IN THE SUPREME COURT OF FLORIDA

CASE NOS. 71,258: 71,355;
71,356; 71,357

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THE STATE OF FLORIDA,

Cross Appellant,

vs.

MICHAEL IRVINE, WILLIAM E. RHODES,
JAMES ALLEN BRYANT and DEE DYNE CASTEEL,

Cross Appellees.

****

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

****

BRIEF OF CROSS APPELLANT

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PRELIMINARY STATEMENT

First, it should be specifically noted that the cross appeal represented by this brief is conditional. If the Judgements and Sentences of the trial court are affirmed as to all defendants, no relief is requested. However, should one or more of the Judgements or Sentences be reversed, this Court is requested to rule on the issues presented herein for the purpose of providing guidance to the trial court.

The cross appellant, **THE STATE** OF **FLORIDA,** was the prosecution in the trial court and the cross appellees, **MICHAEL IRVINE, WILLIAM E. RHODES, JAMES ALLEN BRYANT,** and **DEE DYNE CASTEEL** were the defendants. The cross appellant will be referred to, in this brief, as the State and the cross appellees will be identified by name, as defendants or as co-defendants, as appropriate.

The symbol "CR" will be used in this brief, to identify the Record-on-Appeal of Dee Casteel (Volumes I-VII) and the symbol "TR" will designate the combined Record-on-Appeal and Transcript concerning the other appellants (the transcript applies to Casteel, as well) (Volumes I-XX). All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The cross appellant hereby re-adopts, realleges and incorporates by reference, as though fully set forth herein, the entire Statement of the Case and Statement of the Facts set forth in its Appellee's Brief in this action.

The cross appellant reserves the right to argue additional facts in the argument portion of its brief, as appropriate.

POINT ON APPEAL

I.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF ARTHUR VENECIA WAS NOT ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL?

SUMMARY OF THE ARGUMENT

The trial court erred in failing to find the murder of Arthur Venecia was especially heinous, atrocious or cruel where, although he found the murder heinous, atrocious and cruel, he held that it was not especially so solely because the victim's suffering, although substantial, was not shown to be prolonged.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF ARTHUR VENECIA WAS NOT ESPECIALLY HEINOUS ATROCIOUS OR CRUEL.

The trial court made the following findings, with regard to each defendant, concerning the application of the especially heinous atrocious and cruel factor to the murder of Arthur Venecia:

> 7. Whether the capital felony was especially heinous, atrocious, or cruel.
>
> **Finding**
>
> While the premeditated murder was testified to as homicide by unknown or unspecified means, the circumstantial evidence at trial and the statements of other defendants indicate that murder victim Arthur Venecia died as the result of having his throat cut. The knowledge that one is about to die, coupled with the apparent method and means visible to the victim, the futile efforts to breathe through blood filled lungs is enough to strike terror in the heart of the most fearless of men. To be attacked within one's home, in the nightime, to beg, to no avail for one's life, to have one's throat cut, and perhaps drown in one's own blood or from the loss of blood, to linger for ten seconds, thirty, a minute, who knows; knowing that life is slowly creeping away is heinous, atrocious and cruel. No individual has the right to take the life of

> another except as prescribed by law. Under our laws only the State, after Due Process of law may execute another human being. 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.
>
> (CR. 1220-1221, TR.7605, 7718-7719, 7769-7770).

Certainly, there is no question that these findings are well-supported by the record (should defendants wish to challenge this, the cross appellant will be delighted to refer them to the applicable portions of the record).

Although, admittedly, when nothing more than a single stab wound is found, this aggravating factor may not apply; Profitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); cert. denied, 464 U.S. 1002 (1983), there was certainly far more than that, in this case.

The trial court erred here, in requiring that it be shown that the victim's suffering was prolonged before the especially heinous, atrocious, or cruel factor (subsequently referred to as "H.A.C.") could be applied.

Indeed, the fact that a victim bled to death after being stabbed was a circumstance supporting the finding of such a factor in Lusk v. State, 446 So.2d 1038 (Fla. 1984); cert. denied, 469 U.S. 873 (1984). So will gurgling sounds, as here, which indicated the possibility that the victim was drowning in his own blood. (TR.7098, 6218-6219); Mason v. State, 438 So.2d 374 (Fla. 1983); cert. denied, 465 U.S. 1051 (1984).

Further, even almost instantaneous death does not preclude an H.A.C. finding where, as here, it is preceded by fear and emotional strain. Adams v. State, 412 So.2d 850 (Fla. 1982); cert. denied, 459 U.S. 882 (1982); **See,** Melendez v. State, 498 So.2d 1258 (Fla. 1986); Preston v. State, 444 So.2d 939 (Fla. 1984). That the victim, as here, plead for mercy, without success, supports such a finding. Melendez v. State, 498 So.2d 1258 (Fla. 1986); Lemon v. State, 456 So.2d 1230 (Fla. 1984); cert. denied, 469 U.S. 1230 (1985).

Also, being attacked in one's own bed, of which there was certainly evidence in this case (TR.7097), also supports such a finding and has been held to do so even when death resulted from a single stab wound. Breedlove v. State, 413 So.2d 1 (1982); cert. denied, 459 U.S. 882 (1982).

Although it may well be that any of these factors standing alone will not support an H.A.C. finding, it is respectfully

submitted that where, as here, the findings of the trial court and the evidence support a number of such circumstances, then it was error to require that the victim's suffering be shown to be prolonged before the factor of especially heinous atrocious and cruel may be found.

The trial court erred in this matter and, should a re-trial or resentencing be required, he should be so informed.

CONCLUSION

Based upon the foregoing reasons and authorities, the trial court clearly erred in this matter and, should a retrial or resentencing be required of any of the defendants concerned in this case, this Court should *so* instruct the trial court, as the Cross Appellant hereby requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF** OF **CROSS APPELLANT** was furnished by mail to **LEE WEISSENBORN,** Attorney for Casteel, **235** N.E. **26th** Street, Miami, Florida **33137 GARY W. POLLACK,** Attorney for Rhodes, Merrill and Pollack, **1320** South Dixie Highway, Suite **275,** Coral Gables, Florida **33146, GEOFFREY** C. **FLECK,** Attorney for Bryant, **FRIEND & FLECK, 5975** Sunset Drive, Suite 106, South Miami, Florida **33143** and **SHERYL LOWENTHAL,** Attorney for Irvine, Suite **206, 2550** Douglas Road, Coral Gables, Florida **33134** on this 6th day of February, **1989.**

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