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

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REPLY BRIEF AND ANSWER BRIEF OF MICHAEL IRVINE AS APPELLANT AND CROSS-APPELLEE

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CITATIONS

STATEMENT OF THE CASE AND FACTS

As both appellant and cross-appellee, Michael Rhae Irvine respectfully relies upon the statement of the case and statement of the facts as set forth in his initial brief.

However, the following response must be made to the state's comments about appellants' statements of the facts.

The introductory remarks to the state's statement of the facts at page 7 of the brief of appellee, clearly, succinctly and in one simple sentence describes what it took appellants four briefs and hundreds of pages of argument to explain.

When the state says that "The defendants' Statements of the Facts are confusing . . . " Brief of appellee, page 7, the state says it all.

If four appellate lawyers specially selected and appointed by the trial judge as qualified to represent defendants on direct appeal to this Court from sentences of death, are unable to provide the facts of the case in a coherent manner such that counsel for the state, an experienced appellate practitioner, can understand them without confusion, then how could anyone expect a jury of laymen to understand the facts in this unnecessarily lengthy, drawn out, convoluted, joint trial upon which the state insisted.

There could have been four, neat one-week trials, or two fair, yet relatively simple, two-defendant trials here, but instead, there was one unwieldy proceeding which resulted in spillover prejudice beginning during jury selection and continuing through the penalty phase. Defendants were prejudiced by co-defendants' counsels' over-zealous questioning of prospective jurors; by one prospective juror's comment that one co-defendant resembled Ted Bundy and another's that if they did what the state said they did, they must be guilty; by the admission of statements and redacted statements; by ultimately forcing three of the defendants to testify in order to explain, or lessen the dramatic effect that the redaction process had on their statements rendering them more inculpatory than exculpatory, as in their original versions; and numerous other instances of prejudice to the defendants resulting from this joint trial.

The state says that the defendants' statements of the facts are confusing. Do not blame the defendants or their appellate counsel. Rather, take a look at the record and see that we are accurate in stating the facts. The facts themselves were confusing. The problem lies in the nature and length of the proceedings, not in appellate counsel's best efforts to set forth the facts. In fact, from a careful review, we find the state's statement of the facts to be every bit as confusing as appellants'.

The state further says that appellants' facts contain substantial amounts of improper argument, fail to contain record references for many facts and contain numerous material errors and omissions.

The state fails to specify which transgressions the undersigned brief writer has committed, so she can only respond to this attack by stating the obvious.

The brief of Michael Irvine was written for and on behalf of that defendant only, not for the other three defendants. In that context, the statement of facts is geared toward the issues raised and presented for Mr. Irvine. Due to the length of the record, it was necessary to present in an objective fashion, the significant facts relevant to Mr. Irvine and his issues, and to omit the myriad of record facts unrelated to him. If this is what the state considers to be omission of facts, then it can surely be justified by considering how long the already oversized brief of Michael Irvine would have to be in order to include every fact in the 7,000 page record.

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

Prosecutor Violates Caldwell During Voir Dire

The state would excuse the conduct of the prosecutors before the trial court on the basis that they did not misrepresent the law, but correctly stated it. This argument falls wide of the mark because what the prosecutors repeatedly emphasized to this jury was not a correct and complete statement of the law.

The prosecutors here repeatedly emphasized that the jury's function was "merely" to recommend (TR 1353-1354, 6169). Thus, the state ignored what is truly the law of Florida, that the jury's recommendation regarding the sentence in a capital case is afforded great weight. Tedder v. State, 322 So.2d 908 (Fla. 1975). In fact, the jury's recommendation is afforded so much weight that it can be overridden by the judge only if virtually no reasonable person could agree with it. Fead v. State, 512 So.2d 176 (Fla. 1987); Ferry v. State, 507 So.2d 1373 (Fla. 1987).

For the state to take the position that the jury's role was not improperly minimized in this case, is clearly wrong.

It was improperly minimized. Because the prosecutors' repeated comments demeaned and minimized the importance of the jury's function, the defendant's sentence of death should be vacated, with such instructions to these experienced prosecutors as this court deems appropriate.

The United States Supreme Court has ruled that due process and the right to a fair trial may be breached when a prosecutor engages in improper conduct. United States v. Young, 470 U.S. 1 (1985). Nearly a half century ago, the Supreme Court in Beraer v. United States, 295 U.S. 78, 88 (1935), counseled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction," and the Court made clear that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." Ibid. In other words, "while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Ibid

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

The State's Failure to Prove a Prima Facie Case

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.

One of the grounds raised in the motion for new trial, was 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 equally clearly a judgment of acquittal should have been granted.

During its case in chief, the state utterly failed to prove a prima facie case of guilt against Michael Irvine for either of the two burglary charges, or the two murder charges of which he now stands convicted. While the state may have proved Irvine's knowledge of the homicides and even his presence at the scene of each homicide, it completely failed to prove that he had prior knowledge of the homicides, intended the homicides or participated in the homicides or the burglaries. The trial court erred in failing to grant Irvine's repeated motions for judgment of acquittal, or his motion for new trial on this ground.

Michael Irvine was convicted two counts of burglary and two counts of first degree murder deriving from the homicides of Arthur Venecia and Bessie Fischer. The state presented no evidence of his guilt of these crimes during its case in chief. All of the evidence giving rise to the Irvine's convictions on these charges were presented during the presentation of evidence by the defendants. Therefore, the trial

court erred in failing to grant a judgment of acquittal at the close of the state's case or at the close of all of the evidence, or Irvine's motion for new trial.

In the redacted statements admitted during the state's case in chief, all defendants consistently and steadfastly denied prior knowledge of or participation in the deaths of either Arthur Venecia or Bessie Fischer.

In State v. Pennington, 534 So.2d 393 (Fla. 1988), this Court laid to rest any question that may have existed regarding the effect of an inculpatory defense case effecting a defendant's entitlement to a judgment of acquittal after an insufficient prosecutorial case. Disapproving all other conflicting decisions including Adams v. State, 367 So.2d 635 (Fla. 2d DCA), cert. denied, 377 U.S. 992 (1964); Cozakoff v. State, 104 So.2d 59 (Fla. 2d DCA 1958); and Roberts v. State, 154 Fla. 35, 16 So.2d 435 (1944), this Court held, answering the Fourth District's certified question in the affirmative, that where the state has failed to make a prima facie case and the defendant moves for a judgment of acquittal which is denied and thereafter, during the defendant's case, evidence is presented that supplies essential (but previously missing) elements of the state's case, it is reversible error for the trial court to deny the defendant's motion for judgment made at the conclusion of all the evidence.

Here, in light of the state's failure to establish a prima facie case of guilt, together with this Court's recent decision in Pennington, 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 of 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. On this ground, the motion for new trial should have been granted.

This error compels a reversal of each of Michael Irvines's four convictions. Accordingly, Michael Irvine urges this Court to reverse his convictions of first degree murder and burglary, to vacate the sentences imposed thereon and to order that he be discharged.

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

Death is a Disproportionate Sentence in this Case

Imposition of the death penalty as the sentence for Michael Irvine is disproportionate in light of other similar cases. Here, the homicides of which Michael Irvine stands convicted are simply not so extraordinary as to justify the imposition of the extraordinary sentence of death.

Specifically, imposition of the ultimate penalty against Irvine cannot be reconciled with the prison sentences of the defendants in Spivey v. State, 529 So.2d 1088 (Fla. 1988) or ~~Roth v.~~ State, 359 So.2d 881 (Fla. 3d DCA 1978). The sentence of death upon Michael Irvine should be reversed.

POINT IX

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

Michael Rhae Irvine does not waive any issues by not specifically addressing them in this Reply Brief. Rather, he reiterates, restates and relies on all matters which are already before the Court.

Michael Irvine again, hereby adopts and incorporates by reference as though set forth in their entirety herein all issues, arguments and authorities stated in his Initial Brief of Appellant, as well as those in each Initial Brief, Supplemental Brief and Reply Brief of each of his co-defendants, Dee Dyne Casteel, James Allen Bryant and William E. Rhodes to the extent, of course, that those issues are applicable to him and not contrary to his position on appeal.

MICHAEL IRVINE'S ANSWER TO CROSS-APPELLANT'S BRIEF

I

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDER OF ARTHUR VENECIA WAS NOT ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

When the state's notice of cross appeal was first filed, not only was it filed in the wrong forum, namely the Third District Court of Appeal, but also it stated merely that "The nature of the Orders appealed are Trial Court rulings on questions of law."

At this posture of the proceedings, the sole issue raised by the state as cross-appellant is whether the trial court erred in finding that the murder of Arthur Venecia was not especially heinous, atrocious or cruel.

From the record, it is abundantly clear that the trial judge was eminently correct in this finding.

Either the state's thirst for death in this case is insatiable, or its notice of cross appeal was filed with no particular error in mind, and this issue was selected only after appellants moved to dismiss the cross appeal, and their motions were denied by this Court. This appellant renews his motion to dismiss the cross-appeal for abuse of process.

The court did not find the manner of death of Arthur Venecia to be especially heinous, "in the absence of specific evidence of prolonged suffering on the part of the victim and

in light of other capital cases considering the same aggravating factor."

As a general rule, a factual determination on a full record cannot be disturbed on appeal. The trial judge heard the evidence and observed the witnesses. Based upon the record, the trial judge correctly did not find HAC to be an aggravating circumstance with respect to the manner of death of Arthur Venecia, both on the facts and as a matter of law.

The term **"heinous"** as used in Florida Statutes Section 921.141(5)(h) means extremely wicked or shockingly evil; **"atrocious"** means outrageously wicked and vile; **"cruel"** describes conduct designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Alford v. State, 307 So.2d 433 (1975), cert. denied, 428 U.S. 912, rehearing denied, 429 U.S. 873; Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059; State v. Dixon, 283 So.2d 1 (1973), cert. denied 416 U.S. 943.

The homicide of Arthur Venecia of which Michael Irvine stands convicted and sentenced to life in prison, as senseless and inexcusable as it may have been, was not heinous, atrocious or cruel under established law. The trial court correctly rejected heinous, atrocious and cruel as an applicable aggravating factor.

The "heinous, atrocious or cruel" aggravating factor applies only to a capital crime the actual commission of which is accompanied by such additional acts as set the crime apart from the norm of capital felonies. Its application is restricted to conscienceless or pitiless crimes which are unnecessarily torturous to the victim. Blanco v. State, 452 So.2d 512 (Fla. 1984), cert. denied, ____ U.S. ___, 105 S.Ct. 940.

The application of this aggravating circumstance has been deemed to be appropriate to offenses "shockingly evil." Dobbert v. State, 409 So.2d 1053, 1058 (Fla. 1976) (murder of nine year old daughter); and has been applied to murders committed in connection with abductions, confinement, sexual abuse and execution-style killings. Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3129. The aggravating circumstance has been upheld in torture murders. Thompson v. State, 389 So.2d 197 (Fla. 1980). Most recently, this Court in Cook v. State, 14 FLW 187 (Fla. Opinion filed April 6, 1989) succinctly noted in the slip opinion at pp. 9 - 10:

> This aggravating factor generally is appropriate when the victim is tortured, either physically or emotionally, by the killer.

The instant case does not involve either torture, or the defendant's desire to inflict suffering. The record fails to establish either the infliction of an extraordinary degree of pain or prolonged anticipation on the part of the victim sufficient to establish the degree of suffering required to invoke the wicked, heinous or cruel aggravating circumstance.

The victim, Arthur Venecia, died of a single stab wound which, as the state recognizes, historically will not support an H.A.C. finding. Profitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983).

The evidence of the homicide, in which Michael Irvine was not an active participant (he was in the house, but not in the bedroom where the death occurred) was circumstantially shown by the state's own evidence to have resulted during a struggle. This is not such a case as those involving the infliction of repeated and multiple stab wounds intended to cause pain and suffering. See, for example, Nibert v. State, 508 So.2d 1 (Fla. 1987) (victim stabbed seventeen times); Floyd v. State, 497 So.2d 1211 (1986) (victim stabbed twelve times); Hansbroush v. State, 509 So.2d 1081 (Fla. 1987) (victim stabbed thirty or more times).

But this case, in contrast, presents circumstances which are clearly more analogous to cases involving homicides perpetrated by a single gunshot, wherein this Court has been remarkably consistent in rejecting the application of this

aggravating circumstance. Craig v. State, 510 So.2d 857 (Fla. 1987); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Cooper v. State, 336 So.2d 1133, 1141 (Fla. 1976); Fleming v. State, 374 So.2d 954, 959 (Fla. 1979); Antone v. State, 382 So.2d 1205 (Fla. 1980); Massard v. State, supra; Cook v. State, supra.

This Court has repeatedly reiterated its established rule and concluded "that in order for a capital felony to be considered heinous, atrocious, or cruel it must be 'accompanied by such additional acts as to set the crime apart from the norm of capital felonies.'" Simmons v. State, 419 So.2d 316 (Fla. 1982); State v. Dixon, supra. The same consideration applies here and the same result should follow. The trial court made specific findings of fact which are entitled to great deference (CR 1220-1221; TR 7605; 7718-7719; 7769-7770):

> While the Court is offended by the manner of death legally it does not find it to be especially heinous, atrocious or cruel in the absence of specific evidence of prolonged suffering on the part of the victim and in light of other capital cases considering the same aggravating factor.

For all of the foregoing reasons, the homicide which occurred in this case was not, under established case law, accompanied by such additional acts as to set the crime apart

from the norm of capital felonies. The trial court's determination that the aggravating circumstances of H.A.C. are factually inapplicable to the circumstances of this case is amply supported by this record. The trial court's judgment should not be disturbed in this regard by this Court on appeal.

CONCLUSION

Based upon the foregoing arguments and citations of authorities, as well as those cited and raised in his Initial Brief of Appellant and the briefs, supplemental briefs and reply briefs of his co-defendants, 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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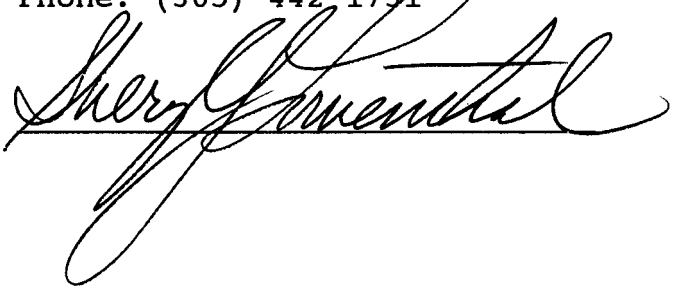

I HEREBY CERTIFY that a copy of this Reply Brief of Appellant Michael Irvine was mailed on April 26, 1989 to the following:

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