IN THE SUPREME COURT OF FLORIDA

CASE NO. 71355

WILLIAM RHODES,

Appellant

VS.

THE STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

GARY W. POLLACK
Special Assistant Public Defender
Merrill and Pollack
1320 South Dixie Highway
Suite 275
Coral Gables, Florida 33146
Telephone: (305) 663-0307

Counsel for Appellant

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INTRODUCTION

The Appellant, William Rhodes, was one of four defendants tried by jury in Dade County Circuit Court. The Appellee, the State of Florida, was the prosecution. In this Brief, the Appellant will be referred to as the "Defendant" and the Appellee will be referred to as the "State".

The symbol "R" will be utilized in this Brief to designate the Record on Appeal which includes the transcript of trial proceedings.

STATEMENT OF THE CASE

Defendant was charged by indictment filed July 13, 1984 (R. 6801) with first degree murder of Arthur Venecia (Count II), and first degree murder of Bessie Fischer (Count IV) and two counts of burglary (Counts I and III).

The Defendant made a statement to the police on June 7, 1984 (R. 7091). Defendant's trial was set jointly with three co-defendants, James Allen Bryant, Michael Irvine and Dee Casteel. All defendants adopted the motions and objections of co-defendants (R. 1092, 7657). All defendants filed motions for severance of requesting separate trials from the others and made numerous renewals during trial. (R. 602, 603, 609, 1070, 6910, 2065, 7640 and 7686, for example).

Rhodes argued motions for severance of the individual counts (R. 603, 3853) and for trial apart from the co-defendants (R. 603 - 646).

The original motion (R. 618) (R. 773) and all subsequent motions for severance were denied (R. 602, 603, 609, 1070, 6910, 3704, 2067, 7640 and 7686). Trial commenced on June 15, 1987, (R. 1085). On July 17, 1987 the jury returned verdicts of guilty on all counts against Rhodes (R. 7521 - 7529). The penalty phase proceedings commenced on July 30, 1987 (R. 6293), and the jury recommended the imposition of the death penalty on both murder counts on July 31, 1987 (R. 7569 - 7570). On September 15, 1987, the trial court imposed the death penalty on Count II for the murder of Arthur Venecia, and life imprisonment for the murder of

Bessie Fischer (Count IV), and concurrent life sentences on each of the burglary counts (R. 7597 - 7613).

Notice of Appeal was filed on October 9, 1987 (R. 7785). The jurisdiction of this court is invoked pursuant to Article V, Section 3(b)(1) of the Constitution of the State of Florida and Florida Statute Section 921.141(4)(a)(i). The court also has jurisdiction to review the convictions for burglary which arose from the same trial as did the murder conviction. See Riley v. State 366 So.2d 19, 20 n.1. (Fla. 1978), appeal after remand 413 So.2d 1173 cert. den. 103 S.Ct. 317, 459 U.S. 981 74 L.Ed. 2d 294 reh. den. 103 S.Ct. 773, 459 U.S. 1138, 74 L.Ed. 2d 985; Huckaby v. State 343 So.2d 29, 30 n.1. (Fla. 1977).

STATEMENT OF FACTS

The Defendant, William Edward Rhodes, is a thirty-six year old white male who attended high school in Springfield, Illinois. By trade he is an auto mechanic and repairman. He was a sergent in Vietnam (R. 5394).

During the summer of 1983 he was employed at a gas station in Southern Dade County along with co-defendant Michael Irvine. Irvine conversed with Rhodes regarding "roughing up" a guy who owed money to someone (R. 7093, 5424). Rhodes agreed to accompany Irvine to accomplish this task (R 7094). Rhodes was the passenger in an automobile driven by Irvine along with another man, whom he didn't know, on the drive out to the home of the person to be roughed up, in rural Homestead (R 7096). The third man, who would later be identified as James Allen Bryant, (the "guy's" homosexual live-in lover R.3732, 4492, 7313) unlocked the door to the home and Michael Irvine and William Rhodes entered (R 7097).

Once inside, Rhodes walked into a room that was "kind of like a bedroom, den". (R 7097). Someone, who would later be identified as Arthur Venecia, (R 7465) jumped Rhodes and began cutting him with some sharp object and a struggle ensued (R. 5430, 7097-98). In order to prevent the person, who was then unknown to Rhodes, (R 7098) from hurting him anymore Rhodes hit him, threw him to the floor, and ran outside (R. 7098, 5398). William Rhodes stated that he did not kill Arthur Venecia (R. 5399). When he left the room the "guy" was still alive (R. 5400, 5405). After Rhodes was outside, Bryant re-entered the house (R

7100). Michael Irvine drove the three back to the gas station where William Rhodes worked and dropped him off. Irvine and Bryant drove off (R 7100).

Prior to going out to the house, Rhodes had received $300.00 and subsequently another $700.00 (R. 5425, 5435). Rhodes stated he received both payments for "roughing the guy up" (R 7101-2). He did become aware the next day that Arthur Venecia had died (R 7102, 5400). The payments were made to him by Michael Irvine (R 7102).

A few weeks after the incident described above, Irvine again asked Rhodes to accompany him, this time to repair a roof on a trailer (R 7106). When they arrived at the location it appeared "awful familiar for not being there before" to Rhodes (R 7103). Unbeknownst to William Rhodes when he left on the journey, it was the same property where Arthur Vencia had died a few weeks before (R 7102).

The trailer was the home of Bessie Fischer, Arthur Venecia's mother. Rhodes went up on the roof to examine the repair job to submit his bid.[1] He left Irvine inside with the old woman. When he returned to the trailer from the roof, to tell of the problems he had found, he saw Michael Irvine strangling the old woman (R 7107-8, 5443). Rhodes ran outside (R 7110 - 5444), grabbed a bottle of Scotch and told Irvine, when he got outside, that what Irvine did wasn't right (R. 5404-5).

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[1] Rhodes stated he knew about roofing work from working in Kansas (R. 7103, 5400).

Irvine asked Rhodes not to say anything about the murder of Bessie Fischer (R 7110). In return Irvine would not talk about the guy Rhodes had "gotten fighting with inside the house earlier" (R 7110). Irvine threatened to tell the police about the Venecia incident if Rhodes did not go back to the trailer with him later and bury the body, which he reluctantly agreed to do (R 7110). Michael Irvine gave Rhodes $1,000.00 and said they were square.

On April 19, 1984, two skeletons, one male and one female were discovered in a pit on the five acre tract that had been owned by Arthur Venecia (R. 4051 - 4058). They would be identified as Bryant's homosexual lover, Arthur Venecia and his 82 year old mother, Bessie Fischer (R. 4693, 4701).

The discovery was made after a search took place based upon information the police received from Geneva Regan who was a waitress at the International Pancake House Restaurant in Homestead that was owned by Venecia and managed by Bryant (R. 7314). Her friend Dee Casteel also worked there (R. 3874 - 3875).

Dee Casteel, after an argument with her boss, James Allen Bryant, feared for her life and made a statement in front of Geneva Regan and her 17 year old daughter in March of 1984 (R. 3849). After stating to Geneva that she had hired two "hitmen" at Bryant's request to get rid of Arthur Venecia (R. 3753) and had disposed of the body, and that she had also arranged for the murder of Bessie Fischer (R. 3769 - 3772), Geneva Regan told Metro Dade Homicide investigators (R. 3773), and the investigation began.

After the discovery of the bodies and having taken statements from the three co-defendants, William Rhodes was arrested in June, 1984, in his hometown (R. 5446) of Springfield, Illinois, and gave a statement to the police on June 7, 1984, from which most of the Statement of Facts herein is derived from (R 7092).

William Rhodes was tried together with Irvine, Bryant and Dee Casteel [whom had solicited Irvine (R.7313)] causing the Defendant to be subject to several accusers besides the State. The two incidents, although separate episodes and separated in time, were also tried together.

On July 17, 1987, the jury returned guilty verdicts on both burglary counts and both first degree murder counts. On September 15, 1987, the trial court imposed upon William Rhodes the sentence of death by electrocution for the murder of Arthur Venecia and imposed life imprisonment for the murder of Bessie Fisher. The court imposed life inprisonment sentences on both burglary counts (R 7762-7773). Counsel was appointed for purpose of appeal. A timely Notice of Appeal was filed. This appeal follows.

SUMMARY OF TEE ARGUMENT

The appellant has raised numerous issues on appeal but wishes to stress those issues covered in this Summary of the Argument without waiving the other points on appeal.

The initial Motion to sever the offenses and co-defendants for separate trials was denied (R. 602, 603, 604). Each of the defendants had made at least one sworn statement which the State considered confessions. Further, the state convinced the trial court that the "confessions" were interlocking and therefore the defendants could be tried together without "Bruton" problems. The court opted to follow F.R.C.P. 3.151(b)(2) and attempt to conceal the identity of the co-defendants mentioned in the statements of each defendant. The method was to redact the references in both the transcripts of oral statements and "dubbing" over the references on recordings which the jury would hear. Unfortunately for the appellant, exculpatory portions of his statement to the police were deleted and any person and every juror could tell who the redacted statements referred to due to:

(a) Obvious differences in size between the Defendants.

(b) The sex of the Defendants.

(c) The dates when the statements were taken.

(d) Slip-ups by State witnesses and deliberate misconduct (violating the judge's instructions not to reveal identities) by the prosecutors.

(e) The roles played by the defendants in the deaths.

(f) Process of elimination.

(g) Opening statements revealing roles and identities.

(h) Voir dire exposing roles and identities.

One defense lawyer summarized the effectiveness of the redactions by stating that, if these jurors could find their way to the courthouse they could surely pick up who is who in the redacted statements. Numerous times during the trial the Judge would re-commit to the redaction method but it became increasingly obvious that there was no protection to the defendant by having the references to him in the co-defendant's statements slimly disguised.

The appellant was placed in a position by the end of the State's case where uncrossexaminable statements had been entered into evidence against him. Had the severance been granted for trial separate from the other defendants, the appellant would not have been placed in this unfair position. The 14th Amendment's due process provision was violatd, as well as the 6th Amendment's right to confront each witness testifying against him.

The co-defendants, Casteel and Irvine, would eventually testify in their own behalf, but co-defendant Bryant, who had been close enough to verify Rhode's self-defense defense and had re-entered the home of Arthur Venecia[2] while Venecia lay injured, and who had stated (whose ineffective redacted statement was in evidence) Rhodes had a knife, could never be cross examined.

Rhodes lost his 5th Amendment right by being forced to take the stand to explain away the unconfrontable statement of Bryant and to further counter the accusations of Irvine, whose opening statement accused Rhodes of both murders. Irvine and Rhodes

[2] Making him a possible suspect of the physical murder.

statements were absolutly contradictory - accusing each other of the murder of Bessie Fischer. This had been brought to the attention of the court prior to trial and the severance should have been granted, or the statements never entered.

The two burglary/murders which were tried together were distinctly separate offenses in both time and incident. Had Rhodes been tried alone, and on each offense separately, he could have had a fair trial. His statement standing separately set forth a self defense against an attack by Arthur Venecia and a statement whereby he witnessed Michael Irvine strangle Bessie Fischer. The State would have had to meet their burden of proof rather than have the case proved by the co-defendants' statements. The State, in order to get by Motion for Judgment of Acquittal had necessarily entered into evidence the ineffective, redacted statements of the co-defendants against Rhodes.

The jury pool was poisoned by jurors who admitted that the repetitive questioning by the four defense attorneys made them believe that the defendants had to overcome these jurors' own belief that the defendants were guilty: their belief being helped along by the State's overreaching voir dire!

The cumulative, shocking, gruesome posed photos of skulls and bones (which were irrelevant, immaterial and whose probative value was out weighed by their prejudicial effect) along with the prosecutors' purposeful ignoring of the Judge's instructions to keep identity a secret, the probable perjured testimony of a state's witness, and the summarizing of testimony also contributed to the defendant's conviction and sentence.

The defendant was further prejudiced when the State struck six of eight black jurors from the jury pool during voir dire without explanation. The inquiry requested by Rhodes' counsel into the reasons why was never granted. The reason for failure to inquire, as required, because the defendant himself was not black, was erroneous.

The overall cumulative effect of all the issues discussed herein was to deprive the appellant of a fair and impartial trial by a jury which was a cross section of the community.

I

THE STATE UTILIZED SIX OF ITS EIGHT PRE-EMPTORY CHALLENGES TO EXCLUDE BLACK JURORS IN VIOLATION OF STATE V NEIL

The case of State v Neil 457 So.2d 61 481 (Fla. 1984) held that pre-emptory challenges may not be used solely to exclude jurors on the basis of race. While the right to use pre-emptory challenges against prospective jurors is guaranteed by Florida Statute Section 913.08 (1983), and Florida Rules of Criminal Procedure 3.350, this right is abused when such challenges are used "solely as a scalpel to excise a distinct racial group from a representative cross-section of society." Neil, Id. at 486. Thus, where it is determined by the trial judge that a party has been challenging prospective jurors solely on the basis of race, the court should dismiss the jury pool and re-start voir dire over with a new pool. Neil, Id. at 487. In the instant case, after requests from all defendants, the lower court failed to conduct a Neil inquiry into the repeated exclusions of black jurors by the state from the jury pool. (T. 1470, (T. 1481, (T. 442), T. 451). The Court's failure to inquire into state reasons for using six of its eight pre-emptory challenges against blacks constitutes reversible error.

The test for asserting a prima facie Neil case is a timely objection; a demonstration on the record that the challenged persons are members of a distinct racial group, and that there is a strong likelihood that they have been challenged solely because

of their race. Neil, Id. at 486. In the instant case, timely objections to the state's use of pre-emptory challenges to exclude black jurors were made at three different times (R. 2554, 2565, 1526). At the time each objection was made, the record reflectd the challenged jurors were black. Id. The test for whether jurors were challenged solely because of their race is whether there existed a valid basis for exclusion other than race. Cotton v State 468 So.2d 1047 (Fla. 3rd DCA 1985), Slappy v State 503 So.2d 350 (3rd DCA 1987), Batson v Kentucky, US, 106 S.Ct. 1712, 90 L.Ed 2d 69 (1986), (See discussion herein), Macklin v State 395 So.2d 1219 (Fla. 3rd DCA 1981). In the instant case, the state exercised eight pre-emptory challenges, six of which were used against black jurors (R. 2554, 3034). The six black jurors excluded were: Mrs. McGee (R. 2554), Mrs. Montgomery (R. 2551), Mr. Lapsley (R. 2547), Mr. Norwood (R. 2549), Mrs. Blue (R. 2551), and Mrs. Level (R.3034). Of the black jurors excluded, in only two cases did there conceivably exist any other basis for exclusion other than race.

Mr. Norwood indicated he would have difficulty in recommending the death penalty in the event the defendants were found guilty (T. 1352). See Wainwright v Witt 105 S.Ct. 844, 83 L.Ed. 841. Adams v Texas, 448 US 38, 65 L.Ed 2d 581, 100 S.Ct. 2521. Upon further inquiry by the defense, he stated he would follow the laws and rules given by the judge in determining guilt or innocence of the defendants (R. 2541, 2544). The other excluded juror, Mrs. Blue, lived in the same city (Naranja) where the alleged crimes occurred and recognized some of the defendants and

witnesses (R. 1432 - 1438). Under these facts it was within the discretion of the trial judge to exclude the juror on the basis of impartiality or prejudice. Porter v State 388 So.2d, 18 (Fla. 4th DCA 1980). No other prejudicial evidence was found in the record pertaining to the remaining four black jurors. (See voir dire, R. 1085 - 3157).

The state's argument at the trial was that no Neil inquiry was required (R. 3040) as prosecutor Novick pointed out that each defendant was white (R. 3035). The Arizona Supreme Court on July 19, 1988, decided the case of State (Ariz.) v Superior Ct. (Gardner), 43 Crim L. 1069, holding that racially prejudiced peremtories applied not only to defendants whom are of the same racial group as the stricken jurors, but to any case where peremptories are used in a discriminatory fashion.[3] (Distinguishing Batson, Id. and limiting it to the specific facts and issues therein). Although not binding on this court the Arizona court's logic is compelling:

> "If we apply the Batson principle exclusively to those cases in which the defendant and the excluded jurors are of the identical race or ethnic group, our trial judges and lawyers will frequently be forced to inquire into the racial and ethnic makeup of particular jurors.
>
> We should adopt the rule that would obviate or reduce the necessity for such an unseemly intrusive procedure.
>
> The discriminatory exclusion of jurors from any cognizable group **necessarily** violates the right to a chance for a fair cross section no matter what the racial or ethnic characteristics of the defendant, his lawyer, the judge, or any party to the action. (emphasis on "necessarily" added to

[3] The Defendant in State v Superior, Id. was a white male defended by a black attorney: so was Rhodes.

demonstrate the court's ruling that the actions are a per se requirement. This court should not consider the failure to inquire harmless error).

Unfortunately, for Rhodes, the argument that the state's racially motivated challenges did not apply to the principles of Neil, Id., when a white person was on trial, as set forth by prosecutor Novick was accepted by the trial judge and no Neil inquiry was made in spite of all requests (R. 3043)."

It affirmatively appears from the record that at least four of six excluded black jurors were pre-empted exclusively on the basis of race. Since the lower court failed to make a proper Neil inquiry, after it was requested by Mr. Rhode's counsel (R. 2554, renewed at 3034), and no other basis for the exclusion of black jurors existed, this court should reverse the conviction and sentence of the trial court and remand the cause for a new trial. Neil, Supra, Hernandez v State 473 So.2d 1364 (Fla. 3rd DCA 1985), (Pearson, J., concurring). See also Jones v State, 464 So.2d 547 (Fla. 1985), Andrews v State, 459 So.2d 1018 (Fla. 1984).

II

THE LOWER COURT ERRED BY FAILING TO GRANT DEFENDANTS' MOTIONS FOR MISTRIAL BASED UPON IMPROPER PROSECUTORIAL QUESTIONING WHICH UNALTERABLY TAINTED TEE JURY TRIAL

The Defendant, WILLIAM RHODES, was entitled to a fair trial, one free from deliberate prosecutorial misconduct. In Gonzalez v State, 450 So. 2d 585 (Fla. 3.d DCA 1984). Coleman v State, 420 So.2d 354 (Fla. DCA 1982), Knight v State, 316 So.2d 576 (Fla. 1st DCA 1975). The Appellate Court reversed a defendant's conviction of robbery where the State persisted in improper questioning to the point where testimony was summarized and improper questions were repeated. The court noted that in spite of repeated objections by defense counsel and reminders by the trial judge, the effect was such that "no curative instructions by the court could dissipate the prejudicial effect." Gonzalez, Id. at 586.

In some cases, minor prosecutorial misconduct may render error harmless. Molina v. State 447 So.2d 253, at 255 (Fla. 3rd DCA 1983) (Pearson, J. concurring). Postell v State, 398 So.2d 851 (Fla. 3rd DCA 1981), cert. denied, 411 So.2d 384 (Fla. 1981). But, where the State persists in deliberately eliciting inadmissible testimony in order to tip the scales against the defendant, this practice will not be sanctioned by the courts. Id.

In the instant case, the record is replete with examples of deliberate attempts by the State to elicit inadmissible testimony, to repeat objectionable questioning, and to summarize prior

testimony. The first prejudicial error committed by the State was in eliciting improper testimony. The State was forewarned by the court not to elicit testimony from witnesses which would make reference to any of the defendants. (T. 143) The following are examples of purposeful State misconduct:

(The State) Q. After telling you that Art Venecia and Bessie Fischer were killed, did she tell you what she did?

A, Yes.

Q. What did she tell you she did?

A, She said she contacted two hitmen to get in touch with Allen to kill Arthur Venecia.

[Objection sustained (R. 3753, 3755) Motions for severance and mistrial denied].

The defendant, James Allen Bryant had been identified as a solicitor; the defendant Dee Casteel was not a "man" which left Irvine and Rhodes as "hitmen" even with redacted statements.

Q. Did your mom tell you who ordered that pit to be dug, who arranged for it to be dug?

A. Who arranged for it?

Q. Yes. Who arranged for it?

A, She and Allen.

[Objections sustained] (R. 3830)

Q. Did you have any information from witnesses who would know about the deaths of Venecia and Fisher when you went to North Carolina?

A, Yes.

Q. Statements of Defendants.

A. Yes.

[Objection sustained] (R. 4468)

At this point the state, through prosecutor Weintraub, revealed the identity of Rhodes in the redacted statements even though the court itself tried to prevent it. Rhodes' motion for mistrial and renewal of the Motion to Sever was denied in spite of the prosecutorial misconduct (R. 4468, 4476, 4477).

Q. Ms. Casteel, what did James Allen Bryant tell you occurred at the home?

Let me break the questions down.
He told you, didn't he, how the gentlemen, how the...

[Objection sustained] (R. 4928 - 4929).

Q. He told you how the people got in the house, didn't he?

[Objection sustained] (R. 4929).

In addition to eliciting inadmissible testimony from witnesses, the State repeatedly summarized testimony, in direct violation of Gonzalez supra. The following are examples to illustrate this point:

Q. During the time that you and your mom lived there, approximately when was it you moved in?

[Objection sustained] (R. 3829 - 3832.)

Q. What was the first thing you saw which you hadn't seen when you covered the pit over a year before in July?
Did you still see the mattress and some of the clothing that you described?

[Objection sustained] (R. 3967 - 3971)

Q. And when that happened [Attorney asked Defendant for I.D.] did Defendant Bryant make any explanations as to why he, the owner of the property, Arthur Venecia...

[Objection sustained] (R. 4183)

Q. Let me ask you a question. It is my understanding you had a discussion with Detective Meier initially after you were advised of your rights, which was not tape-recorded, right? You talked with him, right? Yes or no?

[Objection sustained] (R. 5417 - 5419)

Since the Judge had decided on the use of redacted statements at trial, the defendants were concerned the State might use witness testimony to circumvent the redactions (R. 3762). The Court, noting the possibility of lay witness slipups permitted the State to lead their witnesses to avoid the relevations (R. 3831). In spite of all these precautionary measures, the State repeatedly asked improper questions which ultimately referenced the Defendants (see text Supra.) In addition, the State repeatedly summarized testimony after objections to this practice were sustained.

The cumulative effect of this deliberate misconduct by the State (See also issue III) was to prejudice Defendant Rhodes' ability to have a fair trial. See: (T.1455) (T.1542) (T.1571) Thus, under Gonzalez, the jury trial was unfairly tainted and must be reversed in order that Defendant Rhodes have a fair trial.

III

THE COURT ERRED IN FAILING TO VACATE THE JURY'S DEATH RECOMMENDATIONS

A. AFTER THE DISCOVERY OF PERJURED TESTIMONY WHICH THE PROSECUTOR WAS AWARE OF DURING THE PENALTY STAGE.

During the trial on July 8th, Dr. Valerie Rao, Assistant Dade County Medical Examiner testified that the manner of death , of Fischer and Venecia was by unspecified means (R.4744, 4760). Her testimony was consistent with her findings contained in her August 7, 1984 reports and sworn pretrial testimony of April 11, 1985 (R.). There were no means by which the state could prove the aggravating factor of especially heinous, atrocious or cruel [Florida Statute Section 921. 141(5)(H)].

During the penalty phase the state called Dr. Rao and knowingly suborned testimony that Venicia... "drowned in his own blood"(R. 6221), and that Fischer died by strangulation while having difficulty resisting her assailant(s) (R. 6226), and that she was conscious for a few minutes; (R.6227) death being a comparatively slow one. The inconsistancy between her penalty phase testimony and her previous testimony and reports is so great as to appear perjurious and the result of prosecutorial coaching and an attempt to secure a desired aggravating factor jury instruction. All details regarding this argument are set forth fully in attorney Koch's Motion to Vacate Advisory Recommendation of Trial Jury filed September 15, 1987 (which is part of the record of defendant Dee Dyne Casteel at 901 - 910) (Argument at R. 6708-6710) [Rhodes adopted at (R. 6695)].

B. WHEN THE PANEL HAD BEEN TAINTED BY TEE MINIMIZING OF THE JURORS' RECOMMENDATION DURING VOIR DIRE.

The jurors were further tainted and biased by the prosecutor's impermissible questioning, belittling their role in the death phase, which led them to believe that the responsibility for determining the appropriateness of the defendant's death rested elsewhere (R. 1366, 1367). Pursuant to Kaldwell v Mississippi 105 S.Ct. 2633, 472 US 320, a prosecutor may not do *so* because the jurors, thinking that they have shifted the responsibility to the Judge will be biased in favor of rendering the death penalty. Rhodes joined in the motion to strike the panel because of the prosecutor's actions, which was denied (R. 1375).

It is apparent that the voir dire misconduct by the state had an impact on the death recommendations rendered by the jury. In combination with the other prosecutoral conduct discussed in issue II and the suborned false testimony of Dr. Rao, the petit jury was *so* tainted as to require reversal by this court of the sentence of death imposed after receiving the jury's tainted recommendation.

IV

THE LOWER COURT ERRED BY PERMITTING THE STATE TO INTRODUCE REPETITIVE TESTIMONY OF SIX WITNESSES DESCRIBING THE UNEARTHING OF THE GRAVE SITE WITH GRUESOME PHOTOGRAPHS OF SKELETONS, THE CUMULATIVE EFFECT OF WBICH WAS HIGHLY INFLAMMATORY AND PREJUDICIAL TO THE JURY

Florida Statute 90.403 excludes the admission of relevant evidence where its probative value is substantially outweighed by its prejudicial effect.

This includes the danger of unfair prejudice, misleading the jury or the unnecessary presentation of cumulative evidence. More specifically, the test for determining whether cumulative evidence is unfairly prejudicial is whether it appeals to the jury's sympathies, arouses a sense of horror, provokes an instinct to punish or otherwise may cause a jury to base its decisions on something other than the established propositions in the case. J. Weinstein and M. Berger, Weinstein's Evidence Page 403 (03), at 403-15 to 403-17 (1978). A jury can be prejudiced where large amounts of gruesome evidence are presented at a trial. Young v. State 234 So. 2d 341 (Fla. 1970) In Young, the Supreme Court reversed a lower court's admission into evidence of numerous photographs of the victims' decomposed torso. The Court noted that while some of the photos may have had some relevance in establishing identification, the overall impact was highly inflammatory and created undue prejudice in the minds of the jury. Id. at 348.

In the instant case, the State introduced at least ten photographs of the unearthing of the grave site of Arthur Venecia

and Bessie Fischer. (See States Exhibits 19-30), (R. 7006-7023). While this use alone may have been probative of a corpus delecti, the State persisted in referencing the grave sites through the testimony of at least six witnesses. First, the State introduced the gruesome photographs of the decedents' skeletons through the testimony of Roger Taffe, of Metro-Dade Crime Scene Sections. (R. 4049-4057). These photographs evidenced the grave (Exhibit 19), the box containing a skeletonized body (Exhibit 20), and closer views of the open box with the skeletal remains clearly visible (Exhibits 21/22, 25), a close-up of the skull (Exhibit 23), another of the skull being unearthed, (Exhibits 26, 27), a close-up of the second skull (Exhibit 29), and the skull's dentures (Exhibit 28). These photographs were published to the jury. (R. 4053). The State then presented the testimony of Mr. Wayne Tidwell, the owner of the backhoe which unearthed the graves. Mr. Tidwell repeated the same testimony given by Roger Taffe, as well as referencing, therefore highlighting, the same photographs introduced through Mr. Taffe's testimony. (R. 4099-4103). He described the opening of the box containing the skeletonized body (R. 4099), (State's Exhibit 21), a close-up of the skeleton (R. 4100), (State's Exhibit 24), close-ups of another skull and bones (R. 4101-4103), (State's Exhibits 26, 28, 29). Mr. Tidwell's testimony was unnecessarily repetitive of previous testimony and highly inflammatory. To further prejudice the jury, the State introduced the testimony of Richard Higgins, the owner of the property on which the grave was located. (R. 4298). He again described the unearthing of the skeletons from

the grave sites, as the other witnesses had done (R. 4314-4315). The jury was again given another visual image of skeletons being unearthed. Mr. Higgins testimony was objected to, as unnecessarily cumulative of prior testimony. (R. 4314). The objection was overruled. (R. 4314). Next, the State introduced the testimony of Detective Ken Meier, who was at the scene of the excavation of the grave site with Roger Taffe. He described the unearthing of the skeletal remains to the jury. (R. 4485-4486). His testimony on this subject was also unnecessarily cumulative and prejudicial to the jury.

But the lower court did not stop the State's repetition of testimony entailing skeletal remains. Thereafter, the State presented Dr. Richard Souviron, an expert in the field of forensic odontology. (R. 4794). Dr. Souviron identified the skeletons found in the grave as those of Arthur Venecia and Bernie Fisher. (R. 4826), (R. 4818). The identifications of the skeletons involved additional photographs of the decedents' skulls and dental structures. (R. 4798-4830). Dr. Souviron's testimony was unnecessary and prejudicial, since the defendants had offered to stipulate to the identities of the bodies. (R. 4790-4798). In determining the probative value of testimony presented by the State, the lower court should have noted the defendants had offered to stipulate to the evidence. See M. Graham, Handbook of Florida Evidence, at 403.1 (1987). By failing to take this into account, the lower court aided the State's deliberate attempt to prejudice the jury through the repetitive introduction of evidence of ghastly skeletal remains.

Finally, the State was able to recreate the unearthing of the skeletons one last time through the testimony of Dr. Rao, an expert in anatomical pathology and forensic pathology. (R. 1143). While her testimony may have been relevant, as to the cause of death of the victims, it was not necessary to redescribe the unearthing of the skeletons. But, nonetheless, Dr. Rao was permitted by the court to describe the same exhibits previously described by Mr. Tidwell and Roger Taffe. She described the skeleton lying in the box (R. 4848-4849), (State's Exhibits 20, 22, 24, 25), (R. 7009, 7011, 7012) the skull with hair (R. 4850), (State Exhibit 29), and additional pictures of the skulls (R. 4852-4853), (State's Exhibits 91 and 93) (R. 7373, 7378). Although the Court noted Dr. Rao's testimony appeared to be cumulative, it permitted the testimony anyway. (R. 4841, 4842). The defendants' frustration with the Court's failure to strike repetitive testimony is illustrated by Attorney Koch's objection to the presentation of a skull during Dr. Rao's testimony. (R. 4837-4840). The court denied the use of the skull as demonstrative evidence, but permitted photographs to be used instead. (R. 4841-4842). The State's deliberate attempt to prejudice the jury to render a verdict on the basis of emotion or horror is exactly the type of prejudice that Florida Statute 90.403 is designed to protect against. The lower court erred as a matter of law by failing to either restrict or strike the testimony of the six witnesses repeating gory details. The cumulative effect of the testimony was to perpetuate the gruesome image in the minds of the jury of skeletons being unearthed from

the ground. Therefore, the trial of Defendant Rhodes was prejudiced by the lower court's failure to control or limit highly inflammatory evidence and must be retried.

V

THE LOWER COURT ERRED BY FAILING TO SEVER TEE OFFENSES AGAINST DEFENDANT RHODES SINCE TEEY WERE UNRELATED IN TIME, MANNER OR PLACE

Rule 3.152 (a)(1) of the Florida Rules of Criminal Procedure provides that where two or more offenses are improperly charged in a single, indictment, the defendant shall have a right to severance of the offenses. Two or more offenses are properly joined together if they are "based on the same act or transaction or on two or more connected acts or transactions." Rule 3.151, Florida Rules of Criminal Procedure. "Connected acts or transactions," refer to a continuing episode closely related in time and unaffected by the accused's alleged guilt in both or all instances. Paul v. State 365 So. 2d 1063, 1065-1066 (Fla. 1st DCA 1979), (Smith, J. dissenting) cited with approval in Paul v. State 385 So. 2d 1371 (Fla. 1980). Blackwelder v State, 100 So.2d 834 (Fla. 1st DCA 1958), Ashley v State, 265 So.2d 685 (Fla. 1972). The following examples are listed to illustrate this point:

1. The assaults on two sets of victims by the same attacker in the same dormitory occurring a month apart constituted separate offenses since they were unrelated in time or sequence. Paul Id. at 1372.

2. The burglaries of nine separate buildings and victims from whom different items were taken on nine different days during a one month period were properly severed because they were not connected in the episodic sense. Williams v. State 439 So. 2d 1014 (Fla. 1st DCA 1983). McMullen v State 405 So.2d 479 (Fla. 3rd DCA 1981).

Similarly, in the instant case, the deaths of Arthur Venecia and Bessie Fisher were unconnected acts involving different persons, occurring at different times. The indictment charges Defendant RHODES in Counts I and II with the burglary of the residence located at 21900 S.W. 134th Avenue, Miami, Florida and the murder of Arthur Venecia on June 19, 1983. In Counts III and IV of the same indictment defendant RHODES is charged with entering a different residence and the murder of Bessie Fisher on August 20, 1983. (R. 6801-6803). Although similar crimes may have been committed, in the sense that they were both homicides, and both on the same five acre tract of property, they were committed upon different persons at different times and at different residences. Thus, Counts I and II are distinct from Counts III and IV in that they comprise different episodes and different persons. Numerous motions were made requesting severance, but none were sustained by the lower court. (R. 7640, 6910, 618-619, for example). Clearly, the lower court erred as a matter of law when it denied the defendant's motions for severance of the burglary and murder counts (Counts I, II, and III, IV) for each individual. Paul, Supra, Williams, Supra, Rubin v. State 407 So. 2d 961 (4th DCA 1981). The purpose of severing unconnected charges is to protect the defendant from being convicted on the basis of other charges against him. Paul, Supra at 1066. Harris v. State 414 So. 2d. 557 (Fla. 3rd DCA 1982). In the instant case, it is clear from the verdict that the jury convicted Defendant RHODES on the basis of two murder charges against him. This occurred in spite of the fact that he denied

liability in both murders, and witnessed Defendant IRVING strangle Mrs. Fisher. (R. 7097-7098) (R. 7107).

The lower court also erred in denying defendants' motions to sever Counts VI through X of the indictment. (See R. 6803-6806, 773). These charges were unrelated to the murder and burglary charges against Defendants RHODES and IRVING as they were directed solely against Defendants BRYANT and CASTEEL. (R. 6803-6806). Thus, the consolidation of these charges along with both murder and burglary counts further prejudiced Defendant RHODES' ability to receive a fair trial on the basis of independent evidence.

The combination of all the charges, the admitted statements and evidence against his codefendants contaminated the jurors' minds, permitting them to conclude that RHODES was guilty by association. If the jurors believed Rhodes to be the perpetrator of the Venecia homocide then they quite probably would and did disbelieve his testimony that he had not murdered Bessie Fischer. The court may have believed Rhodes, upon reflection of the "life" as opposed to death sentence for her murder, demonstrating that Rhodes could have been acquited on each charge individually if not for the "spillover" effect created by trying the separate instances together. The lower court's denial of defendants' motions to sever offenses is an error as a matter of law and must be reversed by this court.

VI

THE LOWER COURT ERRED IN USING REDACTED STATEMENTS IN LIEU OF GRANTING A SEVERANCE WHICH PREJUDICED DEFENDANT RHODES AND FORCED HIM TO TAKE THE STAND AT TRIAL, IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS

Rule 3.152(b)(1) of the Florida Rules of Criminal Procedure provides a court shall order a severance of defendants in order to obtain a fair determination of the guilt or innocence of the defendants. But where the State seeks to use defendants statements at trial, they must be redacted so as not to prejudice the co-defendants Rule 3.152(b)(2), Florida Rules of Criminal Procedure. In the event the defendants are prejudiced, a severance must be ordered. Crum v State 398 So.2d 810 (Fla. 1981). Menendez v State, 368 So.2d 1278 (Fla. 1979), Johnson v State, 355 So.2d 143 (Fla. 3rd DCA 1978).

In the instant case, the lower court opted for judicial economy rather than upholding Defendant Rhodes' right to a fair trial. By trying four defendants together the lower court magnified the prejudice inherent when one defendant accuses the other. In this case all four defendants sought to accuse the others of committing or planning the murders. (See generally R. 7090-7304). Irvine's opening statement accused Rhodes of both murders prior to the first entry of evidence (See Judge's statement R. 3839). Defendant Rhodes was most particularly prejudiced by the co-defendants statements in that they make Rhodes the "fall guy" by singling him out as the murderer (R. 7178), (R. 7343). Defendant Bryant stated "the smaller guy" went into the bedroom and

thereafter he heard a scream (R. 7178). Based on their physical appearances, Defendant Rhodes is much smaller than Defendant Irvine (R. 5444-45). Defendant Rhodes was further prejudiced in that he was unable to cross examine Defendant Bryant about his accusatory statement(s) since Defendant Bryant did not take the stand at trial (R. 5240) (See issue VII). Defendant Casteel, in her original sworn statement indicated her friend Mike "had a friend" who would do the job (R. 7315). She then identified him as "Bill" (Rhodes) (R. 7343).

In addition to the other Defendants accusing Defendant Rhodes of committing the murders, Defendant Rhodes' defense was antagonistic to Defendant Irvine's (R. 7090-7117) (R. 7118-7166). Defendant Rhodes claimed Defendant Irvine was in the room with him when Mr. Venecia attacked him (R. 7098). He also states he saw Defendant Irvine strangle Mrs. Fischer (R. 7107). Defendant Irvine claimed Defendant Rhodes went into Mr. Venecia's room alone (R. 7128). He also stated Defendant Rhodes strangled Mrs. Fisher with nylon hose (R. 7131). Both defendants requested separate trials, since their defenses were irreconcilable (R. 609-610, 612, 3704).

The lower court admitted the redacted statements were ineffective in masking the identities of the co-defendants (R. 3763). In fact, the court noted the jury would figure out the names of the individuals referred to in the statements (R. 3763, 3775). The court also noted that any curative instructions given to the jury would be of little assistance (R. 3763).

Mr. Sohn made numerous objections on behalf of Defendant Irvine and Defendant Rhodes, claiming their identities would be revealed in spite of the redactions (R. 3510) (R. 3523, 3530, 3531). The lower court overruled these objections, leaving this court to correct the error (R. 3532, 3546).

In addition to the use of absolutly ineffective redacted statements, Defendant Rhodes was further prejudiced by their use, when his identity was revealed through deliberate prosecutorial misconduct plus references by witnesses. (See issue II). The use of the poorly redacted statements at trial revealed the identity of Defendant Rhodes, and implicated him in the crimes alleged by the State. As Mr. Sohn stated after opening statements:

> "Let's be honest, with all respect to the court, to attempt to redact the statement and attempt to camouflage it, it is evident from the state's first words that the jury knows who's "who" in these statements: "who did what, "who" was in the house (R. 3710).

In order to explain away the co-defendant's obvious references Rhodes was forced to testify in his own behalf in violation of his Fifth Amendment Right against self-incrimination. A defendant cannot, in a criminal case, be compelled to testify. United States v DeLuna, 308 F.2d 140 (5th Cir. 1962). (Discussed later at length). Here Rhodes, by being improperty joined, was so compelled.

Due to the above reasons, this court must reverse the judgment of the lower court and grant Defendant Rhodes a new and separate trial.

VII

THE LOWER COURT VIOLATED DEFENDANT RHODES' SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY FAILING TO GRANT A MOTION FOR SEVERANCE

The Sixth Amendment of the Constitution guarantees a defendant the right to confront his accusers. This right is particularly important in cases where out of court statements implicating a defendant are made by a co-defendant who does not take the stand at trial. Bruton v. United States 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed 472. Holmqren v United States, 217 US, 509, 54 L.Ed 861, 30 S Ct. 588 (1910). The failure of the confessor to take the stand deprives the defendant of the right to cross-examine his accuser, a violation of the due process clause of the Fourteenth Amendment, Mr. Bruton, Id.

In the instant case the court was continuously made aware that a potential "Bruton" problem could arise when the statements of all co-defendants were entered into evidence (for example R. 2065-2067). Defendant BRYANT made an out of court statement implicating Defendant RHODES, but did not testify at trial (R.5239). Defendant BRYANT's statement was introduced as evidence at trial (R.4488-4533). Defendant BRYANT's statement implicated Defendant RHODES in several ways. First, he claimed RHODES was carrying a weapon ("razor or a knife") while en route to Mr. Venecia's house (R. 4496). Although Defendant RHODES is not directly referred to in the redacted statement, BRYANT's statement, when read in conjunction with the other Defendants' statements and testimony directly implicates RHODES. (See objec-

tions R. 3188). For example, Defendant RHODES' statement indicated that a struggle broke out between himself and Mr. Venecia resulting in Mr. Venecia being cut (R. 7098). Defendant BRYANT's statement also noted that he heard Venicia say, "please just take everything in the house." (R. 4497); then heard a scream and saw Mr. Venecia's feet lying on the floor surrounded by blood (R. 4499). Defendant BRYANT's statement implicates Defendant RHODES as an aggressor or the perpetrator of the murder of Mr. Venecia. The inability of Defendant RHODES to cross-examine Defendant BRYANT on this issue was crucial because Defendant IRVINE claimed none of the defendants were carrying a weapon at this time (R. 7126). RHODES himself stated that he was cut by Mr. Venecia, and then briefly struggled in order to escape (R. 7098). Defendant BRYANT also accused Defendants RHODES and IRVINE of stealing money after the commission of the murder of Mr. Venecia (R. 4498). Thus, he was able to impeach without being subject to cross-examination by Defendant RHODES. Most importantly for Defendant RHODES' defense, Defendant BRYANT! in his sworn statement, stated that he was in the house during the commission of the Venecia murder. In fact, he was close enough to see Mr. Venecia (R. 4497). This statement, coupled with Defendant RHODES' assertion that Defendant BRYANT went back into the house later, raises doubt as to who actually killed Mr. Venecia. These are important issues which were accusations by Defendant BRYANT! implicating Defendant RHODES, but never resolved since Defendant RHODES could not cross examine his accuser. The lower court improperly denied Defendant RHODES' numerous motions for sever-

ance and this failure directly violated his constitutional rights under Bruton.

The Court created an exception to a Bruton violation in Parker v. Randolph. 442 U.S. 62, 99S.Ct. 2132, 60 C. Ed. 2d 713 (1979). It held that when two co-defendants each confess to a crime and the two confessions interlock such that the salient facts of each confession appear in both, then no violations of the Sixth Amendment occur. This case was used by the State in their argument against severance in the instant case (R, 623). The holding of Parker is premised on the fact that no violation of a defendant's rights under the Confrontation Clause occurs when the defendant's own confession implicates him and supports his co-defendant's confessions. Parker (Id. at 74). The facts in the instant case are distinguishable from Parker since neither Defendant BRYANT nor Defendant RHODES confessed to any of the crimes with which they are charged.

Since Parker, the Court has retreated from its holding that no Bruton violation occurs when interlocking confessions are introduced together. In Cruz v. New York U.S. 107, S.Ct. 1714, 95 L.Ed. 2d 162 (1982) the Court held a Bruton violation may occur when interlocking confessions are introduced at trial and their harmfulness must be assessed on a case by case basis. Cruz at 1718. Confessions interlock when the salient facts against the first defendant appear in the confession of the second defendant, and vice versa. Parker, Id. at 72-74. The Court noted that a nontestifying co-defendant's confession may be enormously damaging to a defendant if it confirms the defendant's confession. Cruz, Id. at 1718.

The defendant was prejudiced even by the co-defendants who did take the stand. The court was well aware, through the motions to sever filed (for example, R. 6905) that each defendant would accuse Rhodes, or at least some other co-defendant of being solely responsible for the murder. The court abuses its discretion by forcing the defendant to "stand trial before two accusers" Crum v. State 398 So.2d 810 (Fla. 1981), See also Rowe v. State, 404 So.2d 1176 (1 DCA 1981). Certainly the court abused its discretion in forcing Rhodes to trial before four (4) accusers!

There was no possibility for the jurors to miss the true identities of the "X"'s and "someones" of the redacted statements: (See discussion by all attorneys R. 1050-1059); even the court was aware of it (R. 3763, 3799). The slim effort to conceal identities became compounded by the State's deliberate attempts to reveal the identities to the jury (See issue II) (renewed Motion for Severence, R. 900). Florida Rule of Criminal Procedure 3.152(b)(2) should not have been the option chosen by the court in this case, since the rule's purpose - preventing reference to the co-defendant in another defendant's confession in a joint trial - could not be achieved. The court's choice was to grant a severence or exclude the statements altogether, Mathews v. State 353 So.2d 1974 (2d DCA 1978). See also Cook v. State 353 So.2d 911 and Mims v. State 367 So.2d 706 (1 DCA 1979).

In fact, there could be no due process with the jurors and Venire which was available as one juror, Mrs. Embi, acted as a spokesperson for the panel when she said:

"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 (NOTE that the jurors grouped the defendants together as a whole), I feel that it has sort of been implied, you know, that there is some guilt here. I feel that the questioning and line of questioning has been addressed to all of us, and to me, I think the burden would be more on the defense to prove that they are not guilty. That is the way...(R. 2019 - 2020) (See also subsequent arguments for severance re: Mrs. Embi R. 2065 - 2076)."

The opening statement of Irvine's counsel accused Rhodes of the murders. Rhodes would be prejudiced throughout the trial. His motion to sever immediately following opening was denied (R. 3704).

Compounding the entry of Bryant's statement was the court's granting of a state Motion in Limine which instructed the defense attorneys to refrain from direct or indirect comment on any co-defendant's failure to testify as it would be per se grounds for a mistrial (R. 6940, 3547). The evolution of the requirement that counsel for a co-defendant causes a mistrial by commenting on the failure of a co-defendant to testify appears to have begun in the case of United States v DeLuna, 308 F.2 140 (5th Cir. 1962). The relationship of DeLuna and its progeny to the granting of the Motion in Limine is of great significance to the unfairness suffered by Rhodes in this joint trial. The DeLuna majority stated clearly that "if an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the co-defendants be tried separately." Id at 309. The record of the instant trial is so filled with the co-defendants' attorneys and Rhodes' attorney making the court aware that they would accuse the co-defendants

of the crimes that it is impossible to cite. After days of discussions on how to redact the statements and immediately after Rhodes' attorney continued to voice his objection, the court voiced the following awareness of the prejudice to the defendants, which ties into the concerns of the DeLuna court (R. 3538):

> "...you know we are going to get through this thing even if it means restricting counsel and even if it means whatever. We are going to get through it, through trial...
> But, I am going to be consistent in the case. If I am consistently wrong, I will be consistentr so if I am keeping it out, obviously he is goint to be restricted in some areas of his cross-examination..."

It has been pointed out earlier in this argument that Bryant held the key to much of Rhodes' defense as he was present and re-entered Venecia's house. Yet Bryant's statement alone was in evidence - unconfrontable, what more compelling situation regarding the need to comment on Bryant's silence could be found? In the progeny of DeLuna, U.S. v Kahn 381, F.2d 824 (7th Cir. 1976) U.S. v DeLaCruz-Bellinger, 422 F.2d 723 (9th Cir. 1970), U.S. v Benz 740 F.2 903 (11th Cir. 1984), U.S. v Berkowitz 662 F.2 1127 (5th Cir. 1981), U.S. v Kopituk 690 F.2d 1289 (and numerous others) the courts have dealt with the denial of the need to comment on a co-defendants silence and with whether or not the trial judge should sever defendants, in similar manner. The overall test developed from the DeLuna evolution (which should be compelling enough reasoning to apply to Florida's severance rules) is:

1) a balancing of the prejudice to the defendant against the interests of judicial economy.

2) a continuing duty to grant a severance if prejudice does appear.

3) a real or "Compelling" prejudice, demonstrated to the trial judge, that will occur to defendants tried jointly and to which the court will not be able to afford protection.

Because of the absolute antagonistic defenses between Irvine, Rhodes and Bryant, there was conflict enough to create the compelling prejudice mandating severance. "If the essence of one defendant's defense is contradicted by a co-defendant's defense then the latter defense can be said to pre-empt the former" (Berkowitz, Id.). Irvine's counsel in reference to the direct contradictions between his client and Rhodes stated: "The trouble I think we are facing is there have definitely been joint trials with redacted statements, but I have never seen one where the defenses or interests are so antagonistic" (R. 3541). "The tests for when antagonistic defenses are irreconcilable or mutually exclusive has been expressed in various forms. Some courts have looked to whether each defendant was the government's best witness against the other.'" U.S. v Berkowitz, Id. citing U.S. v Crawford 581 F.2 at 492; U.S. v Johnson 478 F.2 1129 (5th Cir. 1973).

There is admittedly no absolute right to comment on a co-defendant's exercise of his right against self incrimination without reference to the circumstances of each particular case. (Kopituk Id. referencing U.S. v Kahn, 381 F.2 824 (7th Cir. 1976). But analysis of Rhodes' facts demonstrate that in combination with the Bruton error severance should have been granted:

1) a real or compelling prejudice existed as defined by U.S. v Benz, Id. - "Compelling prejudice means the jury will not be able to "collate and appraise the independant evidence against each defendant..." (similar to reasons set forth by the Bruton court in favor of severance).

2) the Motion to sever was renewed ad nauseum (See numerous cites) by all, including Rhodes' counsel, as more and more prejudice materialized due to the joinder.

3) the Judge was well aware of the scales tipping towards compelling prejudice versus judicial economy and abused his discretion by failing to apply the only real balancing test - whether the defendant received a fair trial! (Berkowitz, Id.) It was the trial Judge himself who summarized his knowledge of the prejudice and the issue which this court would inherit as follows:

> "I said that way back and so I am going to give somebody, if there're convictions in this case, I am going to give some appellate court a review and say once and for all, as an appellate court backed away from this situation, we don't say anything or address ourselves to the issue and what would happen if this were the case, so I am going to give that case and maybe, once and for all, we can lay to rest the issue of what's to happen in multi-defendant cases with interlocking confessions or whatever term the appellate court chooses to use with it, but to give them something so that the trench soldiers, those of us who are here every day in these courtrooms, can decide once and for all what is it that the appellate court wants us to do and they are never going to have that and duck the issue about not having a joint trial.
>
> This gives some of these folks who are going to have a difficult time when this trial starts some hope for the future, if that they got an appeal pending, some of them."

In the instant case, Defendant BRYANT's statement and Defendant RHODES' statement superficially interlock in that they

describe the same events leading up to the death of Mr. Venecia. Both statements refer to individuals getting into a car to drive to Mr. Venecia's house, both of the statements indicate that Mr. Venecia was injured after the individuals entered the house; all persons got back into the car and drove off. Since Defendant BRYANT's superficially interlocked with Defendant RHODES' statement, it was possibly the single most harmful evidence against him in that each statement was exculpatory. Neither was a "confession" of guilt. But the portions of Bryant's statement implicating the Defendant RHODES were not subject to cross-examination or comment that Bryant refused to take the witness stand. In spite of the Court's efforts to redact the statements of the defendants so as not to incriminate them, the Court was aware all the identities were revealed regardless of those efforts, (See, for example R. 3537, 3862, 931). The redacted statements did not prevent Defendant RHODES from being implicated by Defendant BRYANT in violation of Bruton, Id. and Cruz, Id. and the litany of Federal cases discussed. The only method by which the Court could have prevented the defendants from unfairly accusing each other would have been to grant the original, or one of the numerous renewed Motions for Severance. The failure of the lower court to hold separate trials, alternately to exclude the defendants' statements violated Defendant RHODES' constitutional rights under the 14th and 6th Amendments of the U.S. Constitution, resulting in an error that should be reversed.

The court in U.S. v Kupituk, Id. summarized aptly:

> "Of course, the interest of the public and the government in efficiently utilizing judicial resources would never justify

denying a person a fair trial. If a person demonstrates that he will incur compelling prejudice if forced to undergo a joint trial, a severance must be granted, regardless of the impact on judicial economy,"

CONCLUSION

The defendant Rhodes has been sentenced to death. His sentence was a result of a trial which was in essence a decision of choosing the economically preferable alternate between a fair trial which would ensure his constitutional rights under the 5th, 6th and 14th Amendments of the United States Constitution and trial along with three (3) co-defendants, all who would accuse him of the murders of Bessie Fischer and Arthur Venecia, either from the witness stand or from unconfrontable sworn statements. In spite of the cost to the state to hold a trial on the separate, unconnected murders, and separate and apart from the co-defendants, the essence of our system of criminal jurisprudence is fairness.

Based upon the individual, foregoing reasons! their cumulative effect, and the authorities cited herein, the judgment and sentence should be vacated and the cause remanded for a new trial and based upon the minimizing of the jury's death phase decision and the introduction of possibly perjured testimony, in the alternative, the sentence of death should be vacated and the defendant resentenced.

Respectively Submitted,

Gary W. Pollack

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Conclusion was mailed to Charles Fahlbusch, Assistant Attorney General, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33136, Sheryl Lowenthal, Suite 304, 2550 Douglas Road, Coral Gables, Florida 33134, Geofrey C. Flect, Esq., Suite 106, Sunset Station Plaza, 5975 Sunset Drive, South Miami, Florida 33143, and to Lee Weissenborn, Esq., 235 N.E. 26 Street, Miami, Florida 33136 this 15th day of September, 1988.

MERRILL & POLLACK
Attorneys for Appellant
1320 S. Dixie Highway
Suite 275
Coral Gables, Fl 33146
(305) 663-0307

By: _____
Gary W. Pollack