

Sentence was imposed on Michael Irvine and on William Rhodes on September 15, 1987. James Bryant and Dee Casteel were sentenced on the following day. Each of them was sentenced to death for one of the two murders.

The court sentenced Michael Irvine to death for the murder of Bessie Fischer; to a consecutive life sentence for the murder of Arthur Venecia; to a consecutive life sentence for the burglary of the dwelling of Arthur Venecia; and to a concurrent life sentence for the burglary of the dwelling of Bessie Fischer (R 6712 to 6715; 7711; 7716 to 7723).

Notice of appeal was timely filed (R 7724) and these proceedings ensue. This Court's jurisdiction is invoked pursuant to Article V, Section 3(b)(1) of the Constitution of the State of Florida, Section 921.141 (4), Florida Statutes and Rules 9.140 (b)(4) and 9.030 (a)(i) of the Florida Rules of Appellate Procedure. This Court also has jurisdiction to review the first degree murder conviction which did not result in the death penalty, as well as the other convictions arising from the same trial as the death penalty conviction. See Riley v. State, 366 So.2d 19, 20 n. 1 (Fla. 1978) appeal after remand 413 So.2d 1173, cert. den. 459 U.S. 981; Huckaby v. State, 343 So.2d 29, 30 n. 1 (Fla. 1977).

STATEMENT OF THE FACTS

This case arises from the April 19, 1984 discovery of two skeletons, one male and one female, in a pit on the property located at 21900 S.W. 134th Avenue in South Dade County, Florida. The male, found with clothing and a blanket, was in a box, somewhat preserved. The female skeleton was found directly in the ground, completely detached, but in a confined area with a wristwatch and eyeglasses (R 3908, 3926 to 3933). They were identified as Arthur Venecia, the middle-aged, homosexual owner of the International House of Pancakes restaurant in Naranja, and his 82-year old mother, Bessie Fischer (R 4693, 4701).

Defendants argued that from the skeletal remains, there was no evidence of criminal activity, and that the only evidence that a crime had been committed emanated from statements given by the woman and three men who were charged with the crimes. The indictment alleged that Arthur Venecia was murdered in July of 1983 and that Bessie Fischer was murdered in August of 1983. A police investigation did not begin until March of 1984, after Dee Casteel dictated a statement to her daughter in the presence of a friend, about events of the previous summer. The friend reported what she heard to the police.

The record reflects that Geneva Regan and Dee Casteel were both waitresses at the International House of Pancakes

(IHOP) restaurant in Naranja, although they did not work there at the same time. Dee Casteel had a drinking problem. Arthur Venecia, a known homosexual, was the owner of the restaurant. His live-in lover, James Allen Bryant, was the manager. Venecia cared for his elderly mother and regularly brought her to the IHOP for dinner (R **3729** to **3732, 3741, 3745).**

As manager, Bryant had access to the restaurant's cash receipts and helped himself to money from the cash register. He lived well, wore nice clothes and jewelry, and drove a Lincoln town car. In December of **1982,** Bryant and Venecia had a spat about several things. Bryant had a new, younger boyfriend named Felix. Venecia knew about Felix. Bryant complained about Venecia's drinking and the fact that Bryant liked to go out partying, but Venecia did not. Venecia complained that Bryant was taking too much money from the restaurant (R **3732** to **3737, 3787).**

In late **1982,** Venecia invited Geneva Regan to come over and see his new home, a one bedroom brick house on five acres of property. Also on the property, there was a trailer where Venecia's mother, Bessie Fischer lived, and there were three greenhouses and a barn (R **3738** to **3740, 3822).**

In April of **1983** Geneva Regan moved out of Florida. At Christmas time, she called the IHOP and learned that Arthur Venecia was not there. She spoke with Dee Casteel and with

Bryant. They told her that Venecia was in North Carolina looking at property (R 3741, 3742).

In February of 1984, Geneva Regan returned to Naranja. The IHOP had been repossessed by the parent company. Casteel and Bryant were no longer working there. Dee Casteel and her three children were living in Arthur Venecia's house (R 3742 to 3747).

On March 20, 1984 after drinking all morning and napping in the afternoon, Casteel awoke and told Geneva Regan that she had something to say, and she wanted Susan (her 17-year old daughter) to write it down so she could sign and date it (R 3747 to 3750).

Casteel's Statement in Presence of Geneva Regan

Geneva Regan was instructed to testify about what she heard, without naming any defendants other than Casteel. According to Regan, Dee Casteel said that Arthur Venecia and Bessie Fischer had been killed (R 3753 to 3764).

Regan testified that Casteel said that Arthur Venecia was murdered on June 19, 1983 and on the next day, "they" went to his house to dispose of the body, which was still in the bedroom. They wrapped it in a bed sheet and put it in a wardrobe in the carport. They cleaned up the blood with sheets and towels and put them in the wardrobe with the body. The body remained in the garage for four to six weeks, after which they moved it to the barn because they did not want

Venecia's mother, living nearby in the trailer, to notice the odor. The body was later buried in a hole in the yard (R **3764** to **3768).** At trial, a redacted version of Casteel's dictated statement was read into evidence by daughter Susan. A portion of that statement reads: "The day the body was moved to the barn, I took Mrs. Fisher [sic] to the hairdresser to get her away from the property." (R **3871).**

Geneva Regan further testified that Dee Casteel said that Bessie Fischer was unable to care for herself; that she (Casteel) brought Fischer her meals; and that when Fischer asked about her son, Arthur Venecia, Casteel told Fischer that he was in North Carolina on vacation, and to buy property. The testimony was that Casteel said that "someone" said that Fischer was beginning to be too nosy, and they would have to dispose of her, too. Because Fischer would not allow just anyone to come inside her trailer, they told her that repairmen would be coming out to fix the leaking roof. On August **20, 1983,** Casteel took Fischer her dinner. As she was leaving, two men drove up. Casteel told Fischer they were the roof repairmen. The next day, Casteel returned to the trailer. Fischer was dead inside. Casteel was upset. The figure of **$2,500** was mentioned as the amount paid for **"the** job." Eventually, Fischer's body was placed in the pit, a forklift was used to take the wardrobe with Venecia's body from the barn to the pit and the hole was covered with a backhoe (R **3768** to **3772).**

The foregoing was written down by Susan Mayo and signed by Dee Casteel in the presence of Geneva Regan. Regan said that she was upset by what she had heard and she went to the police (R 3773). According to Casteel's daughter Susan, Casteel wanted to make a statement before witnesses because following a recent argument with Bryant, Casteel was in fear for her life (R 3853).

The Investigation

Once Geneva Regan reported what she had heard to the police, an investigation began. On April 19th, a crime scene technician went to Venecia's house, which was being renovated by its new owner. The technician testified that there were no signs of prior violence in the house (R 3906 to 3909, 3919). As he photographed the interior of the home, a backhoe was excavating a pit on the property some hundred feet away from the house (R 3912, 3923).

Inside the pit, there was a wooden wardrobe containing clothing, a blanket and a skeletonized body (R 3926, 3927). More skeletonized remains were found in another area of the pit. The bones of the second skeleton were detached, but in a confined area. A watch and dentures were found near the skeleton, eyeglasses atop the skull (R 3930 to 3033, 3937).

Wayne Tidwell, who runs a backhoe equipment rental company in south Dade, testified that in June of 1983 he met with Dee Casteel at 21900 S.W. 134th Avenue. She hired him

to dig a trash pit, for which Casteel paid him **$280;** and she later called him to come out and fill in the pit for which she paid **$180.** In April, **1984,** the police asked Tidwell to reopen the hole. The bodies were found (R **3947** to **3968).**

The medical examiner testified that the cause of death was homicide by unspecified means (R **4744).** Actually, she was unable to ascertain any cause of death from the bones, and only concluded death by homicide based upon information given to her by the police, that is the statements made by the defendants, and her view of the scene (R **4762).**

Statements Taken From Michael Irvine

Detective John Parmenter testified that on May **4, 1984** he and another Miami detective traveled to Marion, North Carolina to take a statement from Michael Irvine. They went to his place of employment, and then to his home with Eddie Smith, a local police sergeant who knew Irvine (R **4364** to **4373; 4395** to **4399).** According to Sergeant Smith, it was **9:30** in the morning when he and the Miami detectives went to the filling station where Irvine worked. He was not there, so they went to his home. Irvine answered the door. Smith introduced the detectives and asked Irvine to come to the station for questioning. Irvine agreed (R **4400** to **4402).**

At the station, they advised him of his rights. A rights waiver form was filled out at 12:18 **p.m. (R 4403, 4407, 4408).** The Miami detectives were with Michael Irvine

until 3:00 that afternoon. They did not dispute that they came to North Carolina for the specific purpose of taking a statement from him; they did not have a warrant (R 4405).

Irvine agreed to give a tape-recorded statement (R 4412). That tape, as redacted was admitted and published at trial over defense objection, and the jury was given a transcript to use, over defense objection (R 4414, 4418).

On May 16, 1984 Michael Irvine was returned to Miami. A sworn statement taken from him in Miami, before a court reporter, was admitted and published to the jury over defense objection (R 4418 to 4422). As redacted, that statement was read aloud at trial at R 4423 to 4434.

On cross examination, Detective Parmenter admitted that his purpose in traveling to North Carolina was to obtain a statement or confession from Michael Irvine, and also that he did not tell Irvine why they wanted to talk to him until after reading his rights at the station. Counsel asked why so much time passed between signing the rights waiver form and taking the taped statement. Parmenter said that Sergeant Smith was mistaken when he said that they got to Irvine's house at 9:45; it was really 11:30 (R 4448, 4451, 4452, 4453).

The detective acknowledged that Irvine stated that although he was present both times, it was someone else who strangled Bessie Fischer and someone else who killed Arthur

Venecia (R **4457, 4458).** Counsel inquired why the tape recorder was not running from the beginning of the interview until **2:00** when the taped statement was taken, and elicited that the detectives simply chose not to record their entire conversation with Michael Irvine (R **4460).**

Three Defendants Testify

Ultimately, three of the defendants testified in their own defense, Dee Casteel (R **4827** to **4924),** Michael Irvine **(R 5255** to **5391)** and William Rhodes (R **5394** to **5466).** After they testified, in guise of rebuttal, the state published their full, unredacted statements to the jury **(5508, 5521, 5564, 5581).** James Allen Bryant rested without presenting any evidence (R **5240).**

Dee Casteel

Dee Casteel testified that she and her friend, Michael Irvine had a standing joke that it would be easier to kill her husband than to divorce him, but it was always said with a smile. Michael Irvine, she said, is not a killer. Bryant heard about the joke and asked her if she knew someone who could have his lover, Venecia killed. Casteel thought Bryant was joking (R **4843** to **4847, 5216).**

At Bryant's insistence, Casteel went to Irvine with Bryant's inquiry. Irvine thought she was joking, but said if someone wanted to pay him, he would get a friend and they

would rough up Arthur Venecia and rip him off. There was never any intent to kill him (R 4848, 5219, 5224).

Casteel said that Bryant told her that he had to get rid of Arthur Venecia. Not only was Bryant in love with Felix, but also, he had caught Venecia in bed with another man. Bryant, she said, called Irvine and told him he did not care what it cost to get the job done (R 4860 to 4863).

A couple of nights later, Irvine and a man Casteel did not know (Rhodes), met Bryant in the Pancake House parking lot. Casteel saw the three of them leave together. She did not think that Venecia was going to be killed. She said she had no personal desire to have Venecia killed; and that she felt morally responsible for his death, but did not go to the police because of her fear of Bryant (R 4868 to 4891).

Casteel said she did not know about Venecia's elderly mother who lived in the trailer, until after Venecia's death. Casteel found Bessie Fischer to be a cantankerous woman, but she became her caretaker, nonetheless. When Fischer asked about her son, Casteel and Bryant told her that Venecia was in North Carolina. Bryant, she said cut Fischer's telephone line, and kept her locked out of the main house. The day Casteel and Bryant moved Venecia's body from the garage to the barn, Casteel took Bessie Fischer to the beauty shop to get her out of the way. It was, she said, Bryant's idea to kill Bessie Fischer (R 4872 to 4878).

Michael Irvine

Michael Irvine testified that he was 42 years old, divorced, had a 9th grade education and was employed in the summer of 1983 as an auto mechanic at Yapell's Amoco in Homestead, where he worked with William Rhodes. Irvine and Dee Casteel had a standing joke about getting rid of her husband. That summer, Casteel came to Irvine because her boss wanted his lover killed. Irvine thought it was a joke, but figured that he and Rhodes could make some money and have a good time ripping off "the little fag" (R 5255 to 5263).

Irvine said he and Rhodes met with Casteel and Bryant at the IHOP. Irvine and Rhodes pretended that they were going to kill Venecia. They asked for $2000, to be paid one-half before and the other half after. That night, Casteel brought Irvine an envelope containing $1000, which Rhodes and Irvine split. The contract was to take place the next night, but nothing happened for two or three weeks. It seems the next day, Bryant tried to kill Venecia and wound up in the hospital. When Dee called with the news, Irvine thought "it was over," and he and Rhodes laughed because they each made an easy $500 (R 5264 to 5270).

Later, Bryant called Irvine and offered to pay $5000 to kill Venecia. When Irvine told Rhodes, they decided to play along with a ripoff. Irvine and Rhodes were paid another $1500. The next night Irvine drove Rhodes and Bryant to

Venecia's house. Bryant, he said, came along to give directions (R **5270** to **5273).**

When they arrived at the house, Bryant unlocked the door and waited outside. Rhodes and Irvine went into the house. Irvine stayed in the living room. Rhodes went into the bedroom. Irvine heard a voice in the bedroom say **"Don't** hurt me." Irvine said that he did not go into the bedroom, did not know what happened in there and he left the house. Bryant, who had been waiting outside, went into the house. Rhodes came out. Then, Bryant came out and they all left. Irvine dropped off Bryant at the IHOP; Irvine went to work: Rhodes left. Casteel brought more money, which Irvine split with Rhodes (R **5273** to **5276).**

Irvine testified that he did not know what had happened in the house, but he was afraid. He continued to work with Rhodes, but he never discussed what happened that night with Bryant or Rhodes. Then, in July, Rhodes told Irvine that someone needed roof work on a trailer in the country. Two or three days later, Irvine went with Rhodes to a house trailer. At first, he did not recognize where they were. When they arrived, Dee Casteel was there. An elderly woman was at the door. The place started to look familiar. As Casteel was leaving, she told the woman that Irvine and Rhodes were workmen who came to repair her trailer (R **5277** to **5281).**

Irvine said he stayed in the kitchen, talking with the woman. Then, he saw Rhodes come up from behind the woman and strangle her with a pair of pantyhose. Irvine said that he "got the hell out." He did not know that the woman was going to be killed. Five minutes later, Rhodes came out. He told Irvine he, meaning Irvine, "didn't see **anything."** Irvine left and had a couple of drinks. Later that day, Casteel gave Irvine an envelope, which he gave to Rhodes without looking inside. It contained money. Rhodes gave Irvine half. Irvine said he did not want it, but he took it. Rhodes then told Irvine that they would have to get rid of the body. Irvine felt that he had no choice, or he would have been killed too. He went with Rhodes back to the trailer. They took the woman's body, and placed it in the pit (R 5281 to 5285).

A few days later, Irvine left for Marion, North Carolina where he stayed with his mother in law, and worked two **jobs.** He said that on the morning of May 4th he had gotten home from work shortly before the detectives came to his door. They said they wanted to talk to him, but did not say why. They finally asked what he knew about the murders of Arthur Venecia and Bessie Fischer. They told him he was free to leave. Irvine told them it started off as a ripoff. After four hours, they tape recorded his statement. They said if he told them what he knew, he could be back home in a couple of days (R 5286 to 5293).

Irvine said that before they began tape recording, he told them what had happened, but they were not interested. After four hours of telling him what to say, they turned on the tape. When Irvine said he wanted to go home, the detectives said there would be a warrant for his arrest for first degree murder. Irvine did not challenge extradition. They returned him to Miami and took another statement. According to Irvine, Detective Parmenter told him that he had not sufficiently implicated Dee Casteel, and if he would give the answers that Parmenter wanted, he could be home in a couple of weeks. In order to be able to go home, Irvine gave a statement which further implicated Dee Casteel. The detectives did not want to hear about a ripoff, but when he gave they answers they wanted, they still did not release him (R **5294** to **5301**).

Irvine testified in court as in his statement, that he did not participate in either killing; that he had no knowledge that anyone was going to be killed; and that he had no intent to kill anyone (R **5302**).

William Rhodes

In his testimony, William Rhodes admitted that he went into the bedroom and wrestled with Venecia. He said he called for Irvine, but Irvine did not come. By his own admission, Rhodes hit Venecia hard and ran out; but Venecia,

he said, was alive when he left. Bryant went back into the house and was there for three to five minutes after Rhodes left (R **5394, 5398, 5399, 5434, 5461).**

Rhodes testified that it was Irvine, and not Rhodes who strangled Bessie Fischer. Rhodes said that he was outside the trailer and that when he walked into the kitchen, Michael Irvine was standing behind Fischer with both hands around her throat. Rhodes said he went to the car to drink some scotch, and when Irvine came outside and said, "we're even," that he (Rhodes) denied killing Venecia. They returned to the station and did not discuss it again. A couple of days later, Irvine told Rhodes they had to bury Fischer's body. They rolled her up in a blanket, carried her to the pit, and as Irvine went to get the shovel, Rhodes said, "Forgive me, she was a good **woman." (5404** to **5407).**

SUMMARY OF THE ARGUMENT

In the first point, we discuss numerous examples of prosecutorial misconduct which so permeated this trial that Michael Irvine did not receive a fair trial. For example, on voir dire, the prosecutor minimized the role of the jury in the decision to impose the death penalty. The prosecutor also asked questions on voir dire that virtually made his opening statement to the jury, such that one prospective juror said that if the defendants did what the prosecutor said they did, they should be sentenced to death. The prosecutor continuously asked improper questions in which he repeated and summarized previous testimony. At the sentencing phase, the prosecutor argued nonstatutory aggravating factors, and elicited inflammatory, but perjured testimony from the medical examiner about the gruesome details of the murders, which previously she testified were homicides by unspecified means.

In the second point, we discuss the severe prejudice visited upon Michael Irvine in being tried jointly with three other defendants. His rights of confrontation and cross examination were severely restricted. The use of redacted statements was a sham because the jury could tell who each X, Y and Z was. During jury selection, certain prospective jurors made statements which prejudiced Michael Irvine, and which would not have been made in a separate trial, for example, one prospective juror said that co-defendant Rhodes

looked like Ted Bundy, and another juror said that because of the intense questioning by so many lawyers, she now thought that "there is some guilt here. . . the burden would be more on the defense to prove that they are not guilty. . . I didn't feel it when I first walked in." The defenses were severely antagonistic. This case was classic Bruton. The defendants' statements were not "interlocking." Michael Irvine should have been tried separately.

In the third point, we discuss the overwhelming prejudice created by the joinder of two murders in the same indictment, where the murders occurred at different times and at different locations. Because of the highly emotional factual scenario, deaths of mother and son, skeletonized remains found buried in a pit, there can be no doubt that the jury could not have separated the evidence and considered each charge separately. Michael Irvine was convicted based upon the cumulative integrative effect of the evidence.

In the fourth point, we discuss the statements given by Michael Irvine to the detectives in Marion, North Carolina and in Miami. The facts showed that Irvine was visited at his home in North Carolina by two Miami detectives and a local police sergeant, who said they wanted to talk to him, but did not say why. They admitted that they went to North Carolina for the specific purpose of taking a statement from Irvine concerning the Fischer/Venecia murders, but that they

did not tell him the subject of their inquiry until after he had signed a rights wavier form. This has been held to render the waiver involuntary, as well as the resulting statement. The second statement taken in Miami 12 days later, was tainted by the initial illegality. Therefore, both of Irvine's statements were made involuntarily. They were inadmissible and should have been suppressed.

In the fifth point, we discuss the motion for a new trial filed by Michael Irvine which raised several meritorious grounds for relief, including that the trial court erred in granting Irvine's motion for a judgment of acquittal of first degree murder because felony murder was neither alleged nor proven. The state charged burglary with intent to commit murder. In order to convict Irvine of burglary, the jury had to find premeditated first degree murder. Felony murder was an inappropriate theory on this indictment. Therefore, it also was error to instruct the jury on felony murder. Because the jury may have convicted Irvine on that theory, a new trial is required.

In the sixth point, we discuss the pretrial motion for individual voir dire and sequestration of jurors during voir dire. This procedure would have avoided the tainting of the venire by those prejudicial remarks mentioned above, and surely would have encouraged more openness in responding to probing personal questions about each juror's attitude toward the death penalty. We ask the Court to take sensitive note

of a new Rule of Criminal Procedure in the Commonwealth of Kentucky which requires individual voir dire of jurors regarding capital punishment and pretrial publicity.

In the seventh point, we discuss the cumulative prejudicial effect of all of the errors which occurred in the trial court, most of which are the subject of issues raised in this brief, or in the briefs of the co-defendants and adopted by Michael Irvine.

In the eighth point, we discuss the constitutional defects in the sentencing procedure, as well as in the sentence of death imposed on Michael Irvine. First, we find that the jury's recommendation was not valid as contemplated by Florida law because the (1) prosecutor argued nonstatutory aggravating factors, (2) the medical examiner gave allegedly perjured testimony about grizzly details of the manner of death and the extent of suffering endured by the victims, where previously she could only testify to homicides by unspecified means and (3) the state's floating death chart emphasized the aggravating and minimized the mitigating, permitting the prosecutor to argue silently what Florida law prohibits him from arguing aloud. And in any event, death is not an appropriate sentence in this case when compared with cases where the death penalty has been upheld by this Court.

In the ninth point, Michael Irvine adopts the arguments and authorities raised by the three co-defendants.

POINT I

PROSECUTORIAL MISCONDUCT WAS PERVASIVE THROUGHOUT THE PROCEEDINGS IN THE TRIAL COURT AND DEPRIVED IRVINE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL AND A JURY MADE UP OF A FAIR CROSS SECTION OF THE COMMUNITY

At the outset of this discussion, we recognize the well-established principles that the defendant is entitled to a fair trial, not a perfect trial, and that the prosecutor may deal hard blows, but not foul ones. This case was tried by a prosecutor who consistently dealt foul blows throughout the proceedings beginning with the jury selection process, through examination of witnesses and even at the death penalty phase. As a result, Michael Irvine did not receive a fair trial.

In this case, as in Molina v. State, 447 So.2d 253 (Fla. 3d DCA 1983), the same prosecutor

> . . . consistently tried to get before the jury matters which he knew or should have known they were not entitled to receive. . . the prosecutor's conduct was inexcusable.

Concurring opinion of Judge Pearson, 447 So.2d at 256. See also page 255, where Judge Pearson noted that this prosecutor's behavior was not just "attributable to inadvertence or ignorance and that he is an unfortunate early victim of our recently announced policy of invoking disciplinary procedures in appropriate cases." This prosecutor was no novice.

With all due respect, the record reflects that this prosecutor is not just zealous, he is masterful at the art of

overkill. As the proceedings progressed, it became clear that as so much time and effort was devoted to this complex case, the trial was going to be completed at all costs. A mistrial would not be granted no matter what happened. The prosecutor capitalized on the situation.

The trial judge stated several times, that if his rulings were erroneous, then they were consistently erroneous; and this Court would guide him in not making the same mistakes in future cases. We suggest that based upon the pervasive acts of misconduct in this case, each of which prejudiced Michael Irvine in the eyes of the jury, a new and fair trial is warranted.

Prosecutor Violates Caldwell During Voir Dire

During jury selection, over objection, the prosecutor delved extensively into the statutory sentencing scheme, thus injecting matters totally irrelevant to the prospective jurors' qualifications to serve. He conditioned them to believe that an advisory recommendation for the death penalty was of minimal significance. See R 1366:

> You understand you don't sentence anyone either individually or as a jury. In the State of Florida, you never make a sentence. Do you understand that?
>
> There is only one person in this courtroom that I know of that would ever, should there be a conviction, ever sentence anyone and that would be his Honor, Judge Person.

These remarks clearly violate Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2639 (1985), which holds ". . .

that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." This was a deliberate attempt by a prosecutor who knew better, to bias the jury in favor of rendering a death sentence.

Other Misconduct During Voir Dire

Additional misconduct was committed during jury selection when the prosecutor improperly included many of the facts of his case in his questions to the prospective jurors, for example, "when people hire people to do criminal acts for them and their level of responsibility for hiring people to do crimes like murder?" (R 1305). As another example, the prosecutor told the jury, ". . . that this was a double first degree murder case. There are two people who independently at different times were murdered" (R 1348). The prosecutor virtually made his opening statement in voir dire (R 1349).

In fact, he was so convincing that one juror answered a question about the death penalty by saying (R 1362):

> . . . If they are charged with the crime you said they did, they are supposed to have the death penalty.

At R 1885, the prosecutor asked, "If more than one person is involved in any particular action and they are acting together, do you think that there is a shared responsibility." Defense counsel's objection was sustained.

State Excludes Blacks From the Jury

At 2551, 2552, defense counsel noted that the state was systematically excusing blacks from the jury. Of five peremptory challenges made by the state on Friday, June 19th, all were black Americans. Counsel requested a Neil inquiry which was denied (R 2554). Of the 80 prospective jurors, only 12 were black Americans, and of the state's seven peremptory challenges, five were exercised against blacks. The defendants did not exercise any peremptory challenges against blacks. A motion to strike the panel was denied (R 2654).

Presumably because there was no Neil inquiry, and because the motion for a mistrial already had been denied, the prosecutor did not hesitate to exclude still more black jurors. See R 3034, 3389.

Gonzalez Violation: Prosecutor Continuously Summarizes and Repeats

Another instance of prosecutorial misconduct at trial, was the continuous summarizing of testimony and repeating questions previously asked and summarizing answers previously given (R 3968 to 3971), which is another prosecutorial problem not unknown to the Third District. In Gonzalez v. State, 450 So.2d 585 (Fla. 3d DCA 1984), that court reversed a conviction based upon improper prosecutorial questioning and comment which permeated and unalterably tainted the trial.

Cross examination is to elicit testimony about facts and to test the credibility of the witness. Questions summariz-

ing or repeating earlier testimony do not lead to admissible testimony and serve only to recapitulate the testimony of the state's witnesses at a point in the trial when recapitulation is not called for. The state does not have the right to make a closing argument in mid-trial and a second at the conclusion. Gonzalez, Judge Pearson concurring, 450 So.2d, 587.

The prosecutor began asking the prohibited summarizing questions on the first day that that witnesses were presented by the state, and continued the next day (R 3899, 3968). The court had to remind the prosecutor that it had "sustained one such objection yesterday." Defense counsel stated (R 3970):

> I can object to every question and you can sustain it. If there is a conviction, according to Gonzalez, if that technique is used throughout the trial, it gets reversed.
>
> It's much simpler for the Court to direct [the prosecutor] to either ask the questions properly . . . but I don't want to stand up in front of the jury and object to every improper question. . .

The prosecutor was admonished to ask questions without building on what the witness said by reciting facts previously elicited (R 3971). But the questions persisted. Another motion for a mistrial on Gonzalez grounds was made at R 5034, based upon the prejudicial effect of repetition in questions.

Other Improper Prosecutorial Questions

The record is replete with improper questions, defense objections sustained by the court and then another improper question on the heels of the last. See, for example, the cross-examination of Dee Casteel by the prosecutor: objection

sustained (R 4945); objection sustained (R 4952); question rephrased (R 4963); objection sustained (R 4976); objection sustained (R 4980); objection sustained (R 4981); objection sustained (R 4982); two objections sustained (R 4993); objection sustained (R 4995); objection sustained (R 4997); objection sustained (R 4998); objection sustained (R 4999); objection sustained (R 5000); objection sustained (R 5001); objection sustained (R 5002); question rephrased (R 5009); objection reserved (R 5014); objection sustained (R 5022); objection sustained (R 5024); objection sustained (R 5039); objection sustained (R 5057); objection sustained (R 5071); objection sustained (R 5099); objection sustained (R 5100); objection sustained (R 5103); objection sustained (R 5104); objection sustained (R 5106); objection sustained (R 5110); question rephrased (R 5114); objection sustained (R 5116); objection sustained (R 5136); objection sustained (R 5137); two objections sustained and all counsel invited up to the bench (R 5138); two objections sustained (R 5145); objection sustained (R 5146); objection sustained and sidebar (R 5147); the cross examination concluded at R 5150.

The court addressed the problem in detail at R 5011 (emphasis added):

> . . . I've been sustaining what I think is an overkill on a word . . . because that completely reversed the meaning of what she said; . . . when you change key words like that, like "talked about" to "negotiate", I sustain those objections because to you it may mean the same, but to the jury it may mean somethins different. . .

Defense counsel again moved for a mistrial on Gonzalez grounds, because the prejudice is so fundamental, that sustaining obections cannot cure it (R 5034 to 5036).

Overkill With Statements

When the prosecutor wanted to question Casteel about one of her statements and wanted her to read it, defense counsel objected on confrontation grounds and because this would be the third or fourth time the prosecutor had gone into the same subject matter. There was another motion for mistrial on Gonzalez grounds, and because it was outside the scope of direct examination (R 5116 to 5120).

The trial judge found at R 5121 to 5224 that the statement was "the same as you have cross examined her on for five hours;" and asked if it was necessary "to go back to this line by line and ask her questions as to what she already said." He warned the prosecutor not to "rehash" testimony.

The court had ruled, but the tenacious prosecutor was not willing to give up the fight for overkill. He continued to argue with the court by suggesting additional grounds to support his presentation of cumulative evidence (R 5125 to 5128). His persistence paid off (R 5128 to 5129). At 5147, defense counsel moved for a mistrial on grounds of continuous repetition and attempts to circumvent the court's ruling.

After presentation of the defense cases, the prosecutor sought, and was granted leave to publish to the jury (as rebuttal), the full, unredacted statements of the three

defendants who testified at trial. Defense counsel argued that this was not proper rebuttal, and that it was cumulative at best and extremely prejudicial at worst (R 5486 to 5535). In yet another instance of overkill, the prosecutor read the entire statement of Irvine to the jury at R 5564 to 5581 and the entire statement of Casteel at R 5581 to 5643.

Misconduct at Sentencing Phase

When the trial concluded, it was clear that if mistakes were made, a higher court would have to correct them. Misconduct or not, there would not be a mistrial. Apparently confident that nothing he would do would result in a mistrial, the prosecutor set about the sentencing phase with even greater prosecutorial zeal than the guilt phase.

a. Nonstatutory Aggravating Factors

First, the prosecutor persisted in arguing nonstatutory aggravating factors in the guise of rebuttal to the defendants' presentation of mitigating factors. With respect to Dee Casteel, the prosecutor argued (R 6568 to 6569):

> My question to you is this: Based on the evidence which you heard in this trial, is this lady Dee Casteel, a lady which has care, comfort, concern for the sanctity of the mother child relationship, is her concern for a mother's relationship to her child, based upon the evidence which you heard in this trial, such and so deep that she should be rewarded by being given a mitigating circumstance?

Argument that Casteel does not respect the sanctity of the parent-child relationship, was nonstatutory aggravation.

Next, the prosecutor attacked Casteel's evidence that she is a cell counselor at the jail, by arguing that she is a leader and as such, she arranged the murder of Venecia. "She gets the job done when she has a plan of action. She is good at what she does." When defense counsel objected to this this nonstatutory aggravating factor, the court responded:

> . . . we are on the battlefield now.
>
> It's gone too far to turn around. Somebody else's going to have to decide this, too much smoke on the field, too many booms going off for this Court.
>
> And I am just going to rule on them and preserve your record and deny your motion because I don't know if it's taking the form of non-mitigating [sic] aggravating (R 6574).

Then, in "rebuttal" to Irvine's evidence of mitigating factors, the prosecutor asked (R 6584):

> What might Mike Irvine's attorney argue to you that he has which mitigates, which outweighs these awful aggravating circumstances?
>
> Well, his ex-wife twice, she says he is a nice guy, they are still friends, this man who regularly, he not only cheated on her throughout the first marriage, he cheated on her throughout the second marriage.

And with respect to William Rhodes, the prosecutor argued that he "took some property to give to one of his many girlfriends." Defendant's objection was sustained (R 6585).

As defense counsel kept objecting to these improper arguments, the prosecutor expressed his displeasure with the objections. It appears that knowing that a mistrial would not be granted, he tried to take control of the proceedings.

The prosecutor said that he was

> . . . getting real annoyed. He keeps interrupting me * * * I think it's just really rude. He can save his objections * * * He is not letting me complete my argument * * * I am going to ask defense counsel reserve their arguments, make them at the conclusion of the argument.
>
> They can make notes and preserve whatever area they think is appropriate at the conclusion of the argument.
>
> THE COURT: But the objection has to be made simultaneous (R 6565 to 6567).

b. The State's Floating Death Chart

The state has a large chart demonstrating aggravating vs. mitigating factors which it uses in death penalty cases. Even if that chart serves some proper purpose in other cases, its use was totally unfair and prejudicial in this one because it allowed the prosecutor to argue silently to the jury what he could not argue aloud.

The court directed the state to delete the numbers on the chart listing the various factors, and all other matters which did not apply specifically to this case (R 6484 to 6485). As a result, so many of those mitigating factors had to be taped over, that the jury must have thought that this case was so awful that no mitigating factors applied (R 6486)

The prosecutor did not deny that he was selective in excluding nonstatutory mitigating factors from the chart, "That's for you to argue," he said, and defense counsel stated: "I want to make sure this is marked because this

document is going to bring this case back and I want to make sure we don't lose it." (R 6487).

The prosecutor argued vigorously for the chart. Without it, he said, his argument would take considerably longer (to write all aggravating factors on a blackboard). He said it was proper because it had been used in other trials (See R 6525 to 6529). He told the court that it would make things easier. The court said "In a matter of human life, I don't want easy to enter into the picture." (R 6510).

c. Perjury of State Witness

whether actively solicited by the prosecutor, or passively admitted without correction, the medical examiner's testimony was entirely different at sentencing with respect to the cause of death, than it was at a pretrial hearing and at trial. Defendants alleged in a motion to vacate the jury's advisory recommendation for the death penalty, that the state allowed the medical examiner to give perjured testimony with respect to the cause of death and the extent of suffering endured by the victims, where previously she testified only that the cause of death was homicide by unspecified means.

The motion alleged that a jury instruction that both homicides were ". . . heinous, atrocious or cruel" was given even though the evidence presented during the guilt/innocence phase of trial was insufficient as a matter of law to warrant that instruction; and the state must have told the

witness to change her testimony to justify the instruction.

At the guilt/innocence phase, Dr. Rao testified that the cause of death of both Venecia and Fischer was homicide by unspecified means. But at the penalty phase, she testified that Venecia drowned in his own blood, he attempted to scream as he drowned, death was slow and he was conscious as he died; and that Fischer was strangled, strangulation was by ligature, Fischer had difficulty resisting, she was conscious for ". . . a few minutes," during the attack and the death process was comparatively slow.

d. Prosecutor Makes Demands *of* Defense Counsel

In closing, the prosecutor argued that the murder of Venecia was cold, calculated and premeditated (R 6553):

> I defy, I defy anyone of the defense attorneys in this case to come up to you, demand of them, demand of them - -

Defense counsel objected and made a motion for a mistrial. The trial judge ruled that ". . . if words were used challenging the defense lawyers to do anything in the case, it's improper." (R 6554).

For the many serious instances of prosecutorial misconduct throughout these proceedings, this Court should reverse Irvine's convictions and remand this cause for a new and fair trial, with such directions as the Court deems appropriate.

POINT II

THE TRIAL COURT CONSTITUTIONALLY ERRED IN REFUSING TO GRANT A SEVERANCE OF DEFENDANTS BECAUSE THE JOINT TRIAL OF IRVINE WITH CASTEEL, BRYANT AND RHODES, DEPRIVED IRVINE OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, THE RIGHT TO REMAIN SILENT, THE RIGHT TO CONFRONT HIS ACCUSERS, THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND THE RIGHT TO BE PROVEN GUILTY BEYOND AND TO THE EXCLUSION OF A REASONABLE DOUBT

The record reflects that the state fought hard to try these four defendants together, and won. That victory however, was achieved at the unacceptable price of forfeiting Michael Irvine's constitutional rights, including the rights to due process and a fair trial. Once the trial court had committed to trying these defendants jointly, it was clear that nothing was going to change that decision. It is up to this Court to provide guidance in such cases in the future, and to ensure that Michael Irvine will receive the fair trial which he was denied.

From the record, it is clear that the trial judge embarked on this hazardous journey with the best of intentions, seeking to do everything possible to protect the rights of each defendant. The task was not just mammoth, it was impossible. Even with all good faith efforts, given the defendants' irreconcilable and antagonistic defenses, it could not be done. The defendants not only had to defend against the state, but also against the co-defendants placing responsiblity on one another. The only way

Irvine could be tried fairly, would be in a separate trial, or in a joint trial excluding co-defendants' statements.

Written and Oral Motions for Severance

The record reflects that Michael Irvine first filed a motion for severance of defendants and separate trials in November of **1984** (R **7645)** and that he continuously and repeatedly throughout the proceedings, sought a severance from the three co-defendants and a separate trial. The motion alleged that Irvine gave two statements in which he repeatedly and adamantly denied knowledge and participation in both murders. In contrast, the co-defendants' statements implicated Michael Irvine. As a result, the joint trial deprived Irvine of his right of confrontation and cross-examination as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. See Bruton **v.** United States, **391** U.S. **123, 88** S.Ct. **1620 (1968).** The motion was argued at R **603** to **632.**

In April of **1987,** Irvine renewed the motion for severance (R **7686),** alleging that the state's intensity in pursuing a joint trial was a direct result of the fact that without the statements of Casteel, Bryant and Rhodes, the state could not prove a prima facie case of guilt against Michael Irvine.

In August of **1987,** as grounds for his motion for a new trial, Irvine again argued that the court erred as a matter of law in denying the pretrial motion for severance of defen-

dants in light of Bruton problems, and severely antagonistic defenses (R **7702**).

Prejudice From Joint Trial: Jury Selection

Severance motions were argued pretrial (R **785, 799, 806, 855, 859**) and during jury selection (R **2019**). The record reflects that on the third day of jury selection, an incident occurred which would not have happened in a separate trial. Following intense questioning of the prospective jurors by the state and by counsel for the defendants, prospective juror Embi said in the presence of the venire (emphasis added) (R **2019**):

> My feeling because of the line of questions and the way the majority of you have addressed them, not only this group, but the other group, I feel that it has sort of been implied, you know, that there is some guilt here.
>
> I feel from the questioning . . . I think the burden would be more on the defense to prove that they are not guilty. . . .
>
> * * *
>
> I didn't feel it when I first walked in.
>
> I feel that way from the line of questioning that you are all are concerned so much about the death penalty. . .

The following day, Irvine's counsel moved for a severance from the co-defendants (R **2064** to **2065**):

> . . . I believe sitting here the fourth day, I have only been able to address the jury one time in that four-day period. The jury is obviously expressing their sentiments, that especially Ms. Embi, I think she speaks for a number of jurors

> especially Mr. Fine from yesterday, that when they came into this courtroom prior to four days of questioning they could at least follow the presumption of innocence, not believe Mr. Irvine is guilty as he sits here, who after four days of repetitious basically prosecutorial oral closing argument and other questions to follow, they can no longer follow their constitutional principles that they had when they came into this courtroom.
>
> Additionally, in light of recent questioning by counsel for Mr. Bryant, two prospective jurors who I would have selected on behalf of Mr. Irvine, are now subject to cause or challenge for cause by the State, you know, ignoring all my prior requests for severance, in regards to the statement and subsequent redactment, the antagonism between Mr. Irvine and Mr. Rhodes, I don't believe that I can get a fair trial for my client, Michael Irvine in this case in light of the sentiments expressed by the jury and respectively would move for a severance at this time.

Counsel also moved to strike the panel because having heard Ms. Embi's remarks, they could no longer judge the case fairly. The motion to strike the panel, and the motion for severance were denied (R **2066**).

This record is replete with other bizarre and extremely prejudicial occurrences. For example, counsel for one defendant made a motion to excuse counsel for another defendant and to have new counsel appointed, alleging that the subject attorney was ineffective and that his questions on voir dire were prejudicial to the other three defendants (R **2068**).

Later, prospective juror Tanna, in the presence of the entire venire, made an outrageous remark about one of the defendants which surely prejudiced all defendants (R 2928):

> Mr. Rhodes, he makes me - - intellectually, I understand what you are saying and I understand what [the prosecutor] is saying, but emotionally he makes me think of Mr. Bundy who killed all those coeds.

The seed was planted. The jury was tainted, but there was no mistrial and there was no severance and a jury was selected. This train was leaving the station, was picking up speed and was ready to crash through every constitutional road block along its way.

Another motion for severance was made during the testimony of Susan Garnett Mayo, Casteel's daughter who was permitted over defense objection, to read her mother's redacted statement to the jury. Although it did not refer to Irvine by name, it did contain a reference to "hitmen" and to the Amoco station where he worked (R 3557; 3865). At the conclusion of Mayo's testimony, counsel moved for a mistrial and renewed his motion for a severance (R 3901):

> I know how hard the Court and even the State went to try to prevent references to my client, Mike Irvine. Unfortunately, [Bryant's counsel] elicited the statement as far as the role of the other people, were Mr. Irvine and Mr. Rhodes.
>
> That in conjunction with the statement regarding the hitmen, the statement about the gas station, it is inconceivable to suggest that the jury doesn't know Mr. Irvine and Rhodes are the hitmen referred in the statement.
>
> * * *
>
> I would also renew the motion for severance in light of the additional statements made implicating my client through the statement of defendant, Casteel, and questioning of Counsel.

Motion for Severance Made During State's Cross Examination of Casteel

Another motion for mistrial was made during the cross examination of Dee Casteel by the prosecutor. Counsel argued that it was clear that Irvine was facing both the prosecutor in his extensive cross examination, as well as the attorney for Casteel on his direct examination, as his accusers. He also argued antagonistic defenses (R 5124).

At the conclusion of the state's case, Irvine renewed his motion for severance on grounds of the co-defendants' statements, the antagonistic defenses, the denial of confrontation and cross examination and the redacted versions of the statements that went to the jury (R 4800).

Conclusion of State's case

Interlocking Confessions Exception Not Applicable

In Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132 (1979), the Supreme Court held that when confessions are "interlocking," the admission of the confessions at a joint trial does not violate the Sixth and Fourteenth Amendments or Bruton. The state argued that a joint trial was proper because the defendants gave "interlocking confessions." State to the contrary, defendants' statements are not interlocking. In fact, they are not even confessions.

The defendants here gave statements, not confessions. A confession admits every element of the offense; a statement may admit some, but not all of the elements. If a statement does not admit to every element of the offense, and the

missing element is supplied by a co-defendant's statement, those cannot be interlocking confessions as contemplated by Bruton and its progeny.

Bruton established the general principle that the admission in a joint trial of the "powerfully incriminating extrajudicial statements of a co-defendant" not subject to cross-examination, impermissibly infringes on the constitututional rights of the defendant. 88 S.Ct. at 1628. Bruton further held that a jury instruction that the statement could be used only against its issuer, was insufficient to cure the defect: "we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." Ibid.

Irvine's statements denied knowledge that a murder was going to occur or that he intended to participate. He did acknowledge that he was present at Arthur Venecia's house and at Bessie Fischer's trailer when they were killed (R 7117). In contrast, Rhodes stated that Irvine participated in the murder of Venecia (I felt Mike was there: I ran into something on the way out and I thought it was Mike), and that it was Irvine who strangled Fischer (R 7091 to 7115).

In Puiatti v. State, 495 So.2d 128 (Fla. 1986), the two defendants were tried jointly, convicted of first degree murder kidnapping and robbery and sentenced to death. Each defendant confessed separately, and then they gave a joint confession. All three confessions were admitted at trial.

On appeal, this Court affirmed, but the Supreme Court vacated that opinion (107 S.Ct. 1950 (1987)). On remand, this Court reconsidered the case in light of Cruz v. New York, 107 S.Ct. 1714 (1987), and again affirmed the convictions and sentences, Puiatti v. State, 521 So.2d 1106 (Fla. 1988), finding Cruz to be distinguishable (emphasis added):

> . . . Puiatti and Glock not only entered into separate interlocking confessions, but they also subsequently entered into a joint confession resolvins all prior inconsistencies. Neither Cruz nor Parker concerned a true joint confession entered into by both defendants.

The interlocking confessions principle may apply where each confession and defendant implicates the other and the salient facts are effectively interchanqeable. such that one confession is merely cumulative to the other. But the interlocking confession exception was never intended to allow the introduction of statements where the defendant denies knowledge of and participation in the offense.

See, for example, Lee v. Illinois, 106 S.Ct. 2056 (1986), wherein the High Court held that if portions of the co-defendant's purportedly interlocking statement which bear in any significant degree on the defendant's participation in the crime, are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too strong a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In essence, if Irvine's statement does not substantiate the others' and it does not,

then their statements are not interlocking, and a severance should have been granted.

In Damon v. State, 397 So.2d 1224, 1225 (Fla. 3d DCA 1981), the facts showed that Damon and co-defendant Ladler confessed to their own and the other's participation in a brutal murder. Damon's statement to the police admitted that he struck the victim repeatedly with a hammer. The victim's body was found with the hammer imbedded in the skull. Ladler, who did not testify at trial, admitted in her statement that she was a prostitute who lured the victim to her home in order to allow Damon to enter the home and take the victim's money. When the victim tried to resist, Damon began to strike him with a hammer, killing him.

On these facts, the Third District held that a severance of defendants for separate trials was not required because the confessions were interlocking. Damon's confession that he struck and killed the victim was the most persuasive evidence of his own guilt; and Ladler's corroboration of his statement was merely cumulative and was not grounds for a severance of defendants for separate trials.

Here, in contrast, Irvine's statements clearly were not the most persuasive evidence of his own guilt, because he repeatedly denied any actual, physical participation in the charged crimes and denied advance knowledge of or intention to commit any of the offenses. The statements of the co-defendants were the most persuasive evidence of his guilt.

Joint Trial Deprived Irvine of his Fifth and Sixth Amendment Rights: he was Forced to Testify, and was Denied the Right to Cross Examine Bryant

Irvine was placing in the untenable posture of having to abandon his Fifth Amendment right to remain silent, in order to refute the co-defendants' accusations against him, and to explain his own redacted statement which, in its unredacted form would have been exculpatory.

In Lee v. Illinois, supra, 106 S.Ct., at **2062**, the Court held that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must subjected to the scrutiny of cross-examination. Here, Bryant portrayed himself as the victim of the other three defendants, yet they could not confront him about his accusations.

In Pointer v. Texas, **380** U.S. **400, 85** S.Ct. **1065 (1965),** the Supreme Court unanimously held the Confrontation Clause to be applicable to the States, remarking that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him **(380** U.S., at **405, 85** S.Ct., at **1068):**

> . . . [t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Irvine's counsel argued vigorously that Bryant's statement exculpated Bryant and implicated Irvine, in that Bryant blamed Rhodes and Irvine for Venecia's murder **(R 3449).** Bryant placed Irvine in the bedroom. Irvine could not cross-examine Bryant about his statement (R **3450).** Irvine admitted driving to the house, but denied being in the bedroom: Irvine said that he heard Venecia scream, and that is when he left the house and Bryant went inside (R **3452** to **3457).**

This is classic Bruton. Irvine was forced to take the stand and explain, whereas in a separate trial, his statement would be admitted in its entirety and he would not have to respond to co-defendants' allegations (R **3468, 3470).** The trial judge invited guidance from this court with respect to multi-defendant cases with interlocking confessions so trial judges "can decide once and for all what it is that the appellate court wants us to do and they are never going to have that and duck the issue by not having a joint trial" **(R3474).**

The Defenses Were Severely Antagonistic

Irvine and Rhodes should not have been tried together. Each blamed the other for the murders. Rhodes said that Irvine strangled Bessie Fischer with his bare hands, Irvine said that Rhodes strangled Bessie Fischer with pantyhose. Rhodes said that he thought that Irvine was in the bedroom when Arthur Venecia was killed. Irvine said that he stayed in the living room and never entered the bedroom, but that Rhodes was in the bedroom. Irvine and Rhodes both said that

Bryant was the last person in Venecia's house that night. Bryant placed the responsibility on Irvine and Rhodes. The defenses were so antagonistic, that a fair trial was not possible.

Redaction of Statements

Early on, it seemed to the trial court that a joint trial would be expedient and manageable. But as the proceedings developed, they spun out of control. It seemed simple to redact the statements by removing names of co-defendants. But it was not. The redaction process was long and arduous. The trial court finally stated that if defendants were convicted, it invited guidance as to whether a joint trial was proper in this case (R 3474).

The decision to redact the statements by replacing names with symbols or pronouns, was made in hopes that by complying with Richardson v. Marsh, 107 S.Ct. 1702 (1987) and Cruz v. New York, 107 S.Ct. 1714 (1987) four defendants could be tried together. It might work with two defendants, but it failed with four. Defendants objected to redaction (R 871, 876, 1021). Irvine's counsel argued that the identity of each "someone" or each "x, y or z" was obvious from the context (R 1024). Irvine objected to the redaction of his own statement (R 1034, 1038, 1039).

Following two days of hearings on redacting statements, Irvine's counsel stated that the attempts to satisfy the interests of all parties had sorely failed (R 1050):

> A joint trial is frankly for the convenience of the state, and it should not infringe on the rights of the defendants, which it seems to me the State is going to do.

If the state wanted to use the confessions of each defendant, it should have done so in separate trials. Redaction did not prevent one defendant's statement from implicating others.

For example, Casteel said she spoke with X at the gas station, and X said he knew someone who could perform a contract. Irvine's statement said someone came to the station and asked if he knew someone who could perform a contract. Then, Irvine said that he spoke to Z, who could do the contract. Rhodes' statement said that X spoke to me about the contract. From these few examples, the jury could recognize Rhodes, Casteel and Irvine from each other's statements. Regardless of the code used, the jury knew.

The court went so far as to send the tape recorded statements to Fort Lauderdale to have them altered by dubbing over names in other voices (R 3436). This alteration of evidence is just not a satisfactory substitute for a fair trial (R 3436).

So much was redacted from Michael Irvine's statement, that the exculpatory portions he would have relied on in his defense at his own trial, were removed. The redacted statement gave the impression that Irvine admitted responsibility for the murders. Yet the actual statement said that Irvine did not do it, someone else did. The trial court was firm

in holding that if Irvine said that he did not do it, someone else did, "that's not going to come in." (R 3448).

The Court Recognized There Were Problems

Redaction created serious limitations on the defendants' cross examination of witnesses. The trial judge ruled that this problem must have come up in other trials with redacted statements, and (R 3537, 3538):

> . . . let the appellate court handle that when it gets to that. That's where I am and it may require restricting you. * *
>
> . . . we are going to get through the thing even if it means restricting counsel. . . but I am going to be consistent in the case. If I am consistently wrong, I will be consistent, so if I am keeping it out, obviously he's going to be restricted in some areas of his cross-examination.

The court recognized that limitations and restrictions were a problem, but "[t]he question is to what extent can you go before you actually trounce upon the defendant's right to cross-examination in a case. . . " (R 3540).

Counsel argued that other joint trials with redacted statements do not present such irreconcilably antagonistic defenses. But the court said, "I made that decision and that is how I intend to go forward." (R 3541).

Then, when the court decided to send the tape recordings out to be dubbed in other voices, the court stated: "I have already decided we are going to do it this way and someone else will tell us whether it's right or wrong." (R 3546).

When the redacted statements were introduced, defense counsel sought introduction of the entire statements as provided in Ackerman v. State, 372 So.2d 215 (Fla. 1st DCA 1979) and Burch v. State, 360 So.2d 462 (Fla. 3rd DCA 1978), on grounds that they were deprived of the right to cross examine and the right to present favorable evidence.

The anticipated problems with cross examination began with the state's very first witness, Geneva Regan. When the state asked her what Dee Casteel said about the murders of Venecia and Fischer and she answered that she contacted "two hitmen to get in touch with Allen to kill Arthur Venecia," counsel moved for a mistrial and a severance (3755):

> Doesn't take a whole lot of logic to identify the two hitmen, whether names were used or not. Clearly we have a reference by Ms. Casteel to Mike Irvine and William Rhodes, and we cannot confront that testimony. I cannot cross examine Mrs. Regan as to the substance of Ms. Casteel [sic] knowledge because that probably came from James Bryant as well. It's the classic confrontation issue we're trying to prevent.

At the conclusion of the defendants' cross examination of Geneva Regan, the motion for severance was renewed based upon "artificial cross examination" which violated the right to fully cross examine witnesses, and the doctrine of testimonial and transactional completeness. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974) (R 3803).

The Law of Severance. Generally

The Florida Rules of Criminal Procedure allow for a severance of defendants when "it is appropriate to promote a fair determination of the guilt or innocence of one or more of the defendants," or when the state intends to offer oral or written statements of a co-defendant which make reference to the moving party, but which would not be admissible as to the moving party. Rule 3.152(b)(1) and (2). Of course the trial court has discretion in determining whether to grant to a severance, but there are circumstances in which a severance is required.

In Campfield v. State, 189 So.2d 642 (Fla. 2d DCA 1966), the court recognized that when a defendant is prejudiced by the confession of a co-defendant, a cautionary warning to the jury is insufficient to protect the defendant's rights. A separate trial is required. No prejudice was found in Campfield, however, because defendant's own admissions were sufficient to convict him. In this case, Irvine's statements are not enough. Here, as in Bruton, the co-defendant's confession implicated the defendant. The co-defendant did not testify. The Supreme Court held that in spite of instructions to the contrary, there was substantial risk that the jury would look to the incriminating extrajudicial statements in determining the defendant's guilt, so admission of that confession violated the confrontation clause.

Rule 3.152(b)(2) deals with the Bruton problem by allowing such a confession to be admitted at a joint trial only after all references to the defendant have been deleted. But as the Second District held in Cook v. State, 353 So.2d 911 (Fla. 2d DCA 1977) and Mathews v. State, 353 So.2d 1274, 1276 (Fla. 2d DCA 1978):

> A Bruton violation has occurred if the jury was highly likely to draw an incriminating inference against the defendant from a codefendant's statement, even if the inference drawn was incriminating only when considered in light of other evidence offered at trial.

Mere deletion of name, or attempt to disguise the defendant's identity in a co-defendant's confession may not be sufficient to meet this test. See, for example, Mims v. State, 367 So.2d 706 (Fla. 1st DCA 1979). The court's only alternative in such a situation is either to grant a severance or exclude the statement altogether. Mathews, at 1276.

And in Crum v. State, 398 So.2d 810 (Fla. 1981), this Court held that even if the co-defendant is going to testify at trial, a severance should be granted where the co-defendant will accuse the defendant of sole responsibility for the crime for which both are charged. In Crum, a severance was proper where a co-defendant's statement was, at first, consistent with that of the defendant, but later changed to place sole responsibility for the murder on the defendant. This Court found, at 811, 812,

By denying the motion, the trial court forced Preston to stand trial before two accusers: the State and his codefendant.

This rationale further evolved in Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981), wherein the denial of a severance was held to be an abuse of discretion where each defendant accused his co-defendant of sole responsibility for the murder, and where the trial court was aware that those accusations would be made at trial. And see Thomas v. State, 297 So.2d 850 (Fla. 4th DCA 1974), in which it was error to deny the pretrial motion for severance where a conflict in defenses was inherent in the case.

Generally, a severance should be granted where there is no other competent evidence which could convict the defendant, even where the co-defendant is available for cross examination; where references to the defendant are deleted from a non-testifying co-defendant's statement, but the jury can still draw implicating inferences against the defendant from the statement; where the co-defendant places sole responsibility for the crime on the defendant and where there is an inherent conflict in the respective defenses.

For all of the foregoing reasons, the trial court erred in denying a severance and this case should be reversed and remanded with directions for a new and separate trial for Michael Irvine.

POINT III

THE TRIAL COURT CONSTITUTIONALLY ERRED IN DENYING THE MOTION FOR SEVERANCE OF OFFENSES SINCE THE OVERWHELMING PREJUDICE CREATED BY A JOINT TRIAL ON TWO MURDERS, SEPARATED BY TIME, LOCATION AND PARTICIPANTS, DEPRIVED IRVINE OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL

The record reflects that prior to trial, Irvine filed a motion under Rules 3.150 and 3.152 of the Florida Rules of Criminal Procedure, for a severance of offenses and separate trials because the indictment charged two counts of first degree murder and two counts of burglary, which arose from separate incidents which occurred on different dates (R 7640). A severance of charges was required in order to promote a fair determination of the guilt or innocence of Michael Irvine for each incident.

At a pretrial hearing, Irvine argued that the case involved two murders committed possibly by two individuals at different locations on different days and in two different manners. By trying these charges together, the sympathy factor for the murder of Bessie Fischer would necessarily spill over to Irvine for the Venecia murder, even though he had no responsibility for it (R 611). The motion was renewed at the close of the state's case and at the close of all of the evidence (R 4800; 5664).

The case of Macklin **v.** State, 395 So.2d 1219 (Fla. 3rd DCA 1981), holds that where offenses are improperly joined in

one charging document, a severance is mandatory upon timely motion because prejudice is conclusively presumed. Further, this case is governed by Paul v. State, 385 So.2d 1371 (Fla. 1980), in which this Court clearly holds that Rule 3.150 mandates a severance where criminal charges are based upon similar but separate episodes, separated in time, connected only by similar circumstances and the accused's alleged guilt in both (or all) instances.

The indictment charged Michael Irvine in Counts I and II with burglary of the Venecia residence, and with participating in the murder of Arthur Venecia on June 19, 1983. Counts III and IV of the same indictment, charged Irvine with entering a different residence and participating in the murder of Bessie Fischer on August 20, 1983 (R 6801). These crimes comprised two distinct episodes separated by considerable time.

In Rubin v. State, 407 So.2d 961 (Fla. 4th DCA 1981), the defendant was tried on eight counts of sexual battery committed against four different victims on three separate occasions. The Fourth District, following this Court's decision in Paul, supra, reversed the convictions and remanded the cause for a new trial holding that although all of the charges were similar factually, they comprised three distinct episodes, separated from each other by a considerable length of time, thereby requiring a severance. Prejudice to the

defendant resulting from the trial court's refusal to grant a severance was conclusively presumed.

An important, if not the primary reason for requiring separate trials on unconnected charges, is to assure that evidence adduced as to one charge will not be misused to dispel doubts on the other, and possibly effect or create a mutual contamination of the jury's consideration of the evidence relating to that respective distinct charge. See, Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982).

Here, the joint indictment presented a disturbing factual scenario, the deaths of mother and son. Although the members of the jury may have been instructed to do otherwise, human nature being what it is, there can be no doubt that they considered the evidence adduced with respect to the murder of Arthur Venecia as additional evidence with respect to the murder of his 82-year old mother Bessie Fischer, and vice versa.

Any reasonable doubt the jury may have had as to Irvine's involvement in either of the murders, surely dissipated when the jury considered the enormity of two murder charges in the same indictment and trial. The end result was that Michael Irvine was convicted, not on the evidence of each charge individually, but based upon the cumulative integrative effect of the evidence.

Rule 3.150 (a) provides that two or more offenses may be charged in the same indictment only when "based on the same act or transaction or on two or more connected acts or transactions." The murders of Bessie Fischer and Arthur Venecia were not connected acts in the episodic sense.

The murders occurred at different locations, the persons present were different, the manner of death was different and the alleged acts were separated in time by a period of two months. Irvine clearly was not involved in any continuing plan or in a connecting sense to each crime charged in the indictment. Each of the two murders constituted a separate and distinct transaction. A severance of offenses and separate trials should have been granted.

POINT IV

THE TRIAL COURT ERRED IN DENYING IRVINE'S MOTION TO SUPPRESS HIS STATEMENTS WHERE THE STATEMENTS WERE OBTAINED IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS

The record reflects that Michael Irvine filed a pretrial motion to suppress his statements, admissions and/or confessions and that the motion was denied following a pretrial evidentiary hearing (R **7659; 303** to **376; 578).**

Irvine argued that his statements given on May **4** and May **16, 1984** in Marion, North Carolina and in Miami, respectively, should have been suppressed because they were obtained in violation of his right to counsel and the privilege against self-incrimination, guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as interpreted by the United States Supreme Court in Miranda v. Arizona, **384** U.S. **436, 86** S.Ct. **1602 (1966);** because they were obtained following an unlawful seizure of Irvine by the police in violation of the Fourth and Fourteenth Amendments, as interpreted by Dunawav **v.** New York, **442** U.S. **200, 99** S.Ct. **2248 (1979)** and Brown **v.** Illinois, **422** U.S. **590, 95** S.Ct. **2254 (1975);** because they were not freely and voluntarily given, in violation of his right to due process under the Fourteenth Amendment of the United States Constitution and Article I, Section **9** of the Florida Constitution; because

they were obtained in violation of his right to be free from unreasonable search and seizure guaranteed by the Fourth and Fourteenth Amendments and by Article I, Section 12 of the Florida Constitution, Wona Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963), Dunawav and Brown, supra and because the statements obtained from Irvine are not supported by any independent prima facie proof of the corpus delicti of the crimes for which he was charged.

The evidence presented at the pretrial hearing on the motion to suppress his statements (R 303 to 376), showed that with respect to the initial statement made in North Carolina, it was undisputed that Irvine was read his Miranda rights. But, although those rights were read and he did make a statement, his waiver was involuntary as was the resulting statement.

Detective Parmenter from Miami, and Sergeant Smith from Marion, North Carolina went to Irvine's house. They talked to him there and at the police station. They did not say why they wanted to talk to him; they did not tell him that he was a suspect. It was not until after the rights waiver was signed, that they revealed the reason for questioning him. Sergeant Smith testified that Irvine was not told the reasons why he was being questioned until after he had been read and signed the constitutional rights waiver form.

Because he was not told of the charges, or that he was a suspect or even why he was at the police station prior to waiving his rights, his statement is rendered involuntary. See United States **v.** McCrary, 643 F.2d 323, 328 (5th Cir. 1981), citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973). It is difficult to imagine how a waiver of Miranda rights could be knowingly or voluntarily made where the suspect is totally unaware of the offense upon which the questioning is based. In McCrary, the Fifth Circuit found that since the defendant had not been advised that he was a suspect, or told the nature of the charges until after he purportedly waived his rights, his waiver was involuntary. 643 F.2d at 328.

In State v. Wininger, 427 So.2d 1114 (Fla. 3d DCA 1983), defendant went voluntarily to the police station for questioning at the request of homicide detectives. He was given Miranda warnings and answered certain questions freely. After signing a waiver, the officer advised defendant that he was a suspect in a murder. Defendant responded that he did not believe it and he wanted to go home. The officer persisted in questioning and eventually elicited incriminating statements. The trial court suppressed the statements. The Third District affirmed.

Although Wininger was decided on the principle that once a person indicates his desire to remain silent, further

questioning is not allowed, there are similarities to the facts in the instant case. Sergeant Smith testified that Irvine repeatedly said that he wanted to go home. The implication was clear, that Irvine believed that if he gave a statement he could go home. This, together with the failure to tell him that he was a suspect, or why he was being questioned until after the rights were waived, plus Sergeant Smith telling Irvine that his cooperation would be made known to the state attorney's office, all combined to make the statement inadmissible.

His stated desire to go home, the promise, the failure to tell him why he was being questioned, all go to make up the totality of circumstances contemplated by Schneckloth, to demonstrate that Irvine did not waive his rights voluntarily. The statement produced as a result of this first encounter with the police was inadmissible and should have been suppressed. With regard to the second statement given in Miami some 12 days later, it was clearly tainted by the initial illegality and thus should have been suppressed as well.

The trial court should have suppressed the statements made by Michael Irvine both in North Carolina and in Miami. Accordingly, Michael Irvine's convictions should be reversed and the cause remanded for a new trial excluding his involuntary statements to the police.

POINT V

THE TRIAL COURT ERRED IN DENYING IRVINE'S MOTION FOR A NEW TRIAL WHICH SET FORTH NUMEROUS SERIOUS VIOLATIONS OF STATE AND FEDERAL CONSTITUTIONAL RIGHTS, INCLUDING THOSE ENUMERATED IN ARTICLE I, SECTIONS 9 and 16 OF THE FLORIDA CONSTITUTION, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Following his conviction on all four counts, and following the jury's advisory recommendation of death, Irvine filed an extensive motion for new trial (R 7702), which was argued and denied at R 6736 to 6740. The motion alleged numerous grounds, any of which was more than sufficient in and of itself to justify the granting of a new trial for Michael Irvine. And in any event, the cumulative effect of the numerous and substantial errors of constitutional magnitude compelled the granting of a new trial for Irvine on all four counts of the indictment. Some of the grounds in the motion for new trial are raised in separate issues in this brief, and others include the following:

that the trial court erred as a matter of law in allowing the introduction of Irvine's statements at trial where the state was wholly unable to establish by any independent evidence, a corpus delicti prior to (or without) the admission of the statements;

that the trial court erred as a matter of law in denying Irvine's motion for a judgment of acquittal on all four

counts made at the close of the state's case and at the close of all the evidence due to the state's inability to prove initially a prima facie case and then to prove its case beyond a reasonable doubt: (a) at the close of the state's case all that was presented to the jury were defendants' redacted statements which clearly, in and of themselves, were not sufficient as a matter of law to establish a prima facie case of guilt of the charges of first degree murder or burglary as alleged in the indictment, and (b) at that posture of the proceedings, the co-defendants' statements as redacted by the court's own directive, were clearly inadmissible against Michael Irvine, and thus clearly a judgment of acquittal should have been granted;

that the trial court erred as a matter of law in failing to grant the motion for a judgment of acquittal as to first degree murder where felony murder was never properly alleged or proven in any manner by the state either in its indictment charging first degree murder and burglary of an occupied dwelling, or in its case in chief: the burglaries charged in Counts I and 111, alleged that Irvine entered the property of Arthur Venecia and Bessie Fischer with the specific intent to commit murder: but in order for the jury to convict Irvine of burglary, it first had to make a specific finding of premeditated first degree murder, and without such a finding there could be no conviction for burglary, so the felony murder

theory was inappropriate where it was totally dependent upon premeditation and by its submission to the jury, clearly served to deprive Irvine of due process and a fair and impartial trial;

the trial court erred as a matter of law in instructing the jury that they could find Irvine guilty of first degree murder under the felony murder theory, notwithstanding the state's allegations in Counts I through IV of the indictment charging burglary and first degree murder: had the state alleged that Irvine entered the property of Arthur Venecia and Bessie Fischer with the intent, for example, to commit theft, battery, aggravated battery or robbery and in the course thereof a killing occurred, then it is entirely conceivable that the felony murder instruction and felony murder theory of prosecution would have been appropriate; but in light of the specific allegations in Counts I and III alleging burglary with the specific intent to commit murder, there in fact was no felony murder alleged or proven by the state and therefore, the instructions regarding felony murder were inappropriate and erroneous, mandating a reversal of Irvine's conviction and granting a new trial; and

that the trial court erred as a matter of law in denying Irvine's motion for a judgment of acquittal where the state specifically alleged in Count II that Arthur Venecia was killed with a razor and that his throat was slashed, where

there was no absolutely no evidence in the record whatever to support such allegations, thereby mandating the granting of a judgment of acquittal on the charge of first degree murder as to Arthur Venecia.

Rule 3.600 of the Florida Rules of Criminal Procedure provides that the court shall grant a new trial under certain circumstances, including the following when the defendant's substantial rights have been prejudiced: that the prosecuting attorney was guilty of misconduct; that the court erred in the decision of any matter of law arising during the course of the trial; that the court erroneously instructed the jury on a matter of law; or that for any cause not due to the defendant's own fault, he did not receive a fair and impartial trial. We respectfully suggest that each of these grounds is amply demonstrated on the record in this case, and that any one of them standing alone was an adequate and sufficient ground to warrant the granting of a new trial.

With the cumulative effect of all of the serious problems which occurred in this case, each of which served to severely prejudice the constitutional rights of Michael Irvine, a new trial was surely required, and the trial court erred in failing to grant a new trial. See Collins v. State, 423 So.2d 516, 518 (Fla. 5th DCA 1982) and Gamble v. State, 492 So.2d 1132, 1134 (Fla. 5th DCA 1986).

POINT VI

THE TRIAL COURT ERRED AND DEPRIVED IRVINE OF DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHEN IT DENIED HIS MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE

Michael Irvine filed a pretrial motion seeking individual voir dire of prospective jurors, and sequestration of the jurors from the courtroom during voir dire in order to prevent them from hearing the questions being asked (R 7665). From the record, it is clear that that motion should have been granted since was impossible to select a fair jury by the traditional method.

The record reflects that there were newspaper articles about this case in the Miami Herald during the jury selection period. Some of the jurors had read the articles. In fact, those newspapers were in the courthouse and in the jury room (R 1310).

Also, it must be noted that some of the jurors made highly prejudicial remarks in the presence of the whole venire, so that even if the juror making the remark was excused, all of the others who were tainted by it, remained.

For example, juror Embi said that the from the questioning "there is some guilt here * * * I think the burden would be more on the defense to prove that they are not guilty" (R 2019); juror Tanna said that Rhodes looked

like Ted Bundy (R 2928); and another juror said, if the defendants were charged with the crime "you [the prosecutor] said they did," then they should be sentenced to death (R 1362). How could every person sitting in the courtroom not be affected by such outrageous remarks?

We respectfully submit that recognizing the gravity of selection of jurors in a case in which the death penalty is sought, the only fair way to select a jury is to question the prospective jurors separately. The Supreme Court of Kentucky recently enacted a new rule of criminal procedure on this exact point, to become effective on January 1, 1989. New Rule 9.38 of the Kentucky Rules of Criminal Procedure provides in pertinent part:

> When the commonwealth seeks the death penalty, individual voir dire out of the presence of other prospective jurors is required as to questions regarding capital punishment and pretrial publicity.

Whether this Court will impose such a requirement in all death penalty cases in the future is a matter for the Court to decide. However, on these facts and on this record, that procedure was warranted and the failure to question the jurors separately resulted in an unfair jury trial for Michael Irvine.

POINT VII

IRVINE DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL DUE TO THE CUMULATIVE PREJUDICIAL EFFECT OF THE TOTALITY OF ERRORS

Due process requires a fair hearing. Article I, Section 9, Declaration of Rights, Florida Constitution; Fifth and Fourteenth Amendments of the United States Constitution. Driessen v. State, 431 So. 2d 692 (Fla. 3d DCA 1983); State v. Steele, 348 So.2d 398 (Fla. 3d DCA 1977); Crosby v. State, 97 So.2d 181 (Fla. 1957). Michael Irvine was deprived of a fair hearing for many reasons including, but not limited to the following:

Irvine should have been granted a severance and a separate trial from his co-defendants in order to be tried fairly; the defenses were irreconcilable and antagonistic; he was denied his right of confrontation and cross examination; his statements to the police were involuntary and thus inadmissible and should have been suppressed; the redaction process was a sham because the jurors knew the identity of persons referred to in the statements; there should have been a severance of offenses where it was overwhelmingly prejudicial to try two separate murders in the same trial; there was prosecutorial misconduct throughout the trial; the prosecutor minimized the jury's role in sentencing; the prosecutor continuously summarized and repeated prior questions and

answers; the jury was incorrectly instructed on felony murder where that was not supported by the indictment or by the evidence, and the jury may have convicted Irvine on felony murder; the trial court failed to grant a new trial on the numerous meritorious grounds alleged in that motion; the trial court failed to grant a judgment of acquittal at the close of the state's case where the state failed to prove a prima facie case and at the close of all of the evidence.

At the sentencing phase, the state's death chart was highly prejudicial because it listed numerous aggravating factors, but no mitigating factors; the medical examiner changed her testimony in that prior to the sentencing phase, she testified that both deaths were homicides by unspecified means, but at sentencing she testified in detail about the cause of each death and the nature and length of suffering endured by the victims; the prosecutor improperly argued nonstatutory aggravating factors in the guise of rebuttal to defendant's evidence of mitigating factors.

All of these errors, any of which alone constitutes a valid reason for reversal, certainly taken together deprived Michael Irvine of a fair and impartial trial. The judgment and the sentence should be vacated and the cause remanded for a new, fair trial.

POINT VIII

APPLICATION OF SECTION 921.141, FLORIDA STATUTES, TO IMPOSE DEATH UPON MICHAEL IRVINE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Following the jury recommendation by a vote of 12 to 0 to impose the death penalty upon Michael Irvine for the murder of Bessie Fischer (R 7701), the trial judge did sentence Irvine to death (R 7712), finding that five aggravating factors sufficiently outweighed the two mitigating factors (R 7716 to 7722). The findings were published in open court at R 6710.

The statutory mitigating factor which the court found was that Irvine had no significant history of prior criminal activity. The nonstatutory mitigating factor was Irvine's behavior while incarcerated (R 7719, 7721). The agravating factors found to exist include the following subsections of Section 921.141 (5), Florida Statutes: (b) prior capital conviction or violent felony; (d) commission of crime during another felony; (e) to avoid lawful arrest; (f) for financial gain; (i) murder committed in cold, calculated or premeditated manner. "The manner of death of Bessie Fischer while offensive to the court as heinous, atrocious and cruel, it was not especially so. The Court does not find this to be an

aggravating factor as to the murder of Bessie Fischer." (R 7719) (emphasis added).

We submit that the jury's advisory recommendation of death was invalid because it was based on improper prosecutorial argument of nonstatutory aggravating factors, perjured testimony and the use of the prejudicial floating death chart. As a result of this invalidity, the resulting death sentence must be vacated.

In light of decisions of this Court and of the Supreme Court of the United States, Irvine does not present repetitive arguments concerning the constitutionality vel non of Section 921.141. However, Irvine does not waive any contentions that capital punishment is per se violative of the Eighth and Fourteenth Amendments and that Section 921.141 is unconstitutional on its face.

a. Death may not be Imposed Where the Essential Safeguard of a Valid Jury Recommendation Made in Conformity With Constitutional law was Nullified by the Prosecutor's Improper Argument, use of Perjured Testimony and the Chart

In Florida, the death penalty can only be imposed pursuant to Section 921.141 upon the reasoned judgment of the trial jury, trial judge and a finding by this Court that the particular factual situation involved, in light of the totality of the circumstances present in the evidence, cannot be adquately punished by the lesser penalty of life imprison-

ment. Proffitt v. Florida, 428 U.S. 242, 251-259, 96 S.Ct. 2960 (1976); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975); State v. Dixon, 283 So.2d 1, 7 to 8 (Fla. 1973). Both judge and jury "must weigh the evidence of aggravating and mitigating curcumstances delineated in the statute to determine whether death is an appropriate sentence." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981); accord Adams v. State, 412 So.2d 850, 855 (Fla. 1982). But unlike the trial judge and jury,

> This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. . .
>
> * * *
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great.

Brown v. Wainwright, 392 So.2d at 1331.

The jury represents the "conscience of the community," McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977), and this Court must give "great weight" to its recommendation, be it is life or death. Odom v. State, 403 So.2d 936, 942 (Fla. 1981); accord Neary v. State, 384 So.2d 881, 885 (Fla. 1980).

Generally, when the jury recommends death, the sentence of death should not be disturbed "unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation." LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978); accord Ross v. State, 386 So.2d 1191, 1197-8 (Fla. 1980). In exercising its review function, this Court has expressly considered jury recommendations in other but similar cases so as to ensure relative proportionality among death sentences. McCaskill, 344 So.2d at 1280.

Of course, this Court cannot perform its review function without a valid jury recommendation. In fact, in cases where jury death recommendations have been tainted by the exclusion of mitigating evidence or the admission of nonstatutory aggravating evidence (as here) this Court has repeatedly vacated death sentences and remanded for resentencing before new specially impaneld juries. See Maggard v. State, 399 So.2d 973, 978 (Fla. 1981); Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Miller v. State, 332 So.2d 65, 68 (Fla. 1976); Messer v. State, 330 so.2d 137, 142 (Fla. 1976).

In this case, the jury's recommendation was tainted by the prosecutor's inflammatory arguments crafting nonstatutory aggravating factors out of rebuttal to the defendants' mitigating evidence. In this joint trial, Michael Irvine suffered from the spillover prejudice of the arguments against his co-defendants as well as those directed against him.

Irvine presented the testimony of Irma Sorrell, the woman who married him twice. She said that he was honest, hard-working, dependable and non-violent (R R **6325** to **6330).** The prosecutor turned this into an aggravating factor by arguing that Irvine cheated on her in the first marriage and in the second (R **6584).**

Dee Casteel presented evidence that she was adored by her children, and that she was a cell counselor while in jail. The prosecutor twisted this evidence into aggravating factors by arguing that Casteel did not have real concern for the sanctity of the mother-child relationship; and that her position as cell counselor showed that she was a leader, reinforcing his argument that she orchestrated both murders (R **6568, 6584).**

The prosecutor also improperly argued that William Rhodes not only committed murders for money, but he also he **"** took some property [from Bessie Fischer] to give to one of his many girlfriends." (R **6585).**

These emotional and inflammatory arguments were not the only source of fatal constitutional defects in the sentencing proceedings. In a motion to vacate the advisory recommendation, defense counsel alleged that between July **8** (trial on guilt or innocence) and July 30 (sentencing phase of trial), the state either deliberately coached and directed Dr. Rao to willfully give perjured testimony; or that it knowingly, and

deliberately allowed her perjured testimony to be given, without correction, in order to support the state's effort to to secure the "heinous, atrocious or cruel" jury instruction thereby misleading the jury in its advisory recommendation. The written motion is not in Michael Irvine's record, but it is in Dee Casteel's record at pages 895 and 904 to 1212. The motion was argued at R 6693 to 6709.

The motion alleged that at the guilt/innocence phase, Dr. Rao testified that she did not perform an autopsy on the skeletal remains identified as those of Arthur Venecia, but at the penalty phase, she testified that she did; and at the guilt/innocence phase, Dr. Rao testified that the cause of Venecia's death was homicide by unspecified means and she did not know what caused his heart to stop functioning, but at the penalty phase, she testified that Venecia drowned in his own blood, that he attempted to scream as he drowned in his own blood, that the death process was a slow one and that the hapless victim was conscious during the dying process.

Concerning Bessie Fischer, the motion alleged that at the guilt/innocence phase, Dr. Rao testified that Fischer's death was homicide by unspecified means and that she did not know what mechanism caused Fischer's heart to stop beating. But at the penalty phase, Dr. Rao testified that Fischer died by strangulation, that the strangulation was by ligature, that during her homicide Fischer had difficulty resisting her

assailant(s), that Fischer was conscious for ". . . a few minutes," during the attack upon her and that the death process was a comparatively slow one.

As if improper aggravating factors and perjured testimony were not inflammatory enough, the state used its floating death chart, which was chock full of aggravating factors on one side and devoid of mitigating factors on the other, to further work the jurors into a death frenzy **(6472** to **6474, 6504** to **6508). So** many of those mitigating factors were taped over, that the jury must have thought that no mitigation applied to these defendants **(R 6486).**

It is well to remember that an accused in a capital case has the same right to have the jury consider the appropriate penalty in a fair and impartial proceeding free from prejudicial inflammatory matters, as he does to have the question of guilt so determined. See Singer **v.** State, **109** So.2d **7, 30** (Fla. **1959).**

b. Death **is a** Disproportionate Sentence **in** This Case

First, it must be noted that the court specifically found that the murder of Bessie Fischer was not especially heinous, atrocious or cruel, and that was not an aggravating factor **(R 7719).** We maintain our position that it is an unfortunate result of this joint trial of defendants and offenses that Michael Irvine suffered great spillover

prejudice both at the guilt/innocence phase and at the sentencing phase.

Irvine's conviction for the death of Bessie Fischer did not warrant imposition of the death penalty. Compare cases in which the death penalty has been upheld by this Court: Rutledse v. State, 374 So.2d 975 (Fla. 1979), cert. denied 435 U.S. 1004 (1979), where a mother and three children were tortured and butchered while the husband returned home to find them; King v. State, 390 So.2d 315 (Fla. 1980), cert. denied 450 U.S. 989 (1981), where the defendant tore the victim's vagina with knitting needles and caused burns, bruises, brain hemmorrhage, stab wounds and broken neck during a rape-murder; Atkins v. State, 497 So.2d 1200 (Fla. 1986), wherein a six year old child was taken to a wooded area, knocked unconscious with a steel rod, brutally beaten again and left on a seldom-traveled dirt road to die, with a broken jaw, teeth were broken out, thirty blows to the head and neck and blood in his stomach; and Scott v. State, 494 So.2d 1134 (Fla. 1986) wherein a random victim was picked up and brutally beaten, driven to an isolated place where he was beaten again and then run over with a car, pinned under the wheels which were spinning in order to push the victim down into the sand to suffocate.

The facts in this case do not rise to the level of these cases in which the death penalty was upheld. Additionally

Irvine presented evidence that he was honest, hard-working, dependable, non-violent and a trusting soul. As an example, his friend for fifteen years, Natalie Stewart testified that Irvine usually left his door unlocked. When someone came in and stole his money, Irvine was not angry or vengeful. Rather, his attitude was that the person must have needed it (R 6325 to 6337). This side of Michael Irvine is deserving of mitigation.

For all of the foregoing reasons, the death sentence must be vacated with directions that the cause be remanded for resentencing with a new jury, or with directions to enter a life sentence.

POINT IX

MICHAEL IRVINE ADOPTS ALL ARGUMENTS AND AUTHORITIES RAISED ON APPEAL BY CASTEEL, BRYANT AND RHODES WHICH MAY BE APPLICABLE TO HIM

Pursuant to his motion which was granted by order of the Court dated August 29, 1988, Michael Rhae Irvine hereby adopts all arguments and authorities raised by and on behalf of each of his three co-defendants, Dee Dyne Casteel, James Allen Bryant and William E. Rhodes, and incorporates same by reference as though set forth in their entirety herein.

CONCLUSION

Based upon the foregoing arguments and citations of authorities, Michael Irvine respectfully requests this Honorable Court to (1) vacate the adjudications of guilt and remand the cause for a new trial with such instructions as the Court deems appropriate, (2) vacate the sentence of death and remand for a new sentencing hearing before a newly empaneled jury or (3) reduce the sentence of death to life imprisonment.

Respectfully submitted,

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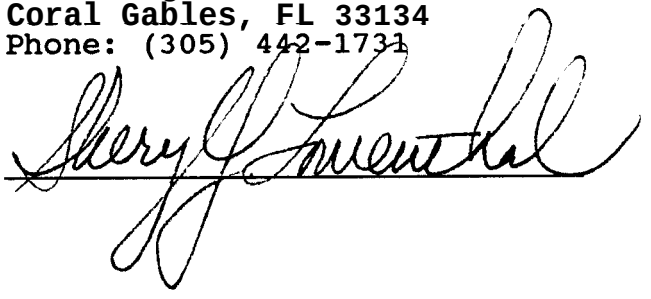

I HEREBY CERTIFY that a copy of the Initial Brief of Appellant Michael Irvine was mailed on September 15, 1988 to the following:

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