IN THE SUPREME COURT OF FLORIDA

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

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

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee.

****

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

****

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Florida Bar No. 0191948
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohdes Building
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

TABI OF ITENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Appellants, **MICHAEL IRVINE, WILLIAM E. RHODES, JAMES ALLEN BRYANT,** and **DEE DYNE CASTEEL** were the defendants before the Eleventh Circuit and the Appellee, **THE STATE OF FLORIDA,** was the prosecution. The Appellants will be referred to by name, as defendants or as co-defendants, as appropriate and the Appellee will be identified as the State.

The symbol "CR" will be used, in this brief, to identify the Record-on-Appeal of Dee Dyne 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

Defendants Irvine, Bryant and Casteel were originally charged pursuant to an indictment of May 16, 1984 (CR.l-4). However, a superceding indictment, against all four (4) defendants, was returned on July 11, 1984 charging them with Armed Burglary of the home of Arthur Venecia with an assault therein (all defendants, Count I), First Degree Murder of Arthur Venecia (all defendants, Count 11), Burglary of the home of Bessie Fischer (all defendants, Count 111), First Degree Murder of Bessie Fischer (all defendants, Count IV), Armed Robbery of Bessie Fischer's watch, (all defendants, Count V), First Degree Grand Theft of real property belonging to Arthur Venecia (Bryant and Casteel, Count VI), Second Degree Grand Theft of a pipe organ belonging to Arthur Venecia (Bryant and Casteel, Count VII), First Degree Grand Theft of a boat belonging to Arthur Venecia (Bryant and Casteel, Count VIII), First Degree Grand Theft of a camper belonging to Arthur Venecia (Bryant and Casteel, Count IX) and First Degree Grand Theft of stocks and bonds belonging to Arthur Venecia and Bessie Fischer (Bryant and Casteel, Count X). (CR.5-11).

Casteel, on March 19, 1985 filed a Motion for Order Scheduling Evidentiary Hearing on Applicability of Death Penalty to Defendant Casteel alleging that the policy of the State Attorney's office concerning whether or not to seek the death

penalty in any specific case was arbitrary and capricious (CR.108-109). This motion was adopted by other defendants and, on March 26, 1985, it was granted by the trial court (CR.108-109; TR.55-64). The State filed a Petition for Writ of Prohibition to prevent the trial court from requiring the State Attorney's office to disclose their justification for seeking the death penalty and, on November 6, 1986, this Court ruled that such disclosure could not be required. Reno v. Person, 497 So.2d 1 (Fla. 1986).

Meanwhile, the trial court, on August 16, 1985, had dismissed Count V, the armed robbery of Bessie Fischer's watch, as to all defendants. (TR.766-767, 1115).

Subsequent to numerous pre-trial hearings (which will be discussed in the Statement of the Facts), a jury trial commenced on June 15, 1987 (TR.1085). The jury returned verdicts of guilty, as to defendant Bryant, on Count I (Unarmed Burglary With an Assault) (TR.7521), II (First Degree Murder of A. Venecia), IV (First Degree Murder of B. Fischer), VI (Grand Theft of over $20,000 of real property), VII (Grand Theft of a pipe organ with a value over $100), VIII (Grand Theft of a boat with a value over $20,000), IX (Grand Theft of a Camper with a value over $100) and Count X (Grand Theft on stocks and bonds with a value over $20,000) (TR.7521-7529). He was found not guilty of the burglary of Bessie Fischer's home, Count III (TR.7523). He was

adjudicated guilty on the appropriate counts on July 17, 1987 (TR.7530-7531).

Concerning Michael Irvine, verdicts of guilty were returned on Counts I (Unarmed Burglary With an Assault), II (First Degree Murder of A. Venecia), III (Unarmed Burglary With an Assault) and IV (First Degree Murder of B. Fischer). (TR.7692-7695). He was adjudicated guilty of these counts (TR.7696-7697).

William E. Rhodes had verdicts of guilty returned against him on Counts I (Armed Burglary With an Assault), II (First Degree Murder of A. Venecia), III (Armed Burglary With an Assault and IV (First Degree Murder of B. Fischer). (TR.7754-7757). He was also adjudicated guilty of these counts (TR.7758-7759).

The jury found Dee Dyne Casteel not guilty of Count I (Burglary of Venecia) (CR.786), but guilty of Counts II (First Degree Murder of A Venecia), III (Unarmed Burglary With an Assault), IV (First Degree Murder of B. Fischer), VI (Grand Theft of over $20,000 of real property), VII (Grand Theft of a pipe organ with a value over $100), VIII (Grand Theft of a boat with a value over $20,000) and IX (Grand Theft of a camper with a value over $100). (CR.786-793). She was adjudicated guilty of the appropriate counts. (CR.831-832).

The penalty phase of the trial began on July 30, 1987 (TR.6158, 6208). Advisory verdicts recommending the death penalty were returned on each of the two (2) murders as to all four (4) defendants, with the closest margin being ten (10) to two (2). (CR.902-903, TR.7569-7570, 7700-7701, 7760-7761).

Dee Dyne Casteel was sentenced to death for the murder of Bessie Fischer (Count IV), to life imprisonment for the murder of Arthur Venecia (Count 11) and for the Armed Burglary of Bessie Fischer's home (Count 111) and to five (5) years imprisonment on each of the other counts (CR.1213-1227).

James Allen Bryant was sentenced to death for the murder of Arthur Venecia (Count 11), to life imprisonment for the Burglary of Arthur Venecia's home (Count I) and for the murder of Bessie Fischer (Count IV) and to five (5) years imprisonment on each of the other counts (TR.7597-7613).

Michael Irvine was sentenced to death for the murder of Bessie Fischer (Count IV), and to life imprisonment on each of the other counts (TR.7711-7722).

William E. Rhodes was sentenced to death for the murder of Arthur Venecia (Count 11) and life imprisonment on the other counts. (TR.7762-7773).

Subsequent to denials of the defendants' motions for new trial, notices of appeal and notices of cross appeal were filed. (CR.1230-1232, TR.7617, 7620, 7625, 7724-7725, 7727-7728, 7731, 7785-7787, 7796).

STATEMENT OF THE FACTS

The defendants' Statements of the Facts are confusing, contain substantial amounts of improper argument, fail to contain record references for many facts and contain numerous material errors and omissions. Appellee's Statement of the Facts, therefore, follows:

Although there were numerous pre-trial motions and rulings thereon, the facts concerning them will not be set forth in a separate section, but in the portion of this statement dealing with trial facts or in the argument portion of this brief, as appropriate.

A. Jury Selection.

1. Utilization of challenges.

Each side was granted forty **(40)** peremptory challenges in this case. (TR.1500).

During the course of the jury selection, it appears that the state utilized sixteen **(16)** peremptory challenges, seven **(7)** against black persons **(TR.1725, 2547, 2549, 2551, 2554, 2565, 3030, 3031, 3034, 3046, 3387, 3389, 3398).** This resulted in a jury in which six (6) of the twelve (12) jurors were black **(TR.3588).**

During this time, the defendants made a number of requests for the prosecution to state its reasons for challenging black veniremen. Each request was denied. (TR.2554, 2565, 2654, 3035-3043). However, an examination of voir dire reveals that Mrs, Blue, one of the challenged black persons, knew a number of people involved in the case, recognized at least some of the defendants and believed one of the defense attorneys had represented her brother (TR.2296, 2304, 2517, 2518, 1520). Also, her father was on probation for having shot and killed her brother (TR.2454-2455, 2516) and her husband and brother-in-law had been arrested two (2) months previously (TR.2516).

Mr. Lapsley, another of the challenged black venire-persons, had been arrested in Alabama for driving without a license (TR.2320-2321). He would require a greater amount of evidence on a murder than on other crimes (TR.2415) and, based on his beliefs, might prohibit a death penalty recommendation (TR.2436).

Mr. Norwood, among other things, wanted to be excused (TR.2418), had been arrested for and pled guilty to burglary (TR.2322-2323), and said he couldn't find a defendant guilty of first degree murder even if the evidence proved it. (TR.2541).

Mr. Montgomery had been arrested for not having a valid license (TR.2317-2319), and his brother-in-law had been arrested for attempted murder and gone to jail (TR.2319).

Mrs. Level, a fifth black potential juror who was challenged by the State, was asked if she would keep an open mind, decide the case only on the facts and follow the instructions of the court. She indicated that she would not **(TR.2813-2814)**. Also, she didn't know if her views on the death penalty would make it hard for her to be a juror **(TR.2913)**.

Mr. Jackson had had a recent death of a close family member **(TR.3362)**. When asked if he would use the definitions for terms given by the judge at the end of the case, he said he wouldn't use the Judge's definitions, but would use his own **(TR.3371)**. He had never heard of premeditated murder **(TR.3368)** and stated that he was being singled out **(TR.3385)** at a time when he had been questioned only by the State **(TR.3365-3385)**.

Mrs. McGee, the seventh potential black juror who was challenged by the State, appeared confused. On two occasions, she had to be asked by the court to speak loud enough to be heard **(TR.1188, 1635, 1664)**, and she felt that the defense was required to present evidence **(TR.1665)**.

2. Questions concerning the Florida death penalty system.

The State explained the trifurcated system used in the State of Florida in death penalty cases to the first venire panel without objection. **(TR.1353-1355)**. The State explained the system a number of times, based on responses to questions and the

seating of new panels, including the advisory nature of a penalty-phase verdict. (TR.1366-1367, 2889-2890, 3255, 3364-3365). This resulted in various defense objections, which were overruled (TR.1369-1375, 3255-3256, 3365). It also resulted in a defense request for a curative instruction (TR.1379-1382). The court, as a result of the request, instructed the venire that what lawyers say is not evidence and that an advisory verdict is not less important because it is advisory (TR.1455-1456).

The court instructed the jury on this issue subsequently, as well, at the penalty phase, in an instruction emphasizing the weight and importance of advisory verdicts (TR.6669, 7573).

3. Other material facts during voire dire.

Mrs. Embi, a prospective juror, believed that some of the questions in voir dire implied guilt (TR.2019-2023). The defense, as a result, requested a curative instruction and the Court instructed the venire that the questioning had no relationship to whether the defendants are guilty or not and no such inferences are to be drawn (TR.2053-2054).

Mrs. Tanna, another venireperson, thought defendant Rhodes made her think of Mr. Bundy, who killed the co-eds (TR.2328). The judge denied a motion to strike the panel, but specifically requested if the defense wanted a curative instruction. They did not (TR.2929-2932).

B. Trial.

1. The State's Case.

Genevieve (Jackie) Regan knew Art Venecia and his mother, Bessie Fischer, because they were customers at the International House of Pancakes (IHOP) in Naranja where she worked as a waitress (TR.3727-3729). Mrs. Fischer was elderly and very dependent on her son (TR.3729). Subsequently, Art bought the restaurant and James Bryant, Art's homosexual lover who lived with him, became the manager (TR.3730-3731).

Around December, 1982, the relationship between Art and Bryant changed. They argued over Art's drinking and never wanting to go anywhere and over Bryant's taking money from the restaurant (TR.3735-3736). Also, Bryant started going out with a new boyfriend named Felix and Art found out about it (TR.3737).

Jackie became friends with Casteel in early 1981 (TR.3740). When Sambos, where Casteel was working as a waitress, went bankrupt, Bryant hired Casteel as a waitress at the IHOP (TR.3740-3741). Around Christmas time, Jackie called the IHOP because she missed her friends there and spoke to Casteel and Bryant, who said Art was in North Carolina buying property (TR.3742). Subsequently, in February, 1984, she spoke to Casteel at Art's house and Casteel told her that Art had asked her to stay and take care of the place while he was in North Carolina (TR.3742-3744). Later Casteel moved to a house in Homestead (TR.3746).

Around March 20, 1984, Casteel invited Jackie out for drinks and they went to a few bars in Homestead, although Jackie didn't drink (TR.3747-3748). They went back to Casteel's, and Casteel went to bed while Jackie waited for the children to get home from school (TR.3748-3749). Susan, Casteel's daughter, arrived home in the late afternoon or early evening (TR.3749) and Casteel came out, looking sober and normal (TR.3750). Casteel said she had something she wanted to say and she wanted Susan to take it down (TR.3750). Casteel spoke and Susan wrote it down (TR.3750-3751). Casteel said that she had contacted two hitmen to get in touch with Bryant to kill Arthur Venecia (TR.3753). An objection was sustained and motion for mistrial denied concerning this (TR.3753-3754). The witness, who had previously been instructed by the State not to name names, was so instructed, again, by the Court (TR.3759). Casteel said that Art Venecia was murdered aroand June 19, 1983 (TR.3764) and that, the following day, they moved the body to a wardrobe in the carport, cleaned up the blood from the bedroom, and put the bed spread they wrapped the body in and the sheets and towels used for cleaning in the wardrobe box (TR.3766). The body stayed in the garage for four to six weeks and, then, they moved the wardrobe to the barn so the odor wouldn't become noticeable to Art's mother, who lived in the nearby trailer (TR.3766-3768).

Subsequently, someone told Casteel that Mrs. Fischer, Art's mother, was becoming too nosy so they'd have to dispose of

her, too (TR.3769). They told Mrs. Fischer her roof was leaking and they would have to have some men out to repair it (TR.3770). Casteel, on August 20, 1983, gave Mrs. Fischer her dinner about 5:00 p.m. and, as she was leaving, two men drove up (TR.3770). Casteel told Mrs. Fischer that it was okay to let the men in because they were there to repair her roof (TR.3770). The next day, Casteel found Mrs. Fischer dead (TR.3770).

Eventually, Mrs. Fischer's body was placed in a pit and a forklift was used to carry the wardrobe with Art's body to the hole (TR.3771-3772). Later, Casteel called the man with the backhoe to come out and cover the hole back up (TR.3772). Within a day, Jackie had given all the information she had heard from Casteel to Dade County homicide investigators (TR.3773).

During cross examination, Jackie testified that Casteel said she was having the statement written in case a person attempted to kill her (TR.3783). Casteel had indicated that she had introduced a person to some men who would kill Art for the person (TR.3784).

During redirect, Jackie said that Casteel quoted the price of Art's murder as five thousand ($5,000) dollars (TR.3800). Casteel said that her benefit from the murder was that she would be financially taken care of for the rest of her life and would always have a job (TR.3800).

Susan Garnett Mayo, Casteel's daughter, testified that, in the summer of 1983, Casteel told her that she was asked to find a hitman to kill someone (TR.3817). About a week later, she told Susan that she had made the contact and the murder had been done (TR.3818-3819). A few weeks later, her mother asked her to come down and the following day they moved to the house in the Redlands that had been Art Venecia's and Bryant's (TR.3819-3821).

Subsequently, Casteel said she made arrangements for backhoe people to come out and dig a pit and, later, for them to fill it in (TR.3832). Casteel pointed out a wooden wardrobe box in the barn (TR.3833). During this time, Susan drove a Buick Skylark and a red pickup truck owned by Art (TR.3837-3839).

Later, Art's house was sold and the family moved to a house in Homestead that Casteel had put a $1,500 down payment on (TR.3844-3845). Casteel was managing the IHOP, which took in about $7,500 in a good week (TR.3847-3848).

On March 19, 1984, Bryant came by the house, hysterical because Casteel had the money from the house closing when she was only supposed to take a portion of it (TR.3851). Bryant was demanding that he had to have his money and Casteel was apologizing (TR.3851). Casteel gave him the money and he left. (TR.3851-3852). That night, Susan found a note saying her mother had gone to see Bryant either because he wanted to know where the

money was or that she was going to get some money from him. The note also said that Bryant was not in a friendly mood and that the police should be called if anything happened to her (TR.3852-3853).

The next day, March 20, 1984, Casteel and Jackie were at Casteel's house when Susan got home (TR.3853). Susan had a conversation with her mother and wrote down what Casteel said, exactly, *so* that, if anything happened to her mother, it wouldn't be just her word against Bryant's (TR.3868). Then, Susan read the redacted version of the statement to the jury (TR.3869-3873). After Casteel finished the statement, she signed it and Susan signed it (TR.3873).

During cross examination by Bryant's counsel, it came out that Susan, on numerous occasions, had seen her mother give the funds from the restaurant to Bryant (TR.3870). She knew that, at least sometimes, it was one hundred percent of what the restaurant had taken in (TR.3880). For example, instead of making a four thousand dollar deposit for money taken in over the weekend, it would all go to Bryant (TR.3880).

Crime Scene Technician Roger Taffe described the unearthing of the bones of the victims on April 19, 1984 (TR.3903-3938).

Wayne Tidwell, a backhoe operator, on June 23, 1983, received a note from his office that Bryant had called for Casteel and had given an address and phone number (TR.3946-3951, 7025). Tidwell went to the address and met with Casteel, who wanted a trash pit dug, eighteen feet by eighteen feet and four feet deep (TR.3954). He dug it and was paid by Casteel, to cover the hole, which he did on July 10, 1983 and Casteel paid his bill for that, as well (TR.3960-3964). Tidwell dug the pit up, again, in April 1984, at the request of the police and found two (2) bodies in it (TR.3965-3967).

Dale Haskins testified, essentially, that defendants Bryant and Dee Casteel (Bryant calling himself "Mr. Casteel") sold him a theater pipe organ for $600 on March 5, 1984 (TR.3998-4026, 7033). Both Jackie Regan and Susan Mayo had previously seen such an organ at Art Venecia's house (TR. 3738-3739, 3833-3834).

Albert Riccio testified that he bought Art Venecia's boat from Bryant and Casteel for $36,000 and that, after dockage, loan payoff and brokerage were paid, his bank disbursed $9,540 by check to a Dee Casteel (TR.4030-4054). Casteel had a power of attorney signed by Arthur Venecia and notarized by James Bryant dated February 10, 1984 (TR.4053). The closing took place February 17, 1984 (TR.7035-7042).

Russell Philpot bought a camper for $4,000 from "Art Venecia" with Casteel notarizing the transfer of the title (TR.4057-4071). "Art Venecia" turned out to be James Allen Bryant (TR.4070). Philpot was asked to make the check out to James Bryant and did (TR.4066). This took place September 8, 1983 (TR.7043).

Technician William S. Miller lifted the fingerprint of James Allen Bryant from that check (TR.4071-4083).

Robert Murphy, assistant general counsel for E.F. Hutton, identified documents concerning the accounts of Arthur Venecia and Bessie Fischer (TR.4084-4096).

Frank Morno, the Coral Gables branch manager for E.F. Hutton, explained that, between June and August of 1983, the entire balances of Arthur Venecia's Account and the Joint Account of Arthur Venecia and Bessie Fischer, which amounted to approximately $33,000, were withdrawn (TR.4096-4131).

William Sussman, a real property attorney, negotiated a mortgage on Arthur Venecia's property with Casteel and a person he believed was Mr. Venecia. The closing on the mortgage was November 8, 1983 and the person he was introduced to signed the closing documents in that name, receiving net proceeds of $12,307.19 from the mortgage. That person was James Allen Bryant

(TR.4135-4152). Subsequently, Sussman handled a closing for the purchase of the property by Richard Higgins from "Mr. Venecia" (TR.4152-4160). Mr. Sussman was asked to identify "Mr. Venecia" at that closing and did *so,* saying, "I can tell you he is Mr. Venecia" (TR.4160).

Richard Higgins also testified that he met Casteel looking at the property, who subsequently introduced him to the owner, "Mr. Venecia" (TR.4173-4177). He bought the property for approximately $150,000 from "Mr. Venecia", who turned out to be James Allen Bryant. This took place on March 28, 1984 (TR.4177-4217). After the signing of the documents, Casteel grabbed the cash, counted it and put it in her purse (TR.4194).

Paula Cook, William Rhodes' sister, testified that Rhodes called her in late May or early June, 1984, saying he needed money and had killed a guy in Dade County because the guy owed him money (TR.4234-4250). He said that it had happened several months ago, but they had just found the bodies and that the guy's business partner had disposed of the body (TR.4250).

The redacted statement of Rhodes was published to the jury over defense objection (the material points of which will be set forth subsequently) (TR.4266-4294), after the predicate had been laid by Detective James Mitchell of Springfield, Illinois (TR.4295-4329).

Migdalia Ramos, Rhodes' girlfriend, testified that Rhodes got quite a bit of money in the summer of 1983, as did his friend, Michael Irvine (TR.4329-4339). Rhodes gave her two diamond rings and a watch, that summer. She pawned the rings, but kept the watch (TR.4340-4346). That watch was, then, identified as Bessie Fischer's watch by her cousin, James Campbell (TR.4351-4356).

Detective John Paramenter explained that he showed a picture of Art Venecia to Richard Higgins and discovered that Venecia was not the person that Higgins had purchased the property from (TR.4357-4360). He was at the Higgins' property when the bodies were unearthed (TR.4360-4361) and, subsequently, observed Venecia's Buick Skylark at Casteel's house (TR.4362-4363).

Detective Paramenter then went to Marion, North Carolina to try to locate Michael Irvine (TR.4363). He went to 322 Park Avenue where Michael Irvine opened the door. (TR.4365). Sgt. Smith introduced he and Detective Meier as detectives from Miami who would like to talk to him and asked Irvine if he would accompany them to the police station, which he did (TR,4365-4366). Irvine was not questioned on the way to the station (TR.4366-4367). Irvine was advised of his constitutional rights and agreed to waive them and speak to the police, both orally and in writing (TR.4367-4372). The Detectives had gone to Irvine's

home at about 11:30 a.m. and the rights form was signed at 12:18 p.m. (TR.317). No one spoke to Irvine before the rights form was signed (TR.318).

There was no testimony that Irvine was advised of the charges against him prior to being advised of his constitutional rights, but he was advised, after making the statement, that the police were attempting to call the State Attorney's office to get a warrant for him and that, if they didn't get the warrant, he was free to go because there were no pending charges (TR.326-330). Irvine never asked Paramenter if he could go home, although, after making the statement, he did ask if his wife could come see him. He was told she could, and she did visit him (TR.327-328).

Sgt. Smith, who was present during Irvine's statement, testified that, once Irvine was questioned about the murders (after being advised of his rights), he denied knowing anything about them for about five (5) minutes. Smith had told Irvine that the officers didn't come all the way from Miami not knowing about the case (TR.346-347). No threats or promises were made to Irvine (TR.347-349). After his rights were read to him, he was informed that the police wanted to talk to him about a homicide in Miami (TR.359-362). Sgt. Smith believed that Irvine did ask to go home at some point, but he couldn't remember when that was (TR.375). Smith did know, however, that Irvine wasn't told he

could go home if he made a statement (TR.366, 375) and that he didn't seem to be expecting to go home subsequent to making the statement (TR.375). After the first statement, a taped statement was taken from Mr. Irvine in North Carolina, a redacted version of which was published to the jury (TR.4411-4418).

After returning to Miami, Irvine was readvised of his rights, waived them again (no threats or promises having been made) and made a second statement, which was taken down by a stenographer (TR.4418-4425). A redacted version of this statement was also published to the jury with limiting instructions (TR.4422-4435) (which had accompanied all previous statements as well, except Casteel's statement to her daughter and Regan). The contents of the two (2) Irvine statements will be discussed subsequently.

Detective Marc Richter laid the predicate for the admission of the statements made to the police by defendants Bryant and Casteel, the redacted versions of which were admitted, with explanatory and limiting instructions (TR.4480-4692). The contents of these statements will be discussed subsequently.

Dr. Charles W. Parkinson, Bessie Fischer's dentist, identified the Buick Skylark which had been testified about earlier as her car, when he knew her in St. Petersburg (TR.4640-4646). He described dental work he did on her and identified her dental records and x-rays, which were admitted (TR.4640-4660).

Dr. Richard Souviron, an expert in forensic dentistry, then explained that, he was able to identify the skull recovered with the loose skeleton as Bessie Fischer's, within a reasonable degree of medical certainty, and identified a tooth found nearby as definitely being Bessie Fischer's tooth (TR.4661-4693). He was able to identify the skull of Arthur Venecia (found in the wardrobe box) from a blow-up of a photo which showed Venecia's teeth (TR.4694-4703). He wrote letters to the medical examiner saying he had made identifications (TR.4703-4706).

Dr. Valerie Rao, the medical examiner, testified that, based upon her examination of the skeletons, the scene and information received from the police investigations, the cause of death for both Venecia and Fischer was homicide by unspecified means (TR.4717-4763). Venecia's skull showed two (2) fractures of his jaw which had been sustained at about the time of death (TR.4736-4739). Previously, at the suppression hearing, Dr. Rao testified that her findings were consistent with Mrs. Fischer dying by strangulation (TR.517-518).

The State rested and motions for judgements of acquittal were denied, with the exception of Casteel's as to count ten (TR.4794) (TR.4763-4815).

2. The Redacted Statements.

The redaction process, itself, which was extensive, will be discussed in the argument portion of this brief, under the appropriate issues.

a. The Bryant Statement.

Bryant said that he and Arthur Venecia had known each other about eight years and were lovers (TR.7228-7229). He had known Art's mother, Bessie Fischer, six or seven years and she lived in a trailer next to Art's house (TR.7228-7229). He also was friends with somebody whom he had hired as a waitress at the restaurant he managed (the IHOP), which was owned by Art (TR.7230).

About the middle of June, 1983, at 11:30 or 12:00 at night, he was called to come to the IHOP (TR.7230-7231). He got in a car with two people, one of whom had a knife or razor, and they went to Venecia's (TR.7231). The lights were turned off as they headed in the drive, the car was parked, and they all went into the house (TR.7232). Someone went into the bedroom as Bryant and the second person stayed in the living room (TR.7232). Shortly thereafter, Bryant heard Venecia say, "Please, just take everything that's in the house.'' and, then, he heard a scream (TR.7232). The person came out of the bedroom and they left, although Bryant had seen blood and the bottom of Art's feet laying on the floor (TR.7232-7233). Someone picked up a money bag and keys from the organ bench and then the three of them drove back to the restaurant (TR.7233).

At the restaurant Bryant got some money out of the safe and gave it to someone. (TR.7233-7234). Then, the people left (TR.7235).

The next day, Bryant drove to Venecia's house and was told to lay down on the seat so someone could tell Art's mother that he and Art were in Virginia visiting Bryant's father (TR.7236). Then they went back to the restaurant (TR.7236).

Several days later, Bryant went back to Venecia's house and, with assistance, put Venecia's body in a wooden box in the garage, using a blanket (TR.7236-7237). Somebody cleaned up the blood in the bedroom with sheets and towels which were then put in the box (TR.7237-7238).

Four or five days later, Bryant and one or more others moved the body from the garage to the barn, using a pickup truck, where the body stayed for five or six weeks, until the hole was dug (TR.7238). Bryant called a back hoe service to come out and dig a hole, which was done. (TR.7239).

Someone told Bryant that Mrs. Fischer was asking too many questions, but he didn't see her after he moved Art's body from the garage and after she was dead (TR.7240). About five or six weeks after moving Art's body, he saw Mrs. Fischer, dead, sitting

at her kitchen table in a chair (TR.7240). He subsequently asked what was done to her and, a short time after that, he was informed that the people who were supposed to put Art's body in the hole didn't come through, so they ("we") were to rent a fork lift and transport the body from the barn to the hole (TR.7241). He rented a fork lift, put the box with Venecia inside in the southwest corner of the hole and covered it with some garbage and a little bit of dirt (TR.7241-7242). He noticed a small mound of dirt in the northwest corner of the hole which he was told was Mrs. Fischer (TR.7241).

After that, someone moved into the house and Bryant liquidated the stocks that belonged to Venecia and Fischer by telephone (TR.7242-7243). He got about thirty thousand dollars from the stock, which was split up (TR.7243).

Subsequently, Venecia's boat was sold using a power of attorney that Bryant had signed with Venecia's name (TR.7243-7244). The boat sold for about thirty-five thousand dollars, about twelve thousand of which was profit (TR.7244). Bryant kept about six thousand for himself (TR.7244).

Bryant also signed the title when the trailer that Mrs. Fischer lived in was sold (TR.7245). There was four thousand dollars profit on that, of which Bryant kept two thousand (TR.7245).

A camper trailer belonging to Venecia was also sold by Bryant, who signed Venecia's name to the title TR.7245-7246). There was four thousand dollars profit on that, as well, of which Bryant kept two thousand **(TR.7246).**

Bryant also helped negotiate a mortgage and sold Venecia's real estate property by presenting himself as Art Venecia **(TR.7246-7247).**

When he received the call to go to the restaurant, he didn't ask what was going to happen because he had been in contact the last week and would get together in the evening **(TR.7249).**

Bryant knew Mrs. Fischer had a couple of diamonds because Art and he had moved her down from St. Petersburg **(TR.7251).**

Bryant told the employees at a restaurant employee meeting that Art was in North Carolina, that someone would be running the restaurant and he would go along with whatever that person said **(TR.7252).**

Bryant's arrangement with Mr. Venecia was that he didn't get a check, but could use money from the restaurant if he needed it. **(TR.7253).** Sometimes Venecia was not completely happy with the amounts he took **(TR.7253).**

He and Venecia had had a fight a week or so before he was killed because Bryant wanted to leave the relationship and Venecia threatened to tell Bryant's mother that he was gay (TR.7254). He and Venecia, during that fight, physically struck and choked each other (TR.7254-7255).

Bryant had taken money from Venecia before, taking it from the restaurant a couple of years before (TR.7255). He had worked at the House of Pancakes in Homestead and was accused of taking money from it, although he did not (TR.7256). This was around August or September of 1982 and he agreed to pay the money back, even though he didn't take it, so as not to have any problems (TR.7256-7257).

b. The Casteel Statement to her daughter.

The redacted version of the statement Dee Casteel made to her daughter in front of Jackie Regan is as follows:

> They went out the following afternoon to look at the body and check on Art's eighty-two year old mother. Bessie Fischer, who lived in a trailer on the property.
>
> In the next following days, they moved the body in the manner listed below.
>
> This confession is told to the best of Dee's knowledge that in the occurrence that anything should happen, this information will be turned into State evidence.

There was a free standing wooden wardrobe approximately six feet by three feet in the garage. We opened the garage door to the house and opened the door to the wardrobe, which was smaller than the length of the wardrobe.

We wrapped him in a bedspread and lifted and dragged him to the garage door. We then forced his body into the box. Then we tried to move the box so we could get in and out the garage door. Then we went in to clean up the excessively bloody mess.

All the rags used to clean the blood were put in the box with the body.

The box was left in the garage about five days. While deciding what to do with the remains we moved the box to the barn in front of the property with the use of Art's '79-'80 Plymouth pickup truck.

The day the body was moved to the barn, I took Mrs. Fischer to the hairdresser to get her away from the property. I guess we left the body in the barn approximately four or five weeks. I went out everyday to make sure there was no smell from the body, and to take care of Mrs. Fischer.

We rented a small bulldozer from Rental Machinery and attempted to dig a hole deep enough to dispose of the body, to no avail.

Then contacted Wayne's Backhoe Service to dig a debris pit approximately ten feet by twelve feet deep.

Art's mother was becoming increasingly difficult to convince that Art was merely on vacation and

that nothing had happened to him. This left us in a position of having to dispose of Mrs. Fischer also.

The same hitmen were contacted and for two thousand five hundred dollars agreed to cleanly and painlessly handle the job.

Mrs. Fisher was aware that there was a leak in her trailer from the roof, and was told that someone would be out to do the necessary repairs, so she would not be alarmed.

It was agreed that they would come out about 5:30, approximately, August *20,* paren, unsure, paren.

I took her dinner about five o'clock and left at 5:30. They arrived first as I was getting ready to leave. I told her that the repairmen were there to fix the roof and that I would see her the next day.

Someone, and I went out Sunday afternoon and she was dead. She only looked asleep, and I think it was done by a chop to the next.

Included in the contract from Mrs. Fisher was the promise that she would be placed in the pit dug and covered until we could get Art's body in the pit and the entire hole covered.

After four days of no action. I contacted someone at the Amoco station at *296* Avenue and U.S. 1 and asked what the problem was, explaining that that was why we paid twenty-five hundred, and that it included burying her.

To backtrack briefly, someone had promised to take care of this Sunday evening after her death. Someone did agree to complete the job.

> We then rented a forklift and bulldozer. We used the forklift to remove Art's body from the barn to the pit. We partially filled the pit and then called Wayne's Backhoe Service to complete the job.
>
> (TR.3870-3873).

c. The Casteel Statement to the police.

The redacted version of the statement that Dee Casteel made to the police was made on April 19, 1984 to Detective Richter (TR.7266-7267). She was working at the IHOP, where she knew the owner, Art Venecia, and, also, someone else (TR.7268). She also knew Bessie Fischer, Art's mother (TR.7268-7269). She had made a comment at work that she knew someone who would kill for a price (TR.7270). Someone contacted her about three (3) weeks later (TR.7270). She said, "Well, unless he's all hot air, yes, he said he'd do it for hire'' (TR.7270). The contact asked her to find out the price to have Art Venecia killed (TR.7270). This was about the first of June, 1983, during a ride (TR.7271). She knew that the gross profit on the restaurant was between $8,500 and $10,000 a week, during season (TR.7271).

She got in touch with the person she knew within the next day or so and he said he'd get back to her (TR.7271-7272). About three (3) days later he came by and wrote the figure $1,250 on a napkin and showed it to her (TR.7272). The person said they needed a picture, the home address and the kind of vehicle Venecia drove (TR.7272).

She told someone what the price was and a passport picture of Venecia was supplied, which she delivered **(TR.7273)** along with the address **(TR.7273).** She asked how soon and was told that no date would be given until half the money was delivered **(TR.7274).** She also gave a description of Art's vehicles and relayed that Art was usually drunk by **10:30** or **11:00** p.m. **(TR.7274).**

Casteel delivered the money a couple of days later **(TR.7274)** and it was counted **(TR.7275).** There was a "no go" and the amount of money was increased to **$5,000,** half up front **(TR.7275-7276).**

Casteel delivered the additional money **(TR.7277)** and learned that the day would be June **19, 1983 (TR.7277).** She was at the restaurant when they showed up that night and they got in the car and left to kill Art at his home **(TR.7277-7278).**

After work the next day she and another or others ("we") went out to Art's house, went into the house through the garage and put a cloth over the window in the front door **(TR.7278-7279).** Art Venecia was dead, on the floor in the bedroom and there was a very large amount of blood **(TR.7279-7280).** She believed she saw the knife on the floor, but got sick and they left **(TR.7280).**

They went back out on Monday, used a bedspread to drag Art's body into the garage, and put it in a wardrobe in the garage (TR.7280-7281). They cleaned up the mess with towels and sheets and put these in the wardrobe, too (TR.7281).

The body stayed there a week to ten days, during which time Mrs. Fischer was told that Casteel would be coming by to feed her since Art had gone to North Carolina (TR.7281).

They didn't want to take the chance that Mrs. Fischer would find Art's body, so Casteel made an appointment and took Mrs. Fischer to the beauty shop and, while she was there, they moved the wardrobe from the garage to the barn (TR.7282). They covered the wardrobe with a sheet of wood (TR.7282-7283). It stayed there three or four weeks until it became necessary to eliminate Mrs. Fischer (TR.7283). Mrs. Fischer was putting pressure on Casteel about where Art was, and Casteel relayed the information, so it was decided to eliminate her (TR.7283-7284).

Casteel made the arrangements for a price of $2,500, half up front, again, which included burying her (TR.7284). Casteel delivered the money, which was from the restaurant (TR.7284).

Later, they thought that burying the bodies on the property was the safest thing, so they contacted Wayne's Backhoe Service, which came out and dug the hole, having been told it was a debris pit (TR.7285).

When the money (half up front) was delivered for the Fischer killing, Casteel was given a Saturday date, which was about four or five weeks after Art's death (TR.7286). Casteel asked for it to be as painless as possible (TR.7286).

Casteel spoke to Mrs. Fischer about the roof leaking because she kept her door locked. At about 5:30 p.m. Saturday (TR.7286-7287) they pulled up just as she was leaving (TR.7287).

Someone picked up the rest of the money the next day, $1,250, which she handed over in an envelope (TR.7288). She asked how soon they would put Mrs. Fischer in the ground and was told Sunday evening (TR.7288).

She went out to the trailer on Monday and Mrs. Fischer was sitting at the kitchen table, dead (TR.7280). The jewelry was missing from its case (TR.7289).

She went by the station that evening and complained because Mrs. Fischer wasn't in the ground (TR.7231). About two days later, she knew the job was finished because, when she went back out, the body was gone and you could see where dirt had been put in the pit to cover her (TR.7291).

A couple of days later they rented a forklift and put the wardrobe closet in the pit (TR.7292-7293). They covered the bodies and then hired Wayne's Backhoe Service to fill the pit (7293).

The IHOP employees were told that Art was on a long vacation in North Carolina and Casteel was made Assistant Manager, a promotion (TR.7294-7295).

Casteel and her children moved in to Art's house (TR.7236). The mortgage payment was not made and the house went into foreclosure (TR.7236), but they borrowed $120,000 on the property from William C. Sussman and paid the first mortgage off (TR.7296-7297). There was about $13,000 left after everything was paid off, and most of that went to the corporate office of IHOP, where they were behind (TR.7297).

The property was sold by warranty deed, which she notarized, and there was a profit of $16,000, of which she got $3,600 (TR.7297-7295). Mrs. Fischer's trailer, another trailer (travel trailer), Venecia's yacht and his stocks and bonds were also sold (TR.7298). She notarized everything for these sales (TR.7298).

d. The Irvine Statement of May 4, 1984.

Irvine, after having been advised of his constitutional rights (TR.7119-7122[1]), said he was approached to arrange a contract in June, 1983 (TR.7122-7123). She meant by "contract" to kill a person, and Irvine said he knew someone who would probably do it (TR.7123). He discussed the contract with the person (TR.7124) and, later, they went to the IHOP where money was discussed; $2,000 was the price, with half up front, to be paid the night before the killing (TR.7124-7125).

The next night, he went by the IHOP and, then, went to the house (TR.7126-7127). They parked in the driveway, were let into the house, and Irvine and another person went inside (TR.7127). The person who entered with Irvine went into another room and Irvine heard a guy say "Don't hurt me" (TR.7128). Irvine left the house (TR.7128) and said "Let's get out of here" (TR.7129).

After awhile, people came back to the car and they left (TR.7129). Later, he was given a bag with a cup of coffee and $1,000 in it (TR.7130). He gave the money to someone and got $500 back (TR.7130).

---

[1] References are to the unredacted statement, State Exhibit number 71, because the tape of the redacted statement, exhibit number 70, is in the evidence locker and no transcript of the redacted statement is in the record.

Subsequently, he was approached to go back out to the place, again (TR.7131). They did go back out, saw an older woman and someone, and someone told them to come in, telling the elderly woman that they were fixing the floor or something (TR.7131). Someone left, and someone picked up a pair of pantyhose and strangled the lady (TR.7131). She was at the kitchen table and the person came up behind her (TR.7131-7132). She wasn't able to struggle and was choked for two or three minutes (TR.7132). She was still sitting in a chair, but he believed she was dead (TR.7132).

Irvine got $750 from someone for helping them (TR.7133). The next day or *so,* someone wanted his help in putting the woman's body in the hole (TR.7133). They went out to the house, found her in the chair, and someone laid her on the floor and covered her with a blanket (TR.7133-7134). They took the body outside, put her in the pit and someone covered her up (TR.7134).

e. The Irvine Statement of May 16, 1984.

Michael Irvine, in his redacted statement of May 16, 1984 (TR.7158), said that he was contacted in June of 1983 to beat somebody up or hurt them (TR.7160-7161). He thought he knew somebody who would do that, and they drove down where there was a discussion about money and a contract on a guy who lived out in the country (TR.7161). The amount was $2,000 to be paid half

the night before and the rest after (TR.7161). He went back to work and, later that night, someone brought him $1,000 in an envelope (TR.7161). He gave it to someone, who gave him $500 back (TR.7161).

He and (Z) went back to the House of Pancakes a day or so later and they met with someone who was talking about someone who was supposed to give them directions (TR.7162). They came back the next night and picked someone up (TR.7162). There were no threats or weapons shown during the ride and someone was giving them directions (TR.7162). Irvine went into the house, to the living room when he heard a guy say, "Don't hurt me." (TR.7162). He left, went out to the car, and said, "Let's get out of here." (TR.7162-7163). They said, "Let's go," and they drove back and Irvine went back to work (TR.7163). Later that night, someone showed up with another $1,000 and (Z) gave him another $500 (TR.7163).

Later, someone wanted the person the house trailer on the same property taken care of (TR.7163). They talked about money and the sum was $1,500 for it (TR.7163). It was decided it would be done a couple of nights later (TR.7163). The plan of action was for them to be "carpenters or whatever" (TR.7163-7164).

Once they got in the trailer, there was an elderly woman there and someone said, "These are the people'' and left (TR.7164). Irvine stayed in the kitchen while the lady sat down and ate supper (TR.7164). Someone came back with something like a woman's pair of pantyhose, and put it around the lady's neck (TR.7164). Irvine turned his back and, a couple of minutes later, walked outside (TR.7164).

Five to ten minutes later, someone came outside, after they finished (TR.7164). Irvine didn't go through the contents of the trailer and didn't know if anyone else did (TR.7164, 7156). Then they left (TR.7156).

Somebody later came by the station w th money. Irvine thought it was $750. He gave it to someone and got half back (TR.7156).

The following day or the next day he had to go back out because they were supposed to put the woman's body in the pit about twenty feet from the trailer (TR.7156). Someone unlocked the trailer door, put the woman's body in a blanket and carried her to the pit (TR.7156). They laid it in the pit (TR.7156), someone covered it up and they left (TR.7157).

A couple days after the first killing, he was contacted because they wanted someone to put that body in the same pit

(TR.7157). He said he'd contact someone and he did, but they refused, saying they wanted more money (TR.7157).

Irvine was getting too deeply involved and had to get out, so he left Miami around late July, 1983 (TR.7157). He got a total of $1,750 for his aid in these endeavors (TR.7157, 7165).

f. The Statement of William Rhodes.[2]

Rhodes, in the summer of 1983, had a conversation about roughing up someone because that man owed money (TR.7093). They went out to see the man, out in the country, north of Homestead, but Rhodes "chicken shitted" out and they didn't do it (TR.7093).

Later, they went back out in a yellow AMC Pacer (TR.7094-7095). They got to a two story brick house, the people unlocked the door, and someone said, "come on, let's go get it done," so they went in (TR.7096-7097). Rhodes went in and made a left into "a kind of bedroom" (TR.7097). As he walked toward the bed, the guy jumped up and was cutting him with the point (TR.7097). Rhodes grabbed him by the hands and pushed his hands back; Rhodes just kept pushing until the guy "kind of went limp" (TR.7097). Rhodes yelled for a hand and pushed the guy down.

---

[2] State exhibit number 65 was the tape of the redacted statement of Rhodes (TR.4326), but references will be to the transcript of the unredacted statement substituted in the record.

He doesn't know how many times, but it seemed like forever (TR.7097-7098). Rhodes kept pushing his hands toward the floor (TR.7098). He heard the guy hit something and then "kind of heard" gurgling sounds and Rhodes hollered at him (TR.7098). The guy was screaming (TR.7098) and he felt someone was in the room. Rhodes kept trying to keep this guy from hurting him and threw him on the floor (TR.7098).

Rhodes got outside the door and saw blood on the front of his shirt (TR.7098). Someone went back in the house for some chains and came back out carrying the kind of plastic envelope you carry pencils to school in (TR.7099-7100).

They got back in the car and he was driven back to the station (TR.7100). He burned his shirt (TR.7100-7101).

Someone had given Rhodes three hundred dollars the first time he went out and the morning after this he was given seven hundred (TR.7101). He later found out that the guy had died (TR.7102).

A week or two later someone said they had to repair a roof for an old lady and they went out to the same place, to a white trailer with a rickety stairway (TR.7102-7103). After they turned off, someone said that she was eating lunch (TR.7103-7104).

When they drove up, there was a red Buick sitting there (TR. 7104-7105). Rhodes asked about a ladder and someone said there was one against the trailer (TR.7105). The lady who lived there was in her early to mid-seventies, kind of chunky and had on a pair of glasses (TR.7105). Rhodes went up on the roof and then inside, when the lady said she had a bad floor with some leaks. (TR.7206). She was eating lunch (TR.7106).

Rhodes checked the floor while someone was in the kitchen with the lady (TR.7107). He went toward the front to tell them what he found and saw someone with their hands around the lady's head, "like choking her" (TR.7107). He knew the lady was being strangled and said, "I don't want nothing to do with this kind of shit" (TR.7108), and left (TR.7109). Someone came out a while later and they got in the car and left (TR.7109).

Subsequently, Rhodes went back to the trailer to carry the old lady out to the hole (TR.7110). Someone went in first and then Rhodes went in (TR.7110-7111). The old lady was on the floor, dead (TR.7111).

Someone spread a sheet "or something" on the floor, rolled her on it, and they used it to carry her out (TR.7111-7112). They put her in the hole and covered her up with rock and dirt (TR.7111-7113). They put her in the corner closest to the

trailer and left **(TR.7113).** On the way back, Rhodes was given **$1,000 (TR.7114).**

2. The Defense.

Casteel took the stand and testified that Bryant called her to meet him and then asked if she knew someone who would "take a contract" **(TR.4827-4843).** She contacted Mike Irvine **(TR.4845)** and the plot began. She acted, essentially, as the contact between Bryant and Irvine throughout the transaction. **(TR.4843-4917).**

Previously, Art had told her that Bryant had shorted the receipts **$1,600** and had attempted to kill him (Art) and had then taken everything in the medicine cabinet **(TR.4852-4853).** Bryant had said he was unhappy in his relationship with Art and was in love with someone else, Felix **(TR.4855).** After the fight and Bryant's taking of pills, he still wanted Art killed, as soon as possible **(TR.4856-4867).** After the killing of Art, Bryant came back to the restaurant (he had accompanied the two "hitmen") and said "it's over" **(TR.4870).**

Casteel began taking care of Mrs. Fischer **(TR.4872-4875).** She became increasingly concerned about Art's absence and, when Casteel told Bryant, he told her to get a price from Irvine for killing Mrs. Fischer **(TR.4875-4877).**

Casteel and Bryant moved Art's body out the garage during Mrs. Fischer's hair appointment, which was made by Casteel (TR.4877-4878).

Casteel became assistant manager at the restaurant, having been promised a lifetime job by Bryant (TR.4879-4882). She was allowed to take money out of the receipts when she had bills due (TR.4885).

Bryant once got $100 from her, for two white doves to be used in a ceremony which would tell how strong and long his relationship with Felix would be (TR.4893-4894). He was happy when they flew off together (TR.4894).

Later Mrs. Fischer started asking questions about Art. Again, at Bryant's request, she contacted Irvine and delivered money to him (TR.4895-4907).

While Art's body was in the barn, she saw a bundle of brown bags in the barn which she assumed contained drugs (TR.4902). She asked Bryant if he was crazy, for getting involved with drugs: Bryant thought it was a great idea because, if anybody found the body, they would assume the death was drug related (TR.4903).

Casteel got $3,600 from the sale of the house, which she lived on after the "mother company" took back the restaurant (TR.4909). She also kept $2,000 from the boat sale (TR.4911). The rest of the money went either to Bryant or for the restaurant payroll (TR.4909-4911).

She said Detective Richter's testimony was essentially correct, but that she had told Meir she never thought Mike would kill anyone (TR.4917-4924).

Casteel's medical records were admitted into evidence through Coral Reef Hospital's records custodian (TR.4932-4937). During cross examination, Casteel admitted that when Bryant talked about a contract, Casteel had a good idea he wanted Art killed (TR.4955-4956).

She described the transactions for the first murder, including the price increase after the fight between Bryant and Art (TR.4956-4971). She knew Bryant was serious (TR.4971) and confirmed that her statement to the police was the truth (TR.4973). She did tell the police that when Bryant, Irvine and Rhodes left the restaurant, she had no doubt that they were going to kill Art (TR.4976-4978), and her memory was better then (TR.4978), but she thought they were going there to rob Bryant, not to kill Venecia (TR.4979-4980). When Bryant got back, he said Art's throat had been cut and it was a gory mess (TR.4985-4986).

She went out with Bryant to help clean up and saw Art in the bedroom with his throat cut (TR.4986-4988). They didn't do anything that day, but went out the next day, cleaned up, and put the body in the wardrobe in the garage (TR.4988-4991). Later, she and Bryant moved it to the barn (TR.4994-4995).

Casteel also testified about setting up the contract for killing Mrs. Fischer, at Bryant's request, since she was expressing concern about Art (TR.4997-5018). She also explained how she introduced Irvine and Rhodes to Mrs. Fischer as roof repair people, left, and came back the next day, with Bryant, and found Mrs. Fischer's body (TR.5018-5022). Bryant gave Casteel the money for the second payment on the Fischer killing and she gave it to Irvine (TR.5022-5023). Before the Fischer murder, she had had Wayne Tidwell dig the pit (TR.5027-5037).

After finding Mrs. Fisher's body, she went down to see Irvine, but he wasn't there, so she spoke to Rhodes about the fact that the price included taking care of the body (TR.5038-5039). Rhodes was upset because he had only gotten half of $1,250 and he said, "I don't ever plant them. I only kill them." (TR.5039-5040).

Afterwards, she and Bryant put the wardrobe with Art's body in the pit and covered it. She had Wayne's Backhoe Service fill the pit in (TR.5041-5044).

She and Bryant sold Bessie Fischer's trailer, with Bryant pretending to be Art Venecia (TR.5057-5061).

Casteel lived at Art's home for a while and collected Art and Bessie's mail and forwarded it to Bryant (TR.5063). She also testified about obtaining the house mortgage and the sale of the organ, the boat and the property (TR.5067-5093).

During early 1984 (after the takeover by the parent company), the restaurant cash register became unavailable to Casteel and Bryant (TR.5103-5105) and money became a problem for Bryant (TR.5105). He came to her house and demanded money, physically threatening her, and she gave him the money (TR.5109-5110).

She made the statement that Susan took down (TR.5113-5116). She agreed to make the statement to Richter, and did (TR.5131-5137). Casteel's unredacted statements were admitted into evidence as state exhibits 100 and 101 (TR.5150).

She was in the office when Bryant called E.F. Hutton, saying he was Art Venecia or Art's nephew, Allen, and asking to liquidate stocks (TR.5190).

Bryant chose not to take the stand and rested (TR.5240-5243).

Michael Irvine testified that, at first, he thought the "contract" was a joke (TR.5154-5259) but, later, he and Rhodes decided to make some easy money by ripping Bryant off (TR.5263). They got the first $1,000 of the $2,000 price (TR.5265-5266), but it didn't *go* the first time because Casteel called and said Bryant had tried to kill Art himself (TR.5268-5269). Then, Bryant called and offered $5,000, and he and Rhodes decided to "go for it", by which Irvine meant to rip off the $5,000 (TR.5270-5271). Bryant gave them another $1,500 (to bring it up to half of $5,000) and he, Rhodes and Bryant went out there with Irvine driving (TR.5272). Bryant unlocked the door and he and Rhodes went in (TR.5273). Then, Bill went into another room, he heard a guy say "Don't hurt me,'' and Irvine left (TR.5274).

Bryant went in as Irvine was coming out and Irvine found he couldn't leave because his keys weren't in the ignition (TR.5274-5275). Rhodes came out and then Bryant came out with the keys and they left (TR.5275). Later, Casteel came by with some money and he and Rhodes split it (TR.5276).

Later, in July, Rhodes asked if he could help with some roof work and they went out to the same place (TR.5277-5279). Casteel and an old lady were by the door of a trailer and

Casteel said these were the guys to fix the trailer and left (TR.5279-5281). He talked to the old lady in the kitchen and then Rhodes came up with a pair of pantyhose and strangled her (TR.5281).

That afternoon, Casteel gave Irvine an envelope that he gave to Rhodes (TR.5283). Then Rhodes came by and gave him money saying that was his half (TR.5284). He took it (TTR. 5284).

Subsequently, he helped Rhodes dispose of the body in the pit (TR.5284-5285). Then he went to North Carolina (TR.5286). Most of the rest of Irvine's testimony concerned his statements to the police which, essentially, he maintained were involuntary and "staged" (TR.5288-5392).

Rhodes testified, essentially, as he had in his statement, but explained what Irvine and Bryant were doing (TR.5393-5466). However, he said, this time that, after he got cut, he wrestled with Venecia and hit him once, hard, and he went down (TR.5398). He also said Bryant went back in the house, after Rhodes left, for three to five minutes and that, to the best of his knowledge, Venecia was alive when he left the room (TR.5399-5400). He said Irvine strangled the old lady with his hands (TR.5404, 5443-5444). Rhodes stipulated to the voluntariness and accuracy of his recorded statement (TR.5414-5415).

He admitted that, during the tussle with the guy in the bedroom (Venecia), he went limp (TR.5430). He also admitted that the guy screamed and he heard gurgling sounds (TR.5432). He got $1,000 after the Fischer strangling (TR.5455).

3. Closing and discussion.

There was a discussion concerning admitting the unredacted statements of the defendants who testified, but they were admitted by the State with the exception of what Bryant told Casteel about Venecia's death (TR.5483-5650).

The defense was offered surrebuttal, but declined (TR.5644-5645). Immediately after defense closing arguments and lunch instructions to the jury, the following happened:

> Absolutely no discussion about the case. All right. We'll see you back here.
>
> (Thereupon, a brief discussion was held off the record, after which the following proceedings were had:)
>
> **THE COURT:** You got it? Should it be addressed to anybody in particular?
>
> **MR. MORRISON:** Well, it's just the idea of having something to say that I have been here.
>
> **THE COURT:** To whom it may concern kind of -- yes the letter will be available. I told my secretary about it on last week.

MR. MORRISON: Thank you.
THE COURT: Earlier in the week, the day before yesterday.

MR. MORRISON: I had to ask Al to ask you.

THE COURT: I am aware and she will have it typed up.

We will see you back --

MS. PINTER: I need to speak to you, too.

THE COURT: (Continuing) -- before 1:30.

(Thereupon, brief discussion was held off the record, after which the following proceedings were held with Emily Pinter and outside the presence of the jury:)

THE COURT: I will put on the record and remind me, if you would, when the attorneys come in just to repeat. The juror is now indicating to me when we first started she didn't know the name of a witness.

However, since she's been in court, she realizes that one of the witnesses, Mr. Philpot, was a school teacher at a school where she was driving a bus to and she wanted to bring that to the Court's attention.

I'll let the lawyers know. That is insignificant.

MS. PINTER: One more thing. This morning I also told you --

THE COURT: What?

MS. PINTER: I said I didn't know any of the policemen or correctional officers, only the ones that went to my church, but out in the hallway this morning, I noticed one that I

know real well, but I have never discussed any of this business and he works as a probation officer I think.

THE COURT: Okay, no problem. We'll bring that up.

MS. PINTER: I have everything off my conscious.

THE COURT: Everybody wants to be fair.

(Thereupon, a luncheon recess was taken until 1:30 p.m. of the same day:)

(TR.5911-5914).

After the lunch recess, there was a brief discussion of charges (TR.5915-5921) and the State began its closing (TR.5922-5947). The court, at a break in the closing argument, informed the attorneys of his discussion with Ms. Pinter (TR.5947-5948). There were no motions or objections (TR.5948) and the State's closing continued (TR.5949-5977).

Defense rebuttals were presented (TR.5948-6009). Verdicts were returned as set forth in the Statement of the Case.

It should be noted that, during the charge conference, the court decided that Casteel's name would not be mentioned during the felony-murder instructions and it would make sure that the jury understood that this was not an oversight (TR.6015-6016).

This was done and the jury was specifically informed, by the Judge, that the felony murder theory did not apply to the person whose name did not appear on the instruction (Casteel) (TR.6044-6047). The verdict forms were reviewed without defense objection (TR.6035-6036). The State "redacted" Casteel's "unredacted" statement to avoid particularly prejudicial statements on pages 26, 36, and 37, before it was submitted to the jury (TR.6101).

Both Casteel and Rhodes moved to waive the jury advisory verdict (TR.6135-6138, 6148), and continuances of the penalty phase were granted to defendants (TR.6154).

C. The Penalty Phase.

1. The State's Case.

Dr. Rao, the medical examiner, testified that the injury to Arthur Venecia's jaw that she saw was unlikely to have caused unconsciousness (TR.6209-6211). She also testified that a gurgling sound is consistent with a victim having had his throat slashed (TR.6218), probably because the blood is going down the airway (TR.6218-6219), and is consistent with the person attempting to speak or scream (TR.6220). Such a person is probably drowning in his blood and, if that were the case with Art Venecia, he would have been conscious for a few minutes (TR.6220). Such a person could also have died from blood loss if a major blood vessel were involved and, if so, he would die

in a few minutes (TR.6220-6221). If a brain suffers a total lack of oxygen, it will die in a period of three minutes (TR.6221-6222), but this does not begin immediately upon the slashing, but a few minutes later (TR.6222).

She learned through the police reports and otherwise, that Bessie Fischer's death was by strangulation (TR.6222). Fischer had weak arthritic hands, which would have affected her ability to resist (TR.6224). Fischer would have lost consciousness probably within five (5) minutes of the time the pantyhose was applied to her. (TR.6225).

Pantyhose probably have a different effect, when used as a weapon, than something more rigid, like a cord, because there is more give in pantyhose, probably increasing the timeframe involved (TR.6226). Dr. Rao did not know if the elasticity of the weapon would have any effect on the level of pain involved (TR.6226).

Dr. Rao was cross examined about her examination of Venecia (TR.6227-6230). The cause of death in her report on him was homicide by unspecified means (TR.6231) and she didn't know if he drowned in his own blood, from blood loss, why his heart stopped beating or how fast he died (TR.6232).

The "homicide" portion of her "homicide by unspecified means" conclusion was based upon what the police told her (TR.6233).

Gurgling sounds indicate that a person is probably alive because blood flow stops at death (TR.6234-6235). It is caused by liquid flowing (TR.6236).

Her conclusion about Bessie Fischer's death was also homicide by unspecified means and the homicide portion was based on what the police told her and the scene investigation (TR.6237-6238). Dr. Rao noted that it would be unusual for the lady to die of natural causes and then bury herself (TR.6238).

Unspecified means she is not sure (TR.6238). Her conclusion is consistent with Venecia either drowning in his own blood or bleeding to death (TR.6239-6240).

Judgments and convictions from phase one of the trial were admitted as State Exhibits 1 through 4 (TR.6244), and the State rested (TR.6245).

2. Casteel's Case.

Casteel called her daughter, Susan Mayo, who testified that her mother once protected her from a physical attack from Ralph Casteel, who was slapping her and going for her throat (TR.6248-

6250). She testified that Casteel was a good mother who had supported her children (TR.6250-6254).

Shirley Blando, an assistant chaplain at the Women's Detention Center, said Casteel had assisted her, had excellent work habits and was not a problem (TR.6256-6259).

Daryl Keaton, a corrections officer, testified that Casteel had good work habits, got along well and without problems with other inmates and was docile (TR.6260-6262).

Thelma Lofton, another corrections officer, testified that Casteel was nominated cell counselor and was a good one (TR.6278-6281).

Edwina Talley, another correctional officer, said Casteel was a model inmate and was a cell counselor and peacemaker (TR.6283-6288). She was a nice person and Thelma had never been anywhere near as close to an inmate as she had with Casteel (TR.6288).

Dr. Syvil Marguit, a psychologist, predicted that Casteel would be a model prisoner who could contribute to the needs of the prison and who would not, foreseeably, be a danger (TR.6299-6308).

Casteel testified that she had never been convicted or arrested before and was deeply sorry (TR.6308-6309).

3. Bryant's Case.

Bryant admitted his medical records from Coral Reef Hospital (TR.6311-6315). Also, a letter from Bryant to Mr. Higgins expressing his sorrow was admitted into evidence (TR.6315-6316).

Willie Mac Daniels, a correctional officer, said Bryant was no problem, his work and attitude were outstanding, and he thought Bryant would continue to be a good inmate (TR.6317-6319).

Liz Taylor, another correctional officer, said she and Bryant worked well together and that, when she had to leave the jail, she sent him a card (TR.6319-6322). His only problem was that, once, another inmate hit him (TR.6322). She did not believe he would pose a danger to other inmates (TR.6323). The card was admitted into evidence (TR.6323).

4. Irvine's Case.

Irma Sorrell, Irvine's ex-wife (twice), testified for him, saying he got along great with her family, was great with the kids and was honest, hard working and dependable and helpful (TR.6325-6328). He was not a violent man and they remained

friends after their divorce and her remarriage (TR.6329-6330). The marriage didn't work because he liked his girlfriends (TR.6326-6327).

Natalie Stewart had known Irvine about 15 years, was close friends with him, and believed he was a trusting, open soul whom she would trust with her life (TR.6331-6333). He was never violent, her parents adored him and he was helpful with both her sons (TR.6333-6335). When he lived next door to her, he left his door unlocked and, if you needed something, you could get it at Mike's and tell him you took it (TR.6335). His cigar box of money was ripped off one day and he said somebody needed it more than he did (TR.6335). Irvine rested (TR.6337).

5. Rhodes' Case.

Dr. Jethro Toomer, a psychologist, believed that William Rhodes could adapt to a prison setting and did not believe he would be a problem prisoner (TR.6337-6341).

Eve Moreno had been friends with Rhodes for about ten (10) years and he lived with she and her son for four or five years, off and on (TR.6342-6343). He is not violent and is a gentle, caring person (TR.6344). Her foster daughter, Sandra, is a slow learner who is 45 years old and has a very good relationship with Bill, who plays games and watches TV with her and helps her read (TR.6344-6345).

Sandra Singleton has known Bill Rhodes a long time. They watched TV shows and played games together. On one occasion he helped her put a bike together and they just did a lot of stuff (TR.6314). She loves Bill and wants to take him home (TR.6347).

Pastor Harlem Mussard of the United Church of Christ has known William Rhodes for seven years, has prayed with him, and believes Bill Rhodes is a fine individual (TR.6348-6349). He doesn't believe the charges and thinks it was self-defense (TR.6349).

He has seen Rhodes with Susan Singleton and believes he has been helpful and a fine friend to her (TR.6350). He believes Rhodes is a fine, upstanding individual (TR.6350).

6. Charge Conference and Closings.

During the charge conference, the State requested that the phrase, "heinous, atrocious and cruel" be defined for the jury in accordance with the definition given in State v. Dixon, (TR.6374). The defense objected and the Court went along with the defense because such amplification has not been provided for in the definitions in the standard jury instructions promulgated by the Florida Supreme Court (TR.6372-6374). The Court and counsel discussed verdict forms and agreed on them (TR.6470-6472). Then, there was extensive discussion concerning a state

chart that listed aggravating and mitigating factors, under the statute (TR.6472).

The State offered to tape over any inapplicable factors (TR.6483). The court was willing to have the State blot out anything found inapplicable and the State had no problem with that (TR.6484-6485). The court suggested that defense counsel get a grease pen and use it to comment on any lack of fairness by the State (TR.6490). Indeed, the Court had no problem with the defense listing numerous, separate nonstatutory mitigating factors (TR.6499).

However, after the State's chart was marked for identification, the defense objected to the chart containing any references to mitigating factors at all, maintaining the State had no right to argue either the presence or absence of any mitigating factors (TR.6505). The discussion of the chart continued (TR.6505-6531). The State offered to tape over all the mitigating factors (TR.6516-6517), or otherwise cover the entire right side of the chart (mitigating factors) (TR.6518). The Judge ordered the mitigating factors eliminated from the board (TR.6519-6520) and an opportunity was given to the defense to photograph the chart prior to closing arguments (TR.6529-6531).

Then, the defense objected to the chart being blank under mitigating factors (TR.6536), which objection was overruled (TR.6539).

The State gave its closing argument (TR.6539). During the argument, the prosecutor said, "I defy, I defy anyone of the defense attorneys in this case to come up to you, demand of them, demand of them -- (TR.6553). This resulted in an objection and a sidebar conference at which a motion for mistrial and a curative instruction were both requested (TR.6553-6556). The Judge sustained the objection, denied the motion for mistrial, and asked for the defense to propose a curative instruction (TR.6554-6556). The defense withdrew their request for a curative instruction (TR.6556).

Various other objections were made to portions of the State's closing, the substance of which will be discussed in the argument portion of this brief, as appropriate (TR.6557-6613). The court did instruct the jury that attorneys were required to make proper objections when they felt they were proper and that the jury was not to judge any attorney because he was objecting (TR.6568). Defense closings followed (TR.6614-6657).

A charge conference was held, during which the Judge agreed to instruct the jury that its opinion carried great weight (TR.6661). During the charge, the Judge did state the following:

> The fact that the determination of whether you recommend a sentence of

> death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of the proceedings.
>
> This Court is required to and does give great weight and consideration to your opinion and may not arbitrarily disregard or go against it.
>
> **(TR.6669).**

7. Verdicts.

The jury recommended the death penalty for each defendant as to each murder, with its closest margin being 10 to 2 **(TR.6685-6688).** The sentences were as previously set forth in the Statement of the Case.

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

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN FAILING TO REQUIRE THE PROSECUTION TO EXPLAIN ITS REASONS FOR EXERCISING PEREMPTORY CHALLENGES? (Restated).

II.

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN FAILING TO SEVER DEFENDANTS' TRIALS AND IN REDACTING THEIR STATEMENTS TO PREVENT PREJUDICE TO CO-DEFENDANTS? (Restated).

111.

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN FAILING TO SEVER OFFENSES? (Restated).

IV.

WHETHER PROSECUTORIAL MISCONDUCT DID NOT CONSTITUTE REVERSIBLE ERROR IN THIS CASE? (Restated).

V.

WHETHER CONTACT BETWEEN THE COURT AND JURY MEMBERS DID NOT CONSTITUTE REVERSIBLE ERROR IN THIS CASE? (Restated).

VI.

WHETHER THE STATE PRESENTED A PRIMA FACIE CASE IN THIS ACTION? (Restated).

VII.

WHETHER THE TRIAL COURT DID NOT REVERSIBILY ERR IN FAILING TO SUPPRESS IRVINE'S STATEMENTS TO THE POLICE? (Restated).

VIII.

WHETHER THE TRIAL COURT DID NOT IMPROPERLY ADMIT EVIDENCE OF DEFENDANT'S WRONGFUL CONDUCT AT TRIAL? (Restated).

IX.

WHETHER PROPER VERDICT FORMS WERE UTILIZED BY THE TRIAL COURT? (Restated).

X.

WHETHER THE DEATH PENALTY WAS PROPERLY APPLIED? (Restated).

XI.

WHETHER OTHER ERRORS OR THE CUMULATIVE EFFECT OF ERRORS DID NOT PREVENT A FAIR TRIAL? (Restated).

SUMMARY OF THE ARGUMENT

I.

The trial court did not reversibly err in failing to require the prosecution to explain its reasons for exercising peremptory challenges where the trial court's discretion in this area is broad, none of the defendants was black, and six of the twelve jury members were black, despite the fact that the prosecution had numerous challenges remaining.

II.

The trial court did not reversibly err in failing to sever defendants' trials and redacting their statements to prevent prejudice to co-defendants. The redaction technique used by the court prevented the jury from determining the identities of the defendants from the face of each statement and, although the identity could possibly have been determined from independent, extrinsic evidence, that is an insufficient basis upon which to assume that the jury will not follow its instructions to limit the consideration of such statements to the persons who made them.

Although some disadvantage may have occurred to the defendants due to the joint trials, they have failed to show that their defenses were *so* irreconcilable and mutually exclusive that failure to sever was reversible error.

III.

Failure to sever the trials of different offenses was not reversible error where there was substantial evidence that the offenses were connected, both causally and episodically and where the same evidence, essentially, applied to all charges.

IV.

Prosecutorial conduct did not constitute reversible error in this case. The alleged incidents that the defendants complain most about were either properly corrected by a curative instruction or such an instruction was offered and refused. The remaining objections to the state's conduct were properly dealt with by the trial court, within its discretion, or were not objected to, at all, and are not fundamental.

V.

Contact between the court and jury members did not deprive the defendants of a fair trial where the record shows that such contacts were on routine matters and that the defendants were not prejudiced thereby.

VI.

A review of the evidence clearly shows that the State did present a proper prima facie case in this action, during its case in chief, and that motions for judgements of acquittal were properly denied.

VII.

Irvine's statements were properly admitted where they were shown to be voluntary. Although testimony conflicted on some matters concerning voluntariness, the trial court properly resolved such conflicts and found the statements admissible.

Further, a proper corpus delecti was laid, prior to their admission.

VIII.

Evidence related to wrongful acts committed by defendant Bryant were, in each instance, shown to be relevant to material issues at trial and, therefore, were properly admitted.

IX.

The court is not required to utilize special verdict forms for felony-murder, the defense did not object to the verdict forms that were used, and Casteel could not have been prejudiced, anyway, where the jury was instructed that they could not convict her on a felony-murder theory.

X.

The death penalty was properly applied. The Florida death penalty statute has been found to be constitutional and the evidence and proceedings below show that it was properly and proportionately applied in this case.

XI.

Neither other errors nor the cumulative effect of errors prevented a fair trial in the case sub judice.

ARGUMENT

I.

THE TRIAL COURT DID NOT REVERSIBLY ERR IN FAILING TO REQUIRE THE PROSECUTION TO EXPLAIN ITS REASONS FOR EXERCISING PEREMPTORY CHALLENGES. (Restated).

This is a case in which the defendants were all white (Casteel's Brief, 22; Rhode's Brief, 14). The State had a total of forty (40) peremptory challenges (TR.1500), of which it appears, they utilized sixteen (16), seven (7) against black persons (TR.1725, 2547, 2549, 2551, 2554, 2565, 3030, 3031, 3034, 3046, 3387, 3389, 3398). It appears that the defense, specifically, defendant Casteel, challenged one (1) black alternative juror (TR.3396). This resulted in a jury in which only six (6) of the twelve (12) members were black (TR.3588).

The defendants maintain that they established a "substantial liklihood" that jurors were being excluded solely on the basis of race, requiring an inquiry under State v. Neil, 457 So.2d 481 (Fla. 1984). The defendants are incorrect.

First, the discretion granted trial court judges in making this detemination is substantial. As this Court stated, citing People v. Thompson, 79 A.D.2d 87, 435 N.Y.S. 2d 739 (1981) with approval:

> to the extent that they suggest that a defendant may compel inquiry into the reasons for a prosecutor's use of peremptory Challenges merely because the prosecutor has used a particular number of his peremptory Challenges to exclude black potential jurors, for it may well be that the prosecutor's peremptory challenges were properly exercised, but for reasons that are not as readily apparent to those who were not in the position of the Judge who attended the voir dire. Thus, while exclusion of a significant number of black potential jurors will usually be part of the case of a defendant who seeks to have the trial court inquire into the prosecutor's use of peremptory challenges based upon alleged exclusion of blacks, such exclusion will be insufficient, in and of itself, to warrant reversal of a trial court's determination not to make inquiry.
>
> Neil at 486.

The United State's Supreme Court also believes that broad discretion should be vested in trial court Judges in this matter, saying that, ". . . . we have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." Batson v. Kentucky, 476 U.S. 79, 97 (1986).

Further, a comparison with other cases reveals no requirement that the trial court's decision be disturbed in this case. The trial court is clearly in a better position than the reviewing court to determine if the required substantial likelihood has been demonstrated and its decision may only be overturned if clearly erroneous. Germane v. Heckler, 804 F.2d 366, 368-369 (7th Cir. 1986); United States v. Matthews, 803 F.2d 325, 330 (7th Cir. 1986); cert. granted on other grounds, 94 L.Ed.2d 788 (1987); City of Miami v. Cornett, 463 So.2d 399, 402 (Fla. 3d DCa 1985); See, Schlanger v. State, 397 So.2d 1028 (Fla. 3d DCA 1981). Thus, the use of five (5) peremptory challenges, creating an all-white jury, did not create the required "substantial likelihood." Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986). Nor did the challenge of six (6) black persons resulting in a monochromatic jury. Woods v. State, 490 So.2d 24 (Fla. 1986). See Parker v. State, 476 So.2d 134 (Fla. 1985); Thomas v. State, 502 So.2d 994 (Fla. 4th DCA 1987); rev. denied, 509 So.2d 1119 (Fla. 1987); Hamilton v. State, 487 So.2d 407 (Fla. 3d DCA 1986). As the Florida Supreme Court stated, "exclusion of a significant number of black potential jurors . . . will be insufficient, in and of itself, to warrant reversal of a trial court's determination not to make inquiry." Woods v. State, 490 So.2d 24, 26 (Fla. 1986).

Defendant Rhodes' assertion, that, " . . . . in only two cases (referring to Norwood and Blue) did there conceivably

exist any other basis for exclusion other than race." (Rhodes' Brief, 13) appears less than candid when the record is examined.

Mr. Lapsley, another of the challenged black venirepersons, had been arrested in Alabama for driving without a license (TR.2320-2321), would require a greater amount of evidence on a murder than on other crimes (TR.2415) and, based on his beliefs, might prohibit a death penalty recommendation (TR.2436).

Mr. Montgomery had been arrested for not having a valid license (TR.2317-2319) and his brother-in-law had been arrested for attempted murder and gone to jail (TR.2319).

Mrs. Level, another black potential juror who was challenged by the State, was asked if she would keep an open mind, decide the case only on the facts and follow the instructions of the court. She indicated that she would not (TR.2813-2814). Also, she didn't know if her views on the death penalty would make it hard for her to be a juror (TR.2913).

Mr. Jackson had had a recent death of a close family member (TR.3362). When asked if he would use the definitions for terms given by the Judge at the end of the case, he said he wouldn't use the Judge's definitions, but would use his own (TR.3371). He had never heard of premeditated murder (TR.3368) and he stated that he was being singled out (TR.3385) at a time when he had been questioned only by the State. (TR.3365-3385).

Mrs. McGee, a potential black juror who was challenged by the State, appeared confused. On two occasions, she had to be asked by the court to speak loud enough to be heard **(TR.1188, 1635, 1664)** and she felt that the defense was required to present evidence **(TR.1665).**

Mrs. Blue knew a number of people involved in the case and recognized at least some of the defendants. Mrs. Blue believed that one of the defense attorneys had represented her brother **(TR.2296, 2304, 2517, 2518, 2520).** Also, her father was on probation for having shot and killed her brother **(TR.2454-2455, 2516)** and her husband and brother-in-law had been arrested two **(2)** months previously **(TR.2516).**

Mr. Norwood, among other things, wanted to be excused **(TR.2418),** had been arrested for and pled guilty to burglary **(TR.2322, 2323)** and said he couldn't find a defendant guilty of first degree murder even if the evidence proved it **(TR.2541).**

It is respectfully submitted that the trial court could properly consider these facts in determining that the defense had not shown a substantial likelihood that the State was utilizing challenges solely due to race.

Also, there is significant doubt whether four **(4)** white defendants even have standing to raise this issue.

Certainly, there can be no question that the landmark case in this area is Batson v. Kentucky, **476** U.S. **79 (1986).** This case has set forth the following basis to establish a sufficient prima facie case to require an inquiry:

> **. . .** .These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of cognizable racial group, Castaneda v. Partida, supra, at **494, 51** L.Ed.2d **498, 97** S.Ct. **1272,** and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. **. . .** (emphasis added).
>
> Id. at **96.**

Here, the defendants were unable to show that members of their race were systematically excluded from the jury, the most basic requirement of the Batson case. Batson is cited in State v. Slappy, **522 So.2d 18, 13** F.L.W. **184** (Fla. **1988), so** heavily relied on by the defendant, no less than eleven **(11)** times. It certainly appears that the Supreme Court of Florida approves of the Batson standing requirement. Certainly, the Fifth District has found this standing requirement to be applicable in Florida, Kibler v. State, **501 So.2d 76** (Fla. 5th DCA **1987).** Further,

Kibler, has been relied upon by the Second District in Cash v. State, 507 So.2d 1159 (Fla. 2d DCA 1987) and was even cited (albeit on other grounds) in State v. Slappy, 522 So.2d 18, 21 (Fla. 1988).

Further, the appellate courts of other States have held that a white defendant has no standing to challenge the exclusion of black jurors. Smith v. State, 515 So.2d 149 (Ala. Cr. App. 1987); McGuire v. State, 363 S.E. 2d 850 (Ga. Ct. App. 1987); State v. Bruce, 745 S.W.2d 696 (Mo. Ct. App., W.D. 1987); See, State v. Waqster, 489 So.2d 1299 (La. Ct. App. 1986).

Further, the Appellants can draw little support from Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985) which was not quashed on other grounds, as appellant has stated (Bryant's Brief, 28), but was affirmed on other grounds at State v. Castillo, 486 So.2d 565 (Fla. 1986). Indeed, it was affirmed because the prosecutor asked an improper question of a witness. This Court was never required to reach the issue of whether a non-black defendant can raise a proper objection under State v. Neil, 457 So.2d 481 (Fla. 1984) as it found that the Neil objection made by the defense in that case was untimely. State v. Castillo, 486 So.2d 565 (Fla. 1986).

Likewise, the appellant can draw little support from Peters v. Kiff, 407 U.S. 493 (1972), which requires that the system of

jury selection be proven discriminatory, a burden that the appellant has not even attempted to meet in this case. See, State v. Waqster, 489 So.2d 1299 (La. Ct. App. 1986). Thus, at the very least, the defense was required to show that the petit jury it attacks (which contained six (6) black persons) did not reflect a fair cross section of the community. See, Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987); State v. Waqster, 489 So.2d 1299 (La.Ct.app. 1986); See, also, Hobby v. United States, 468 U.S. 339 (1984); State v. Vincent, 43 Crim. L. Rep. (BNA) 2277 (Mo. Ct. App. 1988).

The trial court did not reversibly err in failing to conduct an inquiry pursuant to the defense objections.

II.

THE TRIAL COURT DID NOT REVERSIBLY ERR IN FAILING TO SEVER DEFENDANT'S TRIALS AND IN REDACTING THEIR STATEMENTS TO PREVENT PREJUDICE TO CODEFENDANTS. (Restated).

A. The Statements.

The fact is, that Allen Bryant is the only defendant who didn't testify. Therefore, he has no confrontation rights claim, at all and the claims of the others must be limited to prejudice caused by the admission of Bryant's redacted statement. However, no valid claim of prejudice due to Bryant's statement has been made, as shown below.

First, defendant Bryant's rights could not, as he contends, have been violated by the admission of his co-defendants' statements, redacted or not, where each of the co-defendants testified and was subject to cross examination. Severance can not be considered to be required on such a basis where the persons making the statements are subject to cross examination. Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978); cert. denied, 436 U.S. 909 (1978); Johnson v. State, 355 So.2d 143 (Fla. 3d DA 1978); cert. denied, 362 So.2d 1054 (Fla. 1978).

Based upon the same reasoning, the only statement that Casteel, Irvine or Rhodes can complain of is the redacted statement of Bryant, since his unredacted statement was never

presented to the jury and all the others were subjected to full cross examination.

Rhodes maintains that he was prejudiced by Bryant's reference that "the smaller guy'' went into the bedroom and, then, he heard a scream (Rhodes Brief, 30-31). This is a particularly interesting argument where that statement comes from Bryant's unredacted statement which was never submitted to the jury (TR.7167-7168, 7178). There is no reference to "the smaller guy" in the statement submitted to the jury (TR.7224-7225, 7232) because it was redacted out. Rhodes has made no other complaint about Bryant's statement (Rhodes' Brief, 30-32).

Casteel's complaint is that, because Bryant's redacted statement contains the phrase that he hired "someone as a waitress at the restaurant I was managing," the jury would not only assume that Casteel was the waitress, but would assume that she was the person referred to whenever the term "someone" was used. (Casteel's Brief, 96-97). Such highly speculative assumptions are not only not warranted, but are unsupported by case law, as shown below.

Irvine doesn't complain about Bryant's statement being prejudicial to him at all, but maintains that the jury could have figured out who Rhodes, Casteel and Irvine were, at least in some instances, by carefully analyzing each of their redacted

statements (Casteel's Brief, 37-54, 49). Although, certainly, arguably false, such a claim is immaterial where each of these people testified and was subject to full cross examination. The facts do not support the claims of prejudice.

The law doesn't support the complaints about the redaction process, either. A short examination of the United States Supreme Court cases on the subject of the admissibility of co-defendants' statements is helpful. The Court, in Bruton v. United States, 391 U.S. 123 (1968) ruled that an accused's right of confrontation is denied when the statement of a nontestifying codefendant, which inculpates the accused (unredacted), is admitted, notwithstanding jury instructions that the statement should be disregarded in determining the accused's guilt or innocence.

This holding was further defined in Parker v. Randolph, 442 U.S. 62 (1979), which held that no Bruton violation occurs when the admitted confessions interlock and support each other and the limiting instruction is given. The Court appeared to accept the definition of the Tennessee Supreme Court that "interlocking" confessions are those which clearly demonstrate the involvement of each defendant as to crucial facts such as time, location, felonious activity and awareness of the overall plan or scheme Id. at 67-68. It also noted that, ". . . . the incriminating statements of codefendants will seldom, if ever,

be of the 'devastating'character referred to in Bruton when the incriminated defendant has admitted his own guilt . . . . Id. at 73.

However, the Court appears to have receded, somewhat, from that position in Cruz v. New York, 95 L.Ed.2d 162 (1987), in which it said that the infinite variability of inculpatory statements and their likely effect on juries make the assumption that the fact that confessions are interlocking will prevent them from being devastating, untenable and, indeed, "interlocking" may well increase the damage done to a defendant by such a statement. Id. at 171. It also mentioned, however, that a codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told. Id. at 171. The "interlockingness," however, does go to the issue of whether the co-defendant's statement has sufficient indicia of reliability to be directly admitted as evidence against the defendant. Id. at 171.

The possible solution of redacting confessions of co-defendants so that they do not directly implicate the defendant was dealt with in Richardson v. Marsh, 95 L.Ed.2d 176 (1987), in which the court stated, after noting that the general rule is that jurors will follow their instructions:

> There is an important distinction between this case and Bruton, which causes it to fall outside the narrow exception we have created. In Bruton, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. Id., at 124, n.1, 20 L.Ed.2d 476, 88 S.Ct. 1620. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating". Id., at 135, 20 L.Ed.2d 476, 88 S.Ct. 1620. By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony).
>
> Id. at 186.

The Court further noted, in footnote 3, that it did not assume that the codefendant's confession did not incriminate the accused, but assumed the contrary, that it would have harmed him if the jury had disobeyed its instructions. However, where extrinsic evidence was necessary to link the accused to the codefendant's confession, the trial judge could properly assume that the jury would follow his limiting instruction. Id. at 186. Although it is certainly correct that the redacted statement in the Marsh, case, redacted not only the defendant's name, but his existence, from the codefendant's statement, the reasoning and language is clearly applicable to any statement not incriminating on its face. Id. at 186.

This law, applied to the redacted statements complained of here, rebuts the defendant's claims of error. It should be noted that the redaction in this case, although it could not destroy all mention of other persons in the statements in this case, was a long and painstaking process which did far more than just "substitute pronouns" as alleged by some of the defendants. (TR.849-1059, 3431-3561). The in-court redaction process, after the State's first draft of redacted statements, began on June 8, 1987 (TR.849-861). It continued through June 9 (TR.862-975), June 10 (TR.976-1059), June 11 (TR.1060-1083) and June 12 (TR.1085-1106). Then, the matter was dealt with, once again after jury selection, based on new defense objections, on June 25, 1987 (TR.3431-3485) and on June 26 (TR.3486-3565, 3569-3571). Indeed, early in the process, the defense strongly inferred that there was a proper method of redaction, although it complained that the state was not using it (TR.870-871). Also, later in the process, Casteel's attorney noted that the redacted statements of Rhodes and Irvine were very good (TR.llll).

The United States Circuit Courts, in cases decided subsequent to Cruz v. New York, 95 L.Ed.2d 162 (1987) and Richardson v. Marsh, 95 L.Ed.2d 176 (1987), have applied that reasoning to uphold the admission of co-defendants' statements which were redacted *so* that the identity, but not the existence, of the defendant was removed, and where other evidence linked

the defendant into the admitted statement. Thus, the fact that other evidence identified the "someone" in a redacted statement did not preclude its admission. United States v. Garcia, 836 F.2d 385 (8th Cir. 1987); See, also, United States v. Gutierrez-Chavez, 842 F.2d 77 (5th Cir. 1988); United States v. Yarbrough, 852 F.2d 1522, 1537 (9th Cir. 1988). Indeed, the circuit courts appear to have been applying this reasoning for some time. Substituting "the other man" for the defendant's name was not improper in a statement which implicated "the other man." United States v. Gonzalez, 749 F.2d 1329 (9th Cir. 1984). It was not improper, in the trial of two codefendants, for an officer to testify that one of them told him that he was not solely responsible and that the other person involved in the kidnapping was armed. United States v. Madison, 689 F.2d 1300 (7th Cir. 1982); cert. denied, 459 U.S. 1117 (1983). The general rule with regard to codefendants' statements, clearly applicable here, was stated in United States v. Castro, 596 F.2d 674 (5th Cir. 1979), as follows:

> . . . . Where, as here, a statement does not directly allude to the defendants, United States v. Hicks, 524 F.2d U.S. 946, 96 S.Ct. 1417, 47 L.Ed.2d 353; 426 U.S. 953, 96 S.Ct. 1729, 48 L.Ed.2d 197, rehearing denied, 426 U.S. 930, 96 S.Ct. 2640, 49 L.Ed.2d 382 (1976); United States v. Grillo, 527 F.2d 1344 (5th Cir. 1976), no rights are abridged. . . .
>
> Id. at 677.

This is underlined by holdings that, in order to invoke the Bruton doctrine, the confession in question must directly, rather than indirectly, implicate the complaining defendant. United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984). To find a Bruton violation, the statements of nontestifying codefendants must not only be clearly inculpatory, but must be vitally important to the government's case. United States v. Sacco, 563 F.2d 552 (2d Cir. 1977); cert. denied, 434 U.S. 1039 (1978); See, also, United States v. Lane, 752 F.2d 1210 (7th Cir. 1985).

Thus, an examination of Bryant's redacted statement removes any doubt about a confrontation rights violation (TR.7225-7260).

However, even if that were not the case, a Bruton violation is harmless where, as here, the average jury would have concluded, based on evidence other than the codefendant's statement (such as properly admitted unredacted statements and independent testimony) that the defendant was guilty. Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978); cert. denied, 436 U.S. 909 (1978). Here, the evidence was overwhelming that Casteel, Irvine, Bryant and Rhodes were, at the very least, aiders and abettors of the crimes of which they were convicted and, therefore, under Florida law, equally guilty, as the jury was instructed. F.S. §777.011.

Bryant, also complains that the redaction of his statement severely prejudiced him because the redaction process allegedly distorted the meaning of his statement. (Bryant's Brief, **42-49**). However, there are a number of problems with this position. The defendant's burden, in making such a claim, is to show that the editing effectively distorts the meaning of the statement or excludes information which is substantially exculpatory. United States v. Smith, **794** F.2d **1333** (8th Cir. **1986**).

The first redaction that Bryant says prejudiced him, although he doesn't fully explain (Bryant'sBrief, **42-43**) was as follows:

> *Q*. Did Mrs. Casteel introduce you to these two men?
>
> **A**. Not by names, no. She just introduced me as Allen and informed me that I should go with the gentlemen, keep cool, they would return me at the restaurant shortly and everything would be all right.
>
> *Q*. Did you go with them?
>
> **A**. Yes, I did.
>
> *Q*. After you got into the car, what occurred?
>
> A. The guy in the back had his razor knife or a knife or a razor or whatever. I don't know exactly what it was. He was yielding a razor or a knife in his hands. From there, we went over to Mr. Venecia's house.

(Original Statement, TR.7176-7177).

> **Q.** Did someone introduce you to these people?
>
> **A.** Not by names, no.
>
> **Q.** Did you go with them?
>
> **A.** Yes, I did.
>
> **Q.** After you got into the car, what occurred?
>
> **A.** The person had a razor knife or a knife or a razor or whatever. I don't know exactly what it was. The person was yielding a razor or a knife in hands. From there, we went over to Mr. Venecia's house.

(Redacted Statement, TR.7231).

It is respectfully submitted that, if the first statement implies duress, the second is hardly so significantly different that such an implication is removed. Bryant's other complaints turn out to be similar, in context. For example:

> **Q.** After the three of you were in the house, what occurred?
>
> **A.** The smaller guy went into the bedroom. The other guy stayed out in the living room with myself. As the other guy got inside of the bedroom, the other--the guy that was with myself--pushed me forward, told me that I should watch this cause this could happen to me. Shortly after there, I heard Mr. Venecia say that, "Please, just take everything that's in the house." I heard the gentlemen that was in the bedroom.

I heard him make a laughing noise. I was pushed up a little forward from there from where I was standing so I would have sight of the bedroom and I kept my eyes closed. Then I heard a scream. Shortly after that, the guy emerged from the bedroom and told the other guy that he was dead, to let's go.

Q. When he came back out of the bedroom and says he's dead, was he referring to Mr. Venecia?

A. Yes.

Q. Did you see Mr. Venecia at that point?

A. Very briefly.

Q. What did you see?

A. Blood. Just a brief bottom of his feet laying on the floor.

(Original Statement, TR.7178).

Q. After you were in the house, what occurred?

A. [Someone] went into the bedroom. The other person stayed out in the living room with myself. As the other person got inside of the bedroom. Shortly after there, I heard Mr. Venecia say, "Please, just take everything that's in the house.'' I heard the person that was in the bedroom. Then I heard a scream. Shortly after that, the person emerged from the bedroom and told the other person to let's go.

Q. Did you see Mr. Venecia at that point?

A. Very briefly.

Q. What did you see?

A. Blood. Just a brief bottom of his feet laying on the floor.

(Redacted Statement, TR.7132-7133).

Further, his complaint that the redaction of the "Mrs. Casteel did . . . ." portion of the statement concerning the repayment of the money missing from the Homestead restaurant misled the jury into believing the money was never repaid (Bryant's Brief, 47) is refuted by the fact that the same statement says the full amount was repaid (TR.7257). Hardly *so* significant a difference as Bryant has indicated.

The large majority of the rest of the redactions that Bryant complains of concern things that Casteel said and did (Bryant's Brief, 44-47). However, the large majority of these concern things that are in Casteel's statements or testimony. For example that Casteel said, "She wouldn't have to work as a waitress any more" (Bryant's Brief, **45)** which was incredibly similar to Jackie Regan's testimony that Casteel said she had been taken care of financially the rest of her life and would always have a job. (TR.3800). Indeed, it fits quite nicely with Casteel's testimony that Bryant promised her a lifetime job (TR.4882). That Casteel met Waynee Tidwell to have the hole dug (Bryant's Brief, 45-46) was testified to by both Tidwell and Casteel (TR.3954, 5025-5027). A careful analysis shows that the redactions did not prejudically distort the statement.

Further, although it appears that some of the statements Bryant now complains of were the subject of objections (TR.3459-3460, 3492-3493, 3498), a good many of them were not. These alleged errors, therefore, were not properly preserved. *See*, Walker v. State, 13 So.2d 2d 4 (Fla. 1943); Bennett v. State, 405 So.2d 265 (Fla. 4th DCA 1981).

The balance, upon examination, are either not error at all, or are harmless error because, considering the balance of the evidence, they must be harmless.

B. Severance.

Each of the defendants, in this case, maintains that they were entitled to separate trials because their defenses were antagonistic. They are incorrect.

The general rule regarding joinder, is as follows:

> **(b) Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information upon which they are to be tried:
>
> (1) when each defendant is charged with accountability for each offense charged;
>
> (2) when each defendant is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to have been committed in furtherance of the conspiracy; or

> (3) when, even if conspiracy is not charged and all defendants are not charged in each count, it is alleged that the several offenses charged were part of common scheme or plan. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.
>
> Rule 3.150(b), Fla.R.Crim. P. (1984)

Certainly, there is no question that this case properly fits under the general joinder rule where the other offenses charged were ancillary to the two murders, where the same people were involved in both murders and where there was ample evidence that Bessie Fischer was killed on the same piece of property a few weeks later to cover up the murder of her son, Art Venecia, and *so* that their joint assets could be disposed of by the defendants (CR.5-11; TR.3727-4815).

However, severance may still be required, in some circumstances:

> **(b) Severance of Defendants.**
>
> (1) On motion of the State or a defendant, the court shall order a severance of defendants and separate trials:
>
> (i) before trial, upon a showing that such order is necessary to protect a defendant's right to a speedy trial, or is appropriate to

promote a fair determination of the guilt or innocence of one or more defendants; or

(ii) during trial, only with defendant's consent and upon a showing that such order is necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

(2) If a defendant moves for a severance of defendants on the ground that an oral or written statement of a co-defendant makes reference to him but is not admissible against him, the court shall determine whether the State will offer evidence of the statement at the trial. If the State intends to offer the statement in evidence, the court shall order the State to submit its evidence of such statement for consideration by the court and counsel for defendants and if the court determines that such statement is not admissible against the moving defendant, it shall require the State to elect one of the following courses:

(i) a joint trial at which evidence of the statement will not be admitted;

(ii) a joint trial at which evidence of the statement will be admitted after all references to the movina defendant have been deleted. provided the court determines that admission of such evidence with deletions will not prejudice the movinq defendant; or

(iii) severance of the moving defendant.

(emphasis added).
Rule 3.152(b), Fla.R.Crim.P. (1984).

The defendants, in this case, have urged this Court to adopt a policy of "when in any doubt, sever." However, as the United States Supreme Court pointed out in Richardson v. Marsh, **95** L.Ed.2d **176 (1987),** there are substantial reasons for not adopting such a policy:

> One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years. Memorandum from David L. Cook, Administrative Office of the United States Courts, to Supreme Court Library (Feb. 20, **1987).** Many joint trials-for examples, those involving large conspiracies to import and distribute illegal drugs-involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace-and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case

> beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability-advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. (footnote omitted).
>
> Id. at 187.

Certainly, there was "finger pointing" between the defendants in this case, albeit that most of it was of the, "I've got some responsibility for these crimes, but they have even more" variety. The question, of course, is whether that is sufficient to require severance.

The general rule, of course, is that motions for severance are addressed to the sound discretion of the trial court, whose order will not be reversed except for palpable abuse. Abbott v. State, 334 So.2d 642 (Fla. 3d DCA 1976); cert. denied, 345 So.2d 420 (Fla. 1977); cert. denied, 431 U.S. 968 (1977). Aiders and abettors charged jointly should, generally, be tried together and that defendants would have a better chance for acquittal at separate trials does not govern. United States v. Burke, 700 F.2d 70 (2d Cir. 1983); cert. denied, 464 U.S. 816 (1983); United States v. Kahn, 381 F.2d 824 (7th Cir. 1967). To be entitled to severance, a defendant must show specific and

compelling prejudice and that defenses are, not only antagonistic, but irreconcilable and mutually exclusive. United States v. Benz, 740 F.2d 903 (11th Cir. 1984); cert. denied, 474 U.S. 817 (1985); United States v. Varella, 692 F.2d 1352 (11th Cir. 1983); cert. denied, 463 U.S. 1210 (1983); United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982); cert. denied, 463 U.S. 1209 (1983). Neither hostility nor antagonistic defenses are sufficient to require severance, even where the defendants involved seek to escape punishment by blaming each other. The defendants, in order to be entitled to severance, must show a conflict in defenses *so* irreconcilable that a jury would infer the guilt of all defendants due to the conflict, alone. United States v. Talavera, 668 F.2d 625 (1st Cir. 1982); cert. denied, 456 U.S. 978 (1982); United States v. Herring, 602 F.2d 1220 (5th Cir. 1979); cert. denied, 444 U.S. 1046 (1980); United States v. Brady, 579 F.2d 1121 (9th Cir. 1978); cert. denied, 439 U.S. 1074 (1979); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976); cert. denied, 431 U.S. 933 (1977); Baker v. United State, 416 So.2d 804 (Fla. 1982); McCray v. State, 416 So.2d 804 (Fla. 1982).

Further, defendants are not generally entitled to severance based on antagonistic defenses where they have an opportunity to confront and cross examine witnesses against them (as previously noted, Bryant was the only defendant who didn't testify). O'Callaghan v. State, 429 So.2d 691 (Fla. 1983); McCray v. State, 416 So.2d 804 (Fla. 1982); Johnson v. State, 355 So.2d

143 (Fla. 3d DCA 1978); cert. denied, 362 So.2d 1054 (Fla. 1978).

For example, even though each of the defendants in a case accused the other of being the killer, where there was other evidence that could be used in determining the veracity of defendants and in making the ultimate determinations of guilt, denial of severance was not error. Hawkins v. State, 199 So.2d 276 (Fla. 1967); vacated in pt. (on other grounds), 408 U.S. 941 (1972). Where a group of defendants sought to present themselves as unknowing dupes of other defendants and the testimony of a codefendant undermined this assertion, denial of severance was not error where such testimony would have been admissible even if trials were separate. United States v. Walker, 720 F.2d 1527 (11th Cir. 1983); cert. denied, 104 S.Ct. 1614 (1984). The complexity of a trial is insufficient grounds to overturn the denial of a motion for severance and, in fact, in complex trials the pressures against severance are especially great because of the drain on judicial resources that would be created by separate trials. United States v. Diez, 515 F.2d 892 (5th Cir. 1975); cert. denied, 423 U.S. 1052 (1976). Although the defendant contended he was coerced by his codefendant and the second codefendant argued that he was coerced by the defendant and the first codefendant, these defenses were not so irreconcilable that joinder was error. United States v. Falcon, 766 F.2d 1469 (10th Cir. 1985). Failure to grant a severance is

not improper because a codefendant's testimony forces the defendant to take the stand. United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986); United States v. Shively, 715 F.2d 260 (7th Cir. 1983); cert. denied, 104 S.Ct. 1001 (1984); See also, United States v. Taylor, 792 F.2d 1019 (11th Cir. 1986); United States v. Boscia, 573 F.2d 827 (3d Cir. 1978); cert. denied, 436 F.2d 911 (1978).

It is respectfully submitted that each of the facts pointed to by each of the defendants in support of this issue (a good deal of which is the representations of counsel that they think severance is necessary) has been held to be insufficient to require severance. The real issue is whether due to the conflict between defenses, the jury would have assumed that all the defendants must be guilty. Such is not the case, in this instance, and denial of severance was not error.

The trial court did not reversibly err in failing to sever defendants' trials and in redacting their statements to prevent prejudice to codefendants.

111.

THE TRIAL COURT DID NOT REVERSIBLY ERR IN FAILING TO SEVER OFFENSES. (Restated).

Defendants Irvine, Rhodes and Bryant maintain that the offenses were required to be severed in this case because, essentially, there is no indication that the murder of Bessie Fischer was connected in any manner to the murder of her son, Arthur Venecia. (Irvine's Brief, 55-58; Rhodes' Brief, 27-29; Bryant's Brief, 32).

Certainly, Rule 3.150(a), Fla.R.Crim.P., does permit joinder only, ". . . .when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected acts or transactions."

It is respectfully submitted that there were sufficient indications that the two (2) murders were connected.

Mrs. Fischer, of course, was Venecia's mother, who lived on Venecia's property and was taken care of by him (TR.3729, 3824). There was evidence that Irvine and Rhodes were present at both murders (and Bryant was, also present at Venecia's) (TR.4266-4294, 5254-5277, 5278-5283, 5383-5400, 5400-5406). Casteel testified that Bryant ordered Fischer killed because she was asking too many questions about Venecia's disappearance

(TR.4875-4877, 4895-4899, 4906-4907, 5005-5023). They were found in the same pit (TR.3872, 3926-3936, 3967, 4661-4701). Fischer and Venecia jointly held over $30,000 in stock that Bryant liquidated knowing it was jointly held (TR.4083-4131, 7242-7243). There does seem to have been some evidence of a connection between the murders.

The general rule regarding severance of offenses is that the granting or denial of a motion for severance is within the discretion of the trial court, that denial of severance will not warrant reversal unless clear prejudice is shown and that the burden of demonstrating such prejudice is a difficult one so that the ruling of the trial judge will rarely be disturbed on review. United States v. Benz, 740 F.2d 903 (11th Cir. 1984); cert. denied, 474 U.S. 817 (1985). The burden is squarely on the movant to demonstrate an abuse of discretion and he is required to show clear prejudice suffered by having to defend the charges simultaneously. United States v. Montes-Cardenas, 746 F.2d 771 (11th Cir. 1984); Johnson v. State, 438 So.2d 774 (Fla. 1983).

Where evidence relevant to the other charges is relevant to the charge which is sought to be severed, denial of severance is not an abuse of discretion. Clark v. State, 379 So.2d 97 (Fla. 1979).

When charges are connected either causally (as the murders are) or episodically (as all the charges are), then severance is properly denied. Brown v. State, 502 So.2d 979 (Fla. 1st DCA 1987); Fann v. State, 453 So.2d 230 (Fla. 4th DCA 1984); Davis v. State, 431 So.2d 325 (Fla. 3d DCA 1983); Parker v. State, 421 So.2d 712 (Fla. 3d DCA 1982); Williams v. State, 409 So.2d 253 (Fla. 4th DCA 1982).

The motions for severance of offenses in this case were clearly properly denied, pursuant to Rules 3.150(a) and 3.152(a), Fla.R.Crim.P. (1984).

IV.

PROSECUTORIAL MISCONDUCT DID NOT CONSTITUTE REVERSIBLE ERROR IN THIS CASE. (Restated).

A. Alleged Caldwell Violation.

The first issue, argued by three of the four defendants (Irvine, Casteel and Bryant), is that the prosecutor improperly minimized the jury's role, pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985), by minimizing the jury's role in the sentencing process.

The jury's sentencing verdict, in Florida, unlike Mississippi, is an advisory one. F.S. §921.141 (1987). Indeed, there is no indication that any of the comments complained of by the defendants were not correct statements of Florida law. Under such circumstances, there is no error, as the United States Eleventh Circuit has held:

> The relevant question under Caldwell is whether remarks made at trial lessened the jury's sense of responsibility toward its role of determining whether the death penalty is appropriate. Although certain language in Caldwell could be interpreted broadly, we must consider such language in light of the fact of Caldwell. We believe the Supreme Court intended that a Caldwell violation should include some affirmative misstatement or misconduct that misleads the jury as to its role in the sentencing process. Caldwell does not mandate

reversal if an advisory jury is told that its role is to advise or to recommend. (emphasis added).

* * *

Under Florida's death penalty statute the jury's role is advisory. After receiving the jury's recommendation, the trial judge must independently weigh the aggravating and mitigating circumstances and render sentence. Therefore, emphasizing the "advisory" role of the jury, or the fact that the jury is making a "recommendation" to the judge, does not support the Caldwell claim. Such statements are neither inaccurate or misleading. (footnote omitted).

* * *

We agree with the Supreme Court of Florida that comments which accurately explain the respective functions of the judge and jury are permissible under Caldwell "as long as the significance of the [the jury's] recommendation is adequately stressed." Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986), cert. denied, 107 So.2d 1617 (1987). After examining the record, we conclude that the court and prosecutor adequately communicated the seriousness of the jury's advisory role. We cannot say that this jury felf anything but the full weight of its advisory responsibility. As a result, petitioner's Caldwell claim must fail. (footnote omitted).

Harich v. Wainwright, 844 F.2d 1464 (11th Cir. 1988) (en banc).

Further, the judge, in this case, made especially certain that the jury understood their responsibilty. After the State had explained the trifurcated system used in Florida (TR.1353-1355, 1366-1367), the Court, at the defense request, instructed the venire that what lawyers say is not evidence and that an advisory verdict is not less important because it is advisory (TR.1379-1382, 1455-1456). Also, the court agreed, at the penalty phase charge conference, to instruct the jury that its opinion carried great weight. (TR.6661). Thus, he gave the following instruction prior to penalty phase deliberations:

> The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.
>
> This Court is required to and does give great weight and consideration to your opinion and may not arbitrarily disregard or go against it.
>
> (TR.6669).

The comments concerned in the Caldwell case were, in contrast to this situation, specifically held to be inaccurate, both because they were misleading as to the nature of the appellate court's review and because they were fundamentally at odds with the role that a capital sentencer must perform, as is clear from the comments themselves:

ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know-they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet the . . .

COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

THE COURT: Alright, **go** on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I

> think it's unfair and I don't mind telling them so.
>
> Caldwell v. Mississippi, 472 U.S. 320, 325-326 (1985).

Also, as this Court noted in Combs v. State, 525 So.2d 853, 858 (Fla. 1988), the United States Supreme Court has specifically stated that, "In Florida, the jury's sentencing recommendation in a capital case is only advisory. . . ." Spaziano v. Florida, 468 U.S. 447 at 451 (1984) (emphasis in Combs). Therefore, correctly stating the law can hardly be reversible error.

The jury's role was not improperly minimized in this case.

B. Alleged References to Indictment.

Casteel complains that the prosecutor improperly referred to the fact that a grand jury had indicted the defendants (Casteel's Brief, 123). However, it must not have disturbed the defendants at the time, since no objection was ever made on such grounds. (TR.2354-2355, 3198-3200). It should be noted that the second such reference was in a statement informing the jury that the State was required to convince the jury of the defendants' guilt to the exclusion of and beyond a reasonable doubt (TR.3198) and the defense did object to, "the prosecutor instructing the jury on the law." (TR.3198). However, no objection was ever made to the passing references to a grand

jury indictment which, therefore, if error, was not properly preserved. Castor v. State, 365 So.2d 701 (Fla. 1978); Courson v. State, 414 So.2d 207 (Fla. 3d DCA 1982); Davenport v. State, 396 So.2d 232 (Fla. 1st DCA 1981); Bassett v. State, 392 So.2d 1025 (Fla. 5th DCA 1981).

C. Alleged Comments on Nonstatutory Aggravating Factors.

Two of the defendants have also argued that the prosecution argued nonstatutory aggravating circumstances (Irvine's Brief, 32-34; Casteel's Brief, 117-118). For example, Casteel argues that the prosecutor improperly argued that she had no remorse for the killing of Venecia (Casteel's Brief, 117-118). This, certainly can not be argued as an aggravating factor, although it would take an extreme case to be reversible error. Pope v. State, 441 So.2d 1073 (Fla. 1983). Lack of remorse can be considered, however, in determining whether a mitigating factor exists or not. Aqan v. State, 445 So.2d 326 (Fla. 1984); cert. denied, 469 U.S. 873 (1984). Casteel presented some evidence of such remorse (TR.6259), so, certainly, the prosecutor could properly argue that it did not exist.

As to the other alleged "nonstatutory aggravating circumstances," those that shouldn't be deemed fair comment on the evidence pursuant to Kennedy v. State, 455 So.2d 351 (Fla. 1984) should certainly not be considered reversible error. Improper remarks only entitle a defendant to new proceedings

where it is reasonably evident that the remarks might have influenced the jury to reach a different verdict. Thus, saying that imposition of the death penalty was "the only way I know that he is not going to get out on the public" was not reversible error. Darden v. State, 329 So.2d 287 (Fla. 1976); cert. dismissed, 430 U.S. 704 (1977). Thus, clearly overstepping the bounds of proper argument on at least three occasions in penalty phase argument was insufficient to require resentencing. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). An appeal for retribution was insufficient to require a new sentencing proceeding, even where the jury vote was only seven to five in favor of the death penalty. Bush v. State, 461 So.2d 936 (Fla. 1985); cert. denied, 475 U.S. 1031 (1985); See, Brown v. State, 473 So.2d 1260 (Fla. 1985).

Indeed, in the penalty phrase of a murder trial, prosecutorial misconduct must be egregious to warrant resentencing. Bertolotti at 138. No such conduct is shown, in this case.

D. Alleged Perjury.

The defense has also argued that the prosecution deliberately had Dr. Rao perjure herself in her penalty phase testimony. (Irvine's Brief, 35; Casteel's Brief, 126-127). However, a comparison of her testimony reveals no such possibility. She testified during the guilt phase that the

victims died by homicide by unspecified means (TR.4717-4763), having previously testified that her findings, with regard to Mrs. Fischer, were consistent with strangulation (TR.517-518). This is a proper classification by the World Health Organization (TR.4745).

Her testimony in the penalty phase consisted of her opinions based on trial evidence, such as her knowledge that Venecia's death was consistent with his death by drowning in his own blood or bleeding to death (TR.6220-6221). She did testify that she learned from police reports and otherwise that Bessie Fischer died by strangulation (TR.6222). There is no indication that that was other than true and, indeed, both Irvine and Rhodes so testified.

She was, of course, subjected to full cross examination concerning perceived inconsistencies between her guilt phase and penalty phase testimony (TR.6227-6240). This issue is a "non-issue."

E. Other Alleged Misconduct.

The defense also complains that the prosecutor improperly made "demands" of defense counsel. (Irvine's Brief, 36; Casteel's Brief, 126). Well it appears that he was about to, but we don't know what, if anything, he was going to demand since he was cut off by an objection before he ever said

(TR.6553). The trial court offered to give a curative instruction, but the defense withdrew their request for one, when he made the offer (TR.6556). Hardly reversible error where a curative instruction could easily have eliminated any problem. See, Ashley v. State, 265 So.2d 685 (Fla. 1972); Williams v. City of Ocala, 203 So.2d 185 (Fla. 1st DCA 1967).

It is respectfully submitted that the other allegedly "prosecutorial misconduct," primarily either stating the law during voir dire (properly) or leading witnesses could not possibly be considered reversible error. Rhodes' "gruesome testimony and photographs" complaint (Rhodes Brief, 22-26) seems particularly indefensible in view of the fact that virtually no objections were made to the photographs that the defense now maintains were so inflammatory.

The alleged prosecutorial misconduct did not deprive these defendants of a fair trial.

V.

CONTACT BETWEEN THE COURT AND JURY MEMBERS DID NOT CONSTITUTE REVERSIBLE ERROR IN THIS CASE. (Restated).

The following took place at approximately noon on July 16, **1987:**

(Thereupon, the jury retired from the courtroom, after which the following proceedings were held:)

THE COURT: We are going to take a recess at this time. We are in recess now until approximately 1:15, 1:15, 1:30. I am going to give them an hour and a half, so it's going to be closer to 1:30.

MS. WEINTRAUB: Are you doing your sounding calendar?

THE COURT: A sounding will be conducted, but I won't be present. I will have the attorneys available in a courtroom to simply announce ready in some cases. We are going to get started at 1:30 again.

If you all want to clear out, you can go ahead and do that now. I am waiting for the paperwork to feed the jury.

(Thereupon, the following proceedings were held outside the hearing of attorneys and defendants:)

THE COURT: Bring them out.

THE CLERK: Should I get them out?

THE COURT: Yeah, bring them out.

(Thereupon, the jury returned to the courtroom, after which the following proceedings were held:)

THE COURT: I need you to gather around just a minute.

Gilda is going to be escorting you to lunch over at the Holiday Inn. When we send the jurors out for lunch, county officials are constantly admonishing us concerning open tabs for the jury. We have some limits.

I can't remember now, but I am going to set a limit of eight bucks for lunch, and it's necessary for me to do that because I don't know what the expenses in this case ultimately will be, if you ultimately will have any number of meals together.

So I would give you some guidelines if there are going to be other meals together on generally what you should do, because the county does write the heck out when the jurors spend more than they think they ought to spend.

I would like the county attorney to have lunch, dinner for what he wants us to make you have it for, but we do have those kinds of limits. They are waiting for you over at the Holiday Inn. Hopefully you can go in, and they have tables set aside for you. Hopefully, you can go over and have a nice lunch and come back.

I estimate we will probably get started around 1:30. You all have to walk over and walk back. so we're looking at 1:30 as our time.

Absolutely no discussion about the case. All right. We'll see you back here.

(Thereupon, a brief discussion was held off the record, after which the following proceedings were had:)

THE COURT: You got it? Should it be addressed to anybody in particular?

MR. MORRISON: Well, It's just the idea of having something to say that I have been here.

THE COURT: To whom it may concern kind of -- yes the letter will be available. I told my secretary about it on last week.

MR. MORRISON: Thank you.

THE COURT: Earlier in the week, the day before yesterday.

MR. MORRISON: I had to ask Al to ask you.

THE COURT: I am aware and she will have it typed up.

We will see you back --

MS. PINTER: I need to speak to you, too.

THE COURT: (Continuing) -- before 1:30.

(Thereupon, a brief discussion was held off the record, after which the following proceedings were held with Emily Pinter and outside the presence of the jury:)

THE COURT: I will put on the record and remind me, if you would, when the attorneys come in just to repeat. The juror is now indicating to me when we first started she didn't recognize the name of a witness.

However, since she's been in court, she realizes that one of the witnesses, Mr. Philpot, was a school teacher at a school where she was driving a bus to and she wanted to bring that to the Court's attention.

I'll let the lawyers know. That is insignificant.

MS. PINTER: One more thing. This morning I also told you ---

THE COURT: What?

MS. PINTER: I said I didn't know any of the policemen or correctional officers, only the ones that went to my church, but out in the hallway this morning, I noticed one that I know real well, but I have never discussed any of this business and he works as a probation officer I think.

THE COURT: Okay, no problem. We'll bring that up.

MS. PINTER: I have everything off my conscious.

THE COURT: Everybody wants to be

(Thereupon, a luncheon recess was taken until 1:30 p.m. of the same day:)

(TR.5909-5914).

This took place after the close of evidence, but before closing arguments had begun.

The court, at the first break in the State's closing (the first closing argument), informed the attorneys as follows:

"HE COURT: All right. Folks why don't you step into the jury room briefly, please.

Let's take about five minutes while you get ready.

(Thereupon, a brief recess was taken, after which the following proceedings were held outside the hearing of the jury:)

THE COURT: Just before going to lunch, a juror Ms. Pinter indicated to me that she saw a person who works with Corrections in the hallway and not associated with this case in any way but had on a uniform.

Remember she knew some officers or some people that attended her church. She recognized someone else. I don't know who it is, but she wanted me to know that she recognized someone working for Corrections.

In addition thereto, she indicated when we first started the trial that she didn't know any witnesses by name. She also said to me that in 1967 she was driving buses for schools down in the south end of the county, Redlands and she recognized Mr. Philpot. Basically he was one -- She recognized Mr. Philpot as having taught school where she would deliver, but I told her I would put it on the record. I would let the attorneys know the first chance that I had.

All right. Let's knock on the door and bring the jurors out.

(TR.5947-5948).

There were no objections or questions.

Mr. Bryant contends that such contact, indeed, any ex parte communication of any kind between Judge and Jury, constitutes reversible error (Bryant's Brief, 60-61). The case law on the matter, however, does not support such an interpretation.

The First Circuit Court of Appeals, in applying the parallel Federal Rule of Criminal Procedure, 43 (a), specifically noted that, ". . . not all ex parte communications between the trial court and the jury are improper. . . ." United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981). Thus, there was no error in a court's ex parte communication with a juror who was distressed at separation from her husband imposed by sequestration. United States v. Aimone, 715 F.2d 822 (3d Cir. 1983). Similarly, where a juror had been hospitalized overnight, the trial judge's inquiries of the juror's physician and the juror, through the physician, to ascertain her condition, were not error. United States v. Hall, 536 F.2d 313 (10th Cir. 1976).

Similar reasoning has been applied in Florida. For example, where jurors' ex parte request to view themselves on television and the judge's response were made before the beginning of deliberations, the presence of defense counsel at the request was not required. Zamora v. State, 361 So.2d 776 (3d DCA 1978); cert. denied, 372 So.2d 472 (Fla. 1979); See, Terrell v. State, 154 So.2d 841 (Fla. 2d DCA 1963).

Further, the fact that portions of the discussions was unrecorded does not mandate reversal where, as here, there appears to be no reasonable possibility that harm occurred. ~~See~~, United States v. Mitchell, *590* F.2d 816 (6th Cir. 1979).

No reversible error was committed due to the contact between the judge and jurors in this case.

VI.

THE STATE PRESENTED A PRIMA FACIE CASE IN THIS ACTION. (Restated).

Defendant Bryant, joined by other defendants, maintains that the trial court was required to grant a motion for Judgement of Acquittal on both murders and one burglary count because the state didn't establish a prima facie case of guilt. (Bryant's Supplemental Brief). This position is refuted by the evidence presented in the State's case.

The evidence certainly proved that Arthur Venecia and Bessie Fischer were dead and buried in their own backyard. (TR.3946-3967, 4661-4706, 4717-4763).

To say that Bryant had a motive to kill Venecia is sheer understatement. His relationship with Venecia had deteriorated, Venecia was accusing him of taking money and he was going out with a new person, Felix (TR.3735-3737). Also, he had, in fact, taken money from Venecia's restaurant (TR.7255), Venecia was blackmailing him into remaining in their relationship by threatening to tell his mother he was a homosexual (TR.7254) and he admitted to choking Venecia the week before the murder (TR.7254-7255).

Further, Bryant admitted to being at the scene of the Venecia killing (TR.7231-7233) and to paying Venecia's killers (albeit "under duress") (TR.7233-7235). He also admitted to assisting in the various stages of disposing of Venecia's body and to calling the backhoe service to dig the hole where Bryant helped to bury him (TR. 7236-7239, 7241-7242). This was corroborated by Tidwell, the backhoe operator (TR.3946-3951, 7025).

Also, subsequent to the killing, Bryant told the restaurant employees that Art was in North Carolina (TR.3742-7252). Then he proceeded to sell off many thousands of dollars worth of Venecia's assets, identifying himself as "Arthur Venecia." (TR.3998-4217, 7033-7043, 7242-7247).

He had been told that Fischer was asking too many questions (TR.7240) and we know that she was killed because she was "too nosy" (TR.3769).

Additionally, and knowing that he had access to the restaurant cash drawer, since he was manager (TR.7230), we also know that the price for killing Venecia was $5,000 (TR.3800) and was done by hired killers (TR.3817).

We also know Bryant sold the trailer Fischer lived in (TR.7243-7245) and that, even before she was killed, Bryant was

liquidating the stocks that were jointly held by Fischer and Venecia (TR.7242-7243, 4084-4131).

There was substantial additional evidence, as well, such as his hysterical demands for money to Casteel, resulting in her giving him money (TR.3851-3852) and the fact that Casteel, whom we know was involved, felt it necessary to leave her daughter a note asking her to contact the police if anything happened to her when she was visiting Bryant (TR.3852-3853).

The general rule in reviewing the denial of a Judgement of Acquittal is that, not only must all facts be construed against the movant, but every inference and conclusion that can reasonably be drawn from those facts, as well. Lynch v. State, 293 So.2d 44 (Fla. 1974); Pressley v. State, 395 So.2d 1175 (Fla. 3d DCA 1981); Knight v. State, 392 So.2d 337 (Fla. 3d DCA 1981); rev. denied, 399 So.2d 1143 (Fla. 1981); See, Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985); aff'd, 485 So.2d 1283 (Fla. 1986). Indeed, it is the duty of the jury to decide what inferences may reasonably be drawn from credible testimony. United States v. Gordon, 580 F.2d 827 (5th Cir. 1978), cert. denied, 439 U.S. 1051 (1978).

Indeed, as the Fifth District has said:

> . . . . So long as the state barely shows a case against the accused it

> should be allowed to proceed with its case. Then if the accused is entitled to a directed verdict at trial or an acquittal, each party has been given its due. It is only when the state cannot establish even the barest bit of a prima facie case that it should be prevented from prosecuting. State v. Upton, 392 So.2d 1013 (Fla. 5th DCA 1981); State v. Fort, 380 So.2d 534 (Fla. 5th DCA 1980); State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979).
>
> State v. Pentecost, 397 So.2d 711 (Fla. 5th DCA 1981).

It is also well-settled that the accused's actions both before and after the homicide may properly be taken into account in making such a determination. Fratello v. State, 496 So.2d 903 (Fla. 4th DCA 1986).

Thus, evidence that the defendant had broken the victim's jaw when combined with circumstantial evidence that the defendant was in the victim's apartment about the time of the crime sustained his conviction for first degree murder. Bradford v. State, 460 So.2d 926 (Fla. 2d DCA 1984); rev. denied, 467 So.2d 999 (1985). That compares with Bryant choking the victim and being at the scene of his murder, even without considering all the other substantial evidence. See, Groover v. State, 458 So.2d 226 (Fla. 1984); cert. denied, 471 U.S. 1009 (1985); Scott v. State, 411 So.2d 866 (Fla. 1982).

Therefore, without considering the evidence which came out in the defense cases, the State clearly presented sufficient evidence in its case in chief to establish a prima facie case. That is without even considering the fact that it was permitted to reopen its case in chief, after the defendants rested, to admit the unredacted statements of the testifying defendants (TR.5545-5546).

The motions for Judgements of Acquittal of the other defendants were even further from being properly granted than were Bryant's. Irvine and Rhodes, while they quibble about prior knowledge and intent, admit being present and getting paid for both murders, just as a beginning (TR.7158-7165, 7093-7114).

A brief examination of the case against Casteel also clearly refutes any such assertion by her.

There was no reversible error in denying motions for judgments of acquittal.

VII.

THE TRIAL COURT DID NOT REVERSIBLY ERR IN FAILING TO SUPPRESS IRVINE'S STATEMENTS TO THE POLICE. (Restated).

Defendant Irvine informs us that his first statement was involuntary because he was not informed that the officers were investigating the Venecia and Fischer homicides until after he had been given his warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). (Irvine's Brief, 60-61). He bases that on dicta in United States v. McCrary, 643 F.2d 323 (5th Cir. 1981) which stated that, where the interrogating officer admitted that he never informed the defendant of the nature of the offense upon which the questioning leading to the incriminating statements was based (possession of long guns by a convicted felon), then the admission of the statements, although error, was harmless, where the admissible evidence was more than sufficient for conviction.

First, the situation here is obviously distinguishable from McCrary where the officers revealed the purpose of their questions, as defendant admits, after signing the rights form.

Second, other circuits have held that the police have no duty to inform a suspect of the crime which they are investigating, which is simply one fact to be considered in

evaluating the total circumstances. Carter v. Garrison, 656 F.2d 68 (4th Cir. 1981); cert. denied, 455 U.S. 952 (1982). Indeed, the Third Circuit was required to reverse in a similar situation, finding that a waiver signed before being advised of the offense concerned was voluntary. Collins v. Brierly, 492 F.2d 735 (3d Cir. 1974); cert. denied, 419 U.S. 877 (1974).

Further, even a statement induced by misrepresentation or deception may be voluntary made and is admissible, if so. State v. Williams, 434 So.2d 967 (Fla. 3d DCA 1983); Harley v. State, 407 So.2d 382 (Fla. 1st DCA 1981).

Similarly, the defense reliance on State v. Wininger, 427 So.2d 1114 (Fla. 3d DCA 1983) because, allegedly, the defendant said he wanted to go home is badly misplaced. Detective Paramenter, who was present the entire time, never heard him say he wanted to go home (TR.327). Sgt. Smith of Marion, North Carolina, where Irvine was held until his extradition, remembered that he asked if he could go home at some point, but didn't remember when. (TR.375). The Wininger case is clearly inapplicable.

The defense writes off the second statement, made by Irvine twelve days later, as "clearly tainted by the initial illegality." (Irvine'sBrief, 62). The second statement, which is so similar to the first that, even if the first were

involuntary, its admission would be harmless error, would be admissible even if the first were not where there is no indication or argument, even by Irvine, that it was anything other than voluntary (except for his "clearly tainted" allegation). Oregon v. Elstad, 470 U.S. 298 (1985).

The claim that the state failed to prove corpus delecti prior to the admission of the statement is unsupported by fact or law. The state need only show death, the identity of the victim and the criminal agency of another and these may be shown by circumstantial evidence. Fridovich v. State, 489 So.2d 143 (Fla. 4th DCA 1986). The identification of the defendant as the guilty person is unnecessary. State v. Allen, 335 So.2d 823 (Fla. 1976). The proof need not be beyond a reasonable doubt, uncontradicted or overwhelming and need not rebut every interpretation of the evidence inconsistent with the state's theory. Id. Further, admissions made to lay persons (such as Casteel's statements to Regan and Mayo) are admissible as part of the corpus delecti. Fridovich at 146.

Here, where two people are found dead and buried in their own back yard and Casteel had said, to lay persons, that they were murdered (TR.3764-3765, 3784, 3870-3873), corpus to the admission of all of the defendants' statements was clearly shown, even without considering evidence which came in after the statements, which can properly be considered. Jones v. State,

360 So.2d 1293 (Fla. 3d DCA 1978). Irvine's statements were properly admitted.

VIII.

THE TRIAL COURT DID NOT IMPROPERLY ADMIT EVIDENCE OF DEFENDANT'S WRONGFUL CONDUCT AT TRIAL. (Restated).

Bryant maintains that totally irrelevant evidence of his bad conduct was improperly admitted. (Bryant's Brief, 50-56). However, this is flatly refuted by the record.

The admissibility of evidence of other crimes, wrongs or acts is codified in F.S.§90.404(2)(a), as follows:

> (2) OTHER CRIMES, WRONGS, OR ACTS.- (a) Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

This is the codification of the standard set forth in Williams v. State, 110 So.2d 654 (Fla. 1958); cert. denied, 361 U.S. 847 (1959) which held that ". . .relevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime. The test of

admissibility is relevancy. The test of inadmissibility is lack of relevancy.'' Id. at 660. Indeed, even before Williams, when the general rule was that evidence which showed or tended to show that the accused had committed another, independent crime was inadmissible, such evidence was admissible to show plan, intention or guilty knowledge. Suarez v. State, 115 So. 519 (Fla. 1928). Under this standard, all the evidence the defendant complains of was admissible.

First, although the defendant admits that his homosexuality was relevant (Bryant's Brief, 50), he then complains of a number of references to it. Also, he infers that his Motion in Limine on the subject was denied (Bryant's Brief, 53), when what the Judge did was postpone the decision until specific references were attempted to be made at trial (TR.3574-3575). This complaint of specific references to Bryant as, "queen of the house," "the little faggott" and *so* on are particularly interesting considering that the undersigned has checked every record reference given for them by Bryant and has discovered that not one was ever objected to (TR.4969, 4970, 5874, 5877-5878, 6918) (See Bryant's Brief, 53, 56). Indeed, such a complaint is particularly inapplicable when Bryant's own counsel battered the jury with Irvine's use of it to gain their sympathy, quoting Irvine as saying, ". . . .we are going to rip the little fag off. . . ." and ". . .the fag will take care of it or we'll fix him. . . ." (TR.5857).

The accusation of a prior "unrelated" theft from another restaurant (TR.4527-4529, 4537-4538, 4541-4542, 7256) was clearly relevant to Bryant's motive for killing Venecia where he had admitted to taking money from Venecia's restaurant and Venecia was constantly accusing him of doing so (TR.7255-7256). Indeed, even Jackie Regan had noticed Bryant and Venecia arguing over Bryant's taking money from the IHOP (TR.3735-3736). The fact that, if reported to the police, this was at least the second such theft reported obviously strengthened Bryant's motive to remove the possibility of being reported for theft, once again.

The references to Bryant's possible involvent with drugs could hardly have been more relevant, when they are examined in context:

> Q. Did you find out -- did you contact Mike at that point?
>
> A. No. sir.
>
> Q. I was repeating it for the court reporter.
>
> Did you have any subsequent conversations with Bryant about this particular matter?
>
> A. Yes.
>
> Q. Tell the jury about that. When did it occur?
>
> A. It was the next day, I believe. Again I asked him why the truck would have been out there; that Mrs. Fischer was still upset. She didn't believe Art was not in town.

Q. And what did James Allen Bryant say to you on that occasion?

A. He told me, boy, I was really stupid.

Q. Did you ask about what?

A. Yes.

Q. And what did he say?

A. He said don't you know your daughter is helping me? Quit asking questions. Get ahold of Mike. Susan is working for me. She's my mule. She's running back and forth to Fort Lauderdale for me. Just get ahold of Mike and get a price.

Q. Well, she was working at the IHOP, was she not?

A. Yes.

Q. What did you interpret the word "mule" to mean?

A. That she was apparently transporting narcotics for him.

MR. SHAPIRO: Objection, Your Honor. Move to strike the response.

THE COURT: Overruled.

BY MR. KOCH:

Q. Had she been going to Lauderdale periodically after she moved to Miami?

A. Yes.

Q. Did you ask Bryant in anymore detail about what was going on between or among these people, including your daughter?

A. Not at that point; no, sir.

Q. Did you believe him?

A. No.

Q. Did you attempt to find out if he was telling you the truth or not?

A. Yes.

Q. Did you ask Susan directly about it?

A. Yes, I did.

Q. And what did she say?

A. She denied it. She says, oh, mom, that's just Allen getting back at me. You know he's jealous that --

MR. SHAPIRO: Objection to what Susan said.

THE COURT: Sustained.

BY MR. KOCH:

Q. She denied what Bryant said?

A. Yes.

Q. At this point did you believe what Bryant had told you concerning Susan?

MR. SHAPIRO: Objection.

THE COURT: Overruled.

BY MR. KOCH:

A. At this point, did you believe what Bryant had told you about Susan?

Q. Not completely.

A. Did he continue to pressure you about contacting Mike?

MR. SHAPIRO: Objection leading.

THE COURT: Sustained.

MR. KOCH:

Q. Did he continue to ask you about what we had been talking about concerning Mike?

A. Yes, he did.

Q. And what did he want you to do?

A. He wanted me to get ahold of Mike and have Mike give a price for killing Mrs. Fischer.

Q. Did you eventually go to the barn were Mrs. Fischer had seen the red pickup?

A. Yes.

Q. That is the barn that was described earlier during the State's case?

A. Yes, sir.

Q. Did you go into that barn?

A. Yes, I did.

Q. What if anything did you see in that barn -- by the way, before I get to that, was Arthur Venecia's body still in the barn?

A. Yes, it was.

Q. And did you go into the barn?

A. In the righthand rear corner of the barn was a stack -- there was a bundle of brown bags.

Q. How many? Do you know?
A. Twelve to 15.

Q. Did you know what was in the bags?

A. I did not open them.

Q. Did you ever learn precisely what was in the bags?

A. No, sir.

Q. What did you assume was in the bags, based on what had occurred and what had been said?

MR. SHAPIRO: Objection.

THE COURT: Overruled.

A. I assumed there was in fact drugs in the bags.

BY MR. KOCH:

Q. And having made that discovery, or seeing what you have described, did you then call James Allen Bryant again about this particular matter?

A. Yes, I did.

Q. What did you say to him and what did he say to you?

A. I asked him if he was crazy, getting involved in drugs, getting my daughter involved and putting them in the barn, and he told me no, he wasn't crazy. He thought it was a great idea. If anybody should stumble on anything in the barn, they would find a dead body and they would find drugs and they would assume it was a drug related death.

Q. At some point after the conversation, did you confront Susan with this particular information?

A. Yes, I did.

Q. Where did that conversation take place?

A. In the office at the IHOP.

Q. Who was there besides the two of you?

A. Just Susan and myself.

Q. What did you say to her?

A. I told her that again Allen had said that she was transporting drugs, and that I had found or had seen a stack of drugs, what I had assumed to be drugs, in the barn, and why did she get involved.

Q. And what did she say to you?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

MR. KOCH: Let me be heard on that please.

THE COURT: You may.

(Thereupon, counsel for the respective parties and the court reporter approached the bench, where the following proceedings were had.)

MR. KOCH: This, under the Evidence Code, is simply not hearsay. This is not a drug case. It is a case involving -- this is not a drug case. This is not a case involving Susan Garnett in a drug case. This involves a murder case.

The element of her intent is an issue not only in the murder counts, but in every one of the ten counts still existing.

This evidence is not coming in for the truth of the matter asserted, but to explain why she did what she

did, what Dee Casteel did after hearing this information. It explains her entire state of mind as it relates to all of the events that follow dealing with Michael Irvine and the death of Bessie Fischer. It is the very essence of the defense case.

This is a classic non hearsay.

MR. SHAPIRO: Judge --

THE COURT: You just want rather be safe than sorry and when we need you to come over to the side and find out what happened --

MR. SHAPIRO: My position is it is clearly coming in to prove there were drugs involved.

THE COURT: It really doesn't matter. I just wanted to get some direction as to where he's going.

MR. SHAPIRO: Let me state it for the record.

THE COURT: What he's saying doesn't matter. It doesn't matter whether it's true or not, but goes to what her reaction was.

All right. Overruled.

MR. SHAPIRO: I would object that it is hearsay.

(Thereupon, the sidebar concluded, the following proceedings were had in open court.)

BY MR. KOCH:

Q. Dee, we're going to go back to what we were just talking about.

You and Susan are in the office of the IHOP. You have just said to her what you have already recited to the

jury and what if anything did she say to you in response to what you just said to her?

A. She told me that I had no right to question anything that she did; that I needed only to look at myself; that I was an alcoholic, a loser, and she was not going to end up like her mother.

Q. What did she then do?

A. She left.

Q. What did you do?

A. I went home and got drunk.

Q. Within the next day or so, did you contact Mike Irvine on behalf of James Allen Bryant?

A. Yes, I did.

Q. Before contacting Mike Irvine, did you consider alternatives to what you did, namely contacting Mike?

A. No.

Q. Did you call the police?

A. No.

Q. Why not?

A. I didn't want to see Susan destroyed or involved.

Q. Is that why you did what you did?

A. Yes.

Q. Do you remeber how you contacted Mike Irvine?
A. No, not for sure.

Q. Why not? Why don't you remember?

A. It's something I really didn't want to do.

(TR.4898-4906).

The references to Mayo as a "mule" and to her transporting drugs were clearly relevant. They were statements of a coconspirator made in furtherance of the conspiracy and in an attempt to get Casteel to contact Irvine *so* that Fischer's killing could be contracted for.

The conversation concerning drugs in bags, in which Bryant said, ". . . .If anybody should stumble on anything in the barn, they would find a dead body and they would assume it was a drug related death." showed that Bryant was interested in covering up the real reason for Venecia's death.

Therefore, these references were relevant both to Casteel's defense and the case against Bryant and were properly admitted.

As B.A.A. v. State, 333 So.2d 552 (Fla. 3d DCA 1979), relied on by the defense, says, ". . . .A trial judge has wide discretion to determine what evidence is material and relevant." Id. at 555. Indeed, it is noteworthy, in that case, that forty (40) field cards written on the respondent in the past, when

officers had told her not to loiter in the area, were held relevant and admissible in her trial on loitering and prowling charges.

Also relevant to this case is Huddleston v. United States, 99 L.Ed.2d 771 (1988). In that case, which was for possession and sale of stolen videotapes, the defense was lack of knowledge of their stolen nature. The government was permitted not only to introduce evidence of the defendant's prior attempted sale of stolen appliances, for which the defendant was never convicted, but evidence that he offered to sell several thousand new, 12" black and white televisions for $12 each (and did sell 38 of them), even where the televisions were never shown to be stolen, at all.

The complained of evidence, along with being relevant to Casteel's defense (duress from Bryant), was also clearly relevant to motive, knowledge and intent and was properly admitted.

IX.

PROPER VERDICT FORMS WERE UTILIZED BY THE TRIAL COURT. (Restated).

Defendant Casteel contends that the trial court could not use general verdict forms for the murders, with regard to Casteel, because the jury might have found Casteel guilty under the allegedly improper theory of felony murder and, due to the verdict forms, we can't tell. (Casteel's Brief, 118-122).

The first problem the defense has chosen to overlook is that they raised no objection to the verdict forms and, therefore are procedurally barred from raising it an appeal (TR.6035-6036). Mustepher v. State, 419 So.2d 656 (Fla. 2d DCA 1982). The second problem is that the jury was instructed, in essence, that they could not find Casteel guilty on the felony-murder theory, as follows:

> As to the felony murder definition, when you review this on paper, there will be names that are missing on various aspects of this definition of felony murder. It is not an accident. Those names are not there because this theory does not apply to that particular person whose name does not appear ont his instruction.
>
> Before you find the defendants, James Allen Bryant, Michael Rhae Irvine, or William E. Rhodes guilty of first degree felony murder of Arthur Venecia and/or before you can find the defendants Michael Rhae Irvine or William Rhodes guilty or

> first degree murder, felony murder of Bessie Fischer, the State must prove the following elements beyond a reasonable doubt:
>
> (TR.6044-6045).

Certainly, there is no doubt that, in this context, the general rule that jurors will properly follow their instructions is applicable. See, Richardson v. Marsh, 95 L.Ed.2d 176, 185 (1987). Therefore, even if the defendant were correct that error was committed, it would have to be held harmless.

Third, as the defendant has admitted, the only on-point authority is directly contrary to its argument, holding that special verdicts are not required in such cases. (Casteel's Brief, 122); Buford v. State, 492 So.2d 355 (Fla. 1988); Brown v. State, 473 So.2d 1260 (Fla. 1985).

The trial court did not commit reversible error by using general verdict forms for the murders.

X.

THE DEATH PENALTY WAS PROPERLY APPLIED. (Restated).

A good many of the defendants' arguments against the application of the death penalty are a rehash of previously stated issues, such as the arguments that the prosecutor argued non-statutory mitigating circumstances (Casteel's Brief, 117; Irvine's Brief, 72,74), Irvine's claim of prosecutorial misconduct (Irvine's Brief, 74-77), and Rhodes' complaints that Dr. Rao "perjured" herself and that there was an improper minimization of the jury's sentencing role (Rhodes' Brief, 20-21). Concerning such claims, the Appellee readopts, realleges and incorporates by reference its previous arguments on the issues as though fully set forth herein.

A. Nonstatutory Aggravating Factors Were Not Applied.

However, some new issues have been raised concerning the application of the death penalty and which should be responded to. For example, Casteel has claimed that, when the trial court made a statement to the effect that it would be unconscionable to sentence the executioners to death without likewise sentencing those who hired them, it was assessing a nonstatutory aggravating factor (Casteel's Brief, 109-110).

However, the defense fails to mention that this was a comment made by the trial judge after the sentences for all the defendants had been pronounced and the Judge had given the reasons for them (TR.6710-6795), just before the court recessed (TR.6795). Further, just because the judge makes a comment does not require that the comment be considered a nonstatutory mitigating factor. Thus, lack of remorse, mentioned in connection with lack of mitigating circumstances, was not improper. Agan v. State, 445 So.2d 326 (Fla. 1983); cert. denied, 469 U.S. 873 (1984). However, another judge mentioned lack of remorse in connection with his finding that the murder was especially heinous atrocious or cruel, which may not be considered in connection with that aggravating factor. Nevertheless, where proof beyond a reasonable doubt had proven that the heinous, atrocious and cruel factor applied, the death penalty was found to have been properly imposed. Pope v. State, 441 So.2d 1073 (Fla. 1983). Indeed, even improper doubling of aggravating factors will not require resentencing where it did not prejudicially affect the weighing process. Kennedy v. State, 455 So.2d 351 (Fla. 1984); cert. denied, 469 U.S. 1197 (1985).

Further, a claim by the defense that the judge's remark that the defendant, "led a parasitic existence" was a finding of a nonstatutory aggravating circumstance was specifically held to be meritless, ". . .because the judge's oral comment was not a

part of the formal written findings of fact in support of the sentence of death. . ." Brown v. State, 473 So.2d 1260 , 1265 (Fla. 1985); cert. denied, 474 U.S. 1038 (1985). The defendant has admitted that such is the case here, as well (Casteel's Brief, 110-111; CR.1218-1227).

The judge stated what factors he applied and they support his sentence (TR.6776-6794).

B. The Aggravating Factor that the Murder was Committed in a Cold, Calculated and Premeditated Manner was Properly Found.

One of the permissible statutory factors is that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. F.S. §921.141(5)(i) (1987). Defendant Casteel maintains that this factor could not have been properly applied. (Casteel's Brief, 112-115). The defendant is incorrect.

The finding on this aggravating circumstance, which the court numbers 8 (CR.1224) tells us that the finding for Casteel is the same as for Bryant (CR.1224). The Bryant finding, as to this factor in the murder of Bessie Fischer, is as follows:

> 8. Whether the capital felony was a homicide and was committed in a

> cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> **Finding**
>
> If the evidence in this case establishes nothing else, it demonstrates the depth of nothingness to which the human soul, unchecked, can slip. One searches for an explanation but try as one will, none is found. Bessie Fischer was caged, fed and then slaughtered without any pretense of moral or legal justification. Each little detail was gone over; meticulously planned. The grave was waiting, the executioners were hired, the murder was carried out with cold calculated precision. Why? Because the defendant wanted to avoid discovery for another murder. The Court finds this to be an aggravating circumstance.
>
> (TR.7610-7611).

There is no question that the record supports this finding and certainly no question that Fischer's murder was a contract killing.

There is also no question that contract killings are precisely the kind of murders that this aggravating factor was intended to apply to. See Cannady v. State, 427 So.2d 723, 730 (Fla. 1983); McCray v. State, 416 So.2d 804, 807 (Fla. 1982).

The key to supporting this factor is that the crime (or at least the underlying crime, if felony-murder) was preplanned.

Thus, even planning a killing because in part, the defendant was afraid that the victim would kill him, if he did not, supported this aggravating factor. Williamson v. State, 511 So.2d 289 (Fla. 1987); cert. denied, 108 S.Ct. 1098 (1988). Indeed, even evidence that the defendant first shot a store clerk in response to what he believed was a threatening movement, but shot him a second time to prevent the clerk from testifying against him, supported this aggravating circumstance. Herring v. State, 446 So.2d 1049 (Fla. 1984); cert. denied, 469 U.S. 989 (1984); See also, Melendez v. State, 498 So.2d 1258 (Fla. 1986); Cooper v. State, 492 So.2d 1059 (Fla. 1986); cert. denied, 107 S.Ct. 1330 (1987); Routly v. State, 440 So.2d 1257 (Fla. 1983); cert. denied, 468 U.S. 1220 (1984).

C. The Introduction of Contemporaneous Convictions At the Sentencing Phase was not Error.

The defense alleges that only convictions for crimes which were committed before the crimes for which the defendant is being sentenced can properly be considered at the sentencing phase. (Casteel's Brief, 115-117). This position is totally without legal support.

The defense has admitted that its argument is contrary to the language of Ruffin v. State, 397 So.2d 277 (Fla. 1981); cert. denied, 454 U.S. 882 (1981). However, it is contrary to far more than that.

This Court has specifically held that even convictions for offenses committed subsequent to the offense the defendant is being sentenced for may be properly considered at the sentencing, provided the convictions were obtained prior to the sentencing proceeding. Wasko v. State, 505 So.2d 1314 (Fla. 1987); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); cert. denied, 459 U.S. 1228 (1983); Elledge v. State, 346 So.2d 998 (Fla. 1977); cert. denied, 459 U.S. 981 (1982).

Indeed, in a virtually on-point case, this Court has held that convictions for attempted first degree murder could properly be considered an aggravating factor in imposing the death penalty where those convictions were contemporaneous with his conviction for the murder for which he was being sentenced. Lucas v. State, 376 So.2d 1149 (Fla. 1979); See, King v. State, 390 So.2d 315 (Fla. 1980); cert. denied, 450 U.S. 989 (1981).

D. The Florida Death Penalty Sentencing Statute is Constitutional.

The defendants claim that the Florida trifurcated death penalty system is unconstitutional. (Casteel's Supplemental Brief; Bryant's Brief, 62-66; Irvine's Brief, 72).

The cases upholding the constitutionality of the statutes that the defendants now attack are numerous, but for example,

Profitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973); cert. denied, 416 U.S. 943 (1974); See, Trawick v. State, 473 So.2d 1235 (Fla. 1985); cert. denied 476 U.S. 1143 (1986).

The Florida Death Penalty Statute is Constitutional and was constitutionally applied.

E. The Death Penalty was not Disproportionate in this Case.

The defendants each claim that death is a disproportionate sentence in their case. This approaches the absurd in the cases of Irvine and Rhodes where there was certainly substantial evidence that they were hired killers who, cooly and with dispatch, carried out two (2) contract killings.

Casteel and Bryant, however, present the interesting, if invalid, argument that those who procure murderers and pay to have murder done are, under proportionality guidelines, less culpable than those who physically did the killing and are less deserving of the death penalty.

First, such reasoning appears to be clearly inapplicable, on its face. To reward those who keep their hands clean because they only hire others to do their killing for them is not a policy which makes any sense. Under such a policy, the poor may

die for committing murder, but the rich need not, since they can hire the poor to do it for them. It is respectfully submitted that this is not a policy this Court will wish to adopt.

Although the United States Supreme Court specifically held the death penalty disproportionate in the case of Enmund v. Florida, 458 U.S. 782 (1982), their reasons for doing so are applicable to this issue. They held:

> Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries that it does not.
>
> Id. at 797.

Thus, the Florida Supreme Court, subsequent to Enmund, found the knowledge that lethal force was to be used to be a major distinguishing factor between that case and the case of State v. White, 470 So.2d 1377 (Fla. 1985), in which the death penalty was reinstated, and in which this Court said:

> . .While appellee verbally opposed the killing during the discussion preceding the murders he did nothing to disassociate himself from either the murders or the robbery. After the discussion relative to killing the victim, whatever appellee might have originally intended or contemplated about lethal force being used in the robbery, it can hardly be said that he did not realize that lethal force was going to be used in carrying out the robbery. . . .
>
> * * *
>
> We hold that Enmund does not bar the imposition of the death penalty under these facts and circumstances.
>
> We vacate the orders staying appellee's execution and reverse the trial court's order granting appellee's **3.850** motion on the basis that Enmund bars the imposition of the death penalty.
>
> It is so ordered.
>
> Id. at **1380**.

Compare that to this case, where there was more than sufficient evidence that Casteel and Bryant not only knew tht lethal force was going to be used, but knew that the use of lethal force was the entire point of the operation.

Further, in Tison v. Arizona, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) the court stated that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability

requirement." 95 L.Ed.2d at 145. Here, we have far more than reckless indifference; we have substantial evidence of actual intent to kill. See, also, Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983).

The death penalty is not disproportionate for any of these defendants.

XI.

OTHER ERRORS OR THE CUMULATIVE EFFECT OF ERRORS DID NOT PREVENT A FAIR TRIAL. (Restated).

A. Individual and Sequestered Voir Dire Was Not Improperly Denied.

Irvine maintains that the court was required to permit his counsel to question each prospective juror, individually and sequestered from all other jurors. (Irvine's Brief, 67).

Irvine complains about comments from Mrs. Embi, but overlooks the fact that, at defense request, the judge then instructed the venire that the questioning had no relationship to whether the defendants were guilty or not and no such inferences can be drawn (TR.2053-2054).

Irvine now complains that Mr. Smith said, before that, that, ". . . .If they are charged with the crime you said they did, they are supposed to have the death penalty" (TR.1362). What Irvine has forgotten to mention is that not one defendant ever objected or asked for a curative instruction concerning that comment. It is respectfully submitted that they can not, therefore, speculate on the damage it may have caused or request reversal on those grounds.

Immediately after Mrs. Tanna made her comment, of which Irvine now complains (Irvine's Brief, 67), the judge asked if the defense wanted a curative instruction. They did not (TR.2929-2932).

Further, the law is well-settled that the control of jury voir dire is within the discretion of the trial judge and a claim of prejudice based on a comment a juror makes during voir dire that is grounded solely on speculation will be insufficient. Foley v. Revlon, Inc., 200 So.2d 627 (Fla. 3d DCA 1967); See, ~~also,~~ Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981); Kalinosky v. State, 414 So.2d 234 (Fla. 4th DCA 1982); rev. denied, 421 So.2d 67, 68 (Fla. 1982).

Indeed, this specific issue has been raised in death cases before and found insufficient on the basis that the granting of individual and sequestered voir dire is a matter within the trial court's discretion. Davis v. State, 461 So.2d 67 (Fla. 1984); cert. denied, 473 U.S. 913 (1985); Stone v. State, 378 So.2d 765 (Fla. 1979); cert. denied, 449 U.S. 986 (1980).

B. Felony Murder Was a Proper Instruction.

Irvine maintains that felony-murder was impossible because the underlying felonies were burglaries with intent to commit murder (Counts I and III, CR.5-6) and, therefore, since proof of

the same intent was necessary to prove both the burglaries and the murders, felony-murder was inappliable.

The first problem with that is that it ignores the time factor. The burglaries, pursuant to F.S. 5810.02 (1987) would require that the intent to murder be present at the time the premises were entered. See, Johnson v. State, 25 So.2d 801 (Fla. 1946). Premeditated murder, in accordance with F.S. §782.04(1)(a)(1.)(1987), requires proof of premeditation at the time of the homicide. See, Stephens v. State, 513 So.2d 1275 (Fla. 3d DCA 1987). Thus, for example, a defendant who enters A's house with intent to murder him, and is then surprised by B and kills him with some intent less than premeditation, could be convicted of felony murder. Similarly, the defendant could change his intent once on the premises and nevertheless kill someone with less than premeditated intent.

The point is that although the intent element may be the same, the time that the defendant had the intent is different. Thus, felony murder was a proper instruction.

Indeed, even if the defendants' reasoning were correct, any error would have to be harmless since, if, as the jury found, they had the intent to commit premeditated murder when they entered, then any murder they committed during the course of the burglary would have to have been premeditated.

Further, where, as here, there was more than sufficient evidence to support premeditated murder and the number and kind of verdicts returned make it virtually certain that the defendants were found guilty of premeditated murder, any error would have had to be harmless. Adams v. State, 412 So.2d 850 (Fla. 1982); cert. denied, 459 U.S. 882 (1982); See, Parker v. Dugger, 13 F.L.W. 695 (Fla. Dec. 1, 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); cert. denied, 465 U.S. 1074 (1984); Brown v. State, 521 So.2d 110 (Fla. 1988).

C. A Judgment of Acquittal on Count II Was Properly Denied.

Irvine alleges that the state specifically alleged, in Count II of the Indictment, that Venecia was killed by a razor and his throat was slashed (Irvine's Brief, 65). This leads to his claim that there was no evidence to support this and, therefore, a Judgment of Acquittal should have been granted. Unfortunately, Mr. Irvine's counsel has been less than candid. The Information alleged as follows:

> **COUNT II**
>
> The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on or about the 19th day of June, 1983, within the County of Dade, State of Florida, JAMES ALLEN BRYANT, DEE DYNE CASTEEL, MICHAEL RHAE IRVINE and

> **WILLIAM E. FWODES**, did, unlawfully and feloniously, from a premeditated design to effect the death of **ARTHUR VENECIA**, a human being, or while engaged in the perpetration of, or in an attempt to perpetrate Burglary, kill **ARTHUR VENECIA**, a human being, by cutting his throat with a sharp object, in violation of Florida Statutes 782.04 to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.
>
> (CR.5-6).

There certainly does not appear to be anything about a "razor" in the Indictment.

The next question is, of course, where is the evidence that he was killed with a sharp object?

Well, we know from Bryant's statement that the people who went out to Venecia's the night of the murder had a knife or razor with them (TR.7231). We know from Rhodes' statement that, allegedly, the victim jumped out of bed and was cutting Rhodes (TR.7097), that Rhodes grabbed his hands and pushed until he went limp (TR.7097) and that, shortly thereafter, he started making gurgling sounds (TR.7098).

We also know, from Casteel, who was being questioned about her conversation with Bryant the day after the murder, when they went out to Venecia's:

Q. He indicated to you, did he not, that Art Venecia's throat was cut, did he not?

A. Yes.

Q. He told you it was a really gory mess, right?

A. Yes.

Q. He asked you at the end of that for your help, correct?

A. Yes.

(TR.4985-4986).

Also, referring to what Casteel saw when they got to Venecia's:

Q. And when you looked inside that bedroom, what you saw, Mrs. Casteel, was Arthur Venecia, the greatest boss in the world, dead, right?

A. Yes.

Q. And you saw blood all over, right?

A. Yes.

Q. And you saw him with no shoes on. right?

A. Yes.

Q. And you saw him with pants on, right?

A. Yes.

Q. No shirt, right?

A. Yes.
Q. Lying on the floor?

A. Yes.

Q. With this throat cut?

A. (Nods head).

Q. Blood all over?

A. Blood all over, yes.

Q. In fact, you thought you even saw a knife on that day, right?

A. I thought I did, yes.

(TR. 4987-4988).

Given the standards for granting a Judgment of Acquittal, previously set forth under Issue VI, denial was certainly no error.

That some of the defendants felt "forced" to testify due to the joint trial has been responded to in the Severance and Redaction sections of this brief.

D. The Appropriate Harmless Error Standard Should be Applied.

Casteel informs us that all trial court errors ("with the exception of the error charged under the Batson and Neil cases") must be shown harmless beyond a reasonable doubt, citing Chapman v. California, 386 U.S. 18 (1967).

Chapman, of course, holds that, before an error involving the denial of a federal constitutional right can be held harmless, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. What the defense has failed to mention, forseeably, is that errors which do not involve the denial of such constitutional rights are governed by F.S. **859.041** (1987), as follows:

> **59.041 Harmless error; effect.-No** judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter or pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be 1iberally construed.

The court is certainly capable of applying the proper standard.

Neither other errors nor the cumulative effect of errors prevented a fair trial in this case.

CONCLUSION

Based upon the foregoing reasons and authorities, the Judgments and Sentences of the trial court should clearly be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CHARLES M. FAHLBUSCH
Florida Bar No. 0191948
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** 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.**

Charles M. Fahlbusch
CHARLES M. FAHLBUSCH
Assistant Attorney General

/ml