IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 71,356

JAMES ALLEN BRYANT,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT JAMES ALLEN BRYANT

GEOFFREY C. FLECK, ESQUIRE
Special Assistant Public Defender
FRIEND & FLECK
5975 Sunset Drive, Suite 106
South Miami, Florida 33143
Tel.: (305) 667-5777

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STATEMENT OF THE CASE

The appellant, James Allen Bryant, was a defendant in the trial court and the appellee, the State of Florida, was the prosecution. The parties will be referred to as they appeared below. The symbol "R" will be used to designate documentary evidence and pleadings contained within the five volume record on appeal. "TR" represents the 6,800 page transcript of trial proceedings from voir dire through sentencing. "SR" will describe the Supplemental Record. All emphasis is supplied unless otherwise indicated.

On July 13, 1984, the defendant, along with co-defendants Dee Dyne Casteel, Michael Rhae Irvine, and William E. Rhodes was charged in a superceding indictment with two counts of first-degree murder (II and IV), two counts of burglary (I and III), armed robbery (V), and five counts of grand theft (VI-X). [R 6801-6807]

Prior to trial, the defendant filed, or adopted, numerous motions. Those germane to this appeal include a "Motion for Inquiry into Discriminatory Exercise of Peremptory Challenges of State of Florida" [R 6828, SR], Motions for a Severance of Defendants [R 6900-6906] as well as for Severance of Offenses [R 6910-69111, a Motion to Suppress Statements [R 6908-69091, and various motions in limine. [R 6953-69581 A Sworn Motion to Dismiss was granted as to Count V. [TR 766-767, 1115] The defendant's repeated motions for severance as well as his Motion to Suppress were denied. [R 603-608, 613-614, 3707, 5104, 5472, 6908, 6910] Likewise, the defendant's repeated request for a

Neil inquiry regarding the state's exercise of peremptory challenges against prospective black jurors was consistently denied. [TR 2554, 2565, 2654, 3034, 3043]

A trial by jury commenced on June 15, 1987. At the conclusion of the State's case and at the conclusion of all the evidence, the defendant moved for judgments of acquittal. [TR 4794-4800; 5657-5664] The trial court consistently denied the defendant's motions.

The jury ultimately returned verdicts finding the defendant guilty as charged, including two counts of first-degree murder, except as to Count 111, of which the jury found the defendant not guilty. [R 7521-75291 A sentencing hearing was conducted on July 30, 1987. At its conclusion, the jury recommended, by a vote of twelve to zero, a sentence of death for the murder of Arthur Venecia. [R 74691 It recommended a like sentence, by a vote of eleven to one, for the murder of Bessie Fisher. [R 7570] The trial court, after making written findings, sentenced the defendant to death by electrocution for the murder of Arthur Venecia. [R 7602-76141 For the murder of Bessie Fisher, the trial court imposed a consecutive sentence of life imprisonment. [R 7598] On the remaining counts of the indictment, the trial court imposed an additional consecutive life sentence on Count I and five consecutive five year sentences of imprisonment on Counts VI through X. [R 7599-76011

The defendant filed a timely Notice of Appeal on October 30, 1987. [R 76171 The state filed a Notice of Cross-Appeal on October 13, 1987 [R 76161 and an Amended Notice of Cross-Appeal on November 3, 1987. [R 7616, 76201 This appeal follows.

STATEMENT OF FACTS

Trial

In 1982, Arthur Venecia purchased an International House of Pancakes franchise in Naranja, Florida. [TR 3729-3730] Defendant Bryant managed the establishment. [TR 3730-3731] Venecia and Bryant lived together and had a homosexual relationship. [TR 3732]

Venecia lived in a small rural house. [TR 3739] His mother, Bessie Fisher, for whom he cared and with whom he was very close, lived in a separate trailer on the property. [TR 3729-3730, 3739-3740]

In December of 1982, according to IHOP waitress Genevieve Regan, the relationship between Venecia and Bryant began to deteriorate and they frequently argued. Venecia accused Bryant of taking too much money out of the restaurant. Bryant was seen in the company of other homosexual men. [TR 3737]

In April 1983, Regan went for a time to North Carolina. [TR 3741] She spoke by telephone to Bryant and co-defendant, Dee Casteel, a waitress at the IHOP. Both Casteel and Bryant told her that Venecia was in North Carolina inspecting some property. [TR 3742] When Regan subsequently returned, she found that the IHOP had been taken over by the parent company because the bills had not been paid. [TR 3743] Casteel and Bryant no longer worked at the IHOP, Casteel was living in Venecia's house, and Bryant refused to talk to her. [TR 3743-3744]

In the months that followed, much of Venecia's real and personal property was sold and his assets liquidated by Casteel and/

or Bryant. On September 22, 1983, Casteel responded to an advertisement placed by Dale Haskins seeking to purchase a theater pipe organ. [TR 4003-40071 Casteel indicated by letter that she had inherited the organ. [TR 40081 After initially declining to purchase the organ, Haskins was contacted by someone identifying himself as Mr. Casteel who offered the organ at a greatly reduced price. [TR 4008-4009] After some additional telephonic conversation, Haskins came to Miami, met the man he assumed was Mr. Allen Casteel, and ultimately purchased the organ from Casteel for $600.00 [TR 4013-4019]. After initially meeting Mr. Casteel at the airport, he never saw him again. [TR 40231

In February of 1984, Albert Riccio responded to an advertisement for a boat. [TR 4033-4035] Ultimately agreeing to pay $36,400.00 for the boat, Riccio met its sellers, Casteel and Bryant, at the Community Bank of Homestead to accomplish the closing. [TR 4037-40391 After the payment of costs and a lien of approximately $21,000.00, Casteel received $9,540.00. [TR 4049-4050] Although Arthur Venecia's name appeared on the title to the vessel, the transaction was consummated due to a power of attorney granted to Dee Casteel [TR 40511 notarized by James Bryant. [TR 40541

Russell Philpott responded in September 1983 to an advertisement to sell a 1980 Taurus camper. [TR 4059-40601 After negotiating with Dee Casteel, who indicated that James Bryant was her associate, he agreed to purchase the camper for $4,000.00. [TR 4061-4062] Ultimately, Philpott met with Casteel and a man she introduced as Arthur Venecia, who left immediately after the

introduction. [TR 4063-4065] Philpott received a title signed by Arthur Venecia and notarized by Dee Casteel. [TR 40641 Philpott paid Casteel by check made payable to James Bryant. [TR 4067-408]

As of June 19, 1983, Arthur Venecia had two accounts with the local office of E.F. Hutton. [TR 41141 The first was closed on August 29, 1983. Venecia's second account, which he held jointly with his mother, Fisher. As of May 31, 1983, it was worth approximately $33,000.00. [TR 4117] During the month of June, various checks were sent to Venecia, and purportedly endorsed by him. [TR 4119-4126] By the end of June, the account had been diminished from $33,000.00 to approximately $17,500.00. [TR 4126] In July, the account was further depleted to approximately $4,000.00. [TR 41291 By September, the account was empty. [TR 4132]

In October or November 1983, real estate agent William Sussman was approached by a mortgage broker who contacted him with regard to a loan secured by a mortgage on the Venecia property. [TR 4138-41421 In his office Sussman conducted a closing for Dee Casteel and the individual he believed to be Arthur Venecia, the Owner of the property. [TR 4143-43441 That individual, however, was the defendant Bryant, who signed a mortgage and promissory note in the amount of $120,000.00 after a first mortgage, in the amount of $82,000.00 and in foreclosure, was satisfied. [TR 4147-41531 As a result of the transaction, a check was given to the defendant in the amount of $12,307.00. [TR 4152-4153] At the closing, Bryant produced a voter's

identification card in Venecia's name. [TR 41541 Mortgage payments on the loan, however, were never received. [TR 4155] In a subsequent telephone conversation with Casteel, she told Sussman that Venecia had been in an accident and was dying in a hospital in Jackson. [TR 4157-41581 Ultimately, a foreclosure action was filed. [TR 4158] A Mr. Higgins responded to the notice of foreclosure, was referred to Casteel and Bryant, and ultimately a second closing was had in March 1984 between Higgins and the defendant posing as Arthur Venecia. [TR 41591 The closing proceeded and a transfer of the property was made from Arthur Venecia to Higgins, who brought the mortgage current and took over the payments. [TR 4161-4162]

Prior to his purchase of the property, Higgins met with Casteel and Bryant, who had been introduced to him as Arthur Venecia. [TR 41781 Bryant had told Higgins that his grandmother was deathly ill and out of state and that that was why the price of the property was so low. [TR 4178-41791 At the closing, Higgins' attorney was concerned because Venecia [Bryant] had no identification, so attorney Sussman was called in to the room and identified the defendant as Venecia. [TR 484-4185] When Higgins placed the cash for the transaction *on* the table, Casteel grabbed it, counted it, and placed it in her purse. [TR 41951 Bryant took no active part in the transaction. [TR 41961

On March 20, 1984, Casteel confessed to Regan that she had hired two hit-men who had murdered Venecia and Fisher. [TR 37531 At her direction, Casteel's statement was contemporaneously recorded by her daughter, Susan. [TR 3750-37511 She explained

that Venecia had been killed on June 19, 1983, and that she had returned the next day to dispose of the body. [TR 3764-37661 The body, along with sheets and towels used to clean up the blood, were put into a wardrobe in the carport where they remained for four to six weeks. Thereafter, the body was moved to the barn and, ultimately, to a hole dug in the front yard for that purpose. [TR 37671 During that time, Casteel explained that she cared for Fisher and explained to her that her son was in North Carolina on vacation. [TR 3768-37691 When Fisher became too nosy, it was decided to "dispose" of her too. [TR 37691 Fisher was told that her roof was leaking and that men would be sent to repair it. The day after the hit-men arrived, Casteel observed Fisher's body in the trailer. [TR 3770-37711 Ultimately, Fisher's body was placed in the pit along with Venecia's and the hole was refilled. [TR 37721

On April 19, 1984, the grave at 21900 S.W. 134 Avenue was excavated. [TR 3906, 39261 A wooden box containing the skeletonized remains and personal effects of Venecia and Fisher was recovered. [TR 3927-3932, 39671

Robert Tidwell, the Owner of an equipmental rental service, and the man who had dug, and later filled, the grave in which the bodies were recovered, testified that a telephone message had been received at his business received from "Allen for Dee." [TR 3947-3948, 39511 Tidwell met with Casteel who told him she needed a trash pit dug, 18 by 18 by 4 feet deep. [TR 39541 A month later, at Casteel's request, Tidwell returned to the property and covered the hole up. [TR 39621

On May 30, 1984, Paula Cook received a telephone call from her brother William Rhodes in which he admitted having "killed a guy" because he owed him money. Rhodes said that the victim had owned a business and that his business partner had disposed of the body and the bodies had just been found. [TR 42501 Rhodes indicated that the victim had been beaten to death and made no mention of a second homicide. [TR 4262]

William Rhodes was later arrested and ultimately gave a statement to Illinois police officers in which he admitted killing Venecia for money and being present when Fisher was killed. [TR 4274-4285] He stated, however, that he had been hired simply to beat Venecia up and that the killing resulted inadvertently during the struggle. [TR 4316-43171

Rhodes' girlfriend during the summer of 1983, Migdalia Ramos, identified certain jewelery Rhodes had given her. [TR 4338-43401 That jewelery was ultimately identified as having belonged to Fisher in 1981. [TR 43561

Michael Irvine was located in North Carolina where he, too, made a statement to the police. [Exhibit 70-71; TR 4416-44221 Upon his return to Miami, Irvine made another recorded statement. [TR 4415-4435, Exhibit 73] In that statement, Irvine explained that he had been contacted in June 1983 to beat someone up. [TR 4424; R 7141-71671 He admitted going to the Venecia residence with Bryant and Rhodes but denied any complicity in the Venecia homicide. [R 7145] Instead, he inferred that Bryant, Rhodes, or both had committed the murder after he had returned to the car to leave. [R 7146] Irvine explained how Casteel later contacted

him to take "care of" Fisher. [R 71471 Irvine insisted that Rhcdes, alone, killed Fisher by strangling her with a pair of panty hose. [R 71481

A statement was also taken from Dee Casteel, which she substantially reiterated at trial. A forty-nine year old, admitted alcoholic, Casteel testified that she had been married and divorced five times and had four children. [TR 4828-48311 She described her previous husband, Russell Garnett, by whom she had given birth to her daughter, Susan Mayo, as very violent. [TR 48321 Mayo left home at the age of fourteen and was living with a girlfriend in mid-1983. [TR 48331 After losing her job as a waitress at various restaurants due to her chronic alcoholism, Casteel obtained employment at the International House of Pancakes in Naranja sometime in February of 1983. [TR 4834-38391

One day, the manager of the IHOP, defendant Bryant, asked Casteel to take a ride with him. [TR 48431 In the conversation that ensued, Bryant asked Casteel if she knew of someone who would take a contract. [TR 48431 Casteel responded affirmatively, recalling a long-standing joke between Mike Irvine and Casteel's ex-husband. [TR 4843-4845] Bryant asked that the man be contacted to determine a price. [TR 48451

In response, Casteel contacted Mike Irvine after Bryant asked her to determine the date that the homicide would occur. [TR 48451 Bryant said he wanted to be sure he had an alibi. [TR 48461 On three or four subsequent occasions, Casteel purportedly acted as a courier between Bryant and Irvine. [TR 48461 Bryant

supplied Casteel with a photograph of Venecia, details concerning his lifestyle, and ultimately a payment of money to be delivered to Irvine. [TR 4847-48481 When Casteel asked Irvine whether he was serious about the matter, Irvine said that he was not and explained that he was going to get a friend and all they were going to do was shake Bryant up. While explaining there would be no killing, Irvine indicated he was just going to "rip [Bryant] off". [TR 48481

Shortly thereafter, Casteel learned from Venecia that he had had a "big quarrel" with Bryant over $1,600.00 Bryant had taken, without authorization, from the IHOP. [TR 48521 After their physical altercation, Bryant had attempted to commit suicide by taking an overdose of medication. [TR 48531 Casteel learned from Bryant that he was unhappy with his relationship with Venecia and that he had become involved in a new relationship with Felix Gonzalez. [TR 48551

As a result of his suicide attempt, Bryant was hospitalized and Irvine's initial plan was postponed. [TR 48561 Later that day, Casteel received a telephone call from Bryant in which he asked her to bring various toiletries to the Naranja Lakes Motel for him. [TR 48571 When she arrived, Bryant asked if Venecia had been killed and upon learning he had not been, became furious. [TR 48581 Bryant supposedly announced to Casteel his devotion to Gonzalez and that he needed to get money and get rid Venecia in order to support Gonzalez in the style he wanted.

Later that night, Bryant telephoned Irvine for the first time, saying that "he didn't care what it cost, ... he would like

it if they could do it that very evening." [TR 48631 The following day, it appeared to Casteel that Bryant and Venecia had reconciled. [TR 48651 A day or two later, however, Casteel received a call from Bryant who later arrived at her home with a gun. [TR 48661 He asked Casteel to kill Venecia. Casteel refused. [TR 48671

Later, Casteel observed Irvine meet with Bryant at the restaurant and leave with him and another individual [Billy Rhodes]. [TR 48691 When Bryant returned later that evening, he said, "it's over". [TR 48701 The following day, Casteel learned that Venecia had, in fact, been killed. [TR 48711 Later, she went to the scene and helped Bryant drag Venecia's body to the garage and clean up the blood. [TR 49891 She and Bryant put Venicia's body in a wooden wardrobe. [TR 49901

The following Sunday, Casteel learned from Bryant that Venecia's mother, Fisher, lived on the property. He purportedly commented that he should have had her killed "because she was going to be in the way". [TR 48721 Casteel offered to care for Fisher. [TR 48731 Bryant told Fisher that Venecia had gone to North Carolina on business, that he would be joining him, and therefore that Casteel would be taking care of her. [TR 48751 After Fisher complained that her phone did not work, Bryant confided in Casteel that he had cut the line to prevent her contacting anyone outside. [TR 48761 Over time, Fisher became increasingly concerned about her son's absence. [TR 48761 Bryant told Casteel to contact Irvine to find out how much it would cost to kill Fisher. [TR 48771

Casteel brought her daughter, Susan, from Ft. Lauderdale to work at the Naranja IHOP. Bryant made Casteel Assistant Manager and directed her to operate the business. [TR 4880-4881] Although the business prospered, Bryant took the proceeds on a daily basis and the business finally failed. [TR 4881-48821

At a later time, Casteel came to believe that Bryant and her daughter were involved in selling drugs. [TR 48991 Casteel saw bags in the barn where Venecia's body had been temporarily stored. She assumed they contained drugs. [TR 49021 She confronted both her daughter and Bryant. [TR 49031

Subsequently, Casteel delivered more money to Irvine on behalf of Bryant. [TR 49071 Bryant told Casteel to tell the police, if they asked, that he was in North Carolina. [TR 49141 In fact, Casteel did lie to the police when they questioned her. [TR 49211

Ultimately, Casteel introduced Irvine and Rhodes to Fisher as roof repairmen, knowing that they were going to kill her. [TR 50211 The next day, Casteel returned to find Fisher dead. [TR 50221 The day after the murder, Bryant handed an envelope of money containing the balance of the payment to Casteel who gave it to Irvine. [TR 50041

At trial, forty-two year old Michael Irvine insisted he had had no discussions with Casteel about Bessie Fisher. [TR 53791 He renounced those portions of his prior statement in which he had stated that Casteel contacted him about eliminating Fisher and that Casteel had suggested posing as a plumber or carpenter to gain entry to Fisher's trailer. [TR 53801 Irvine, an automotive

mechanic, testified that he had known Dee Casteel three or four years prior to June 1983. [TR 5254-5256] Bill Rhodes worked with him as a mechanic at an Amoco station. [TR 71 Irvine characterized Casteel's inquiry of him regarding a "contract" as a standing joke. [TR 5261-5263] When Casteel reiterated her request several weeks later, Irvine told her she was crazy but spoke to her about it, intending to "rip [Bryant] off". [TR 5261-5262] He denied any intention to kill anyone and invited Rhodes to join in with him. [TR 5261-5263] After Bryant was hospitalized and Casteel called to say the deal was called off, Irvine and Rhodes thought it was over with. [TR 5268-52691 Shortly thereafter, however, Bryant called and offered $5,000.00 for the killing of Venecia. [TR 5270] According to Irvine, he and Rhodes intended only to take the money from Bryant but not kill anyone. [TR 52711

The following night, Irvine, Rhodes and Bryant went to the Venecia residence. [TR 5272-52731 At first, Bryant entered the house but left shortly thereafter. [TR 52731 Irvine denied any involvement in the contact between Venecia and Rhodes within the house. [TR 5274] According to Irvine, Bryant re-entered the house before they left together. [TR 5273-52741 Irvine denied having ever discussed with Rhodes or Bryant what happened in the house. [TR 52771

In July, approximately a month later, Irvine was contacted by Rhodes about some roofing work in the country. [TR 52901 He met Casteel on the premises not realizing the he was on a trailer on the Venecia property. [TR 5278-5280] Irvine insisted that he

stayed in the kitchen while Rhodes strangled Fisher with a pair of pantyhose. Irvine insisted he had no idea Fisher was to be killed. [TR 5282] Later, however, Irvine agreed to help dispose of Fisher's body. [TR 5284-5285]

William Rhodes testified that Irvine had talked to him in June of 1983 about roughing a guy up to make some quick money. [TR 5395] He denied having ever discussed with Irvine or Casteel the killing of Arthur Venecia. [TR 5396] He denied having ever seen Bryant until he and Irvine picked him up to go to the Venecia residence. [TR 5396-5397] Rhodes admitted walking into Venecia's room and being attacked by Venecia. [TR 5397-5398] After being stabbed, Rhodes wrestled with Venecia, hit Venecia and then ran away. [TR 5398] Upon returning to the vehicle, Bryant returned into the premises. [TR 5399] Rhodes denied having killed Venecia. [TR 5399-5400]

Later, according to Rhodes, Irvine contacted him regarding a roof job on a trailer. [TR 5400-5401] He later went to the trailer with Irvine, met Fisher, and inspected the roof. [TR 5402] According to Rhodes, Irvine, not he, strangled Fisher as she sat at the kitchen table. [TR 5404]

Penaltv Phase

Medical examiner Valerie Rao opined that Venecia's injury to his jaw, and resulting fracture, probably did not render him unconscious. [TR 6211] She was further permitted to testify that gurgling sounds heard in connection with the slashing of Venecia's throat were indicative of blood in his air passages at a time he was trying to speak or scream. [TR 6218-6221] Rao suggested that Venecia could have died from drowning in his own blood or from the severing of the major blood vessels in his neck. In either event, Venecia would have been conscious for a few minutes. [TR 6220-6222]

While Rao described one mechanism of Venecia's death as drowning in his Own blood, she was demonstrated to have listed the cause of death on the autopsy report she prepared as "homicide by unspecified means." [TR 6231] She ultimately conceded that she did not know the cause of death or how quickly he had died. [TR 6232] Rao conceded, too, that except for what she had been told, she did not know the mechanism of Fisher's death, either. [TR 6238]

Rao testified that Fisher suffered from an arthritic-type degenerative bone disease which would have impaired her strength and ability to resist an assault. [TR 6224] Assuming Fisher had been strangled with pantyhose, she would have lost consciousness in less than five minutes. [TR 6225] Rao was unable to describe the degree of pain involved. [TR 6226]

The only other evidence presented by the state consisted of

the judgments of conviction and sentence suffered by each of the defendants in this case. [TR 61441

The defendant, in mitigation, entered into evidence his medical records resulting from a June 13, 1983 commitment to the Coral Reef Hospital. [TR 6310-6312; Defense Exhibit A] By stipulation, the defendant entered into evidence a letter written by the defendant dated June 11, 1984, to Higgins expressing his profound pain and sorrow. [TR 6315] Corrections Officer Willie MacDaniels testified that Bryant worked with him as a trustee at the Dade County Jail. [TR 631763181 He testified that Bryant's work and attitude were outstanding, that he never presented a behavioral problem, and to his belief that Bryant would be a good inmate in the future. [TR 6318]

Officer Elizabeth Taylor, also a corrections officer at the Dade County Jail, testified that she had a formed a close relationship with Bryant as an inmate. [TR 6320-63211 She was so impressed by him, in fact, that she wrote him a card when he left her facility. [TR 6321; Defense Exhibit D] She attested to her belief that Bryant presented no danger if sentenced to a term of imprisonment. [TR 6323]

SUMMARY OF THE ARGUMENT

I.

The exercise of peremptory challenges by a party, particularly the State, on the basis of race alone is wrong and impermissible. Thus, the exclusion of black prospective jurors by a prosecutor simply because they are black is prohibited. Such conduct is made no less wrong by the fact, as here, that the defendant is white and that blacks are ultimately well-represented on the jury. What is now abundantly clear, by the consistent recent decisions of this Court, is that racism during jury selection will not be tolerated for any reason and that the appearance of such conduct will impose upon the trial court the obligation to conduct a hearing and demand explanation from the offending party. The trial court here, despite the repeated requests of the defendants, failed to conduct such an inquiry even after the defendants made a clear prima facie showing that the state was exercising its peremptory challenges against black people solely because they were black. The failure of the trial court to make inquiry constituted reversible error. The defendant's convictions and sentence of death cannot be sustained.

II.

This record reflects the existence of antagonistic defendants, antagonistic defenses, and even antagonistic defense counsel to a degree unequaled in any reported decision. Throughout this trial, the defendant faced the unrelenting attacks, not only of the Assistant State Attorneys legitimately involved in the defendant's prosecution, but of the counsel for

his three jointly tried co-defendants, as well. Because of the remarkable degree to which the defendants' defenses were irreconcilable, the frequency with which the issue arose to the insurmountable prejudice of the defendant, and the extraordinary intensity of the attacks levied upon him by counsel for his co-defendants, the possibility of the defendant's receipt of a fair joint trial was nil from the inception of this case. While the trial court acknowledged the problem as well as the extraordinary prejudice suffered by the defendant, it failed to do the one thing required to insure the defendant's receipt of a fair trial - grant his repeated pleas for a severance. That error can only be corrected by this Court by the grant of a new, fair, separate trial.

III.

In addition to the unrelenting assaults suffered by the defendant at the hands of his co-defendants' counsel, the defendant suffered an additional and particular prejudice by virtue of his forced joint trial. The state introduced into evidence against the defendant, who did not testify at trial, the defendant's post-arrest confession. That confession, in its original form, explained the circumstances of his involvement in the offenses charged, placed the blame principally on co-defendant Casteel, and described a context in which his limited degree of culpability was the result of coercion and duress. The trial court, solely to accommodate the confrontation rights of the co-defendants, redacted the defendant's statement so severely that its tone, context, and meaning were substantially changed to

the defendant's detriment. The introduction into evidence of the defendant's incomplete and misleading statement denied him due process of law and a fair trial. He is entitled to a new trial.

IV.

The allegations of the state in this prosecution stirred the passions and prejudices of the jury against the defendant to a substantial degree without the introduction of gratuitous, collateral, and irrelevant evidence of the defendant's bad conduct and bad character. Here, not only was the defendant's homosexual orientation unfairly exploited, but evidence of the defendant's alleged involvement in drug trafficking and of a prior, unproven, theft were admitted into evidence by the trial court. Because the evidence erroneously introduced was irrelevant, immaterial, and unduly prejudicial, the defendant was further denied a fair trial. He should be granted a new trial at which the evidence is limited to the allegations within the indictment.

V.

It is apparent from this record, that on at least two occasions, the trial court engaged in communication with members of the jury outside the presence of the defendant, outside the presence of defense counsel, and even off the record altogether. While it will undoubtedly be argued by the state that the trial court's transgressions were innocuous and most likely caused the defendant no harm, the fact of the matter is that such a determination cannot be made from this record with the unmistakable clarity required to defeat the defendant's prayer

for relief. The trial court's violation of the sacrosanct rule that "nothing shall be done in the absence of the prisoner", especially when considered in conjunction with the other prejudicial errors suffered by the defendant, compels the conclusion that the defendant's convictions and sentence of death cannot, consistent with the guarantees of the Florida and Federal Constitution, be sustained.

VI.

A.

The extraction of the ultimate penalty under the circumstances of this case constitutes cruel and unusual punishment. If the facts of this case are reviewed objectively without the tremendous overlay of inflammatory and collateral decoration such as the jury was permitted to consider, the circumstances of this case are no more exceptional or egregious that most others in which a homicide results from some combination of passion and greed. Because other defendants, convicted of like crimes, have avoided the death penalty and because this crime was not accompanied by such additional acts as to set it apart from the norm of capital felonies, the imposition of the death penalty is inappropriate and disproportional. At the very least, the defendant's sentence of death should be vacated.

B.

The imposition of the death penalty in this case is fundamentally defective and tainted ab initio by the repeated attempts by the prosecution to diminish the jury's sense of responsiblity and the significance of the jury's penalty

recommendation. The comments of the prosecutors, especially during ~~voir~~ ~~dire~~ and during argument to the jury, substantially misstated the law in Florida and misled the jury to believe that its role in the sentencing procedure was less important and less significant than it really was. The jury was therefore, inconsistent with Caldwell v. Mississippi and its progeny, more likely to return a recommendation of death believing the ultimate responsibility for the defendant's fate lay elsewhere. Such an unconstitutional process, and its unconstitutional result, cannot be countenanced by this Court. The defendant's sentence of death must be reversed.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A HEARING OR OTHERWISE MAKE INQUIRY OF THE STATE UPON A SHOWING BY THE DEFENSE OF THE PROSECUTOR'S SYSTEMATIC AND UNJUSTIFIABLE EXCLUSION OF BLACK JURORS, THEREBY VIOLATING THE DEFENDANT'S FIFTH AMENDMENT DUE PROCESS AND SIXTH AMENDMENT IMPARTIAL JURY RIGHTS.

Throughout the protracted jury selection in this case, it soon became apparent that the state was systematically using peremptory challenges against prospective black jurors in the absence of any record justification other than race. Consistent with the recent unequivocal holdings of this Court, the defendants repeatedly implored the trial court to conduct a hearing and to compel the state to explain its facially improper and racially motivated jury selection. In direct contradiction of the rules which have developed from this Court, the trial court steadfastly refused the defendants' requests, apparently believing, because the defendants were white and several blacks remained on the jury, that the issue was somehow rendered moot. As has become more and more clear by the developing law of Florida, the trial court was wrong. The racially motivated exercise of peremptory challenges is impermissible in any case, regardless of the ultimate composition of the jury or the race of the accused. Because the defendant clearly met his initial burden and the trial court insulated the state from ever having to justify its conduct, reversible error was committed.

The fundamental holding of this Court in State v. Neil, **457**

So.2d 481 (Fla. 1984) is simple. Peremptory challenges cannot be exercised solely on the basis of race. To challenge an opposing parties' peremptory excusals, a party must object in a timely manner and demonstrate on the record both that those persons challenged are members of a distinct racial group and that there is a strong likelihood that they are being challenged solely because of their race. Id. at 486; King v. State, 12 FLW 502 (Fla. 1987). In Neil, the trial court ruled that the state did not have to explain why it had struck three black people who had been questioned to that point during ~~voir dire~~. This Court reversed that ruling, holding that when a party timely objects to the other party's use of its challenges, shows that the strikes were used against members of a distinct racial group, and demonstrates that there is a strong likelihood that the challenges have been used solely because of race, then the burden shifts to the striking party to "show that the questioned challenges were not exercised solely because of the prospective jurors' race." 457 So.2d at 486-87 (footnote omitted); Tillman v. State, 13 FLW 194 (Fla. 1988). Thus, it is undeniably reversible error for a trial court to fail to conduct a Neil hearing, timely, once the burden of proof shifts to the state. Blackshear v. State, 13 FLW 192 (Fla. 1988). Such a hearing must be conducted during the ~~voir dire~~ process. A hearing held after the trial has concluded is untimely. Id. at 193. The failure to conduct a hearing at all is even more clearly error.

In State v. Slappy, 13 FLW 184, (Fla. 1988), this Court "reaffirm[ed] this State's continuing commitment to a

vigorously impartial system of selecting jurors ..." and held that:

> ... when the state engages in a pattern of excluding a minority without apparent reason, the state must be prepared to support its explanations with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself. [Id. at 1861

Thus, the Slappy Court found reversible error even though the final jury panel contained one black, for the simple reason:

> Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other. This is so because 'the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some jurors'. [Citations omitted, Id. at 1851

Thus, this Court proclaimed its commitment to the eradication of even the appearance of racial prejudice within the jury selection process:

> It would seem equally self-evident that the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being - to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large. [Id. at 1841

Thus, there is no doubt that such "reprehensible" conduct by the state is not in any way diminished by the ultimate composition of

the petit jury.

Moreover, this Court explained in Tillman, supra, and further defined in Slappy and Blackshear, the procedure to be utilized when a challenge of racial discrimination in the use of peremptory strikes is made. This Court held that "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor." Slappy at 185. Moreover, the trial judge must "evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons." Id. In other words, "a judge cannot merely accept the reasons proffered at face value." Id. As this Court concluded:

> In essence, the proffered reasons must be not only neutral and reasonable, but they must be supported by the record. It is incumbent upon the trial judge to determine whether the proffered reasons if they are neutral and reasonable, are indeed supported by the record. Tillman at 195.

In the case at bar, the trial court was unable to make any of the determinations it was obliged to make. It could not adjudicate the reasonableness or neutrality of the state's justifications because it did not hear them. It likewise could not know whether the state's reasons for excluding blacks, if for reasons other than race, were supported by the record. Accordingly, the trial court abandoned its function and failed to conduct the inquiry it was duty bound to make.

The state's systematic exclusion of black jurors, for no apparent reason other than race, began on June 19, 1987. The

state exercised five of seven peremptory challenges against black Americans by excusing jurors Montgomery [TR 25471, Lapsley [TR 25471, Norwood [TR 25491, Blue [TR 25511, and McGee [TR 25541. The defense made a timely, explicit request for a "Neil inquiry which the trial court denied:

> MR. KERSHAW: Let the record reflect that McGee is black, five peremptory. All five are directed against blacks.
>
> I ask at this time the Court to have a Neil inquiry as to why the state has chosen to excuse his five peremptory challenges, five out of the seven peremptory challenges towards blacks.
>
> THE COURT: All right. Denied. [TR 25541

The state volunteered explanation only as to juror Blue, i.e., "... she thought she recognized the defendant because she lives in that area." A review of the record reveals that Ms. Blue believed she had seen the defendants' faces before. [TR 25181 She did not know in what context. ("I don't know if it's because we're sitting or I have seen their pictures somewhere or what, but as I sit here, it comes to me for some reason and ---") [TR 25181 She guessed she might have seen one or more defendants on a picture in a post office or at a restaurant, but she did not remember. ("I don't know, but their faces are so familiar. It's a blockage somewhere.") [TR 2519-2520] When asked if she thought she would be affected by her recognition or whether she recalled having any personal relationship with any of the defendants, Ms. Blue stated "NO." [TR 25211 The one person Ms. Blue knew she had seen previously was Delores, an elderly

spectator who had nothing to do with the case. [TR 2520-25211

The point is, not only does the record fail to substantiate a legitimate basis consistent with Ms. Blue's excusal consistent with the rationalization offered by the state, but it demonstrates the court's persistent refusal to require the state to respond to a "Neil" inquiry. Indeed, when the defense renewed its request "to have the state explain why five ... peremptory challenges ... were used against all black jurors", the court failed to respond. [TR 25651

Upon reconvening the following morning, June 22, 1987, the first issue addressed by the defense was the presentation of a written "Motion for Inquiry into the Discriminatory Exercise of Peremptory Challenges of (sic) State of Florida", all counsel joining. [R 6828; TR 2594; SR] The trial court reserved ruling. [TR 25941 Subsequently, the defense moved to strike the panel:

> The state introduced the element of race into this trial in the jury selection procedure last Friday.
>
> Of the seven peremptory challenges, they have used five, excused blacks, whereas every other defendant in the case has not exercised any peremptory challenges against blacks. [TR 26541

The trial court denied the defendants' motion. [TR 2654] The defense persisted in its protest:

> I have no reason to believe that the state, until the Court puts an end to it, will stop exercising peremptory challenges on the basis of race and, therefore, what we went through last week will continue. [TR 26541

The issue came to a head the following day, June 23, 1987, when the state again exercised a peremptory challenge on black prospective juror Level. [TR 30341 Again, the defense renewed its motion for a Neil inquire. [TR 30341 It was unrefuted that only nominal inquiry was made into Ms. Level's qualifications as a juror. [TR 3036] Instead, the state argued that Neil, with regard to black jurors, only applied to black defendants. ("... the Neil case does not apply to these white defendants.") [TR 30401 Neither this Court nor any other known to the defendant, however, have accepted the State's invitation to base the entitlement to relief upon the race of the accused. The defense protested, appropriately, that all criminal defendants, whatever their race, have standing to challenge the arbitrary exclusion of members of any race from service. [TR 3040] This issue was addressed by the District Court in Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985); quashed on other grounds, State v. Castillo, 486 So.2d 565 (Fla. 1986). Citing the United States Supreme Court in Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), the court correctly determined that a criminal defendant, whatever his race, has standing to challenge the arbitrary exclusion of members of any race from service on a Grand or Petit jury. 466 So.2d at 8,n.l.

Nevertheless, the trial court again denied the defendants' request for relief, stating, "I am not going to make inquiry at this time." [TR 30431 The next day, undaunted, the state again excused a black person, juror Jackson, by the exercise of a peremptory challenge. [TR 33891

The state will undoubtedly argue as well that the presence of six black jurors somehow rectifies the abuses of the state in this case. As a matter of law, such a position is untenable. State v. Slappy, supra, at 185. Moreover, such a conclusion does not logically follow. The state's improper exercise of peremptory challenges against black jurors to attempt to prevent a perceived over-representation of black jurors constitutes just as insidious an exercise of racial discrimination as in the case where blacks are under-represented. The issue here is not a matter of representative juries - it is, rather, about discrimination and bigotry. Slappy at 194.

Ultimately, without ever having conducted any inquiry pursuant to State v. Neil, supra, a jury was selected. [TR 35881 The state exercised seven of its sixteen peremptory challenges against blacks. [R 69371 The defense excused one black alternate juror. [TR 33961

Accordingly, what is apparent from this record is the fact that both the prosecution and the trial court labored under the misconceptions that because the defendants were white and because the jury was substantially black, that the rule of Neil did not apply. What we now know, however, is that racial discrimination is insidious and intolerable in every case - regardless of the race of the accused or the ultimate composition of the jury.

The trial court erred in failing to grant the defendants' repeated demands for a Neil inquiry under circumstances which demonstrated a clear showing of the state's exercise of peremptory challenges for purely racial reasons. The error of

the trial court can be corrected only by the reversal of the defendant's convictions and sentences and the grant of a new trial.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS FOR SEVERANCE DUE TO THE EXTRAORDINARY DEGREE TO WHICH HE WAS PREJUDICED BY HIS CO-DEFENDANTS' IRRECONCILABLE AND ANTAGONISTIC DEFENSES, IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Nothing is more remarkable in this case than the degree to which the defense of defendant Bryant was antagonistic to that of co-defendant Casteel, and to only slightly lesser degrees, the defenses of Rhodes and Irvine. Long before the trial commenced it was apparent that Bryant's co-defendants, Casteel in particular, would blame the homicides in this case solely upon the defendant Bryant. From opening statement to the conclusion of the penalty phase of this case the defendant faced not only the accusations of the State of Florida, but three additional vociferous and aggressive accusors as well. The trial of the defendant was thereby pervaded with a character of unfairness which renders the trial court's failure to grant a severance a serious abuse of discretion. The defendant's conviction and sentence of death must be reversed.

In deciding that a motion for severance is a discretionary matter for a judge, the courts of Florida have nevertheless recognized that severance should be liberally granted whenever a potential prejudice is likely to arise in the course of trial. Menendez v. State, *368* So.2d 1278 (Fla. 1979). "The objective of fairly determining a defendant's innocence or guilt should have

priority over other relevant considerations such as expense, efficiency and convenience." Crum v. State, 398 So.2d 810 (Fla. 1981); Green v. State, 408 So.2d 1086, 1087 (Fla. 4th DCA 1982).

Rule 3.152(b)(1)(i), Fla.R.Crim.P., provides for severance before trial:

> [U]pon a showing that such order is necessary to protect the defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of one or more of the defendants.

However, when joinder of defendants or offenses causes an actual or theatened deprivation of the right to a fair trial, severance is no longer discretionary. United States v. Boyd, 595 F.2d 120 (3d Cir. 1978); Baker v. United States, 329 F.2d 786 (10th Cir. 1964). It is mandatory.

It is well recongized that joinder of defendants requires a balancing of the right of the accused to a fair trial and the public's interest in the efficacious administration of justice." United States v. Zicree, 605 F.2d 1381, 1386 (5th Cir. 1980). No defendant should ever be deprived of a fair trial because it is easier or more economical for the government to try several defendants in one trial rather than in multiple trials. United States v. Boscai, 573 F.2d 827 (3d Cir. 1978). As the Court stated in King v. United States, 355 F.2d 700, 702 (1st Cir. 1966), "[a] joinder of offenses, or of defendants involves a presumptive possibility of prejudice to the defendant ...". Indeed, it appears that in this case "the only real purpose served by permitting a joint trial ... may [have been] the

convenience of the prosecution in securing a conviction." United States v. Fountz, 540 F.2d 733, 738 (4th Cir. 1976).

Courts have recognized that antagonistic defenses can prejudice co-defendants to the degree of creating the impossibility of receiving a fair trial. United States v. Crawford, 581 F.2d 489 (5th Cir. 1978). Hence, a severance is required where an antagonistic defense admits to some or all of the elements of the charge, United States v. Roberts, 583 F.2d 1173 (10th Cir. 1978); or where the "defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that the conflict alone demonstrates that both are guilty". Rhone v. United States, 365 F.2d 980 (D.C.D.C. 1966).

Florida's severance rules are consistent with the minimum standards promulgated by the American Bar Association. ABA Standard for Criminal Justice 13-3.1(b)(2d Ed. 1980) suggests that severance should be granted whenever it appears likely that potential prejudice may arise at trial.

This Court's decision in Crum v. State, 398 So.2d 810 (Fla. 1981), should control the issue here. In Crum, the appellant and his co-defendant were indicted and tried together for first-degree murder. The appellant moved for severance, alleging that his defense and that of his co-defendant were so antagonistic as to warrant a severance. The appellant represented that he had learned that his co-defendant "would accuse him of singularly committing the murder for which the two of them were charged." 398 So.2d at 811. The trial court denied the motion for

severance, but this Court reversed, stating that: "[b]y denying the motion, the trial court forced [the appellant] to stand trial before two accusors: the state and his co-defendant." 398 So.2d at 811-12. The First District Court of Appeal in Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981) reached the same conclusion under similar circumstances. Precisely the same result is compelled here.

Similarly, in Thomas v. State, 297 So.2d 850 (Fla. 4th DCA 1974), involving the issue of possession of cocaine found on the floor of a vehicle between the co-defendant's legs, a conflict between the defendants' defenses was inherent in the case. As the Court appropriately reasoned:

> This became a definite problem when the defendant elected not to testify and the co-defendant took the stand. Id. at 852.

The same circumstances exist here where Bryant did not testify but his three co-defendants did, each pointing their accusatory fingers at him.

In the case at bar, not only did defense counsel for the co-defendants repeatedly argue to the jury the defendant's guilt, but they presented each co-defendant's direct testimony to prove their assertions. Cf. Crum, at 811. Moreover, the trial court's efforts, albeit heroic, to sanitize the co-defendants' statements prior to their introduction into evidence by the state could not have helped but cause exactly the kind of confusion recognized by this Court in McCray v. State, 416 So.2d 804, 806 (Fla. 1982):

> A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a co-defendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstances. Rooten v. United States, 391 **U.S.** 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). McCray at 806.

This is not such a case as McCray v. State, supra, involving mere "hostility along defendants or the desire of one defendant to exculpate himself by inculpating a co-defendant". This is a case where, due to its unique circumstances, the defendant never had a chance for a fair trial jointly tried with his co-defendants.

Prior to trial, counsel for co-defendant Casteel moved, specifically, for a severance from defendant Bryant. [TR 603-605] Although principally made because of the implications of Bruton, counsel for Casteel specifically noted, "We are alleging as to the defendants, Bryant and Casteel, antagonistic defenses ..." [TR 6061 Counsel for co-defendant Irvine alerted the trial court to the fact that counsel for co-defendant Rhodes would blame defendant Bryant for the murder of Venecia, once Irvine placed the blame on Rhodes. [TR 6081 In addition, of course, the defendant, Bryant, himself, demonstrated to the trial court, the enormous and irreparable harm he would suffer if tried with his co-defendants:

> If Your Honor will remember during part of this pre-trial hearing two or three weeks ago. Mr. Koch actually gave an example of what would most likely happen in the courtroom if these cases are tried together. If you remember, Mr. Koch walked over to the defendant, Mr. Bryant, and actually pointed his finger at the defendant, Mr. Bryant, thereby acting as

> an accusor and my argument, one of my arguments would be that Mr. Bryant must be separated from the defendant, Dee Casteel, in order to have a fair trial because not only will he be facing the State of Florida as an accusor, but he will most definitely be facing at least Mr. Koch and maybe the other attorneys as well as accusors in this case.
>
> I think that is a denial of his rights to a fair trial as guaranteed him in both the state and federal constitutions. [TR 613-614]

The antagonisms which existed during the trial of this case went beyond conflicts between the defenses of the various accuseds. As early as jury selection, counsel for Casteel went so far as to move to remove Bryant's counsel from the case due to his purported incompetence. [TR 2068-20721 As counsel for co-defendant Irvine remarked:

> ... I have never seen [a case] where the defenses or interests are so antagonistic. [TR 35411

During opening statements, the problem of irreconcilable defenses became apparent. Counsel for co-defendant Casteel placed the blame directly and exclusively upon Bryant:

> ... the central character in this story is right over there (indicating). That is the defendant, James Allen Bryant: and you will learn through the course of this trial, through the testimony that is introduced, that James Allen Bryant was a master manipulator of people.
>
> As a manipulator ... dominate and use people ... manipulator ... .
>
> First thing he did was to identify a weakness or a vulnerability in someone. Having identified that vulnerability, he then exploited it. He exploited that

> vulnerability to achieve a particular end that he designed; and when that person was used up, that person was cast aside.
>
> * * *
>
> He was Arthur's queen. [TR 3654-3655]

Casteel's counsel not only attacked Bryant's character, however, he directly argued his guilt:

> What the evidence will clearly establish is that Dee [Casteel] had no desire, motive, intent to see Arthur Venecia killed. One person did. That man right there (indicating), James Allen Bryant. [TR 36701

Co-counsel directly blamed Bryant for the murder of Fisher as well.

> ... James Allen Bryant was beside himself with what he considered to be his stupidity: I should have had her killed the same time. ... she's got to die too. ... she was a buffer between Bryant, Bryant's desire to kill Bessie Fisher and Bessie Fisher's death. ... [TR 3673-36741

Irvine's counsel attacked Bryant with equal vigor:

> ... James Bryant decides, for whatever reason, maybe to save the money, but he decides he's going to kill Art Venecia himself. [TR 36891
>
> * * *
>
> So Bryant calls Irvine and says, you've got to help me. I have to kill this man. I'll pay you whatever you want. Money is no object. [TR 36901

Counsel for Rhodes, too, seized the opportunity to shift the blame to Bryant alone:

> When [Rhodes] left that house, Arthur Venecia was still alive.
>
> But who entered the house immediately after that? That man (indicating) James Allen Bryant. [TR 36971
>
> * * *
>
> I submit to you, ladies and gentlemen, that James Allen Bryant and Michael Irvine are the guilty parties in this case. [TR 36991

Bryant's counsel stated the problem accurately but his repeated requests for relief were consistently denied:

> I would renew the motion for severance on behalf of Bryant based on Mr. Koch's opening statement and I believe I counted six times in which Mr. Koch actually walked over to the defendant, Bryant, and actually pointed his finger at Mr. Bryant.
>
> So on the grounds that were previously stated throughout these proceedings and these additional grounds, I think it is clear the defenses are so antagonistic that the defendant, Bryant, is denied his right to a fair trial; and that he is standing not only before the state as an accusor, but before Dee Casteel and also became apparent Mr. Sohn and counsel for Mr. Rhodes as well. So I now have four accusors against Bryant.
>
> THE COURT: All right. Denied. [TR 37071

Subsequently, of course, Dee Casteel took the witness stand and testified directly against Bryant. [TR 4927 et. seq.] Defense counsel again renewed his motion for severance on the basis "that the record is clear at this point that the defendant is facing two accusors: Mr. Koch ... and Mr. Novick, ... I would renew the objection as to antagonistic defenses, ...". [TR

5104]

And, after the testimonies of Irvine and Rhodes, the full force of the combined efforts against the defendant became painfully apparent:

> MR. SHAPIRO: For the record, I'd like to renew my motion for severance based upon the fact that the defendant, James Allen Bryant, is facing, one, two, three, four accusors at this particular stage of the proceedings and [the] defenses are antagonistic, and based upon previous motion, I renew that at this stage.
>
> THE COURT: Motion is denied. [TR 54721

During closing arguments as well, the theme persisted. Irvine's counsel attacked Bryant without reservation:

> State has done a good job of proving to you who did it. They have proved that Billy Rhodes strangled and killed Bessy Fisher, and they basically have proven to you that this man, the little faggot as the lawyer refers to him, James Bryant, apparently killed Arthur Venecia.
>
> * * *
>
> ... [Rhodes and Irvine] agree on one thing, that that man [Bryant] was the man that saw Arthur Venecia alive. They do agree on one thing; that man [Bryant] is a killer and the evidence on that point is not in dispute. [TR 58741
>
> * * *
>
> [Irvine] thought she [Casteell was joking, and when he realized she wasn't joking because she was pressured from that man, James Bryant, he said you are serious about this, and he asked for more detail, what is going on, tell me why you are doing you this, who is putting the pressure on you? James Bryant, the little fag.
>
> What does Bryant want? He wants his lover killed. He tried to kill him

himself. I guess he figured to try to save the money he'd try to kill Art Venecia with his own hands. When he couldn't do it, he went to Casteel, lets pay some money for somebody to do it. [TR 5877-5878]

* * *

Now, we have talked about what Billy Rhodes and Mike Irvine agreed on, that Bryant is a killer. [TR 5881]

* * *

James Allen Bryant wants his lover killed. ... as far as James Allen Bryant is concerned it is killing all the way. [TR 5989]

Rhodes' counsel, likewise, attacked defendant Bryant:

James Allen Bryant, according to the evidence, on a previous occasion had tried to kill Art Venecia. He wanted his lover dead. He wanted to find something younger and finer that he could have. That's right.

As his own lawyer said, the young faggot wanted to find a younger faggot. [TR 61981

* * *

Who has the motive to have Art Venecia killed? This man right here, James Allen Bryant. Dee Casteel had no motive, Michael Irvine had no motive, Billy Rhodes had no motive.

* * *

He slit his lover's throat while Art Venecia laid there unconscious from a broken jaw given to him by William Rhodes. [TR 6003-6004]

Casteel's counsel, even after all the defendants had been convicted, went so far as to argue that Bryant should not be

allowed to argue certain mitigating circumstances. [TR **6362-63631**

The extent of conflict and the degree to which the defendant Bryant was attacked by his co-defendant's counsel is extraordinary. The defendant was prosecuted, not only by prosecutors on behalf of the State of Florida but by three additional defense counsel on behalf of their individual clients, as well. Nothing the defendant was able to do, or could have done, could have mustered the Herculean efforts required to avoid the inherent prejudice he suffered by virtue of his joint trial. Unless this Court is prepared to abolish altogether antagonistic defenses as a basis for severance, it must grant relief to Bryant for the remarkable unfairness worked upon him at his joint trial. The defendant should be granted a new trial at which he is tried alone, and fairly, by a single accusor on behalf of the state, alone.

III.

THE TRIAL COURT'S REDACTION OF THE DEFENDANT'S CONFESSION, TO ACCOMMODATE THE CONFRONTATION RIGHTS OF THE CO-DEFENDANTS, SO SERIOUSLY CHANGED THE TONE AND MEANING OF THE DEFENDANT'S STATEMENT THAT IT DENIED HIM DUE PROCESS OF LAW.

The defendant's pre-trial statement, introduced into evidence by the state, was a substantial part of the evidence upon which the prosecution based its case. The document presented to the jury, however, was not the defendant's actual statement, but an artificially created, redacted version, altered to accommodate the constitutional rights of the co-defendants. The trial court's consideration of the co-defendants was effected at the expense of the defendant's right to have the jury consider his full, unedited, statement without its exculpatory parts being exorcised. Because the defendant was seriously prejudiced by the incomplete and misleading redacted statement admitted into evidence, he was denied due process of law and he should be granted a new, fair, trial.

In the redacted statement ultimately considered by the jury, and sent back to the jury room with them for their intimate inspection, not only were the co-defendants' names changed to less descriptive pronouns, but more important, the defendant's assertions of innocence and particularly his claim of duress, were excluded altogether. For example, the redacted statement makes it appear that the defendant eagerly accompanied Rhodes and Irvine to Venecia's house. It omits the defendant's explanation:

> She just introduced me as Allen and informed me that I should go with the gentlemen, keep cool, they would return at the restaurant shortly and everything would be all right. [R 71761

The redacted statement makes it appear that the defendant was under no duress at all. To the contrary, in the actual statement the defendant explains:

> ... the guy that was with myself -- pushed me forward, told me that I should watch this cause this could happen to me.
>
> * * *
>
> 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. [R 7178, 72321

The defendant's entire statement concerning having been forced at knife-point to accompany Irvine and Rhodes to Venecia's house was excluded:

> Q. You mentioned that one of the men displayed a knife or a razor. Which one was it?
>
> A. The smaller built guy.
>
> Q. Where was he in the car?
>
> A. In the back seat.
>
> Q. How was he holding the knife?
>
> A. He was holding it in his hand like twirling it around (indicating).
>
> Q. At that point, why didn't you get out of the car?
>
> A. Because I was afraid to. [R 7204-7249]

Likewise, the defendant's explanation that one of the men entered Venecia's bedroom with a razor or knife in his hand while the other man who stayed with him in the living room had a knife also, was entirely deleted from the redacted statement. [R 7205-7206, 72501

While Irvine and Rhodes were permitted to argue throughout the trial that the defendant had entered the bedroom and killed Venecia himself, the trial court excised that part of the defendant's statement attributing to Irvine, upon Irvine's emergence from the bedroom, the statement that Venecia was already dead:

> Shortly after that, the guy emerged from the bedroom and told the other guy <u>that he was dead</u>, to let's go.
>
> Q. When he came out of the bedroom and says he's dead, was he referring to Mr. Venecia?
>
> A. Yes. [R 7178, 7233; Excluded portion in underline].

While the redacted statement permits the inference that the defendant acted on his own volition at various times, the omitted portions of the defendant's statement revealed that he was acting at the direction of others and particularly Casteel:

> She asked me to go down and pull the safe for her. [R 7180-72341

The statement considered by the jury reflected the question, "You say you pull[ed] the safe?" [R 72341 In fact, the question was, "You say the Mrs. Casteel asked you to pull the safe?" [R 71801

In every instance where the defendant explained that someone else rather than he was involved, it was excluded. Among the statements never heard by the jury are the following:

> She took some out of one of the envelopes and stuck it in a paper bag that she already had, and then she took it out to the car and gave it to the guys in the car. [R 71811
>
> * * *
>
> She informed me that it was better for myself and herself. [R 71821
>
> * * *
>
> She wouldn't have to work as a waitress any more. [R 71821
>
> * * *
>
> Q. So, Mrs. Casteel got out of the car and went in[to Fisher's trailer]?
>
> A. She went into Art's first.
>
> Q. To Mr. Venecia's house first.
>
> A. Right. [R 71841
>
> * * *
>
> A. I entered the house with Mrs Casteel. *** She had asked me to go to the property with her so that the body could be taken out of the house. *** She slid it up and under him. [R 7185, 72361
>
> * * *
>
> Q. What was the reason for moving the body?
>
> A. She said she didn't feel it was wise to leave it up at the house. [R 7187, 72381
>
> * * *
>
> Q. Did Mrs. Casteel tell you [that the hole was dug to put the body inside of it]?

A. Yes. [R 7188, 72391

While the redacted statement makes it appear that it was the defendant's idea to bury the body, in actuality it was Casteel's idea:

> A. I made the call for someone to come out for her and she met someone out at the property. [R 7188, 7239; excluded portion in underline].

The redacted statement invites the inference that Fisher's murder was the defendant's idea. It omits references in the defendant's complete statement to the fact that Casteel was the motivating force behind Fisher's death:

> ... but she was gonna have to take care of her. [R 7190, 72401
>
> * * *
>
> A. She told me that everthing was gonna be taken care of. [R 7192, 72411
>
> * * *
>
> She informed me that she had someone fill the hole. [R 7194, 72421
>
> * * *
>
> A. Mrs. Casteel handled the sale of [Mrs. Fisher's trailer]. [R 7197, 72451

The defendant's explanations that he merely acquiesced to the will of Casteel were deleted from his statement and remained unknown to the jury:

> A. Well, this had been going for so long, I had been afraid for so long, that I just basicly went along with everything that Mrs. Casteel had wanted to do up through that time. [R 7211-7212, 7254;

excluded portion in underline].

In the defendant's original statement, he has asked about a prior accusation of theft at an International House of Pancakes restaurant at which he used to work. The defendant explained that although he was not guilty, he had agreed to pay $2,200.00 in restitution in order to resolve the problem. He further explained that while he did not have the money to pay back, Mrs. Casteel did and tendered it on his behalf. [R 7215-7216] In the defendant's redacted statement given to the jury, his response is altered in such a way as to make it appear that although he had agreed to make restitution, he had reneged and not made the payment at all. [R 72571 This distortion of the defendant's statement and the true facts resulted in false evidence of the defendant's bad character and lack of credibility:

> Q. How did you pay the money back?
>
> A. I didn't. Mrs. Casteel did. She sent them a personal check of hers. [R 7216, 7257; excluded portion in underline].

The defendant consistently objected that the redaction of his statement, compelled by his joint trial, unfairly distorted the facts and prevented the reasonable inference from the actual statement that the defendant was "not there [at the Venecia residence] of his own free will" and that the redacted statement made "him seem like he was more part of the actual killing than he was." [TR 3459, 34601 The trial court responded sympathetically:

> The Court: You might be right. You get down to the old argument, and I don't know how this is going to have to come out ultimately, but you get down to the old argument perfect trial versus something else. [TR 34641

Nevertheless, the defendant's requests to include various exculpatory parts of his statement not included in the redacted version were consistently denied [TR 3492-34981 as was the defendant's objection to the jury's consideration of the redacted form of his statement.

Under analogous circumstances, involving the introduction of incomplete or unintelligable, and therefore, misleading, tape recorded statements, the Courts have recognized that incomplete evidence may be as prejudicial to a defendant as that which is directly inculpatory. The reasoning and conclusion of the Court in Carter v. State, 254 So.2d 230, 231 (Fla. 1st DCA 1971) should control the Court's resolution of the similar issue presented here:

> At first blush, we questioned how a recording so unintelligable could have been detrimental to appellant. We concluded, however, that individual jurors might have speculated upon the various isolated portions of the recording which could be understood. Such speculation cannot be a basis for conviction. Id. at 231.

Here, the issue is more compelling. It involves, not evidence which is incidentally incomplete or misleading, but evidence which has been deliberately and purposely changed by the trial court to a form which is grossly misleading and unreliable. The

defendant's statement, which undeniably formed a substantial part of the state's case, was so substantially altered as to render both it, and the jury's verdict based upon it, untrustworthy. See, Brady v. State, 178 So.2d 121, 125 (Fla. 2d DCA 1965).

The redaction of the defendant's confession was directly related to, and a consequence of, the defendant's improper joinder at trial with his three co-defendants. The introduction of the defendant's altered statement, in a form which distorted its meaning to the defendant's severe disadvantage, was yet another consequence of his improper joinder and the trial court's futile attempt to reconcile the introduction of the defendant's statements with the constitutional rights of the co-defendants, at the expense of the Fifth and Sixth Amendment rights of the defendant, Bryant. The defendant is entitled to a new trial.

IV.

THE TRIAL COURT ERRED IN PERMITTING THE REPEATED ELICITATION OF EVIDENCE OF THE DEFENDANT'S BAD CHARACTER AND OF UNRELATED COLLATERAL MISCONDUCT FOR NO REASON OTHER THAN TO DENIGRATE THE DEFENDANT'S CHARACTER AND INFLAME THE JURY AGAINST HIM, THEREBY DENYING HIM DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It may have been unavoidable that the jury know that the defendant was a homosexual, since the state theorized that he murdered his older lover for a new, younger, paramour and murdered his lover's mother to conceal the crime. As if the animus of the jury was not aroused sufficiently simply by virtue of the defendant's deviant life style and the nature of the offenses alleged against him, the passions of the jury against the defendant were unjustifiably stirred by the introduction of utterly irrelevant and immaterial collateral conduct. A prior, utterly unrelated accusation of theft and particularly evidence of the defendant's involvement in drug trafficking, in addition to exploitation of the defendant's sexual preference and unsubstantiated testimony of his violent nature had no place, whatsoever, in this case. The failure of the trial court to grant the defendant relief from the prejudice he suffered by virtue of the introduction of such evidence compels the grant of a new fair trial.

It is generally accepted that evidence in criminal trials must be "strictly relevant to the particular offense charged." Williams v. New York, 337 U.S. 241 (1949). The admission of

irrelevant facts that have a prejudicial tendency is fatal to a conviction, even though there may be sufficient relevant evidence to sustain the verdict. Williams v. United States, 168 U.S. 382 (1897); Hall v. United States, 150 U.S. 76 (1893); United States v. Allison, 474 F.2d 286 (5th Cir. 1973).

It has been repeatedly held, as in Green v. State, 190 So.2d 42 (Fla. 2d DCA 1966), that evidence of another offense wholly independent of the case being tried must be excluded if it has no direct bearing in proof of the instant case, and where its only probative value is to prove or tend to prove a wholly extraneous offense even though the offenses are similar or of a like nature.

It is fundamental that immaterial questions should be excluded on proper objection. Eatman v. State, 48 Fla. 21, 37 So. 576 (Fla. 1904). In other words, evidence on collateral issues having no bearing on the defendant's guilt should be excluded. Tully v. State, 69 Fla. 662, 68 So. 934 (Fla. 1915). Evidence is only admissible which proves, or tends to prove, a fact material to the issues sought to be proved. Strickland v. State, 122 Fla 384, 165 So. 289 (Fla. 1936).

Not only may the prosecutor not adduce every description of evidence which, according to the prosecutor's theory, may be supposed to elucidate the matter in dispute, but each person charged with the commission of an offense must be tried on evidence legally tending to show his guilt or innocence. Simmons v. Wainwright, 271 So.2d 464 (Fla. 1st DCA 1973); Thomas v. State, 202 So.2d 883 (Fla. 3d DCA 1967). In short, the test of admissibility is relevancy and the test of inadmissibility is

lack of relevency. Williams v. State, 110 So.2d 654 (Fla. 1959); B.A.A. v. State, 333 So.2d 552 (Fla. 3d DCA 1976).

It is well established that evidence which suggests the commission of a crime other than that for which an accused is on trial is inadmissible when that crime is in no way connected with the crime charged. Williams v. State, 110 So.2d 654 (Fla. 1959); Colbert v. State, 320 So.2d 853 (Fla. 1st DCA 1975); Beagles v. State, 273 So.2d 796 (Fla. 1st DCA 1973).

In Suarez v. State, 95 Fla. 42, 115 So. 519 (Fla. 1928), this Court articulated the now firmly established rule concerning the admission of evidence of collateral crimes:

> The general rule is that, on a prosecution for a particular crime, evidence which in any manner shows or tends to show the accused has committed another crime, wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible. [115 So. 519 at 526.]

By the same token, it is a cardinal principle of criminal law that the State cannot introduce evidence attacking the character of the accused unless the accused first puts his good character in issue. Wadsworth v. State, 201 So.2d 836 (Fla. 4th DCA 1967). The rule is similarly stated, in light of the "relevency test" established in Williams v. State, supra, that where a defendant has not placed his character in issue and evidence as to the defendant's character introduced by the prosecution sheds no light on motive, intent, absence of mistake, common scheme, identity, or a system or general pattern of criminality, the introduction of testimony as to the defendant's bad character or

criminal propensity is improper. Mann v. State, 22 Fla. 600 (1886); Fitzgerald v. State, 203 So.2d 511 (Fla. 2d DCA 1967).

In the case at bar, the defendant anticipated the enormous prejudice inherent in this prosecution by the filing of pre-trial motions in limine to prevent unnecessary reference to the defendant's sexual proclivities. [R 6053] The trial court declined to grant it. [TR 3571] Thus, the prosecutor did not resist a gratuitous reference to the defendant as "queen of the house" [R 4969] and the suggestion that the defendant and his lover would "cackle and giggle like two adolescent girls." [R 4970] The prosecutor even introduced evidence that the defendant practiced "the art of Santoria" although the objection to the reference was sustained. [R 4886]

In addition, the state elicited from Susan Mayo, co-defendant Casteel's daughter, that she was concerned for her mother's life:

> Because if anything were to have happened to my mother, it would be my word against Allen's, and if it were to "come up," from her on paper with signatures, then it would be evidence. [TR 3868]

Thus, the state was permitted to portray the defendant's violent, if not homicidal, character through improper evidence of the co-defendant's daughter's fear for her mother's life.

In addition, and more important, the state was permitted to introduce into evidence that the defendant had previously been accused of a completely unrelated theft of money from a restaurant (an International House of Pancakes, but not the one

involved in this case or owned by Venecia) at which he had previously worked. The issue first presented itself when the state introduced into evidence the defendant's redacted pre-trial statement in which he was interrogated about the unrelated alleged misconduct. [R 7256: TR 4527-4529, 4535; State Exhibit 78] The defendant protested "that specific acts of misconduct and certain bad acts ... [were] clearly improper and [were] an attack on Mr. Bryant's character." [R 4439-44421 Furthermore, over the defendant's objection, counsel for co-defendant Casteel was permitted to extensively cross-examine on the collateral matter of the defendant's alleged theft from the Homestead IHOP. [R 4537-4538, 4541-45421

> Now, in reference to the IHOP, the International House of Pancakes, the restaurant that Art Venecia owned, that was located in Naranja; is that your understanding?
>
> A. Yes, sir, it is.
>
> Q. In the statement that was just read to the jury there was reference to an IHOP in Homestead. That would be a different restaurant?
>
> A. To my understanding, it would: yes, sir.
>
> Q. And apparently, based on that statement that was read to the jury, Mr. Bryant was accused of stealing money from the IHOP in Homestead: wasn't that correct?
>
> MR. SHAPIRO: Objection and ask for a sidebar on this. [TR 4537-45381

Not only was the defendant's character attacked by the insinuation that he was violent and with evidence that he might

previously have been a thief, the spectre of drugs was improperly introduced into this case as well. During Casteel's direct examination she was permitted to testify that Bryant had told her that Casteel's daughter, Susan, was working for him as a "mule", "running back and forth to Ft. Lauderdale for [him]." Further, over the defendant's objection, Casteel was permitted to offer the explanation, "that she was apparently transporting narcotics for him." [TR 48991 Casteel further testified that when she went into the barn containing Venecia's body, she saw twelve to fifteen brown bags. Although she admitted she did not open the bags and never learned what was in them, she was permitted to advance her assumption that the bags contained narcotics:

> I assume there was in fact drugs in the bags. [TR 49021

Casteel was thereupon permitted to relate her subsequent conversation with the defendant in which he purportedly advanced the idea that "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." [TR 49031 Casteel was thereafter permitted to relate her confrontation with her daughter in which she related that the defendant had admitted that Susan was transporting drugs and that Casteel had seen what she assumed to be a stack of drugs in the barn. [TR 49031

Ironically, Casteel's counsel, while urging the admission of such evidence, made the argument to the trial court which best explains the problem with its admission:

> This is not a drug case. *** This is not a case involving Susan Garnett in a drug

> case. This involves a murder case. [R 4904]

Finally, to compound the prejudice and insult, co-defendants' counsel exploited the defendant's homosexuality and resorted to name calling - "the little faggot" [R 5874], "the little fag" [R 5877, 5878], "the young faggot" [TR 6918].

The unrestrained assaults upon the defendant by the prosecution as well as the co-defendants' counsel [See Point 11, supra] was extraordinary in its persistence and hostility. The repeated attacks on the defendant's character and the exploitation of matters wholly collateral to the issues involved in this case, denied the defendant a fair and impartial trial guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The defendant's conviction should be reversed and his case remanded for a new trial untainted by such improper appeals to the jury's sensitivities and passions.

V.

THE TRIAL COURT ERRED IN COMMUNICATING WITH MEMBERS OF THE JURY OUTSIDE THE PRESENCE OF THE DEFENDANT, OUTSIDE THE PRESENCE OF DEFENSE COUNSEL, AND OFF THE RECORD, THEREBY DENYING THE DEFENDANT HIS RIGHT TO DUE PROCESS OF LAW, HIS RIGHT TO BE PRESENT, AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

On at least two occasions, after the jury had been sworn and all of the evidence had been presented, the trial court responded to communications of members of the jury in contexts which clearly indicate the absence of the defendant and the absence of counsel. Moreover, it is equally apparent that portions of those communications were altogether off the record. The ex parte communications with the jury by the trial court and the exclusion of the defendant and his counsel from the proceedings constituted harmful error. The defendant's convictions and sentence of death cannot be sustained.

It is fundamental that in a criminal proceeding "nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370 (1893). The right to be present has been called a right scarcely less important to the accused than the right of trial itself. Diaz v. United States, 223 U.S. 442 (1912). An accused has the right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97 (1934); Faretta v. California, 422 U.S. 806 (1975).

Florida Rule of Criminal Procedure 3.180 codifies the constitutional mandate and expressly recognizes that the defendant's presence is required:

* * *

> (5) At all proceedings before the court when the jury is present.

Moreover, Rogers v. United States, 422 U.S. 35, 38, 95 S.Ct. 2091, 2094, 45 L.Ed.2d 1 (1975), established the rule concerning the right of a defendant and his counsel to be present and participate in any discussion between the judge and the jury. The Supreme Court stated that the "orderly conduct of a trial by jury", essential to the proper protection of the right to be heard, entitles the parties ... to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." (Id. at 38, 95 S.Ct. at 2094, quoting Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed. 853 (1919).

It is equally well-settled that after the jury retires to deliberate, messages may not be sent by the judge to the jury without prior notice to defense counsel and consultation with them. Rogers v. United States, supra at 39; United States v. Ronder, 639 F.2d 931, 934 (2d Cir. 1981); United States v. McDuffie, 542 F.2d 236 (5th Cir. 1976). As the McDuffie Court held:

> When a communication is received from the jury, counsel should be informed of its substance and afforded an opportunity to be heard before a supplemental charge is given ... Unless counsel is advised of the contents of the jury's message, he

> cannot evaluate the propriety or adequacy of the proposed supplemental charge, formulate objections or suggest additional instructions. In short, he cannot make an informed decision as to what course of action to take. 542 F.2d at 241.

After all the evidence in this case was presented, and both sides rested, the trial court declared a luncheon recess prior to the commencement of closing argument. [TR 5911] After excusing the jury, "a brief discussion was held off the record, ..." obviously between the court and juror Morrison. [TR 59111 That communication apparently involved Morrison's request for a letter from the Court confirming his jury service. [TR 5911-59121 Thereupon, juror Pinter addressed the Court and another "brief discussion was held off the record, ...". [TR 59121 The trial court thereupon confirmed that the attorneys were absent from the process and expressed its intent to revisit the matter later with counsel:

> THE COURT: I will put on the record and remind me, if you would, when the attorney's 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. Philpott, 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. [TR 5912-59131

Thereupon, however, Pinter made the belated revelation that, although she had denied having known any law enforcement

personnel during jury selection, that she now realized that "... I noticed one [out in the hallway this morning] 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 [sic] [TR 59131

Only after the presentation of the state's closing argument did the Court reveal the fact of its earlier ex parte communication with juror Pinter. [TR 5947-59481 The ultimate significance of Pinter's misrepresentation during ~~voir~~ ~~dire~~ and her belated revelations was not properly addressed by the trial court and cannot accurately be determined by this record. Similarly, after the jury retired to deliberate, during another recess, the trial court revealed that it had responded to another prior, off record, inquiry of the jury regarding whether or not it should sign [the verdict forms] in pen or pencil. [TR 6102] As such, clear error is demonstrated and it cannot be said that the error was harmless.

The rule prohibiting ex parte communications by the trial court with a criminal jury is explicit and absolute. It is so because, no matter how seemingly innocuous or innocent or even well-intended such conduct might be, its actual effect cannot, at least in the context in which it arose here, be determined. It simply cannot be said, in this capital case, that the trial court's repeated communications with members of the jury outside

the presence of both defense counsel and the defendant, himself, did not injuriously effect the outcome of this trial beyond a reasonable doubt. Accordingly, for the clear transgressions of the trial court, the defendant's convictions and sentences should be reversed.

VI.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

The Imposition of the Death Penalty Against James Bryant Constitutes a Disproportional and Constitutionally Impermissible Application of Capital Punishment.

It appears likely, from a review of the cases this Court has been called upon to review, that most criminal homicides derive from motivations involving some combination of passion and profit. This case is no different. It is therefore incumbent upon this Court, as in all capital cases, to objectively review the circumstances to ascertain whether, in fact, the imposition of the death penalty constitutes a proportional application of the ultimate sentence. In this case, despite the applicability of certain aggravating circumstances, to uphold the imposition of the sentence of death would be inconsistent with the penalties meted other defendants committing similar crimes under like circumstances. As such, the defendant's sentence of death cannot be sustained consistent with the promise of equal protection, due process, and freedom from cruel and unusual punishment guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Florida Statute §921.141(5) establishes an automatic review

procedure in this Court to ensure against the disproportional application of the death penalty:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live m the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in the light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in judgment at all. Dixon v. State, 283 So.2d 1 (Fla. 1973 at 10).

Death is reserved only for the most aggravated of murders, and thus is not proportional in a case such as this me. Banda v. State, 13 FLW 451 (Fla. 1988). Despite the best efforts of those involved in the process, studies have shown the disproportional application of capital punishment:

> 1. Robert F. Carr confessed to the sex murder of three Dade County youngsters and was sentenced to three life terms.
>
> Arthur Lee Goode confessed to the similar murder of me 10 year-old boy in Lee County and was sentenced to death: Goode v. State, 365 So.2d 381 (Fla. 1979).
>
> 2. Ronnie Lee Pouncey of Opa Locka spent almost four hours bashing in the head of a friend, stopping occasionally to much on raisin bran. He was sentenced to 133 years in prison.
>
> Clifford Hallman angrily slashed the throat of a Tampa barmaid after she slapped him. She died four day later and Tampa General Hospital paid a $40.000 malpractice settlement for its role in

her death. Despite the recommendation of the parole board, Hallman is on Death Row. Hallman v. State, 305 So.2d 180 (Fla. 1974).

3. Learie Leo Alford, son of a West Palm Beach minister was found guilty of the rape and murder of a 13 year-old girl who was on her way to the beach. The victim's nude, blindfolded body was found in a Riviera Beach trash pile. Alford is on Death Row. Alford v. State, 307 So.2d 433 (Fla. 1975).

Gary Knopf was convicted of beating a 16 year-old Jacksonville girl to death with a board, raping her, then dumping her body in the woods. He plea-bargained for a second-degree murder conviction. Knopf received 199 years in prison.

4. George Vasil was 15 when he was convicted of killing a 12 year-old Fort Pierce girl after raping her and stuffing her panties into her mouth. He pleaded innocent. Vasil is on Death Row. Vasil v. State, 374 So.2d 465 (Fla. 1979).

Robert Lee Douglas, then 16, plead guilty to murdering one elderly Miami Beach woman and raping another. Dade Circuit Judge John Tanksley refused the prosecution's request of the death penalty. Douglas was sentenced to life imprisonment plus 738 years.

5. Charles Proffit, then 27, was charged with breaking into Joel Meigehow's home and stabbing him to death during an early morning robbery. He pleaded innocent in a Hillsborough County court. Proffit was sent to Death Row. Proffit v. State, 315 So.2d 461 (Fla. 1975).

Prestin Shands, Jr. confessed to murdering Miami Springs Motel manager Ramon Nieves-Guirao during a robbery. After surprising Shands and his accomplice at the motel, Mieves-Guirao was hacked, stabbed and gored with an ornamantal sword. Shands, then 19, pleaded guilty to second-degree murder. He was sentenced to 114 years in prison.

10. Jacob Dougan, Jr., Elwood Barclay and two friends calling themselved the

> Black Liberation Army picked up a white hitchhiker in Jacksonville, drove him to a trash dump and stabbed him repeatedly. Stephen Orlando was then shot twice in the head as he begged for mercy. The murderers later sent a tape recording to radio stations proclaiming racial war. Dougan and Barclay were sentenced to death. Douqan v. State, 398 So.2d 439 (Fla. 1981); Barclay v. State, 411 So.2d 1310 (Fla. 1982).
>
> Phillip Courtney, Dale James King and James R. Jacobs took a ride to a black neighborhood in Miami. Their purpose, according to trial testimony, was to "go shoot some niggers." King fired a shotgun into a crown of young blacks, killing two teenagers. He and Courtney were found guilty of two first-degree murder charges and two counts of attempted murder. Jacobs was found guilty of two second-degree murder charges and two counts of aggravated battery. Courtney, King and Jacobs are serving back-to-back life sentences plus two consecutive 15 year terms.
>
> [Miami Herald, May 27, 1979, Barry Bearah and Carl Hiaasen]

These examples are offered to demonstrate the arbitrary and fortuitous manner in which capital prosecutions are disposed pursuant to Florida Statute 5921.141. More disturbing is the case of Joseph Roth, a Miami electrician, who was convicted of killing his wife. Roth v. State, 359 So.2d 881 (Fla. 3d DCA 1978). Trial testimony indicated he waited until she was asleep, then attached one of her arms and legs to a home-built device which he plugged into a light socket. Six months earlier Roth had purchased a $20,000.00 life insurance policy on his wife. He pleaded innocent to the murder. After a trial at which Roth was found guilty of first-degree murder, Roth was sentenced to life

in prison. The prosecution did not even seek the death penalty. Roth, however, was no less motivated by greed and passion than was Bryant in the case at bar. Such inconsistent punishment is constitutionally impermissible.

By the same token, it is apparent from the facts recited in Spivey v. State, 13 FLW 445 (Fla. 1988), that co-defendant Crofton master-minded a scheme to have her estranged husband murdered and ultimately hired Spivey to commit the murder for $20,000.00. Crofton did not face the death penalty, and was convicted only of conspiracy to commit murder. The Defendant here faces death for a similar act.

The death penalty must be applied "fairly and with reasonable consistency, or not at all". Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Here, it was not. The trial court found four aggravating circumstances but also found two mitigating circumstances. The homicides of which Bryant stands convicted are not so extraordinary as to justify the imposition of the extraordinary sentence of death. More important, the execution of James Bryant cannot be reconciled with the prison sentences of the defendants in Spivey and Roth for offenses which were no less pointless or more justifiable. The sentence of death imposed upon James Bryant should be reversed.

B.

The Sentencing Proceedings Were Constitutionally Deficient Due to the State's Repeated Efforts to Minimize the Importance of the Jury's Role, thereby Denying the Defendant Due Process of Law, Equal Protection, and His Right to a Jury Trial Guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In Florida, the jury's recommendation regarding the sentence in a capital case is afforded great weight. Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 53; Tedder v. State, 322 So.2d 908 (Fla. 1975). The advice given by the sentencing jury in Florida is so integral and important that it must be afforded great weight, e.g., Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Lamadline v. State, 303 So.2d 17 (Fla. 1974), and can be overridden by the judge only if virtually no reasonable person could agree with it. E.g., Fead v. State, 512 So.2d 176 (Fla. 1987); Ferry v. State, 507 So.2d 1373 (Fla. 1987). Here, however, the prosecutor made repeated comments to the jury which were inaccurate and minimized the jury's sense of responsibility. Therefore, the defendant's rights under the Fifth and Eighth Amendments to the United States Constitution were violated and he should be granted, at least, a new sentencing hearing.

Here, the prosecutor, during ~~voir dire~~, persistently advised the jury that its determination after the sentencing hearing was "merely" a recommendation. His comments demeaned and minimized the importance of the jury's ultimate role:

> "Upon a return of a jury verdict of guilty for first-degree murder ... the judge ... asks [the jury] for a recommendation to him, to Judge Person, merely a recommendation as to whether or not ... one or more defendants who are convicted of first-degree murder should or should not be electrocuted ... [TR 1353-13541
>
> * * *
>
> The jury in the second part recommends to the Judge ... it is a recommendation. Only the Judge in the State of Florida, unlike in a lot of other states,

> sentences defendants including defendants who are convicted of first-degree murder. The jury in Florida makes a recommendation by a majority vote to the Judge who does the sentencing. [TR 1354-13551
>
> * * *
>
> The Court sentences and the jury of twelve makes a majority recommendation to the Judge who eventually does the sentencing ... and you make a recommendation to him." [TR 1355-13561

The defendants, on the authority of Caldwell v. Mississippi, 422 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), moved the court to strike the jury panel. [TR 1369-1374] The trial court denied the defendants' motion. [TR 13751

Later, through a different prosecutor, the state persisted in its attempt to reduce the jury's sense of responsibility:

> At the conclusion of your deliberations in the second phase, in the penalty phase, you make a recommendation.
>
> Unlike the verdict in the guilt phase, where it must be unanimous, and the Court will instruct you on that, you make a recommendation in the second phase, whatever that recommendation may be.
>
> * * *
>
> But your verdict is a recommendation to his Honor, Judge Person, because he is the only person who can impose the sentence. [TR 28901
>
> * * *
>
> Well, there is a decision called a recommendation and then there is a further decision and that is the Court's. [TR 2897]

In response to the expression by a juror of a reluctance to "send somebody to death", the prosecutor put the juror at ease and

emphasized the Court's responsibility while diminishing that of the jury:

> You make a very important decision in the penalty phase. It is a recommendation to His Honor, Judge Person, and it's His Honor, Judge Person, who weighs that recommendation and makes a decision on what the penalty will be. [TR 2899]

Later, again, the prosecution downplayed the jury's responsibility:

> Does everyone understand that the Court does the sentencing in the State of Florida?
>
> In Texas, the jury does.
>
> Does everyone understand that, everyone in the first row?
>
> Mr. Tranvanbi, do you understand if you are a member of this jury and returned a guilty verdict, the Judge will do the sentencing at the conclusion, a total conclusion of the case.
>
> Do you understand it?
>
> MR. TRANVANBI: Yes.
>
> MR. KOCH: Excuse me.
>
> Judge, I object to that.
>
> * * *
>
> THE COURT: All right. I will overrule the objection at this point. [TR 3255-3256]

The trial court, however, later acknowledged the existence of the problem:

> ... during jury selection some of the statements that were made concerning the jury's role in phase two may conceivably

> have been inferentially diminished in the way it was presented to them, that your role is merely, and its more than that, its merely an advisory opinion to the Court and the Court retains the ultimate power to either impose or not impose the penalty. [TR 61691

In fact, the Court ultimately decided to modify its charge to the jury in order to ameliorate the harm already done and modified the standard jury instruction to eliminate the term "solely". [TR 6172, 6179, 62031 However, as defense counsel protested:

> Well, its not like getting the water back into the bottle.
>
> We had a trial where over objection Mr. Novick went into great lengths about how this is only, and the word only was stretched out into like a four or five syllable word, only an advisory recommendation.
>
> The prosecutor does that for an obvious reason. The Supreme Court said prosecutors cannot do that. [TR 61721

Neverless, during the prosecution's argument at the sentencing phase of the proceedings, it perpetuated the same theme it had initiated during ~~voir dire~~ to relieve the jury of the awesome responsibility it actually had:

> You've got to understand here that the advisory sentence that you will be passing is, there're two advisory sentences and there's two advisory sentences as to each of the defendants ... [TR 65421

The prosecutor emphasized the term "recommend" and "advise" repeatedly. [TR 6545, 6546, 6601, 6604, 66121

The conduct of the prosecution throughout trial created the reasonable probability that it caused the jurors to relax the caution and deliberation in making a finding of fact or facts from the evidence which their duty required, and to surrender, in whole or in part, their functions and responsibilities as fact finders. It invited the jury to reach a sentencing determination without attaching to themselves the odium of error and allowed them to think that a mistake could be corrected by the future acts of the trial court. This presented the "intolerable danger that the jury will in fact choose to minimize the importance of its role" - a situation constitutionally impermissible under the landmark United States Supreme Court decision Caldwell v. Mississippi, supra.

The Caldwell Court reversed the defendant's sentence of death where the prosecutor commented that a death sentence would be subject to appellate review. The Court held, simply, that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 329. It noted that "legal authorities almost uniformly have strongly condemned the sort of argument offered by the prosecutor here." Id. at 2642. The Court further noted that this has been the view of almost all the State Supreme Courts that have dealt with the issue since Furman v. Georgia, 408 U.S. 283 (1972) and that even before Furman the sort of argument offered by the prosecution was viewed as clearly improper by most state courts whether in

capital or non-capital cases. See, e.g. People v. Morse, 60 Cal.2d 631, 649-653, 36 Cal.Rptr. 201, 212-215, 388 P.2d 33, 44-47 (1964); Pait v. State, 112 So.2d 380, 383-384 (Fla. 1959); Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-736 (1918); People v. Johnson, 284 N.Y. 182, 30 N.E.2d 465 (1940); Beard v. State, 19 Ala. App. 102, 95 So. 333 (1923).

The American Bar Association, in its standards for prosecutorial conduct, maintains the same position. See, ABA Standards for Criminal Justice; 3-5.8 (2d ed. 1980) ("References to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision"). Id., at 3.90.

The Caldwell court therefore reached the inescapable conclusion:

> The jury might "wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely err because the error may be corrected on appeal." Maggio v. Williams, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983) (Stephens, J. concurring in judgment). Id. at 2641.

The same reasoning and conclusion apply here. A jury otherwise reluctant to sentence a defendant to death might well accept the invitation to "send a message of its extreme disapproval for the defendant's acts", content in the belief that the trial court's ultimate decision would supercede their own. Recent decisions of the Eleventh Circuit Court of Appeals and

this Court's recent decisions in Combs v. State, 13 FLW 142 (Fla. 1988) and Grossman v. State, 13 FLW 127 (Fla. 1988), acknowledge the continued viability of the Caldwell doctrine.

In Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) (pending rehearing ~~en banc~~), the Court appropriately noted that under Florida law the "limitation ***on*** the judges exercise of the jury override provides a 'crucial protection' for the defendant.", citing Dobbert v. Florida, 432 **U.S.** 282, 295, 97 S.Ct. 2290, 2299, 53 L.Ed.2d 344 (1977). The Court further noted, citing Caldwell, that the prejudicial effect of the prosecutor's argument was increased by the fact jurors would be likely to find minimization of their otherwise difficult rule of determining whether another should die attractive, particularly when they were told that the alternative decision makers were legal authorities that they might view as having more of a right to make such an important decision. Id. at 2641. Thus, as the Court concluded, and as is equally likely here, the jury abdicated its "awesome responsibility" for determining whether death was the appropriate punishment in the first instance. The Court expressed the fear, as does this writer, that the defendant:

> ... might be executed although no sentencer had ever made a considered determination that death was the appropriate sentence if his sentence were allowed to stand.

See, Caldwell, 105 S.Ct. at 2641. Accordingly, the Court deemed the defendant's death sentence unreliable and reversed the

District Court's denial of habeas corpus relief.

Similarly, in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), the Court reversed and remanded a similar denial of the defendant's habeas corpus petition. Again recognizing the Florida Rule that a trial court must give great weight to a jury's recommendation, McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982), the Court appropriately concluded, as this Court should here, that the prosecutor's comments "misled the jury as to their actual role.":

> The jury was left with a false impression as to the significance of their sentencing role. This false impression, as acknowledged in Adams, created a danger of bias in favor of the death penalty. Id. at 1482; Caldwell at **1532.**

Moreover, the Court recognized that the fact that most of the prosecutor's comments were made during voir dire did not detract from the Court's conclusion that the granting of habeas corpus relief was erroneous since "comments made prior to the sentencing phase can establish a Caldwell violation." Id. at 1483, Adams at 804 F.2d **1531,** n.7.

The defendant was severely prejudiced when, in addition to all the other inflammatory evidence to which the jury was improperly exposed, the jury was misled by the state to misunderstand and undervalue its crucial role in the determination whether the defendant would live or die. That minimization of the jury's sense of responsibility invited the jury more readily to impose the death penalty. Because the defendant was denied a proper determination by the jury of the propriety of the death

penalty in the first instance, the defendant's sentence cannot be sustained. At the very least, therefore, the defendant's sentence of death should be vacated.

CONCLUSION

The defendant stands convicted of the most serious of felonies and has been sentenced to the ultimate irrevocable penalty after a trial tainted ab initio by a constitutionally defective, and racially biased, jury selection procedure. The defendant's compelled joint trial with his three viciously accusatory self-interested co-defendants so egregiously prejudiced him that he was doomed to conviction from the start. At trial, the prosecution's introduction of the defendant's post-arrest statement, butchered to such a degree that it was changed to an inculpatory from an exculpatory document, as well as the introduction of evidence of collateral, unrelated, acts of misconduct and unproved crimes, coupled with the trial court's ex parte communications with the jury, completely denied the defendant a fair trial. Moreover, the prosecution's persistent attempts to minimize the importance of the jury's role in the sentencing procedure rendered the penalty phase of this case fundamentally defective and the imposition of the death penalty can be shown to be a disproportional application of the ultimate sentence. Accordingly, the defendant's convictions and sentence of death must be reversed by this Court on appeal.

Respectfully submitted,

FRIEND & FLECK
Sunset Station Plaza
Suite 106
5975 Sunset Station
South Miami, Florida 33143
Tel.: (305) 667-5777

By: _____
GEOFFREY C. FLECK, ESQUIRE
Special Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded Charles Fahlbusch, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, Lee Weissenborn, Esquire, 235 N.E. 26th Street, Miami, Florida 33136, Gary W. Pollack, Esquire, 1320 S. Dixie Highway, Suite 275, Coral Gables, Florida 33146, and Sheryl Lowenthal, Esquire, 2250 S.W. Douglas Road, Coral Gables, Florida, this 14th day of September, 1988.

By: GEOFFREY C. FLECK, ESQUIRE