71,357

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER ~~71-355~~

DEE DYNE CASTEEL,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

In this Brief the parties will be referred to as they stood in the lower court or by their last names.

The terms "State" and "Prosecutor" are used interchangeably .

The symbol "TR" will refer to the transcript with the date of the particular transcript and the page number given thereafter. The symbol "R" will refer to the Record on Appeal.

I. STATEMENT OF THE CASE AND OF THE FACTS

A. Indictment

On July 13, 1984, a superceding indictment was filed against Defendants Bryant, Casteel, Irvine and Rhodes. They were all charged with two counts of burglary, two counts of first degree murder, and one count of armed robbery. Bryant and Casteel were also charged with three counts of grand theft in the first degree and one count of grand theft in the second degree. The trial court granted Irvine's motion to dismiss Count V of the new indictment, the armed robbery charge (TR-8/16/85 - 15-17). That count was dismissed as to all the defendants (TR-6/15/87 - 31).

The State announced that it would be seeking the death penalty as to all four defendants (TR-6/15/87 -34).

This defendant, Casteel, is a female. Her co-defendants were males.

B. Voir Dire

The voir dire examination in the court below occurred over several days and fills some 3500 pages of the trial transcript.

1. First Panel

During his examination of the first jury panel, the prosecutor polled the prospective jurors as to whether each juror believed that the State mast prove the case "beyond all doubt" (TR-6/15/87 - 186-191).

The prosecutor then elicited from one juror an

admission that "(m)ost people tend to believe that a female probably wouldn't be capable of a murder." The prosecutor invited each member of the panel to "envision a set of facts where...a woman...can be involved in a murder case...anyone have a problem envisioning that?" (TR-6/15/87 - 196-199).

Examining the same panel the following day, the State asked one prospective juror if she could follow an instruction involving "a thaory of when people hire people to do criminal acts for them and their level of responsibility." Casteel's counsel objected and this objection was sustained. (TR-6/16/87 - 221-225).

Thereafter Rhodes advised the trial court that the Miami Herald had run an article describing in detail the events involved in the case (TR-6/16/87 - 226). Several prospective jurors told the prosecutor that they had read the article. The trial court instructed the panel not to read newspapers from that point Forward (TR-6/16/87).

Next, the State resumed questioning prospective jurors about whether they could find that the people who hire killers are just as guilty as the killer themselves (TR-6/16/87 - 230-237). Casteel twice objected that this line of questioning improperly intruded into the facts of the case, particularly in light of an earlier revelation about the case in a Miami Herald article. The objections were sustained (TR-6/16/87 - 237-238). Nevertheless, the State persisted with similar questions (TR-6/16/87 - 230-248; 251-

255). The trial court then read to the panel from the instruction on the law of Principals contained in the Florida Standard Jury Criminal Charges (TR-6/16/87 - 248-249).

Next, the prosecutor told the prospective jurors: "Judge Person indicated that this was a double first degree murder case. There are two people who independently at different times were murdered..." (TR-6/16/87 - 264). Casteel immediately objected on grounds of prejudice and moved to strike the panel. The trial judge denied the motion, but he also ordered the prosecutor to "go about this properly" (TR-6/16/87 - 265-266).

Later, the prosecutor stated to one prospective juror: "You understand you don't sentence anyone either individually or as a jury. In the State of Florida, you never make a sentence. Do you understand that?" (TR-6/16/87 - 282). The prosecutor then told the juror that the trial court did not have to follow the jury's majority recommendation regarding the sentence (TR-6/16/87 - 282).

Casteel then moved to strike the panel on the ground that the prosecutor's suggestion that the ultimate determination of death would rest with someone else minimized the jury's role and might sway some jurors who might otherwise be reluctant to impose the death penalty (TR-6/16/87 - 283-285).

The Motion To Strike was denied (TR-6/16/87 - 291). The court issued a curative instruction to the effect that it

did not mean by its earlier reading of same to single the Principals instruction out for special attention. Regarding the jurors role in the penalty phase of the trial, the trial court told the panel:

> "(T)he Court wishes to impress upon you that advisory opinion that you will offer in this case, if we do get to that point, that in no way limits the importance of following my instruction in making a recommendation on the death penalty should that come up in this case." (TR-6/16/87 - 372)

The final significant occurence during the voir dire examination of the first jury panel was the making of challenges for cause. The State lodged a cause challenge against prospective juror Green because such panelist had advised that she did not believe in the death penalty. The prosecutor commented with respect to the prospective juror's convictions about the death penalty that "(s)ilence in this business is basically consent" (TR-6/17/87 - 639). The trial court excused prospective juror Green, obstensibly for cause, but with the comment that "she doesn't want to be on this jury" (TR-6/17/87-639).

Thereafter other peremptory and cause challenges were asserted by the respective parties.

2. Second Panel

During the State's voir dire examination of the second panel of prospective jurors, the prosecutor advised the group that a grand jury had charged the defendants with the murders (TR-6/17/87 - 728).

Once again, the State grilled these prospective jurors regarding their feelings about the death penalty (TR-6/17/87-751-777). One of the State's questions emphasized that in a first degree murder case, only the judge can actually impose the death penalty (TR-6/17/87 - 782).

The State returned to the matter of a Principals instruction. The trial court again read the standard Principals instruction, and issued the cautionary instruction previously given to the first panel at Casteel's suggestion (TR-6/17/87-803-804).

Because Casteel's co-defendant, Bryant, and Arthur Venecia, one of the two victims, had been lovers, Casteel questioned the panel regarding their views about homosexuality. The State agreed that some inquiry into this issue was relevant (TR-6/18/87 - 847-849).

Bryant's counsel argued to the trial court that he should be allowed to voir dire regarding the jury's views on homosexuality, notwithstanding that other counsel had explored that question with this second panel. Bryant's counsel explained to the court that he was resurrecting these topics in order to establish a rapport with the members of the panel (TR-6/18/87-967-968).

Next, the trial court charged the panel relative to the two phases of a first degree murder trial (TR-6/18/87 - 969-970). Then Rhodes moved for a severance on the ground that the panel was prejudiced. That motion was denied (TR-6/18/87 - 983-984).

At this point in the voir dire examination, Casteel's counsel adopted all the previous motions of co-defendants' counsel although there had been a previous ruling by the trial court that an objection made by one defense counsel was to be considered an objection by all such counsel (TR-6/15/87 - 5-8). He then moved the trial court to exercise its inherent power to strike the panel, and to remove Bryant's counsel and replace him with a new attorney upon grounds that Bryant's counsel was incompetent to try a capital case and that his shortcomings were adversely affecting Casteel. The trial court denied such motion "at this time" (TR-6/18/87 - 988).

During examination by Rhodes' counsel, the trial court sustained the State's objection to the question of whether a prospective juror believed that the death penalty was unfairly applied against one racial group or against poor people. In addition, it sustained a State objection to such attorney's comment that the State does not always seek the death penalty in first degree murder cases (TR-6/18/87 - 1054-1055).

Thereafter respective counsel moved to strike various members of the panel for cause, including panelist Bidle, whom the State challenged because he didn't believe in the death penalty. Casteel countered that Bidle had nevertheless said he would follow the law. The trial court granted the State's motion (TR-6/18/87 - 1081).

3. Third Panel

After the third panel of potential jurors was seated but

before voir dire had begun, Casteel's counsel objected at sidebar that:

> "(w)e are running into a lot of problems because the State is bringing up their Principal theory. What happens is we have two groups of jurors in here. One will hear it read and other (sic) one will want it repeated again, because State was focusing on it, that is why the instructions got read.
>
> I want to try to put a stop. What I ask the Court now to do is to limit the State's inquiry as to that. I don't want the instructions read.
>
> I don't want to unduly emphasize at this point. I think proper inquiry would be whether they would be willing to follow the Court's instructions as to the criminal liability of any members of a group. I don't think the State should be permitted inquiry any further than that." (TR-6/18/87 - 1103)

In reply to Casteel's objection, the trial court ruled as follows: "We have gone too far with it now. It's one of those kinds of things. If I made an error, we are into it and the whole pie is poisoned and it doesn't matter at this time" (TR-6/18/87 - 1106).

Once again, the State queried the members of the third jury panel as to whether they believed a woman was capable of murder (TR-6/19/87 - 1259-1260).

The State also renewed the Principals issue, inquiring of a prospective juror whether he or she would have any problem "judging the guilty (sic) of each of these defendants...when it is claimed (that) they have acted together in a criminal episode?" (TR-6/19/87 - 1261). Of another panelist, the

prosecutor asked whether "your internal sense of what is right and wrong, not the law again, does that tell you that both should or should not be guilty...?" (TR-6/19/87 - 1264-1265). Casteel objected several times to the State's questions but, once again, the prosecutor continued on this tack notwithstanding remonstrations from the trial court (TR-6/19/87 - 1265-1269).

The State also returned to the question of the meaning of "reasonable doubt," asserting to the panel that that term does not mean "to the exclusion of all doubts or beyond a shadow of a doubt or 100 percent" (TR-6/19/87 - 1277). The State's exhortations to the panelists regarding the meaning -- or nonmeaning, to be more precise -- of "reasonable doubt" consume the next seventy pages of the trial transcript (TR-6/19/87-1271-1341).

During the challenge colloquy, the following interchange took place:

> "The Court: (juror) Blue.
>
> Mr. Novick: Peremptory challenge by the State.
>
> Mr. Kershaw: Let the record reflect that Ms. Blue is a black American.
>
> Ms. Weintraub: Let the record reflect also at sidebar and in the Court's presence she said that she thought she recognized the defendant becasuse she lives in that area.
>
> Mr. Novick: And let the record reflect that since it has never been stated before, that none of the defendants are black Americans.
>
> Mr. Kershaw: The case law is that every American is entitled to a fair jury. It was the Neil decision. It was systematic

> exclusion of any particular group. It doesn't have to be what the race of the defendants are, but. the jurors being excluded by the State in a racist manner." (TR-6/19/87 - 1467-1468)

A few moments later, Rhodes' attorney, Mr. Kershaw, renewed his objection:

> "Mr. Kershaw: At this time, on behalf of Mr. Rhodes, we would renew our request for the court to have the State explain why five challenges, peremptory challenges, that were used today, why they were used against all black jurors.
>
> The Court: What now?
>
> Mr. Kershaw: We would like it explained why the peremptory challenges that were used today that they all were directed against the black prospective jurors.
>
> Mr. Soyn (Irvine's counsel): We join in that request.
>
> Mr. Shapiro (Bryant's counsel): I am assuming we join." (TR-6/19/87 - 1481)

4. Fourth Panel

Before the fourth panel entered the courtroom, Irvine's counsel informed the court that articles about the case have appeared in both the Miami News and in a Homestead, Florida, newspaper (TR-6/22/87 - 54).

Next, Casteel objected to the new panel in its entirety because only twelve of eighty prospective jurors were black. "That's an underrepresentation of black Americans...I ask that the panel be stricken and that a panel composed of a representative mass section of people be brought

down...,specifically one that has adequate representation of black Americans" (TR-6/22/87 - 61-62). Casteel further argued that the State had injected the issue of race into the proceedings on the previous day of trial by directing five out of seven peremptory strikes at blacks "whereas every other defendant in the case has not exercised any peremptory challenges against blacks" (TR-6/22/87 - 61-62). Casteel's motion to strike was denied (TR-6/22/87 - 62). The court and counsel then discussed whether the race of each member of the panel had been adequately identified in the record (TR-6/22/87 - 62-64).

The trial court subsequently instructed the fourth panel of jurors not to read newspapers (TR-6/22/87 - 67).

During the voir dire examination, the State explained the two phases of a first degree murder case to the panel. While discussing the function of aggravating and mitigating circumstances in the penalty phase, the prosecutor commented: "So many people may vote for life imprisonment. Some people may vote for the death penalty. But your verdict is a recommendation to his Honor, Judge Person, because he is the only person who can impose the sentence" (TR-6/23/87 - 298).

Following a lengthy interchange between the prosecutor and a prospective juror about whether the latter could recommend the death penalty, Casteel objected that the State had gone beyond its "legitimate inquiry" into the potential jurors' attitudes on the subject (TR-6/23/87 - 310-312). The trial court directed the State to confine its questions to the jurors'

general attitudes about the death penalty, rather than attempt to elicit predictions from the jurors about how they would act if they were faced with the question of specific phases of a trial (TR-6/23/87 - 312). Nevertheless, the State continued to press the panel members for definite responses to the State's penalty phase hypotheticals (TR-6/23/87 - 313-326).

Next, the State returned to the Principals issue. It asked the panelists seated in the jury box: "Does anyone find that the only responsibility one has is for what one does individually and alone?" (TR-6/23/87 - 327). The State then attempted to prepare the panelists for the principals instruction that the court would deliver at "some time down the line," but Casteel interjected with an objection, which was sustained (TR-6/23/87 - 328). This exchange followed:

> "Ms. Weintraub (for the State): It's basically what I am asking you, folks, is what we have been asking you all along, in the event that the Court instructs you what the law is in Florida on the situation that Mr. Acevedo gave us the words for --
>
> Mr. Koch (Casteel's counsel): Ms. Weintraub, excuse me.
> Same objection.
> It's the same question.
>
> The Court: Overruled.
> It's in the event of the instruction.
>
> Ms. Weintraub: And there is a word for it in law. It's called principal theory. But if you get an instruction on that--
>
> Mr. Koch: Objection. Objection.
> It has no qualification, no bearing on the qualifications of an individual to serve. It is irrelevant under 913.

> The Court: If the question is, will you be able to follow the law, of course, then we are going to get to the bottom line of that. I assume that's the direction here.
>
> Mr. Koch: Yes, precisely.
>
> Ms. Weintraub: Yes. That's my question. Folks, will you follow the law?"

Shorlty after Casteel began her voir dire of the fourth panel, prospective juror Tanna responded as follows to a question that was intended to gauge her comprehension of the concept of presumption of innocence:

> Ms. Tanna: I really -- I'm sorry. I don't know if I am being too personal but, for instance, I don't mean to be rude but when I look at this gentleman in the red sweater--
>
> Mr. Koch: Mr. Rhodes.
>
> Ms. Tanna: Mr. Rhodes, he makes me--intellectually, I understand what you are saying and I understand what Ms. Weintraub is saying, but emotionally he makes me think of Mr. Bundy who killed all those coeds. (TR-6/23/87 - 336).

Rhodes' counsel immediately moved to strike the panel, but that motion was denied (TR-6/23/87 - 337-338).

The State told the fourth panel that a grand jury had returned the indictment in the case (TR-6/24/87 - 519).

As it had done previously, the State appeared to be attempting to usurp the court's function by instructing the panelists on the law of reasonable doubt. During a lengthy discussion on the subject, the prosecutor asked a propsective juror: "(W)ould you expect. the State to prove its case to you

beyond all doubt or beyond a shadow of a doubt or to present an open shut (sic) case?" Bryant's objection to this comment was overruled (TR-6/24/87 - 603). Casteel and Rhodes requested that the court read the Florida Standard Jury Instruction on reasonable doubt as it had previously read the instruction on principals, but the court declined to do so: "I am not going to read it now because...I start singling out instructions and every other person gets up, I might have to read another one" (TR-6/24/87 - 606).

Once again, the State singled out Casteel before this fourth panel, asking the members about their reactions when they learned that "three men and a woman" were on trial as a predicate to asking whether they believed that a woman was capable of murder (TR-6/24/87 - 626-627). Casteel's objection thereto was sustained (TR-6/24/87 - 627-631).

The State then turned to the Principals issue and at sidebar, after a Casteel objection thereto, the trial court commented that the State was trying to "(m)aneuver us into a position where I have to read the law again. I am trying to avoid that" (TR-6/24/87 - 639-640).

Thereafter, the State inquired of the panel, "Does everyone understand that the court does sentencing in the State of Florida?" Casteel's objection was overruled (TR-6/24/87-663-664). When the State broached the subject later, Casteel again objected to the prosecutor's statement regarding the jury's "recommend(ing)" function, but this objection, too, was overruled

(TR-6/24/87 - 772/773).

At the conclusion of voir dire examination of the fourth panel, the final jury was selected and sworn (TR-6/24/87 - 812).

C. Severance, Redaction and Confrontation Clause Issues

All four of the defendants gave statements to the police. At the trial court's direction, these statements were redacted and references to co-defendants were replaced by pronouns or other non-specific designations. The court explained that its purpose in redacting the statements was "to avoid statements that incriminated other people, denying them the right to cross-examine on those points" (TR-6/15/87 - 5).

At the arraignment on the original indictment filed on May 17, 1984, the trial court stated: "If they are tried together, based on what I have been hearing, it's a good possibility there might be a severance. Is there? I don't know" (TR-5/24/87 - 95).

Prior to the commencment of voir dire, Irvine complained that the trial court's redacted version of his statement damaged him because it "takes away (Irvine's) exculpating explanations." The court advised that it would reconsider the redacting done by it to Irvine's statement in light of this objection (TR-6/15/87-5-8).

The court also announced that it would consider the objections made by one defendant as having been made by all of them (TR-6/15/87 - 8).

At this point, the State notes that the parties had not

discussed the form in which the statement made by Casteel to her daughter, Susan Garnett, and to witness Jackie Regan, should be admitted at trial (TR-6/15/87 - 9-10, 12).

Further discussion regarding the redaction and severance issues occurred at the completion of the voir dire phase of trial. Counsel for Irvine stated that he wanted to be furnished the final redacted version of his client's statement before making his opening statement. The State agreed that the statements needed to be completed before the making of the opening statements (TR-6/24/87 - 815-818).

The trial court then said: "I am not looking very favorable at the quote, unquote, new evidence...(I) will just diary your (State's) request to use as evidence" (TR-8/24/87-820, 821).

Following resumption of the proceedings on the next day, the trial court announced that it was "committed" to using "Fort Lauderdale" "for (the) purposes of preparing a transcript (of the defendants' typed statements) for presentation to the jury." The prosecutor asked whether the Fort Lauderdale company would be substituting words for those that were eliminated, and the trial court answered: "Yes, do whatever I ask them to. I want them to put in words with a slightly different voice but the words will be placed in there" (TR-6/25/87 - 842-844).

Next Casteel's counsel and the trial court discussed the redacting of Bryant's inculpating statement. Casteel's counsel argued that there would be no reference to a female in Bryant's

redacted statement. The trial judge explained that he had left the reference to a female in the Bryant statement because "that's part of her defense...I can go through Bryant's statement and eliminate all references to a female...working as a waitress at the restaurant, but then there's nothing to support Bryant's position" (TR-8/25/87 - 849-850). The trial judge added that he had initially wanted to keep Casteel "disguised" in the Bryant statement but that he had changed his mind because in her own statement Casteel had referred to herself as a waitress. "It's my thinking that you would want it to be known that she was a waitress, not the manager" (TR-8/25/87 - 851).

Casteel responded that a better approach would be to redact everything that was not an admission against the declarant's penal interest out of the defendants' statements, even if such redacted portion would be exculpatory to a co-defendant (TR-6/24/87 - 812). To this the trial court responded that exculpatory statements would not remain in the redacted statements (TR-6/25/87 - 856).

Counsel for Rhodes and Irvine then argued that parts of Bryant's statement inculpatory as to them should not be allowed into evidence. Counsel for Irvine further argued that if all references to co-defendants were to come out of Casteel's, Rhodes' and Irvine's statements, the same should also be done with respect to Bryant's statement (TR-6/24/87 - 857-859).

Then the trial court said: "It's clear other people are arriving at the house along with him and that's what I tried to

make clear in all of the statements--this is a joint venture" (TR-6/25/87 - 860). Counsel and the trial continued to discuss whether parts of statements exculpatory to co-defendants should be left in or redacted out of the defendants' statements. Casteel's counsel argued for the former position and Bryant's counsel argued for the latter (TR-6/25/87 - 867-868). The trial court called the situation a "mine field," but insisted that it is the law "to have every admission against his interest to have it admitted" (TR-6/24/87 - 869).

The trial court further stated that if a particular defendant testified, the other defendants would have the right to substitute in evidence that defendant's full inculpating statement for the redacted version thereof (TR-6/25/87 - 869-880).

The State told the trial court that all of the arguments that were being made in connection with the redacted statements had been made "against going forward with a joint trial. The trial court responded:

> "I am not even thinking about that aspect of it any more..(the appellate court) can lay to rest the issue of what's to happen in multi-defendant cases, with interlocking confessions..." (TR-6/25/87 - 881,882)

The State next announced it would introduce into evidence the inculpating statement that Casteel gave to her daughter, Susan Garnett, "if it conforms with the motion I filed this morning...that it be consistent with the redacted statement" (TR-6/25/87 - 885-886).

The State explained that on March 30, 1984, Casteel dictated an inculpating statement to her daughter, Susan Garnett, in the presence of a friend, Geneva Regan (TR-6/25/87 - 887-888). The trial court expressed its concern that if the statement were admitted, it "could make null and void everything we are doing" (TR-6/25/87 - 891, 892).

The trial court struck part of Bryant's statement identifying Irvine as the driver of the vehicle on the trip to Venecia's house the night he was killed, with "somebody" being substituted in lieu of thereof (TR-6/26/87 - 901-902).

Thereafter the trial court substituted "someone" for "y" and "z," commenting that "we don't know where this is going once we get these technical people working on it" (TR-6/26/87 - 912-913). Thereafter the words, "I kept my eyes closed" were redacted from Bryant's statement at the request of Bryant's counsel (TR-6/26/87 - 920-921).

There followed a discussion regarding whether language should be eliminated from Bryant's statement reciting that he was forced to ride with Irvine and Rhodes to Venecia's house the night Venecia was killed. The trial court granted this request (TR-6/26/87 - 922-929). Next, counsel and the trial court turned to Rhodes' statement. Irvine's counsel moved to strike language that such counsel felt would strongly imply that Irvine was in Venecia's bedroom with Rhodes, but the trial court denied such motion after expressing the opinion that the Rhodes statement suggested to him that Rhodes was saying that Casteel was in the

Venecia bedroom (TR-6/26/87 - 934-936).

Then counsel and the court discussed a reference by Casteel to the Amoco station where she met "someone" and where Irvine worked. Irvine's counsel moved to strike same because the jury would be able to deduce therefrom that Irvine was the person at the Amoco station to whom Casteel spoke about having Venecia killed. This motion was denied (TR-6/26/87 - 936-937).

Thereafter the trial court denied Irvine's motion to strike that portion of Casteel's statement that "it was her understanding when they left the restaurant that they were going to kill Art Venecia," Irvine's counsel arguing unsuccessfully that such recitation was inculpating to Casteel's co-defendants (TR-6/26/87 - 938). Motions by counsel for Irvine and Bryant to strike portions of Casteel's statement were denied (TR-6/26/87-939-941).

Casteel's counsel next raised the point that when the officers who took the various statements subjected themselves to cross-examination, the involved defense counsel would have the right to fully question them about all parts of the statements, both as a part of the constitutional confrontation right and of the right to cross-examine. The trial court's response thereto was that these questions had been dealt with by trial courts previously; "that's where I am and it may require restricting you" (TR-6/26/87 - 945).

The trial court added:

> These are not normal issues. It's just not

normal.

I heard what Mr. Koch said yesterday and a slow creeping smile came over my face but, you know, we are going to get through the thing even if it means restricting counsel and even if it means whatever.

We are going to get through it, through the trial, and I can sense at least the direction of his thought in the case.

But I am going to be consistent in the case. If I am consistently wrong, I will be consistent, so if I am keeping it out, obviously he's going to be restricted in some areas of his cross-examination. I mean that's obvious to me.

When he gets up there, some of these things you are talking about, when he gets ready to cross-examine a witness about what, isn't it true that Bryant also told you that when he was in the house that someone was forcing him to go into the room and watch what was going on out of fear for his life, I am just using that as for example, that pops out, he is going to get on cross, isn't it a fact he said that, or at least this point today, that's what he's going to do but I will deal with that at the appropriate time. (TR-6/26/87 - 946-947)

Irvine's counsel expressed the opinion that while there had been other joint trials with redacted statements, he had never seen one where the defenses were so antagonistic. The trial court replied: "In your head, they are so antagonistic, not in mine. If I thought that, I would have granted a severance in the case....The statements will go forward as I have already done them" (TR-6/26/87 - 949).

Immediately thereafter counsel and the trial court discussed Irvine's request for the deletion of a portion of

Casteel's statement, and the trial court agreed to strike language that Casteel had attributed to Bryant to the effect that "I explained that someone had tried to kill Art and tried to commit suicide." However, other language appearing thereafter which Irvine wanted stricken was left intact (TR-6/26/87 - 950-951).

Then the State expressed its concern that defense counsel would make a jury issue of the "dubbing" of the tapes, and the trial court stated:

> "Quite frankly, it doesn't matter about the objection. The point is, I am making, it doesn't matter what the objections, I have already decided we are going to do it this way and someone else will tell us whether it's right or wrong" (TR-6/26/87 - 954).

The State then argued its motion in liminie that defense counsel be ordered to not comment directly or indirectly in their opening statements on any co-defendant's presumptive decision to not testify at the trial. Counsel for Bryant thereafter misstating the law by asserting: "I understand the case law to be that a defendant cannot comment on the Fifth Amendment rights of another co-defendant" (TR-6/26/87 - 956).

The trial court granted the State's motion (TR-6/26/87-957-958).

Thereafter the State argued that the inculpating statement that Casteel gave to her daughter, Susan Garnett, was admissible under Section 90.803 (18)(e), Florida Evidence Code, and a statement of a co-conspirator (TR-6/26/87 - 960).

However, in connection therewith, the State conceded that this particular request was contradictory to all that the redacting of the other statements was supposed to accomplish (TR-6/26/87-962), and Irvine asserted that Casteel's counsel would "love to have Garnett's statement come in because it's the most self-serving declaration of a defendant I have ever seen" (TR-6/26/87 - 963).

The trial court announced it would not allow the State to utilize the "Casteel-Garnett statement" in its present form and probably not in any form in the joint trial of these defendants because "it's absolutely inconsistent with everything we have been doing during the last few months" (TR-6/26/87 - 969).

Irvine's counsel thereafter moved in liminie that Casteel's counsel be prohibited from referring to Bryant as "a sexual deviate, faggot, or queer" and from bringing out to the jury the homosexual relationship of Bryant and Venecia "as it related to the homicide of the two people in this case" (TR-6/26/87 - 973, 974, 980, 982). The trial court did not rule thereon.

D. The Trial

At the beginning of a new session of court the following day, the State announced: "six out the twelve main members of the jury are black." (TR-6/29/87 - 10)

At the opening of the trial despite the trial court's earlier ruling that the State would not be allowed to have introduced in evidence the statement given by Casteel to Garnett,

the prosecutor made a direct reference to the fact of the giving of such statement in his opening statement **(TR-6/29/87 - 37-39).**

Counsel then proceeded to give opening statements and while in the course thereof Casteel's counsel argued that Bryant had masterminded the killing of Venecia, hence, Bryant's counsel moved for a mistrial but that motion was denied **(TR-6/29/87-76).**

Thereafter counsel argued renewed motions for severance and Rhode's raised the objection that the State in its opening had referred to the statement given by Casteel to Garnett. (TR-**6/29/87 - 124-132)** Casteel's counsel added as a ground for her motion for a severance the antagonistic defenses as between Casteel and Bryant. **(TR-6/29/87 - 128-129)**

Prior to the first witness Casteel argued that where the State calls a witness through whom an incriminating statement by a defendant will be introduced, that defendant is entitled to have the balance of his statement also introduced even though it is favorable to him **(TR-6/30/87 - 138, 139).**

Bryant's counsel then requested the trial court to restrain Susan Garnett - and Geneva Regan - who were to be called as the State's witness - from saying anything that would be inconsistent with the redacted statements of the defendants and in support thereof he raised the confrontation clause argument **(TR-6/30/87 -139,** 140). The State assured the trial court that that objection would be met but the trial court observed that that response didn't direct itself to the objection

of Casteel's counsel, and thereafter the trial court adopted the State's logic that such would have to be dealt with when the matter should arise (TR-6/30/87 - 141, 142). The trial court then added:

> "...it is my intent to restrict that (i.e., inquiry into areas already redacted from the defendant's statements) so that therefore no names come out of this session that someone was not alone, someone was with them, someone else was present." (TR-6/30/87 - 143)

The trial court announced it would restrict cross-examination by requiring the involved witnesses "to leave out names the court has been trying to do throughout these proceedings." (TR-6/30/87 - 147).

Genevieve Regan, the State's first witness, said she was a friend of Casteel's. She testified that Bryant hired Casteel at the involved IHOP restaurant located in Naranja, Florida; that around Christmas, 1983, Casteel told her that Venecia was in North Carolina; and that in February, 1984, the IHOP parent corporation had taken over that restaurant. She said that Casteel (in approximately February, 1984) was living on Venecia's residential property because Venecia wanted her to take care of it while he was in North Carolina and that Casteel had thereafter moved into a new house. She said she knew Casteel drank alcoholic beverages (TR-6/30/87 - 148-169).

Regan further testified that "one morning" Casteel called her and that they went out for 2 or 3 hours during which period Casteel drank alcoholic beverages. She testified that thereafter she drove Casteel home and that Casteel went to bed and slept

(TR-6/30/87 169-172). She said that later Casteel reappeared and stated she had something she wanted to say and she wanted Susan (Garnett) to write it and she would sign and date it. (TR-6/30/87 - 172-173) Regan described Casteel as being "sober and normal" (TR-6/30/87 - 173). She said that Casteel further stated "she couldn't live with it anymore" (TR-6/30/87 - 173).

Regan said the Statement took 15 to 30 minutes and Casteel's daughter Garnett wrote down what Casteel said (TR-6/30/87 - 173, 174). Regan said that she overheard the statement and that Casteel had stated that Venecia and Fisher had been killed after she had contacted **"two** hitmen" to get in touch with **"Allen"** (Bryant) in order to kill Venecia. Counsel for Rhodes and Irvine both objected to the reference to Bryant and moved for a mistrial because of the denial of constitutional confrontation rights. The objection was sustained but the mistrial was denied. The trial court then instructed Regan to not name any names but Casteel's (TR-6/30/87 - 175-181).

On continued direct, Regan testified she heard Casteel say the following: Venecia was murdered on June 19, 1983; that the next day she went to Venecia's house to dispose of the body; that she described wrapping up the body and cleaning up blood; that a box containing Venecia's body remained in the garage to Venecia's house 4 to 6 weeks and that it was eventually put in a hole in the front yard, but only after it had been moved to the barn; that she carried food to Fisher after Venecia's death: and that **"someone"** told her that Fisher was getting **"nosey"** about

Venecia's absence and that they'd have to dispose of Fisher too (TR-6/30/87 - 181-191).

Regan testified, also, that Casteel said she told Fisher some men were coming to repair her roof and that it was okay to let them in; that when Casteel "returned" Fisher was dead; that Casteel was upset when she saw that Fisher's body was still at the table the next day: that $2000.00 had been paid to kill Fisher; that Fisher's body was placed in a hole dug by a forklift. After hearing all of this Regan told her roommate, Vicky Runzik, and went to the police. (TR-6/30/87 - 191-195).

Subsequent to the above, the trial court instructed the jury that he had instructed "the attorneys and certain witnesses" to not refer by name" to certain persons at certain times," with the result that neutral pronouns would be used (TR-6/30/87 - 196, 197).

On cross-examination of Regan by Casteel's counsel, she testified as follows: Casteel was a drunk; she never heard Casteel say she wanted Venecia killed and that this "motive" had come from another person; on the morning of the involved confession, Casteel got drunk and she couldn't walk thereafter; that Casteel said she was giving the statement in case anything happened to her; she never heard Casteel say she and another person planned Venecia's death; that she introduced a person to some men who would kill Venecia for that person; and that it was that person and not Casteel who wanted Venecia killed (TR-6/30/87 - 197-207).

Regan further confirmed that Bryant had spoken of Venecia's jealousy of him and that Venecia would do anything for Bryant; and that Felix (Bryant's new and younger lover) stayed at the restaurant.

On redirect Regan testified she heard Casteel say she had made financial arrangements in the amount of $5000.00 for Venecia to be killed. Defense objections, including Casteel's, were overruled with respect to the above question. Regan further testified that she heard Casteel say she'd benefit from the death of Venecia by being "taken care of financially the rest of her life" ...including "a job always" (TR-6/30/87 - 215-222).

Casteel's counsel objected anew to the restriction of the cross-examination of Casteel under the "doctrine of testimonial completeness," and because it restricted the right of cross-examination, and he thereafter moved again for a severance. At this juncture the trial court expressed its dissatisfaction at the continuous renewing of severance motions. There followed a lengthy dialogue between Casteel's counsel and the trial court of testimony that Casteel's counsel thought he would elicit from Regan if his cross-examination wasn't restricted, the essence of which that such cross-examination would demonstrate that Bryant- and not Casteel - was the moving and dominant party who initiated and brought about the death of Venecia. The trial court adhered to its ruling on this point but again emphasized it was because such cross-examination was outside the scope of the direct examination and not because such cross-examination was

inadmissible (TR-6/30/87 - 222-229).

The next State witness was Wayne Tidwell. He testified he was in the equipment rental business and that, in particular, he rented out backhoes (TR-6/30/87 - 369). He testified that on June 23rd or 24th of 1983 he received a message from "Allen (Bryant) or Dee (Casteel)" at 16961 S.W. 298th Street, which was Venecia's property and that when he went there a woman met him whom he then he identified as Casteel in court. (TR-6/30/87-369).

Tidwell then testified: that Casteel wanted a pit dug; that they negotiated a price and that he was to dig the pit one day and return on another to fill it in; that after he did fill it in Casteel paid him; that he remembered smelling a strong odor while out at the property that initial day; that Casteel called him subsequently to come back and cover up the hole which he did on July 10, 1983 (TR-7/1/87 - 369-387).

Tidwell further testified that in April of 1984, police called him and that at their request he returned to the Venecia property and redug the pit where two bodies were discovered (TR-7/1/87 - 387-389). At this point and through this witness the State introduced photographs of a head and the witness further described finding parts of bodies. (TR-7/1/87 - 399-402).

On cross-examination by Casteel's counsel, Tidwell admitted he didn't know - as between Casteel and Bryant - who had initially called him (TR-7/1/87 - 406). He further testified on that on one of the occasions when he was paid, he went to the

IHOP for the payment (TR-7/1//87 - 408-411). On cross-examination by Bryant's counsel, Tidwell testified as follows: That when he went to the IHOP - on the second occasion on which he was paid- Casteel introduced him to Bryant and Casteel paid him cash. However, he, also, admitted that he previously testified that he believed he was paid in cash the first time and by check the second time (TR-7/1//87 - 411-413).

The next witness was Dale Haskins. (TR-7/1/87 - 421, 422). He testified: that in response to his advertisement for an organ, he received a letter from Casteel, which was moved into evidence, and that Casteel sent back a description of an organ she said she inherited; that at some point a man identifying himself as Mr. Allen Casteel called him and discussed a price; that he came to Miami where "Allen Casteel" met him at the airport; that he thereafter met Casteel; that a bill of sale was prepared by him and signed by two persons (which was moved into evidence); that he gave cash to Casteel for the organ; and that he took the organ and left (TR-7/1/ 422-445).

Al Riccio was the next State witness. He testified that he met Casteel and Bryant in February, 1984, when he went to a closing on a boat he had purchased from an advertisment. The title, he said, was signed by Casteel with a power of attorney from Venecia, and the power had been notarized by "James Bryant." (TR-7/1/87 - 454-476).

Casteel's daughter, Susan Garnett, testified on behalf of the State at the trial. Garnett said that during a telephone

conversation in the Summer of 1983, Casteel had told her she had been asked to find someone to kill someone and that a week later she, i.e., Casteel, contacted someone in this regard (TR-6/30/87 - 239, 240). Garnett said she subsequently moved **"back"** to Homestead and went to work at the IHOP at Naranja where Casteel and Jackie Regan were working. (TR-6/30/87) Garnett said that subsequent to her return, she, her brothers, and Casteel moved into "Art and Allen's house" (TR-6/30/87 - 243). She said she did not know Venecia but that she did know Bryant through Casteel. She thereafter described the Venecia property and identified various photographs, including aerial photographs, showing such property (TR-6/30/87 - 244-250). Garnett said she was familiar with the hole on the Venecia property and after she added thereto that Casteel said "she and Allen" had told her about the hole, Bryant's counsel objected that she had used Bryant's name. The motion was denied but the trial court did instruct counsel to lead the witness thereafter to keep her away from other names. It also, at the same time, granted a motion that the State be directed not to summarize the testimony (TR-6/30/87 - 252-254).

Garnett said that Casteel said she had ordered the hole dug and that Casteel pointed out to her a steel-like horn, a pipe organ, and a wooden wardrobe box six feet by three feet (TR-6/30/87 - 254, 255).

She said that Bryant was not working at the IHOP at that time but that he would come in occasionally; that Bryant would

come in to the IHOP with "Felix, Freddy, and Juan Carlos," and that Freddy would pick up money from "Allen;" that that summer she sometimes drove Venecia's Buick Skylark; that she was paid a salary plus getting tips at the IHOP; that her mother gave her other monies for groceries from the IHOP; and that when her mother was in the hospital she would take monies from the IHOP to Bryant's house at the end of the day **(TR-6/30/87 - 259-262).** Garnett testified that Freddy and Juan Carlos lived in a camper by the side of the Venecia house after Venecia's death **(TR-6/30/87 -265).** She said she had known Irvine since she was **7** or **8** years old and that she considered him a friend; she described the Venecia house as getting sold; and said that after that Casteel and the family moved **"back"** to Homestead in a house on which Casteel put down **$7500.00 (TR-6/30/87 - 266, 267).**

Garnett said her relations with Casteel were good when Casteel wasn't drinking. She said that after the "primary corporation" took over the Naranja IHOP because it wasn't being paid properly, Casteel received no monies from the IHOP **(TR-6/30/87 - 269, 279).**

Garnett further testified that one day in March of **1984,** while Jackie Regan was at their house, Bryant came to visit Casteel and that he was hysterical because Casteel had taken monies from the closing on the Venecia property to close on Casteel's new house and that after Bryant and Casteel argued, Casteel gave money to Bryant **(TR-6/30/87 - 273, 274).**

Garnett thereafter testified that that night after she

got home from work she found a note from Casteel that she had gone to see Bryant regarding the money and that if anything happened to Casteel, she should call the police **(TR-6/30/87-275).**

At this point in the trial the State announced it intended to have Garnett identify the "typed version of her written statement" and that thereafter the State would move the redacted version thereof into evidence. Casteel's counsel objected to this proposed procedure and the trial court ruled that Garnett was to have the redacted version of her statement in front of her while she continued testifying but that said statement would not be taken into the jury room **(TR-6/30/87-277-284).** Irvine objected to the statement as not being an admissible co-conspirator's statement becasue no independent evidence of the alleged conspiracy had been shown, but this objection was overruled **(TR-6/30/87 - 285, 286).**

Thereafter Irvine objected to part of the redacted version thereof being read to the jury and Casteel objected to the **"partial** document" rather than the **"whole** document" being used. The trial court denied these motions **(TR-6/30/87- 287-289).**

Garnett testified that she wrote what her mother said so that if anything happened to her it would be evidence of what had happened so it wouldn't be her, i.e., Garnett's, words versus what Bryant would say **(TR-6/30/87 - 290).**

She said that both Casteel and she signed the statement **(TR-6/30/87 - 295).**

On cross-examination by Bryant's counsel, Garnett testified as follows: That Bryant kept control of the IHOP money and that she saw Casteel give money to him "numerous times;" that sometimes Casteel would take IHOP money to buy alcoholic beverage; that Casteel was unhappy in her marriage with Mr. Casteel and that Casteel said she would get rid of him and that we'd get a place to live; that it was her idea to write down what Casteel said about the deaths of Venecia and Fisher, etc.; that she (Garnett) knew the bodies were buried in the yard; that her mother had mood swings when she would drink; that she "partied" with (Freddie) (Juan Carlos) including drinking alcoholic beverages and using cocaine; that Fisher was killed before Casteel, et al, moved into the Venecia property; that Jackie Regan, Casteel's good friend, was present when Casteel made her statement to Garnett: that Casteel looked "pretty sober" when she gave the said statement: that nobody but Casteel told her that Bryant had planned to kill Venecia; and that Casteel explained to her regarding the various transactions involved in selling Venecia's property as they took place (TR-6/30/87 - 296-320).

Thereafter the State presented numerous witnesses to establish that Casteel and Bryant were selling Venecia's property and that Bryant was posing as Venecia (TR-7/1/87 - 480-493, 512-520, 519-609.

One of these witnesses was Richard Higgins. He purchased a piece of property (which had been Venecia's residential property) from an "Arthur Venecia" (who turned out to be Bryant),

and he said he was introduced to him by Casteel. He described the details of the sale and the title difficulties he later realized he had because "Arthur Venecia" was not the person who conveyed the property to him, etc. (TR-7/1/87 - 597).

Beginning a new day of trial the State called one Paula A. Cook, who was Rhodes' sister and who at all times material lived in Edinburg, Illinois.

Cook said that Rhodes had told her during their first telephone conversation that he had killed a man in Dade County, Florida, and that in their second telephone conversation he said he had done so because the man had owed him money. She added that Rhodes told her the killing occurred several months earlier and that the **"body/bodies"** had just been found by the police, which body/bodies they had disposed of after the killing(s). She said Rhodes told her his partner had told him the victim's name (TR-7/6/87 - 671).

Following (or during) cross-examination of Cook by Rhodes' counsel, the taped Rhodes confession that he had given was played outside the jury. In that tape recording, Rhodes said the following: That he talked with **"X"** about "roughing up" the guy; that they went to the victim's house with **"a** person" after picking him - Rhodes - up at the Amoco station; that he walked toward the bed (in Venecia's house) to "find the guy we was supposed to rough up and the guy jumped up and was cutting me;" that I kept pushing him toward the floor and heard "gurgling sounds and the man screaming; that he was in the bedroom but

didn't see blood there because it was too dark but that there was blood on his shirt; that the man went limp and he, i.e., Rhodes, ran out to leave before the police arrived; that the "third person" went "back" to the house with chains; that "X" was driving and that "X" gave him $700.00 and the rest of the money the next day; that he and "X" were each to get $1000.00; that he didn't see any money change hands between "X" and "the lady;" that he and "X" returned to the same place thereafter to repair a trailer for an old lady; that "X" said ". .the person we're doing a job for, she - she takes - she takes her meals to her;" that he got up on the roof of the trailer and looked at the floor inside; that he saw "X" with his hands around the lady's head and he was choking her "with both hands and that he had no doubt "X" was strangling her; that "X" talked him into returning to the trailer to carry the old lady's body to a hole; that "X" told him, "you got me and I got you and we'll just do this and we're square; and that "X" gave him $1000.00 **(TR-7/6/87 - 687-717).**

Counsel for Bryant's "no corpus delicti" objection to the tape was overruled **(TR-7/6/87 -718).**

Detective James T. Mitchell of the Sheriff's Department in Springfield, Illinois, testified that he took the above-described taped statement from Rhodes on June 7, 1986. After testifying that Rhodes was "mirandized," the trial court admitted the Rhodes tape "for record keeping, for record purposes, not for purposes of being submitted to the jury for consideration in the jury room." The trial court added, "It pertains to any of

the redacted statements." The trial court then said it would instruct the jury with "reference to how they are to receive the evidence that is presented against the person making the statement, and also the fact that the Court has redacted certain aspects of the tape and substituted certain sounds and syllables or pronouns." The trial court then stated that it observed that all the defendants had objected to this procedure (TR-7/6/87-736).

The trial court then advised the State it could publish Rhodes' recorded statement; Irvine's counsel objected to the State passing out "copies of the redacted statement;" and the trial court then gave instructions to the jury relative to redacted statements.

Rhodes' recorded statement was then published and thereafter transcripts thereof were retrieved from the jurors (TR-7/6/87 - 740-750).

The next State witness was Migdalia Ramos, who said she was Rhodes' girlfriend. On direct-examination she testified that Rhodes gave her quite a bit ofmoney in 1983, and, in addition, some jewelry consisting of two diamond rings and a watch. She said she sold the rings for money. The watch was admitted in evidence - over objection. Ramos said Rhodes told her that "just him and a friend got some jewelry" (TR-7/6/87 - 752-765).

The State's next witness, James Campbell, who said he was Fisher's cousin, identified the aforedescribed watch as being Fisher's watch (TR-7/6/87 - 774-780).

Thereafter the State called Metro Dade Homicide Officer James Parmenter to the stand. He said he went to the Venecia property where Higgins was residing, and he described Tidwell digging up the bodies, etc. He said that he thereafter went to Casteel's residence (TR-7/6/87 - 781-785).

Parmenter testified that he flew up to North Carolina to locate Irvine on May 3, 1984; that he was successful in this regard; that he read the Miranda rights to Irvine; and then Parmenter said, "the interview began by showing him a picture that we had brought with us of Dee Casteel, and he was asked did he know this person" (TR-7/6/87 - 796).

A Casteel objection to the said above-quoted answer by Parmenter was sustained upon the basis that the answer would constitute Irvine testifying about an alleged photograph of Casteel without Casteel's attorney having the opportunity to confront Irvine about the matter. Specifically addressing the matter, the trial court said, "...in other words, you're putting Irvine in the chair now and asking him to identify Dee Casteel" (TR-7/6/87 - 796, 799).

Thereafter Irvine mentioned "a yellow pacer" owned by "somebody he knew" (TR-7/7/87 - 801, 802).

Thereafter Casteel's counsel argued to the trial court that he should be allowed to cross-examine Detective Parmenter by asking him about statements by Bryant in his unredacted statement concerning the fact that he had previously taken a sum of money from another IHOP and that he had paid back the said sum of money

to avoid being prosecuted, the basis of the argument being, in effect, opening statements made by Bryant's attorney that Bryant had no motive to steal anything from Venecia because he had equal access to the Venecia home, etc., so that such counsel had created an issue dealing with motive and financial greed. The trial court deferred ruling thereon (TR-7/7/87 - 814-816).

The next State witness was Eddie Smith who said he worked for the Marin North Carolina Police Department. Smith said that he heard detectives reading Miranda rights to Irvine (TR-7/7/87-818-826).

Thereafter Detective John Parmenter resumed testifying for the State. He testified regarding his taking of the tape recorded statement from Irvine (TR-7/7/87 - 829-840).

Thereafter Irvine's redacted recorded statement was read to the jury with transcripts thereof being marked in evidence over Irvine's objections (TR-7/7/87 - 838 - 843).

Then Detective Parmenter read Irvine's sworn statement to the jury. He said that Irvine said the following: That in June, 1983, he knew **"somebody"** who would beat **"somebody"** up: that **"we"** met and was discussing money, to-wit: $2000.00, with a guy who lived out in the country; that **"we"** came back the next night and picked somebody up; that he, i.e., Irvine, was in the living room and heard a guy say, "don't hurt me" and that **"I** opened the door and got the daylights out of there;" that **"someone"** showed up that night with $1000.00 nad **"Z"** gave me another $500.00; that later on **"someone"** wanted tne one in the house trailer taken care

of for $1500.00, and that we would pose as carpenters; that the lady was sitting down eating and "someone" came back with something like a woman's pair of hose, and the next thing he knew "someone" put it around the lady's neck; that the lady was sitting in the chair when he left; that he got two payments of $750.00 the next day; that "we" went back out two days later and put the woman's body in a pit; and that the total amount of money he received for both endeavors was $1750.00 (TR-7/7/87-845-859).

Detective Parmenter said Bryant was alert when he gave his statement and he said Bryant initialed the Miranda form (TR-7/7/87 - 868).

Thereafter Casteel's counsel, Shapiro's counsel, and the trial court again discussed the desire of Casteel's counsel to introduce bad acts evidence against Bryant, following which the trial court said:

> "It may be proper for court rebuttal." (TR-7/7/87 - 862-865).

On cross-examination Detective Parmenter said that Bryant never told him that he had any prior knowledge of the murders and then he added: "On one version he claimed he was forced to go, and on a second version he was shown weapons but was not actually threatened with it during the ride" (TR-7/7/87 - 868). The detective said that Irvine gave a second statement in Miami, this one being written (TR-7/7/87 - 886, 887).

The detective said that Irvine told him that there was "a contract" for "me and him" to beat somebody up. Parmenter then

said that Irvine said that the word **"contract"** meant to kill somebody. Rhodes' counsel then removed for a mistrial and then a severance and both motions were denied (TR-7/7/87 - 898-899).

The next State witness was Police Officer Marc Richter, who took Bryant's statement on April 20, 1984. He said that Bryant was mirandized and that no threats were involved. The redacted version of Bryant's statement was then moved in evidence: copies were passed out to the jury; and the trial court instructed the jury that the said statement was only to be considered as evidence against the person making it plus advising them it had been edited by substituting neutral pronouns and alphabetical designations (TR-7/7/87 - 904-911).

The Bryant statement of April 20, 1984, was then read to the jury, and it contained the following recitations: He was a waiter at the Coral Gables Holiday Inn: he knew Venecia 8 years and "we were lovers;" he knew Fisher 6 to 7 years and **"we** were friends;" that he knew **"someone,"** who was **"friends"** with me, for 1 1/2 years: that he hired **"someone"** as a waitress; that he didn't know **"someone"** and **"someone,"** contacted me at home late and asked me to drive to the IHOP; that he went with them to Venecia's house and "the person" had a knife or razor in the car; that **"someone"** went into the bedroom and **"the** other person" stayed in the living room and that he heard Venecia say, "please, just take everything that's in the house" and then he heard him scream; I saw blood on both of his feet; someone picked up a money bag and some keys on the organ bench; that he got money out

of the safe and gave it to somebody; conversation was that it would be better financially for me with "Mr. Venecia" dead; that he checked into Naranja Lakes Motel and took a shower; that he drove to Venecia's house after he got off work and that **"someone"** told him to lay in the seat so Fisher wouldn't see him and that someone was going to inform her that Venecia and Bryant had gone to Virginia to visit Fisher's father; that three or four days 1ater **"we"** went back to Venecia's house and saw his body and the blood in the bedroom; that **"someone"** and I moved the body to the garage and put it in a wooden box or closet; that **"someone"** cleaned up the blood out of the bedroom; that four or five days later **"we"** returned to the house and moved the body in a pickup truck from the garage to a warehouse or barn on the property; that the body remained there 5 or 6 weeks until a hole was dug; that he made the call to have the hole dug; that Fisher was alive when **"we"** moved Venecia's body and that he didn't see Fisher again until she was dead and her body was bloated; thereafter **"someone"** moved into the house and then **"we"** started to liquidate some stocks held by E.F. Hutton; that he didn't recall if they split this money **"50-50";** that he signed a power of attorney authorizing the sale of Venecia's boat but that he didn't go to the closing and that of the $12,000.00 derived from the sale of the boat, he got $6000.00; that the trailer was sold for $4000.00 and he got $2000.00; that the camper sold for $4000.00 and he got $2000.00; that he had seen one of the persons before prior to going to the house with the two **"somebodies"** but had never talked

with that person; that Fisher kept jewelry inside the trailer but just a couple of diamonds but he didn't know where they were; that he signed the power of attorney on the boat "but that this had been going on for so long, I had been afraid for so long that I just basically went along with everything"; that because of the fight he had had with Venecia "a week or so before" (i.e.,before the death of Venecia), he was afraid he'd be implicated (in the killings) and that he was afraid of getting caught; that Venecia and he had physically struck each other in their fight which was brought about because he wanted to end their relationship and because Venecia threatened to tell Bryant's mother that Bryant was gay; that he never stole any money from the (Naranja) IHOP because everything was available to him but that a couple of years earlier he agreed to pay $2200.00 to the Homestead IHOP to repay money that had been stolen which he agreed to do to avoid trouble even though he hadn't stolen the money; that as it turned out he didn't pay the $2200.00; that he was in Coral Reef Hospital because of a drug overdose the day of his fight with Venecia; that he spent the night at the Naranja Motel because sometimes he would go out and drink; and that he currently resided in a rented house with Felix Gonzalez **(TR-7/7/87 - 912-956).**

After the reading of the redacted Bryant statement, it was moved into evidence by the State **(TR-7/7/87 - 956, 957).**

Detective Marc Richter was next questioned by the State regard the statement he had taken from Casteel. He said that

after he mirandized Casteel and asked her some preliminary questions, she told him she didn't have any further information to tell him and that at this point he told her that detectives were searching Venecia's property with digging equipment and that they had found one body. He said that her response was, **"Art's** mother" **(TR-7/7/87 - 970-979).**

Detective Richter testified that Casteel then told him that she knew that eventually the police would catch up with her and that she would now feel relief to tell the entire story about what occurred. He said that he thereafter took a formal statement from Casteel without the use of a stenographer and at this point in the trial, Casteel's said statement was moved into evidence over the objections of Casteel's counsel upon Fourth and Fifth Amendment grounds, and because there had been **"no** independent prima facie proof of corpus delicti of the crimes which this defendant is charged." Said objections were denied **(TR-7/7/87 - 981-983).** Additionally, the trial court at this point found that all the defendants had freely and voluntarily given their respective statements **(TR-7/7/87 - 985).**

Casteel's statement given to the police on April **19, 1984,** was then read to the jury, but beforehand the trial court again instructed the jury it was only to be considered against "the defendant giving that statement" **(TR-7/7/87 - 986).**

The highlights of the statement are as follows: That she is 45 years old; that she was contacted "by this individual" because "I had very stupidly made a comment at work three weeks

prior that I knew someone who would kill someone for a price;" that "someone" asked her to get a price to have Venecia killed; that she went to a gas station a couple of days later and asked "someone" to give her a price, etc.; that three days later "someone" came by the IHOP and wrote a figure on a napkin which she believed was $1250.00, and that he asked "if we wanted to go" he'd need a photograph of the intended victim, his home address, and the kind of vehicle he drove; that half of the price was to be paid at the outset and the balance when the job was done; that she told "somebody" about the price, etc., and that he gave her a passport photo of Venecia; that the price was upped to $5000.00, which was agreeable; that she received a telephone call from the Naranja Motel at 3:00 a.m., and that she spent the night at the motel; that between 11:30 p.m. and midnight on June 19, 1983, one of them showed up at the IHOP and that they got in the car and left to kill Venecia; that she went home and that she had to work the next day; that "we" rode out to Venecia's house on Sunday, the next day, and she saw Venecia's body; that she thought a knife was on the floor; that the next day "we" returned and dragged the body to a wardrobe closet; that "someone" had her go to Fisher's trailer within a day or so since she had to be fed and also to tell Fisher that her son was in North Carolina; that she made a beauty shop appointment for Fisher so she'd be gone when they moved Venecia's body; that she fed Fisher twice a day; that Venecia's body remained in the barn 3 to 4 weeks but it was moved "after it became necessary to eliminate Mrs. Fisher; that

the price for killing Fisher was $2500.00 which included burying her; that she delivered the money to kill Fisher which she got from the IHOP and that there was no doubt in her mind what the money was for; that Fisher was killed because of her anxiety over Venecia; and that she wanted it done "as painlessly as possible;" that she went to Fisher's trailer the day the killers came out and then "I went out and got drunk;" that "someone" came to the IHOP and got the rest of the money; that she went to Fisher's trailer the next day and Fisher was "sitting in the kitchen like she was asleep;" that on Monday night she returned to the gas station to complain that Fisher's body had not been disposed of and to complain about the missing jewelry; that two days later "they" finished the job; that forklift equipment and a backhoe were used to cover up the hole; that Venecia's absence was explained at the restaurant by saying he was in North Carolina; that funds disapperared from the IHOP; that she moved into Venecia's house *so* it wouldn't be vandalized but that the mortgage payments there were not being paid, the annual mortgage payment being $10,000.00; and that Venecia's property was disposed of (TR-7/7/87 - 986-1026).

In addition to the statement itself, a diagram drawn by Casteel was introduced in evidence (TR-7/7/87 - 1027).

Thereafter, over the objection of Bryant's counsel, Casteel's counsel was allowed to ask Detective Richter whether Casteel had related to him that "she relayed the information to someone" and whether "someone" said to her, "we have no choice,

we are going to have to eliminate her, too." The detective answered both questions in the affirmative (TR-7/7/87 - 1028-1035).

Thereafter Bryant's counsel cross-examined Detective Richter. The detective said Casteel told him she had to put the murder off because **"someone"** had attempted suicide and because of the fight about a week before the murder and that **when she** inquired as to when the job would be completed **"someone"** told her "the fag will take care of it or we'll fix him." Richter also testified that Casteel told him she felt confident the "fag" **"someone"** was referring to was Bryant (TR-7/7/87 - 1037, 1038).

At this point Bryant's counsel objected to Bryant's name having been used and Casteel's counsel argued that Bryant's counsel "had opened the door" by suggesting to the jury that Bryant had attempted to commit suicide because of a broken heart but that he, i.e., Casteel's counsel should be able to argue that the reason why Bryant attempted suicide is because he had tried to kill Venecia the night before and failed.

The next State witness was Dr. Charles W. Parkinson, a dentist, who said that Fisher had been his patient in St. Petersburg before she left there in 1981 and that he had her dental records. Dr. Parkinson said that Detective Parmenter had requested copies of Fisher's dental records and that he had furnished such to him. He identified his dental records and described the dental work he had done for Fisher (TR-7/8/87-1073-1076). The dental records were moved into evidence (TR-

7/8/87 - 1071-1080).

The next State witness was Dr. Richard Sorwinson, another dentist.

His specialty is forensic odontology. The essence of his testimony was that based upon his examination of the skull found in the pit and an examination of Fisher's dental x-rays from Parkinson, he was reasonably certain but "not absolutely certain" that the skull was Fisher's. He further testified that there was "a positive match" between the other "skull remains" found in the pit and the photograph of Venecia. (TR-7/7/87 - 1085-1130).

Casteel's counsel then argued that there was no need for the State to be allowed to introduce in evidence the actual skull(s), or photographs thereof, because there was no question as to the ages of the deceased persons and because Dr. Sorwinson had given his above-described findings and that therefore such testimony would be cumulative. However, the trial court disagreed and stated that he did concur with such objection "because of the peculiar nature of the case and the remains involved" (TR-7/7/87 - 1141).

The next State witness was Dr. Valerie Rao who described herself as being "a medical examiner for Dade County" (TR-7/7/87 - 1140). She testified that she went to the Venecia property in April of 1984, and that she saw a backhoe there. She identified a photograph of the involved wooden box and said there were "remains" in the box. She described the remains. She said that her autopsy thereof revealed that there was no evidence of

gunshot wounds with respect to Venecia's remains; that there was no to determine what hit the jaw of Venecia; and that the injury to Venecia's head was **"anti-mortem."** She said she certified Venecia's death as **"Homicide** by Unspecified Means" and that she reached such opinion "by a reasonable degree of medical certainty" (TR-7/7/87 - 1140-1169).

Dr. Rao testified regarding the autopsy she performed with respect to Fisher, which included examining her skeletal remains and dental plate, that she, too, was the victim of "Homicide by unspecified means," and she said on cross-examination that the term "unspecified means" meant "I don't know" (TR-7/7/87 - 1169-1184).

The State then rested (TR-7/7/87 - 1187, 1188). Casteel's counsel thereafter presented his argument for a judgment of acquittal. He first argued that the trial court should have not allowed in evidence any of the inculpating statements-confessions of Casteel because there had been no or an insufficient "independent corpus delicti of the crimes for which the defendant, Dee Casteel, is charged."

Such counsel also argued that the State failed to establish that the two deaths were caused by the criminal agency of another. These motions were denied (TR-7/7/87 - 1189, 1190).

Casteel's counsel then argued that his earlier denied motions to dismiss the burglary charge against Casteel with respect to Venecia's house should be granted because Bryant had let Rhodes and Irvine enter thereto. This motion was denied (TR-

7/7/87 - 1191-1195).

Thereafter Casteel's counsel argued that the Felony-Murder aspect of Count II should be thrown out with respect to Casteel because a principal cannot be charged with felony murder. More specifically Casteel's counsel argued that the presence of a defendant is required at the crime for a defendant to be able to be guilty of felony murder unless that defendant "had intent for the crime to be committed." The trial court agreed with Casteel's counsel on this argument (TR-7/7/87 - 1200-1204).

Casteel's counsel then objected that the State had no evidence had been established to prove "the date as alleged in the Indictment and the State responded that its "on or about" language was sufficient to prevent the defendant being placed in double jeopardy. That motion was denied (TR-7/7/87 - 1204-1206).

Thereafter the trial court denied counsel for Casteel's lack of intent argument with respect to Counts I, II and IX (TR-7/7/87 - 1205-1206).

The next challenge of Casteel's counsel was as to Counts 6, 7, 8, 9, and 10.

However, Casteel's motion for a judgment of acquittal as to these counts was denied with the exception of Count 10 (TR-7/7/87 - 1217).

Thereafter followed the judgment of acquittal motions in behalf of Bryant, Irvine and Rhodes (TR-7/7/87 - 1217-1240).

Defendant Casteel then testified in her own behalf. She described in detail her alcoholic consumption history and habits,

testifying she had consumed alcohol since she was 15 years old; that all of her five husbands were heavy drinkers, and that she averaged drinking a quart of liquor per day. She said that her relationship with her only child, Susan, had deteriorated since she remarried when Susan was 14 years old. She described her prior employment at various restaurants from which she was fired because of drinking problem (TR-7/7/87 - 1250-1260).

Casteel testified that Bryant hired her to be a waitress at the involved IHOP in February, 1983, and that sometime thereafter she thought Bryant was going to fire her because of her drinking after she learned Bryant wanted to meet with her. However, she said that such was not the purpose of their meeting and that instead he asked her to go for a ride and then inquired of her if it was true that she knew somebody who would kill someone for $500.00, which information he had heard because "it was a standing joke between Mike Irvine and me and my "husband" that Irvine had offered to kill my husband for $500.00 (TR-7/7/87 - 1261-1267).

Casteel next testified that she told Bryant she might get somebody and she said she felt relieved and gratified she wasn't going to get fired. She said that Bryant thereafter gave her a date (for the killing of Venecia) with respect to which he could have an alibi and she "acted as a courier" three or four times with respect to price negotiations. She said she delivered money to Irvine which Bryant had given her. She said Irvine told her he'd get a friend and they would go shake up Bryant but that

there'd be no killing. Casteel said that Venecia did not give her **$1600.00** for a divorce; that Bryant had shorted the receipts; that he and Bryant had a big argument; and that Bryant threatened to kill him **(TR-7/7/87 - 1267-1276).**

Casteel said that Bryant and Venecia had a homosexual relationship; that Bryant was unhappy in it; and that Bryant had a new love interest in the person of one Felix Gonzalez **(TR-7/7/87 - 1276-1278).** She thereafter said she called up Irvine and told him to forget shaking up Bryant that night because he was in the hospital; that she thereafter took clothes to Bryant at the hospital; that she brought liquor for both Bryant and she and they both drank and she did until she was drunk; and that Bryant was furious because Venecia hadn't been killed **(TR-7/7/87 - 1278-1287).**

Casteel testified that Bryant wanted her to kill Venecia and that she had no personal desire to see Venecia killed. She said she never met Rhodes previously. She said that on the date of Venecia's death, Irvine came to the IHOP and Bryant went with him. She said she learned of the killing when they returned and Bryant told her it was done (but she also said she **"actually"** learned of it the next day) **(TR-7/7/87 - 1287-1294).**

Thereafter Casteel said she felt morally responsible for Venecia's death. She said she didn't remember if Bryant or she made the next delivery of money. She said Bryant said he should have had Venecia's mother killed whom she said she had never previously seen. She said she offered to care for Fisher so that

Bryant wouldn't have her killed. She said that Fisher was concerned regarding Venecia's absence **(TR-7/17/87 - 1294-1299).**

Casteel said she made a hair appointment for Fisher so they could move Venecia's body. She testified that her daughter, Susan, returned from Ft. Lauderdale and went to work at the IHOP. She said Bryant promised her a lifetime job at the IHOP and that she was promoted to assistant manager but that Bryant was in charge and that he was pilfering receipts. She stated that Bryant let her take out money for her bills and that he wanted her to take $100.00 out and give it to Felix, who was a practitioner of the Santeria religion, to buy two doves to be released to determine if Bryant and Felix would remain together (which they would if the doves flew off together). Casteel's attorney also wanted to ask Casteel if Bryant drank a thimble full of chicken blood to show the depth of the Bryant-Felix Gonzalez homosexual relationship but the trial court wouldn't allow this because it would allegedly be prejudicial as to Bryant. She said that Felix, Bryant and Susan partied together **(TR-7/7/87 - 1299-1316).**

Casteel said that Fisher saw Venecia's truck and wanted to know why he hadn't come to see her and that when he learned of such, Bryant wanted her to get hold of Irvine and get a price for killing Fisher. She said that Bryant described Susan as his **"mule"** and that she was therefore of the opinion that Susan was transporting drugs for Bryant..although Susan denied such. However, immediately thereafter the trial court denied a Bryant

objection as to the question of what Susan had said to Casteel about allegedly being involved in transporting drugs for Bryant but changed this ruling in the face of counsel for Casteel's argument that such was not hearsay but rather went to show Casteel's state of mind. Casteel said that Susan thereafter told her she, i.e., Casteel, was "an alcoholic, a loser, and she was not going to end up like her mother." She said she, i.e., Casteel went home and got drunk. Casteel said the next day she contacted Irvine in behalf of Bryant. She said she had no desire to see Fisher killed (TR-7/7/87 - 1316-1329).

She testified she went into the hospital a short time later after she collapsed for excess drinking. She said she moved into Venecia's house in late August or September and that doing such was Bryant's idea because he felt someone should be on the property in case people starting asking questions. She said that at this point she was beginning to fear Bryant. She next testified regarding Venecia's property and the disposing thereof, and said she was arrested on April 20, 1984 (TR-7/7/87-1329-1345).

At this point the trial court told counsel:

> "If we were to follow the procedure that we said we would, we were trying three, four separate trials, then the State for a defense against each defendant separately, and therefore now defendant Casteel has taken the stand but right now the only party interested in cross-examining, basically, is the State." (TR-7/7/87 - 1359)

Casteel's counsel next - out-of-turn - had the records of the Coral Reef Hospital regarding Casteel's hospitalization for

collapsing introduced in evidence (TR-7/7/87 - 1358-1360).

Thereafter the State cross-examined Casteel, and in response thereto she testified that she was a good waitress even though she drank alcohol, etc.; that she described Venecia as being "a nice guy" and that he couldn't have been a better boss; she said Venecia purchased a Lincoln Town car for Bryant's; she denied knowing anything about Venecia's financial holdings except to say that the IHOP'S business was good; that she knew Bryant and Venecia about the same length of time and that she knew Irvine 7 or 8 years; and that she and her husband were not getting along well that summer and that she had since divorced him (TR-7/7/87 - 1360-1373).

At this point the State asked her if she thought it would be easier to kill her husband rather than to go through "complicated divorce proceedings!! and she denied such was the case (TR-7/7/87 - 1373, 1374).

Casteel further testified on cross-examination by the State that Bryant was 15 to 16 years younger than Venecia; that Bryant liked to go and Venecia liked to stay at home; that the two of them had "physical fights;!! she described (again) going to see Irvine for Bryant and negotiating a price of $1250.00 for the killing of Venecia; she described the fight and the setting of the new date to kill Venecia; and she redescribed other details in advance of the killing of Venecia (TR-7/7/87 - 1374-1394).

At this point, the State brought forth a copy of a statement made by Casteel and had her look at it. He thereafter

proceeded to further cross-examine her. She had initially said she did not know "they" were going to kill Venecia; she subsequently admitted that she had said in her sworn statement that she did know they were going to kill him; and she said after that that when "they" returned, she thought they had robbed Bryant (TR-7/7/87 - 1394-1404).

At this juncture in the trial, Irvine and Rhodes objected and moved for a mistrial (respectively) upon grounds that the State had used Casteel to elicit information furnished by Bryant which denied them confrontation rights with respect to Bryant. These were not granted (TR-7/7/87 - 1405-1408).

Casteel then testified as to details Bryant told her about, such as his being at Venecia's house when Venecia was killed, i.e., his throat had been cut; that the house "was a mess;" and that he wanted "my help." She described Bryant driving her to the Venecia house and she said what they did there then and the next day. Casteel was then further questioned about Fisher and that Bryan had said they'd have to eliminate her, for which she negotiated a price (TR-7/7/87 - 1408-1422).

Casteel's counsel then argued to the Court that the State shouldn't be allowed "to cross-examine by insinuation" and, in this regard, he cited the example of the State having previously asked a question of Casteel as to whether she had wanted Irvine to kill her husband. The trial court sustained the objection (TR-7/7/87 - 1425).

Following the denial of another motion for mistrial in

behalf of Rhodes, the State asked Casteel what the price for killing Fisher was to be and how the **"killers"** were to divide it. Then there was a Casteel objection as to the State asking leading questions with the trial court impliedly denying same and thereafter Casteel testified further as to details in her involvement in the overall affair, during the course of which the State asked Casteel if she served Fisher **"the** last supper" (TR-7/7/87 - 1425-1444).

The balance of Casteel's testimony that day on cross-examination constituted a repeating of her direct examination testimony as to details that mostly occurred after the deaths of Venecia and Fisher (TR-7/7/87 - 1458-1518).

Casteel's cross-examination by the State continued the next trial day and she continued repeating details she had covered on direct examination (TR-7/7/87 - 1518-1538).

Casteel there testified as to the details of her giving her 62-page statement. When the State tried to make the point in its questioning of Casteel that in her statement of March 20, 1987, to her daughter, she never said she was sorry regarding the deaths of Venecia and Fisher, Casteel's counsel moved for a mistrial. That motion was denied (TR-7/7/87 - 1573).

Next followed the cross-examination of Casteel by Bryant's counsel. This questioning began by Bryant's counsel asking Casteel how long she'd been a notary public and if she knew how to transfer property. He then asked her if she had ever worked for a firm named Miller Gas and at this point Casteel's

counsel objected that what Bryant's counsel wanted to bring out was that at this job in the 1960's, Casteel was accused of embezzling money and made some sort of restitution. The State said it agreed with counsel for Casteel's argument that the involved Bryant inquiry dealt with "a collateral crime" and wouldn't be admissible under the Evidence Code. Bryant's counsel abandoned this inquiry (TR-7/7/87 - 1576-1578).

Bryant's counsel questioned Casteel relative to where the funds came from in 1983 to help her other daughter buy a house and Casteel said she inherited $2000.00 from her grandmother (TR-7/7/87 - 1582, 1583). Such counsel challenged Casteel's contention that when Bryant had first mentioned he wanted someone killed, he didn't mention Venecia's name and she explained that the apparent contrary answer she had given Detective Richter by explaining: "During the pre-interview the three officers wanted all this included at one time rather than going into the second conversation" (TR-7/7/87 - 1583-1585).

Bryant's counsel next held up a police report and asked Casteel if it wasn't true that Irvine had told her "the fag will take care of it or we'll fix him." The objection of Casteel's counsel thereto was not granted (TR-7/7/87 - 1586, 19587).

Casteel next repeated the earlier testimony she had given relative to her conversations with Irvine before Venecia's death. During the course of such testimony, Bryant's counsel tried to demonstrate to the jury that there was a discrepancy in her testimony as to whether Bryant was with her when she first met

Fisher or when she agreed to feed Fisher. She said that Bryant said directly to her that he was sorry he didn't have Fisher killed initially **(TR-7/7/87 - 1590-1596).**

She said that prior to June **19, 1983,** she did not have access to the IHOP office. She said she did not know if the brown bags contained drugs and that Bryant told her Susan was handling drugs **(TR-7/7/87 - 1598-1601).**

Casteel said she received **$3600.00** from the sale of the Venecia property and didn't receive half of the monies derived from that sale. She said she told "Jackie," who had been present when Bryant had come to her house and argued with her, that she was giving Susan a statement "to get it off my chest" and because she was afraid of Bryant. She said that before Venecia's death, she knew about Venecia's camper and his having the IHOP but not the rest of his finances **(TR-7/7/87 - 1601-1607).**

Casteel said she didn't tell Bryant how to liquidate the stocks and that, in fact, she didn't know there were any stocks to be liquidated, but she did concede upon being specifically questioned by Bryant's counsel that she was in the same room when Bryant was on the telephone talking about the stocks **(TR-7/7/87-1609-1612).**

She said she secured a loan on Venecia's truck at Bryant's request. At this point Casteel's counsel argued that Bryant's counsel was attempting to go outside the indictment and beyond the direct examination of Casteel to show her commission of collateral crimes.

Thereafter, Casteel gave further testimony about her having gone to work at the IHOP at which time Bryant was the manager. She said that on the night of Venecia's death, she was not waiting at the restaurant and she did not call Bryant and tell him to come to the restaurant. She said she didn't force Bryant to go with Irvine that evening. She said her role was no more than that of a courier and that she simply carried information back and forth in an envelope (TR-7/7/87 - 1612-1628).

She said she did request that Fisher be killed as painlessly as possible. She said that her saying it was "no go" on the first date when Venecia was supposed to be killed meant that Bryant was to not be robbed at that time. She said that she had heard Bryant say Venecia had given him a Lincoln Continental but that she did not hear Bryant say Venecia gave him jewelry. She said that Bryant and not she had called the backhoe company. She said that - referring to after Venecia's death - she always called Bryant before taking money from the IHOP for herself but that she did not do so before paying IHOP bills (TR-7/7/87-1028-1135).

Thereafter Irvine's counsel cross-examined Casteel. She said she never thought Irvine was a killer and the reason why she went to him (with Bryant's request) was because of jokes Irvine made about "knocking off" her husband and because Bryant was pressuring her. She said that Irvine told her he would not be killing anybody but that he would take Bryant's money. She said

that everyone knew no killing would be taking place but Bryant. She said that Irvine had no intention of killing Venecia even after the price had been raised to $5000.00, instead of $1250.00. She said the "rip off" of Bryant was to take his money and not do the killing, rather than to take him out to rob him and that the reason why Bryant wanted to go to the house when Venecia was to be killed was to protect his investment (TR-7/7/87 - 1635-1646).

Casteel said she called Irvine the originally scheduled night to tell him to forget it that night because Venecia was not home and not because Bryant had tried to kill Venecia. She said she had only spoken to Rhodes one time at the gas station (TR-7/7/87 - 1646-1648).

On cross-examination by Rhodes' counsel, Casteel testified she was drinking heavily when she heard Rhodes say: "I don't plant them, I just bury them" (TR-7/7/87 - 1649-1651).

On cross-examination by the State,, Casteel conceded she had told Detective Richter that it was Venecia who was to be killed but she went on to explain that there were a lot of things Detective Richter and the other involved police officers didn't want included in the statement because such things didn't get to "the nitty gritty" (TR-7/7/87 - 1650-1661).

At this point the counsel for Casteel announced that he rested and immediately thereafter Bryant's counsel announced that he rested without having called his client to testify. The trial court then announced that Bryant would have to submit to an

inquiry by it regarding his testimony without testifying. Such counsel again announced that their respective clients rested (TR-7/7/87 - 1663-1670).

Irvine's counsel thereafter called his client to testify in his own behalf. The essence of his testimony on direct examination was as follows: Casteel had approached him as to whether he would be willing to kill somebody and he said he thought she was kidding but she said she wasn't; he said she approached him again and told him the guy she worked for wanted to have his lover killed; he said Casteel told him Bryant wanted Venecia killed so he could take his money and have a good time; he said he told her he didn't intend to kill anybody but that he would set them up and take Bryant's money; he said he asked "Bill" if he would go along so they could make some money; he said that he and Rhodes went to the IHOP and that Casteel and Bryant were there; he said that Rhodes masqueraded as the guy who would do the killing; he said they told Bryant the price would be $2000.00 with one-half of that to go to each of them; he said Casteel brought an envelope to him that night with $1000.00 in it and she said that the "contract" was to be performed the next week; he testified that they didn't intend to go to Venecia's house and that, rather, it was Bryant who wanted to go to the house (when they went there two or three weeks later); he said Casteel told him Bryant tried to kill Venecia himself the night they received the $1000.00; he said that Casteel had called him and that Bryant got on the phone and wanted to know why they

hadn't killed Venecia and that he'd now pay $5000.00 for the job to be done; he said that he and Rhodes went back to the IHOP the next morning to set the deal up; he said that when they did go to Venecia's house, Bryant told them the way; he and Bryant opened the door to the house and went in but then came out again; he said that Rhodes went down the hallway and he heard a man saying "don't hurt me," and that he, i.e., Irvine, went back outside; he said he didn't know what happened "in the other room;" he said he was going out of the house as Bryant was coming up; he described them leaving; he said he drove Bryant back to the IHOP; and that the next morning Casteel gave him some money in an evelope which he said he gave to Rhodes who gave him half the money (TR-7/13/87 - 3-25).

Irvine next testified on direct examination regarding his involvement with Fisher and as was the case with respect to Venecia, he essentially denied any responsibility in the killing of Fisher. He said he saw Casteel at Fisher's trailer when he went there with Rhodes to do some roof work on the trailer and he said that Casteel thereafter left. He said he didn't know Fisher was to be killed. He said that he "stayed" in the kitchen talking with Fisher when Rhodes came up with a pair of pantyhose and strangled her. Irvine testified that that afternoon Casteel gave him an envelope and that he again gave the envelope to Rhodes. He said he was offered and took half the money. He said he went back with Rhodes to dispose of Fisher's body (TR-7/13/87 - 25-34).

Irvine testified that the police wanted him to implicate Casteel more in his May 16th statement because "I had not implicated her enough" (TR-7/13/87 - 47, 91).

He said he did nothing to stop the killing of Fisher and that he did get more money thereafter. He described he and Rhodes putting Fisher's body in a pit.

On cross-examination by Bryant's counsel, Ivine repeated that he and Rhodes had not compelled Bryant to go with them to Venecia's house (TR-7/13/87 - 114).

On redirect examination by his own counsel, Irvine reiterated that he "implicated" Casteel because they said they needed to have him do such and that he'd be home in a couple of weeks. Thereafter Irvine's counsel rested (TR-7/13/87 - 139, 142).

Rhodes next testified as a witness in his own behalf. On direct examination he maintained that Irvine brought up with him "roughing up a guy to make some quick money" (TR-7/13/87 - 144, 145). He said that he first met Bryant when Bryant accompanied them when he went out to pick him up and he said he didn't have a knife or razor and that to his knowledge neither did Irvine. He said he didn't know Bryant's name at the time and that this person opened the door and that they all went in but that said person came back out shortly thereafter. Then Rhodes testified that he "went over" and hit the bed and that "the guy" came up out of the bed that thereafter he, i.e., Rhodes, got out. He said that he then hollered and he and the guy were wrestling and

that he hit the guy's head. He said that they both "went down" and that thereafter he ran away from the house. He said that Bryant then went into the house where he remained three to five minutes (TR-7/13/87 - 145-148).

Rhodes said he did not kill Venecia and that he learned he had been killed the next day. He said Venecia was alive when he left the house.

Regarding Fisher, he said that he and Irvine went back to the property to repair the roof on Fisher's trailer and that when they arrived he saw Casteel sitting in a white Buick. He said that after he went up on the roof he and Irvine followed "the old lady" into the trailer so that she could show them a hole in the floor and he said that thereafter when he came up the hallway toward the kitchen he saw Irvine behind her with both of his hands behind her head and he told him he was crazy and that he, i.e., Rhodes, was getting out. He denied having killed Fisher.

On cross-examination by the State, Rhodes was asked if he had ever been convicted of a crime and he stated he had. His attorney objected thereafter because the State had not produced "rap sheets."

Then the State began questioning Rhodes regarding a statement he had given and Rhodes contended the State had never allowed him to see the unredacted version of the handwritten statement "because this one I have read there is some writing missing." The prosecutor made no response to this (TR-7/13/87-159-170).

Rhodes next testified again on further cross-examination by the State as to the details involved in the Venecia affair. He said he heard gurgling sounds while he was struggling with Venecia. He said he was paid $780.00 to help rough a guy up and that Irvine cheated him out of $350.00 (TR-7/13/87 - 170-184). Rhodes then again described the details of the Fisher affair. He elaborated about the death of Fisher by explaining that he saw Irvine with both his hands around her neck with her struggling. He said he didn't try to help Fisher because Irvine was bigger than him and he added that he wasn't very proud of himself (TR-7/13/87 - 184-194).

Rhodes testified that Casteel's statement was wrong and that he had told her he didn't know what she was talking about when she came looking for Irvine because she had paid $2500.00 to include burying Fisher which hadn't been done. He said that Casteel "was bombed out of her mind." He said he needed money badly (TR-7/13/87 - 194-205).

Following this testimony, Bryant's counsel renewed his motion for a severance because of antagonistic defenses, which was denied, and then the State announced it was seeking to introduce the unredacted statements of the three defendants who had just testified. Bryant's counsel objected thereto and he thereafter stated that he wanted to have some of Bryant's statements that had been redacted put back in again. The State then announced it had no objection to the entire Bryant statement coming into evidence but counsel for Casteel, Irvine and Rhodes,

all voiced their objections, Casteel's being that redacted portions of Bryant's statement were accusatory as to Casteel and that since Bryant didn't testify, Casteel would thereby be denied confrontation rights. The trial court indicated it would not allow Bryant's unredacted statement in evidence (TR-7/13/87-222-727).

Regarding the unredacted statements of the three defendants who testified and having heard the objections from counsel for Casteel and Irvine and from the State, the trial court ruled that he would allow Rhodes' and Irvine's unredacted statements in evidence but that "we need to do some work on Casteel." The objections of Casteel's counsel, including the provisions of Section 90.403, Florida Evidence Code, i.e., of unfair prejudice, and that such would be cumulative to what the jury had already heard were overruled (TR-7/14/87 - 4-12).

Rhodes' counsel objected that the playing of the unredacted tape recording of Rhodes did not constitute rebuttal evidence for the State but this objection was de facto overruled by the playing of the said tape recording to the jury. Casteel raised an objection to the jury being given transcripts of the tape to read while listening to the tape recording and, further, that there was a sentence on the transcript but not on the tape. These objections were not sustained and the trial court instead charged the jury that regarding any discrepancies, the jury should rely on the tape and not the transcript (TR-7/13/87 - 12-38).

Regarding Casteel's statement the State conceded that it did not constitute rebuttal evidence but urged that it nevertheless should be published to the jury as "a truthful presentation of the evidence." The State did concede that the language on page 20 of Casteel's sixty-four page statement wherein she recited what Bryant said about Irvine would deny confrontation rights to Irvine since Bryant didn't take the stand (TR-7/13/87 - 49-54).

Rhodes' counsel then objected to that part of Casteel's statement where she said she didn't go with the other three defendants to Venecia's house because she said Rhodes "is vicious and seemed to enjoy his work" but Casteel, on the other hand, said that part of Casteel's statement should be left in because "that is part of our defense." Casteel's counsel also argued that that part of her statement should be left intact because of the Doctrine of Completeness (TR-7/14/87 - 57, 58).

The trial judge then said that the unredacted statements should be allowed in evidence either as rebuttal or the State could be allowed to open its case but that either way, "the information needs to be put before the jury..." (TR-7/14/87-63).

However, the judge added that even if a scintilla of evidence justified Casteel's defense of fear as to why Casteel didn't go with the other three to the house, then Casteel's comments regarding Ivine and Rhodes knowing karate should be allowed in evidence. He ruled with Casteel on this point (TR-

7/14/87 - 69).

Thereafter the trial court instructed the jury relative to parts of Casteel's unredacted statement being redacted (TR-7/14/87 - 80).

Irvine's unredacted statement was then read to the jury (TR-7/14/88 - 82-99).

Then Casteel's partially unredacted statement of April 19, 1984, was read to the jury (TR-7/14/87 - 99-161).

Then the jury charge and legal argument conference commenced. After the State announced that it did not concede "lack of presence" on the part of Casteel to be a bar to her being liable to the felony murder charge relative to Fisher (becasue she was allegedly at least constructively present), it conceded that the presence requirement as to Casteel with reference to Venecia had not been met under the alleged dicta in State v. Lowery, 419 So.2d 621 (1982), although the State said it did not agree with this dicta. The trial court then announced it would be governed by the Lowery case and it granted Casteel's motion for judgment of acquittal as to Counts II and IV, the two first degree murder counts (with respect to the felony murder under a Principal theory -- but not with respect to Casteel allegedly being a hirer) (TR-7/14/87 - 172, 173).

Casteel then argued for a judgment of acquittal with respect to the burglary counts with respect to the homes of each of the victims because each had given permission for same to be entered. This was denied.

Thereafter all pre-trial and trial motions of all defendants, including all severance motions, were deemed as being renewed by the trial court and they were all redenied (TR-7/14/87 - 182, 183).

Thereafter Casteells counsel argued their proposed jury instructions.

Casteells counsel announced his intention to comment on Bryant's failure to testify since his counsel had "absolutely," in his opening statement, committed Bryant "to testify or suffer the consequences" (TR-7/14/87 - 305, 307).

The conference then turned to the Florida Standard Criminal Jury Instructions.

Casteel's counsel again argued his right to comment on final argument concerning the failure of Bryant to testify and in support thereof he pointed out statements Bryant's counsel had made in his opening statement as to statements allegedly made by Casteel to Bryant and specifically that Bryant had said that Casteel said to Bryant, "Dee says go with these men" (to the Vencia house the night Venecia was killed). It was the contention of Casteells attorney that he should be allowed to argue that Bryant failed to prove this allegation by not testifying (TR-7/14/87 - 319-327).

The trial court ruled as follows: "I am simply going to rule that...you may not comment upon any defendant's failure to take the stand" (TR-7/14/87 - 326-327). The judge then announced that no redacted statements would be physcially submitted to the

jury (TR-7/14/87 - 336, 344).

Thereafter Casteel's counsel moved for a mistrial based upon the trial court's ruling that he would not be able to argue to the jury regarding Bryant not having testified and such counsel reminded the judge that he had moved for a severance because of antagonistic defenses and denial of confrontation rights at the conclusion of counsel for Bryant's opening statement because of such counsel telling the jury that Casteel had called Bryant to the restaurant the night Venecia was killed. That motion was denied (TR-7/14/87 - 355-358).

Thereafter Bryant's counsel made his final argument and spent by far the bulk of his argument time attacking Casteel as being the alleged ring leader in plotting the deaths of Venecia and Fisher and, in particular, attacking her for being a liar (TR-7/14/87 - 359-384).

Then Irvine's counsel made his final argument (TR-7/14/87 - 384-411) followed by the final argument of Rhodes' counsel (TR-7/19/87 - 419).

Thereafter the State made its final argument and in that final argument the State made no effort to separate between what evidence should be considered against each of the defendants.

Next Casteel's counsel rested without making a final argument (TR-7/14/87 - 496).

Next the trial court charged the jury (TR-7/14/88 - 553-598). Before the jury retired, the trial court noted for the record that all objections were deemed as having been reasserted

to all charges not wanted and that all requests for instructions not given as having been remade (TR-7/14/88 - 598).

The trial court ruled that the sworn statement of Casteel would not be given to the jury because "with those portions in it....it will be a **mistrial."** However, thereafter the trial court announced to the contrary because that statement was not in evidence (TR-7/14/87 - 614-616).

The jury then returned its verdicts which were as follows (as to Casteel): Not Guilty as to burglary of Venecia; Guilty as to First Degree Murder of Venecia; Guilty as to Burglary upon Fisher (unarmed and with an assault); Guilty of First Degree Murder as to Fisher; Guilty as to four Grand Theft counts; and Not Guilty as to the fifth Grand Theft count (R-786-793).

Subsequent thereto Casteel's counsel announced that he was withdrawing his Statement of Statutory Mitigating Circumstances Under the Authority of Maggard v. State, 399 So.2d 973 (1981) (Footnotes 13, 14 and 15) (TR-7/30/87 - 6, 7). Next Casteel's counsel objected to the final language from the Florida Criminal Standard Jury Instructions (page 77 thereof), to-wit:

> "...final decision as to what sentence shall be imposed rests with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to punishment, as to what punishment should be imposed upon this defendant." (TR-7/30/87 - 7)

The trial court agreed that there was a problem saying that it is **"concerned"** that there could be "error of constitutional magnitude" and said it would make a statement to

the jury that its function in the penalty phase was not "a perfunctory matter." However Casteel's counsel vigorously argued, in effect, that such an instruction would be insufficient in light of the "considerable time" used and "great lengths" gone to by the State (during voir dire) to "trivialize" the importance of the jury's function in the penalty phase. The trial court then said it was "looking for a middle ground" despite the fact that it maintained that neither the instruction nor anything said heretofore in the trial had "in any way" trivialized the jury's role. The State then arguend that if the trial court overrode a jury's recommendation (for the life sentence, etc., option) such should be looked at "severely" and the trial court said, "that will be basically the Court's response to Mr. Koch's argument" (TR-7/30/87 - 16-24).

The State then announced that it would reserve for its rebuttal stage to introudce any evidence "to rebut future mitigating circumstances" but that it would be introducing certified copies of "the simultaneous convictions" (TR-7/30/87-23).

Casteel's counsel then objected to Dr. Rao (the assistant Dade medical examiner who testified at the trial) being allowed to testify at the penalty phase because of her to be given "psychic terror" testimony and he demanded that the State be required to proffer her testimony. The trial court required the State to make such a proffer (TR-6/30/87 - 28-33).

There followed a colloquy between counsel and the trial

court arising out of the announcement by Bryant's counsel that he intended introducing a letter with Casteel's name redacted out. The trial court then read its proposed instruction regarding the jury's function in the penalty phase and its proposed instruction regarding aggravating and mitigating circumstances (TR-7/30/87-39, 46).

E. Penalty Phase Trial

The penalty phase thereafter began and the State called Dr. Rao to the stand. She testified that part of her findings with respect to Venecia were that he suffered an injury to his jaw and that that type of injury would not render someone unconscious because it didn't involve a brain injury. Then the prosecutor asked Dr. Rao if she hadn't testified at the trial that Venecia's throat had been cut and counsel for Casteel and Rhodes objected and Counsel for Irvine said the only evidence of Venecia's throat being cut was in Bryant's statement which the State argued that this assertion was also in Casteel's statement. This objection was overruled (TR-7/30/87 - 57-62). Thereafter the State elicited from Dr. Rao answers that the slashing of a throat is consistent with gurgling sounds; that the gurgling sounds are caused by someone having blood in their throat; that in her opinion Venecia was conscious for a few minutes; that he probably drowned in his own blood; and that he could have died from loss of blood. Dr. Rao further explained that the brain will die for lack of oxygen after three minutes (TR-7/30/87 - 62-65).

Dr. Rao also said that Fisher probably lived a few minutes and that it would take longer to strangle someone with a pair of pantyhose than with a telephone cord (TR-7/30/87 - 68, 69). Following cross-examination of Dr. Rao by Casteel's counsel, during which the former conceded that she recited with respect to both victims that they died of homicide by unspecified means, there was further discussion by and betwen the judge and counsel regarding the propriety of the State being allowed to introduce certified copies of the convictions in the instant case. The trial court ruled that it would allow the certified copies to be received in order that they could be argued but that "others he can't argue, defense objections to the contrary notwithstanding"
(TR-7/30/87 -83-87).

Casteel's counsel then called Susan Garnett Mayo to the stand who said she loved her mother (TR-7/30/87 91-96). Such counsel then called Shirley Blando, an assistant chaplain, who testified she met Casteel at jail and that Casteel was very sorry for the deaths of Venecia and Fisher (TR-7/30/87 - 99-102). He next called Daryl Keaton, a corrections officer, who testified that Casteel was very docile (TR-7/30/87 -103-105). On cross-examination the State tried to elicit testimony from Keaton that Casteel was a good worker but Casteel's counsel objected that under the law work habits do not qualify as non-statutory mitigating circumstances. The State's line of inquiry was then withdrawn (TR-7/30/87 - 106-119).

The next Casteel witness was another corrections officer, Thelma Lofter, who said she had known Casteel for 30 months and that Casteel was a floor counselor (TR-7/30/87 - 124). Thereafter corrections officer Edwina Talley testified that Casteel was a model inmate (TR-7/30/87 - 126-132).

Thereafter Casteells counsel asked the trial court to forbid the State at said point from going beyond the narrow issue as to whether Casteel was a good prisoner and such counsel argued that it would be inappropriate for the State to bring out non-statutory aggravating factors (TR-7/30/87 - 138, 139).

Casteel's next witness was clinical psychologist Syvil Marquit who prognosticated that Casteel would be a model prisoner provided she would not have access to alcohol. She added, "she is not a fighter."

Casteel herself next testified and said that she was "deeply sorry for my participation (TR-7/30/87 - 152).

The State then argued that all defense counsel should be prohibited from arguing that their respective clients did not have significant prior criminal records. Casteel's counsel, on the other hand, argued that they should be allowed to argue as a non-statutory mitigating circumstance that Casteel had no prior history of violence.

Casteel's counsel objected to a proposed State jury instruction using the language "cold, calculating, premeditated..." as versus "heinous, atrocious and cruel" because it would change an aggravating circumstance into sort of a super

aggravating circumstance (TR-7/30/87 - 214-219).

Over the objection of Casteel's counsel that the State should not be allowed to have the jury charged that her burglary conviction was an aggravating factor since she could have only been convicted thereof under a Principal theory, the court ruled it would allow such change. Casteel's counsel submitted three proposed penalty phase jury instructions to the trial court and after lengthy argument thereon, all four were denied (TR-7/30/87 - 213).

One of Casteel's proposed instructions reads: "You may recommend a sentence of life imprisonment even if you find one or more aggravating circumstances and no mitigating circumstances" (R - 855).

Counsel and the trial court next discussed which of the statutory aggravating circumstances as set forth in Section 921.141, Florida Statutes, were applicable to the case. The State argued for the applicability of statutory aggravating circumstances (5)(b), i.e., "the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person." In addition to objecting thereto, Casteel's counsel requested the trial court "for an explanation actually written in to the effect that the other capital offense or felony, etc.,...is, in fact, contained in this particular case," but the State contended this would be confusing and following additional argument by all counsel and the Court, it decided to give statutory aggravating circumstances 5(a) "as

it is." (TR-7/30/87 - 249-257).

Argument then switched to statutory aggravating circumstances 5(d) which defense counsel opposed on the basis of the robbery or burglary having to have been committed as an adjunct to the murder, but this argument was rejected (TR-7/30/87 - 257-263).

With reference to aggravating circumstances 5(e), the State argued that the last portion thereof, to-wit: "...or effecting an escape from custody," should be deleted but defense counsel opposed this in order that the jury would "...get the full effect of the meaning of this aggravating circumstance." Thereafter discussion of 5(e) turned to the issue of whether it should be given based upon the premise that the evidence showed Fisher was killed to avoid or prevent a lawful arrest or whether it should not be given because the evidence showed the dominant motive in the killing of Fisher was greed. At this point Casteel's counsel raised the point that the giving of 5(e) would create an overlap with "both the burglary and the financial gain" but the State responded, "they are one and the same" (TR-7/30/87 - 272).

Casteel's counsel argued that as to Casteel's involvement with the death of Fischer, the jury should not be charged with respect to aggravating circumstance 5(b), i.e, the capital felony was especially heinous, atrocious, and cruel (TR-7/30/87 - 284-293). Casteel's counsel then announced that he was withdrawing his previous pleading "setting forth the statutory mitigating"

circumstances (TR-7/30/87 - 300).

The State then announced that in its final argument it would use a basic chart that's used in all death penalty cases listing all aggravating and mitigating circumstances which its said "was taken out of evidence in another trial" (TR-7/30/87-315). There followed discussion as to counsel for Casteel's desire to have the chart marked with the State opposing this being done. Casteel's counsel argued further in this regard that all waived mitigating circumstances and non-applicable aggravating circumstances would not be presented to the jury either by being read by the trial court or by being argued by counsel, and that the chart would be prejudicial because all statutory aggravating and mitigating circumstances are included therein (TR-7/30/87 - 315). The trial court ordered the State to "blot out" all non-applicable statutory aggravating and mitigating circumstances (TR-7/30/87 - 315-328).

Thereafter all defense counsel argued that the State was not entitled to make any penalty phase rebuttal arguement, citing the provisions of Rule 3.780(c), Florida Rules of Criminal Procedure. Casteel's counsel further argued that "the State is specifically prohibited from arguing either the presence or absence of any mitigating circumstances and from making use of a chart containing mitigating circumstances.

The trial court ruled that the State would not be able to have the mitigating circunstances appear on a chart or board alongside the aggravating circumstances, and he told the State

that its argument as to why the defendants should receive the death penalty "has absolutely nothing to do with what these people argue" (TR-7/30/87 - 362-364).

Casteel's counsel next objected to the State being allowed to use its charge because it contained all nine aggravating circumstances while the trial court had already eliminated three of them after Casteel's counsel stated other objections to the chart, all of which were overruled (TR-7//30/87 - 378-382).

In his final argument the prosecutor told the jury what the trial court's instructions would be relative to "mitigating circumstances" and the matter of whether they outweight "aggravating circumstances" (TR-7/30/87 - 388, 389).

Subsequent thereto, the prosecutor, while arguing whether the killing of Venecia was committed in a cold, calculated and premeditated manner, said to the jury: "I defy, I defy anyone of the defense attorneys in this case to come up to you, demand of them, demand of them..." Casteel's counsel moved for a mistrial which was not granted (TR-7/30/87 - 396-399).

The prosecutor next argued, as to Casteel, the absence of mitigating circumstances over the vigorous objection of Casteel's counsel that such argument amounted to the State arguing "non-statutory aggravating circumstances under the guise of discussing or rebutting non-statutory aggravating circumstances. In addition, Casteel's counsel moved for a mistrial which was denied (TR-7/30/87 - 399-408, 413). Thereafter, the prosecutor

blatantly continued to argue the absence of the mitigating circumstances being contended for in behalf of Casteel (TR-7/30/87 - 413-423). The prosecutor also argued to the jury with reference to Casteel's involvement in the killing of Fisher that it had to decide whether the aggravating factors were sufficiently outweighed by the mitigating factors and he again went through the list of mitigating factors (TR-7/30/87 - 441-444).

Thereafter followed the final arguments of defense counsel (TR-7/30/87 - 457-500).

In his charge to the jury during the penalty phase, the trial court specifically, inter alia, instructed it as follows:

> "Your advising sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings" (TR-7/30/87 - 508, 509).
>
> "If you find the aggravating circumstances do not justify the death penalty, your advising sentence should be on of life imprisonment without possibility of parole for 25 years" (TR-7/30/87 - 510).
>
> "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances (emphasis added)." (TR-7/30/87 - 510).
>
> "You should weigh the aggravating circumstances against the mitigating circumstances and your advising sentence must be bound upon these considerations and these proceedings"(TR-7/30/87 - 512).

With the exception of the non-statutory alleged

mitigating circumstances being asserted in behalf of Casteel, the trial court charged the jury as to all of the aggravating circumstances it had decided were applicable to be considered with respect to one or more of the four defendants without any breaking down of which should be considered against each respective defendant. Specifically, the trial court included therein that the jury should consider whether "the crime for which defendant is being sentenced was especially wicked, evil, atrocious or cruel" (TR-7/30/87 - 509-511).

The jury then returned to consider its penalty verdicts and returned the following verdicts against Casteel. (a) It recommended by a 10 to 2 vote that the death penalty be imposed against Casteel with reference to the death of Venecia; (b) It recommended by a vote of 12 to 0 that the death penalty be imposed against Casteel with reference to the death of Fisher (TR-902, 903).

At the sentencing the trial court sentenced Casteel to life imprisonment with no parole for 25 years with reference to Venecia and imposed the death peanlty upon her with reference to Fisher. Further it sentenced Casteel to one other consecutive life sentence plus five year consecutive terms on the lesser charges. In conjunction therewith the trial court announced its findings as to aggravating and mitigating circumstances (TR-7/30/87 - 27-45).

This appeal followed.

POINTS ON APPEAL

POINT I.

WHETHER THE TRIAL COURT ERRED IN FAILING TO SEVER THE TRIAL OF CASTEEL FROM THE TRIAL OF THE THREE CO-DEFENDANTS AND, MOST PARTICULARLY, FROM THE TRIAL OF CO-DEFENDANT BRYANT?.

(A) WHETHER THE TRIAL OF CASTEEL SHOULD HAVE BEEN SEVERED FROM THE TRIAL OF BRYANT BECAUSE THE DEFENSES OF THESE TWO DEFENDANTS WERE INTOLERABLY ANTAGONISTIC?

(B) WHETHER CASTEEL'S RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HER WERE DENIED BY THE TRIAL COURT'S REFUSAL TO SEVER HER TRIAL FROM THAT OF BRYANT BECAUSE BRYANT'S STATEMENT TO THE POLICE -- WHICH INCULPATED CASTEEL EVEN IN REDACTED FORM -- WAS INTRODUCED IN EVIDENCE BY THE STATE AND BRYANT DID NOT SUBMIT TO CROSS-EXAMINATION BY CASTEEL?

POINT 11.

WHETHER THE COURT ERRED IN FAILING AND REFUSING TO HOLD A HEARING OR OTHERWISE ASCERTAIN THAT THE PROSECUTOR WAS NOT INTENTIONALLY EXERCISING PREMPTORY CHALLENGES AGAINST PROSPECTIVE JURORS SOLEY BECAUSE THEY ARE BLACK PERSONS?

POINT 111.

WHETHER THE DEATH SENTENCE IMPOSED BY THE TRIAL COURT ON DEFENDANT DEE DYNE CASTEEL SHOULD BE REDUCED TO A LIFE SENTENCE UNDER THE STATUTE BECAUSE OF THE UNCONSTITUTIONALITY PER SE OF THE DEATH PENALTY AND FOR OTHER REASONS?

(A) WHETHER THE COURT ERRED IN ASSESSING A NON-STATUTORY AGGRAVATING CIRCUMSTANCE AGAINST CASTEEL?

(B) WHETHER THE COURT ERRED IN CONCLUDING THAT THE CAPITAL FELONY COMMITTED BY CASTEEL UPON FISHER WAS DONE IN A COLD CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION?

(C) WHETHER CASTEEL WAS DENIED A FAIR PENALTY PHASE TRIAL BECAUSE THE TRIAL COURT ALLOWED THE

STATE TO INTRODUCE CERTIFIED CONVICTIONS OF THE GUILTY VERDICTS IN THE CASE.

(D) WHETHER CASTEEL WAS DENIED A FAIR PENALTY PHASE TRIAL BECAUSE THE TRIAL COURT ALLOWED THE PROSECUTOR TO ARGUE NON-STATUTORY MITIGATING CIRCUMSTANCES TO THE JURY?

(E) WHETHER THE DEATH SENTENCE OF DEFENDANT CASTEEL SHOULD BE REDUCED TO LIFE IMPRISONMENT UNDER THE STATUTE UNDER THE PRINCIPAL OF PROPORTIONALITY REVIEW?

POINT IV

WHETHER THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY A GENERAL VERDICT FORMS WITH REFERENCE TO EACH OF THE TWO FIRST DEGREE MURDER CHARGES ASSERTED AGAINST DEFENDANT CASTEEL WITH THE PREJUDICIAL RESULT THAT IT CANNOT NOW BE ASCERTAINED WHETHER THE JURY INTENDED TO FIND HER GUILTY OF THE FELONY MURDER CHARGES OR THE PREMEDITATED MURDER CHARGES?

POINT V

WHETHER DEFENDANT CASTEEL WAS DENIED A FAIR TRIAL, A FAIR SENTENCING HEARING, AND THE DUE PROCESS OF THE LAW BY THE MISCONDUCT OF THE PROSECUTOR?

POINT VI

WHETHER THE STANDARD OF REVIEW IS WHETHER THE TRIAL COURT'S ERRORS ARE HARMLESS BEYOND A REASONABLE DOUBT?

SUMMARY OF ARGUMENT

I. In the involved trial involving first degree murder charges against defendant Dee Dyne Casteel and three other defendants, to-wit: James Allen Bryant, Michael Irvine, and William E. Rhodes, with the State seeking the death penalty against all four, the trial court erred in refusing to sever the trial of Casteel from the trial of the three co-defendants, and particularly from that of co-defendant Bryant, who, like Casteel, was charged by the State with having brought about the deaths of Arthur Venecia and his mother, Bessie Fisher, by hiring co-defendants Irvine and Rhodes to kill such persons.

This was error in the first instance because there simply was no way defendant Casteel could have secured a fair trial in a joint trial with the other three defendants with the involved confrontation rights question and in the circus-like atmosphere that had to be and was caused by the four defendants being tried together. Despite all the instructing by the trial court to the jury that the confession of each was to only be considered against the defendant giving the confession because of the factual circumstances in this case, it simply strains credibility to believe that the jurors followed these instructions.

Specifically, the trial of Casteel should have been severed from the trial of Bryant because the defenses are these two defendants were antagonistic in the extreme with each claiming the other was the initiater of the killings of Venecia

and Fisher.

Further, the trial of Casteel should have been severed from the trial of Bryant because Bryant's confession which inculpated Casteel, if for no other reason than she was referred to therein as "a waitress" (and she is the only female defendant in the case), with Casteel's counsel not having the opportunity to cross-examine Bryant and thereby exercise Casteel's constitutional confrontation rights because Bryuant alone among the defendants did not take the stand and testify. And on top of that the trial court would not allow Casteel's counsel to comment to the jury relative to Bryant's not testifying even though Bryant's counsel opened the door by telling the jury in opening argument that the evidence would show that Bryant went to the restaurant the night Venecia was killed because Casteel asked him and told him to "go with these men."

The verdict of the jury and the judgment entered therein against Casteel should be reversed because the prosecutor intentionally exercised peremptory challenges so as to reduce the number of black persons on the jury.

The death sentence imposed upon Casteel should be reduced by this Court to a life sentence under the statute because of unconstitutionally per se of Florida's death penalty statutes.

The death sentence as to Casteel should be reduced to life under the statute because the trial court improperly assessed a non-statutory aggravating circumstance upon her, to-wit: that because it was imposing death sentences against the

two killers, it would be unfair not to do the same with respect to the two hirers.

The death sentence as to Casteel should be reduced to life under the statute because the trial court committed error in concluding that Casteel's role in the death of Fisher was cold, calculated and premeditated without any pretense of moral or legal justification.

The death sentence imposed upon Casteel should be reduced to life imprisonment under the statute because the court erred in allowing the State to have introduced in evidence certified copies of the convictions in this very case.

The death sentence imposed upon Casteel should be reduced to life imprisonment under the principle of proportionality review because only this Court has allowed the execution of only one other person who was not directly involved in a killing since the death penalty was reinstituted in Florida.

The trial court erred in submitting to the jury a general verdict forms with reference to each of the two first degree murder charges asserted against defendant Casteel with the prejudicial result that it cannot now be ascertained whether the jury intended to find her guilty of the felony murder charges or the premeditated murder charges.

Defendant Casteel was denied a fair trial, a fair penalty phase trial, and the overall due process of the law by the prosecutorial misconduct of a prosecutor who was more interested in securing a conviction and the imposition of a death penalty

than he was in seeing to it that justice was done.

POINT I

THE TRIAL COURT ERRED IN FAILING TO SEVER THE TRIAL OF CASTEEL FROM THE TRIAL OF THE THREE CO-DEFENDANTS AND, MOST PARTICULARLY, FROM THE TRIAL OF CO-DEFENDANT BRYANT.

In this very discombobulated overall trial, the fundamental constitutional-legal deficiency insofar as Casteel is concerned was the failure and steadfast refusal of the trial court to sever the trial of Casteel away from the trials of the three co-defendants and, most particularly, from the trial of co-defendant Bryant because for all the reasons to be discussed hereunder there was simply no way that Casteel could secure a fair trial in a joint trial with three other co-defendants when all four of them had confessed, because of the fact of constituional problems thereby caused counsel, including Sixth Amendment confrontation rights and Fourth and Fifth Amendment problems. Further, despite the instructions of the trial court that the confession of each defendant was only to be considered against that defendant, in light of the factual circumstances involved in this case, it would simply be unreasonable to assume that the jurors followed such instructions. It would be added that in a far less serious trial the "Irangate" defendants' trials were all severed into single defendant trials. These severances should have been granted for a number of different reasons which are enumerated and argued below.

(A) THE TRIAL OF CASTEEL SHOULD HAVE BEEN SEVERED FROM THE TRIAL OF BRYANT BECAUSE THE

DEFENSES OF THESE TWO DEFENDANTS WERE INTOLERABLY ANTAGONISTIC.

Casteel's trial counsel sought a trial severance for his client from the time he filed a pre-trial motion seeking such relief (R-112-116) up until Casteel's motion for a mistrial near the end of the trial which was based in part on the trial court's failure to have granted such a severance (TR-7/14/87 - 355-358).

Specifically in this regard, Casteel's counsel moved for a trial severance from Bryant at least three other times during the trial (TR-6/29/87 - 138; 6/29/87 - 222-229; and 7/14/87-182, 183).

During the opening statement of Bryant's counsel, such counsel accused Casteel of being greedy: he said she knew "the killers;" that after "the crime is committed" she moved into Venecia's house and took control of his business (TR-6/29/87-99); that Bryant "got a call to go down to the restaurant...He goes down...Dee Casteel says, go with these men (TR-6/29/87-100); that Casteel "knew these killers and arranged for everything;" that she "could have had Bryant killed, but she needed Bryant (TR-6/29/87 - 101); that "the manipulation was from Dee Casteel...It was a plan to kill Arthur Venecia (TR-6/29/87-102); that after Venecia's death, Casteel took over and controlled the restaurant and "moves into James Bryant's (sic) house, kicks him out of the house (TR-6/29/87 - 102); that Bryant had "a feeble mind" and was easy to manipulate (TR-6/29/87 - 102); that he was already amply provided for by Venecia and

didn't need any money; that he was threatened and taken out to the house (TR-6/29/87 - 103); and that "Dee was in control" (TR-6/29/87 - 105).

On cross-examination of State's witness Wayne Tidwell, the owner of the backhoe which was used to dig the hole in which both involved bodies were eventually buried, Bryant's counsel elicited testimony that Casteel had introduced him to Bryant and that it was Casteel who paid him to have the hole dug and who made the arrangements as to where within Venecia's property it was to be dug (TR-6/29/87 - 421).

Thereafter on cross-examination of State's witness Susan Garnett, who is, of course, Casteel's daughter, Bryant's counsel elicited testimony from Garnett that Casteel was unhappy in her marriage to Mr. Casteel and that by participating in the killing of Venecia she could get the money to get out of her house and get away from her husband (TR-6/30/87 - 304, 305).

On cross-examination of Casteel, Bryant's counsel elicited testimony from Casteel that for the preceding twelve years she had been involved "in a number of transactions'' and "knew how to transfer property;" that she had worked as a bookkeeper for five years; and that the testimony she had given on direct examination that when Bryant first asked her if she could hire a killer, Bryant didn't mention the name of his intended victim, was contrary to an earlier statement she had given in which she said that Bryant mentioned Venecia at the outset (TR-7/10/87 - 1576-1585).

Further, during his cross-examination of Casteel, Bryant's counsel extracted an admission from Casteel that her contention on direct examination that after Venecia's death Bryant introduced her to Fisher at the trailer and told Fisher that Casteel would be taking care of her while her son was in North Carolina, was different from a recitation in the statement Casteel had given the police, which was to the effect that Bryant had her initially go to the trailer to see Fisher by herself (TR-7/10/87 - 1593, 1594).

Thereafter Bryant asked Casteel if she had told Garnett, "...it will be better for me, I will be able to have a house, I can get rid of Cas and we'll be able to live in a house, or something to that effect?" Casteel said that she hadn't made such a statement "in those words" (TR-7/10/87 - 1605, 1606). Then Bryant's counsel asked Casteel if it wasn't "common knowledge around the restaurant" that Venecia had a camper, "a nice house," and a boat. Casteel said she only previously knew about Venecia's owning a camper and having the franchise ownership interest in the IHOP (TR-7/10/87 - 1606).

Bryant thereafter tried to establish from Casteel on cross-examination that her trial contention that she did not tell Bryant how to liquidate stocks "from the E.F. Hutton account" and that she did not know there were stocks to be liquidated, was contrary to a recitation in her statement that she was present in the same office with Bryant while he was liquidating the E.F. Hutton stock (TR-6/30/87 - 1612, 1613).

Subsequent thereto Bryant's counsel questioned Casteel as to whether she had gotten "a personal loan" on a truck (which had been owned by Venecia) and posted it "as collateral." Casteel said she had but that she did so and secured $2500.00 therefrom "at Allen's request." Following an objection by Casteel's counsel that Bryant's counsel was involving Casteel "in collateral crimes," Bryant's counsel responded by saying: "...The relevance and the importance of this line of cross-examination is that the witness has stated that she had received thirty-six hundred dollars from the disposal of all the assets of Mr. Venecia." To this argument, Bryant's counsel added:

> "That clearly is line of questioning to show the credibility, and also as to the individual that was involved. She says her involvement was a little more than a simple courier, and that she got thirty-six hundred dollars for the house. I'm trying to prove that she's making up a story." (TR-6/30/87-1617, 1618)

On cross-examintaion of co-defendant Irvine, Bryant's counsel inquired as to whether Irvine had rehearsed his testimony and specificaly whether he had spoken to "Dee in what you were going to say today..." (TR-7/13/87 - 110). Irvine's answer to both questions was in the negative but Bryant's counsel planted the thought of possible Irvine-Casteel collusion in the jury's mind in the process.

Bryant's counsel also asked Irvine if it wasn't true that (on the night of the Venecia murder) "Dee called Mr. Bryant to come down" and, again, even though the answer was in the

negative because "he was there," Bryant's counsel attempted to plant the seed of doubt (TR-7/13/87 - 114). Such counsel thereafter elicited testimony from Irvine that "That evening she (Casteel) brought the other $1500 up" (TR-7/13/87 - 120).

Further, in response to counsel for Bryant's question as to whether he had told "Dee" he needed a picture of Venecia, his home address and a description of Venecia's car, Irvine testified that he had told this to Bryant (TR-7/13/87 - 122).

On cross-examination of co-defendant Rhodes, the following colloquy occurred between Bryant's counsel and Rhodes:

> "Q. Okay. And did Dee call you on the phone and she was upset because you chicken-shitted out and she wanted to know when you are going to do the job?
> A. I don't remember who called. Somebody called me about it, but I don't remember who it was.
> Q. It was a lady, though, right?
> A. Could have been. Like I said, I don't remember who it was.
> Q. Could you turn to page three of your statement. Do you have that? Maybe that'll refresh your recollection, the last two sequences of questions, if you can look at those. Did you have a conversation with the lady on the phone? Some lady asked about when we -- cause I chicken-shitted out. Was I absolutely going to get the job done. Do you remember that?
> A. Yes, sir, now I do reading it.
> Q. Now that you look at it, you remember it was a lady that called you?
> A. Yes, sir." (TR-7/13/87 - 212, 213)

In his final argument Bryant's counsel argued, in pertinent part, the following: (a) that Casteel either lied or was mistaken with reference to her conflicting versions of whether Bryant did or didn't mention Venecia's name when they

initially discussed the matter of a killing; (b) that Casteel lied or was mistaken when she had testified she thought Bryant was to be taken to a secluded place to be robbed; (c) that Casteel either lied or was mistaken when she testified that Bryant had gotten into a fight with Venecia over the former catching the latter in bed with "a boy named Terry" and later saying that this fight was over money; (d) that Casteel either lied or was mistaken when she testified that the only time Irvine "ever spoke" to Bryant about the price (to kill Venecia) being increased to $5000 was over the telephone; (e) that Irvine had testified that Casteel -- and not Bryant -- did the negotiating; (f) that Casteel lied about how she first met Fisher; and the attacks upon Casteel by Bryant go on and on (TR-7/16/87 - 359-384). As a matter of fact, undersigned counsel would submit to the Court that he believes it would be an accurate statement that the major and almost entire thrust of the final argument of Bryant was to portray Casteel as the initiater of the killing of Venecia and of all the crimes that followed, including the killing of Fisher, and that Bryant was just a weak character who was forced at knifepoint to go along and witness the killing of Venecia and who thereafter simply went along with the other crimes.

A joint single trial of several defendants may not be had at the expense of one defendant's right to a fundamentally fair trial. United States v. Echeles, 352 F.2d 892 (7th Cir. 1965). Further, while the decision to grant a severance is a matter in

which the trial judge has wide discretion, that discretion is not without limits. United States v. Hernandez-Berceda, 572 F.2d 680 (9th Cir. 1978).

Further, not only did the failure of the trial court to sever the trial of Casteel from the other defendants, and particularly, from Bryant's trial, and thereby deny Casteel the due process of law under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 9, Constitution of the State of Florida, and the right to a fair trial under the Sixth Amendment to the U.S. Constitution and Article I, Sections 2 and 16, Constitution of the State of Florida, but such also served to deny her a fair penalty phase trial for the reason that there, even more than in the trial itself because in the penalty phase the jury was called upon to determine what aggravating and what mitigating circumstances existed with respect to Casteel and the fact that Bryant's counsel had been hammering away at Casteel all during the trial could not have done anything but great harm to Casteel.

And, finally, as to this sub-issue, as a part of its weighing process in determining whether to grant a requested trial severance, the objective of fairly determining the defendant's guilt or innocence should be given priority over other relevant consideration such as expense, efficiency and inconvenience. Crum v. State, 398 So.2d 810 (1981).

(B) CASTEEL'S RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HER WERE DENIED BY THE TRIAL COURT'S REFUSAL TO SEVER HER TRIAL FROM THAT OF BRYANT BECAUSE BRYANT'S STATEMENT TO

THE POLICE -- WHICH INCULPATED CASTEEL EVEN IN REDACTED FORM -- WAS INTRODUCED IN EVIDENCE BY THE STATE AND BRYANT DID NOT SUBMIT TO CROSS-EXAMINATION BY CASTEEL.

The trial court made a yeoman effort to balance the legitimate interests of the State with those of the defendants with reference to the reception in evidence, and the manner thereof, of the inculpating statements-confessions of the respective defendants, but as it itself impliedly agreed was the case, it ultimately got lost in a thicket of its own making, as is evidenced by this statement by the trial judge, to-wit:

> "These are not normal issues. It's just not normal. I heard what Mr. Koch said yesterday and a slow creeping smile came over my face but, you knonw, we are going to get through the thing even if it means restricting counsel and even if it means whatever. We are going to get through it, through the trial, and I can sense at least the direction of his thought in the case. But I am going to be consistent in the case. If I am consistently wrong, consistent, so if I am keeping it out, obviously he's going to be restricted in some areas of his cross-examination. I mean that's obvious to me." (TR-6/26/87 **- 946, 947)**

In the statement of Bryant, a redacted version of which was read to the jury, Bryant said that he hired "someone as a waitress at the restaurant I was managing." Thereafter he said that he did not know "an individual by the name of someone" or "an individual by the name of someone." He said that in the middle of June, 1983, "someone" telephoned him at home and asked him "to drive to the restaurant and meet." Bryant further recited in the sworn police statement that "someone" introduced

him to people in a car. Thereafter Bryant described going to Venecia's house at knife or razor point and what the "other people" who went with him did with "someone" going into the bedroom after which he -- Bryant --heard Venecia begging for mercy and screaming. At a later point in the statement Bryant described "someone" giving money in a bag to "the other people" in a car **(TR-7/17/87 - 912-956).**

Bryant's sworn statement was lengthy and contained many more references to "someone" than are listed above but, suffice it to say, that there was no way whatsoever that this jury could not have concluded therefrom that Casteel was "the waitress" and that she was either the initiater and criminal ringleader with respect to the two killings or one of the killers themselves and the trial court's redactions to the contrary notwithstanding, Bryant's statement was very unfairly prejudicial to Casteel and because Bryant chose to exercise his right to not testify at the trial, Casteel was very clearly denied her federal and state guaranteed right to confront the witness against her.

A criminal defendant is deprived of his rights, under the Sixth Amendment to the U.S. Constitution, to be confronted with the witnesses against him, when a non-testifying co-defendant's incriminating pretrial confession is introduced at their joint trial, even if the jury is instructed to consider the confession only against the co-defendant. Bruton v. United States, **391** U.S. **123, 88** S.Ct. **1620, 20** L.Ed 2d **476 (1968).** In Cruz **v.** New York, **481** U.S. _____, **95** L.Ed 2d **162, 109** S.Ct. _____(1987),

the Court held in pertinent part (at p. 172):

> "We hold that, where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, see Lee v. Illinois, supra, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. Of course the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him (assuming the 'unavailability' of the codefendant) despite the lack of opportunity for cross-examination, see Lee, supra, at , 90 L.Ed 2d 514, 106 S.Ct. 20576; Bruton, 391 U.S. at 128, n 3, 20 L.#d 2d 476, 88 S.Ct. 1620, and may be consided on appeal in assessing whether any Confrontation Clause violation was harmless, see Harrington v. California, 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969)."

In the instant case, the State would avoid the holdings in the Bruton and Cruz cases on the basis of the trial court's having redacted Casteel's name from Bryant's statement but it is Casteel's contention that that goal was not only not accomplished but that, worse yet, the jury could have concluded from Bryant's redacted statement that Casteel was an actual killer.

To support its position in this regard, the State at the trial cited and relied upon Richardson v. Marsh, 481 U.S. _____, 95 L.Ed 2d 176, 109 S.Ct._____(1987), but this defendant would respectfully assert that the court in the Richardson case does not afford the state the solace it thinks it does. Speaking at page 188 of 95 L.Ed 2d, the Court said the following:

> "The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. On the precise facts of Bruton, involving a facially incriminating confession, we found that accommodation inadequate. As our discussion above shows, the calculus changes when confessions that do not name the defendant are at issue. While we continued to apply Bruton where we have found that its rationale validly applies, see Cruz v. New York, ante, p---, 95 L.Ed 2d ---, 107 S.Ct.----we decline to extend it further. We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction <u>when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence.</u> (emphasis added)"

In the instant case the defendant's name was concededly redacted from Bryant's statement but the same very clearly cannot be said with regard to "any reference to her existence." There was no one else in the world that the jury could have concluded was "the waitress" but Dee Dyne Casteel.

Following the U.S. Supreme Court's decision in <u>Cruz</u> and Richardson, which incidentally were handed down on the same day, the United States Court of Appeals of the 11th Circuit handed down its decision in United States v. Petit, 841 F.2d 1546 (11th Cir. 1988), and had the following to add relative to the confrontation-redacted statement question (at p. 1556 of 841 F.2d), to-wit:

> "...The Court in Richardson held that 'the Confrontation Clause is not violated by the

> admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence. **107** S.Ct. at **1709** (emphasis supplied). The Court added in a footnote that it expressed no opinion as to the admissibility of a confession 'in which the defendant's name has been replaced with a symbol or neutral pronoun.' Id. at n. **5.** In this case, Pasqual's statement that he called a 'friend' who save permission for the soods to be stored at his warehouse, when considered with the other evidence, could reasonably be understood only as referring to Petit. Accordinsly, although Pasqual's confession did not directly implicate Petit in the conspiracy, it sufficiently inculpated him so as not to fall under the clear exception to Bruton provided by the Court's decision in Richardson." (emphasis added)

And in the earlier case of United States v. Burke, **700** F.2d **70** (2nd Cir. **1983),** the court stated, in pertinent part, at page **85:**

> "...a redacted statement is clearly inculpating when the jury is aware that names have been redacted and, in light of other evidence, could infer that the omitted names may have included a co-defendants. See United States v. Danzey, **594** F.2d **905, 917-18** (2d Cir.), cert. den. **441** U.S. **951, 99** S.Ct. **2179, 60** L.Ed 2d **1056 (1979)."**

In this regard this defendant would also place her reliance on the holding of the Illinois Supreme Court in People v. Cruz, **42** CRLl1 **1069 (1988).**

And, finally, this defendant would call to this Court's attention the following words of the United States Supreme Court in Lee v. Illinois, **476** U.S. **530, 106** S.Ct. **2056, 90** L.Ed **2d 514, 525 (1986),** where that court there quoted from its earlier

holding in Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed 2d 923 (1965), to-wit:

> "...we observed that (t)here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an esssential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Further, the trial court should have severed Casteel's from that of Bryant because Casteel's counsel specifically requested the trial court's permission to be allowed to comment on the fact that Bryant had failed to take the stand and testify. This was particularly so because Bryant's counsel had said in his opening statement that the evidence would prove that Casteel called Bryant to come to the restaurant "to go with" Irvine and Rhodes the night Venecia was killed (TR-6/29/87 - 100). Under these circumstances it is the absolute duty of Casteel's attorney to make such argument. DeLuna v. United States, 308 F.2d 140 (former 5th Cir. 1962); United STates v. De La Cruz-Bellinger, 422 F.2d 723 (9th Cir. 1970); and Gilmour v. State, 358 So.2d 63 (1978).

POINT II

> THE TRIAL COURT ERRED IN FAILING AND REFUSING TO HOLD A HEARING OR OTHERWISE ASCERTAIN THAT THE PROSECUTOR WAS NOT INTENTIONALLY EXERCISING PEREMPTORY CHALLENGES AGAINST PROSEPCTIVE JURORS SOLELY BECAUSE THEY ARE BLACK PERSONS.

When the prosecutor peremptorily challenged prospective juror Ms. Blue, Rhodes' counsel noted for the records that she

was black. Thereafter, the prosecutor then did -- without solicitation by the trial court -- note that Ms. Blue had said she recognized "the defendant" because "she lived in that area" and following this the other prosecutor observed -- also with solicitation by the trial court or in response to anything that any of defense counsel had said -- that "some of the defendants are black Americans" (TR-6/19/87 - 1467).

Thereafter Rhodes's counsel correctly argued that it mattered not "under the Neil decision" (i.e., State v. Neil, 457 So.2d 481 (Fla.,1984), whether defendants who seek the protection of that decision are themselves black because the systematic exclusion of any particular group is impermissible. Subsequent thereto Rhodes' counsel specifically made "a Neil inquiry" as to why the State had exercised five out of seven peremptory challenges against black prospective jurors and just as specifically that motion was denied (TR-6/19/87 - 1470).

And subsequent to that denial, Rhodes' counsel stated:

> "Mr. Kershaw: We would like it explained why the peremptory challenges that were used today that they were all directed against the black prospective jurors." (TR-6/19/87 -1481)

During the voir dire examination the State peremptorily challenged two back jurors -- one right after the other -- and gave no reason therefor even though Rhodes' counsel noted that both were black (TR-6/19/87 - 1463). Shortly thereafter the State peremptorily challenged another balck juror after failing to sustain a cause challenge under "Wainwright v. Witt." (TR-

1464) Then very shortly thereafter the prosecutor peremptorily challenged another black and, again, without giving a reason ever after Rhodes' counsel again noted that another black was being challenged (TR-6/19/87 - 1965). Perhaps ,it was that the prosecutor felt his immediately thereafter accepting a black juror as a sufficient answer as to why he had challenged others (TR-6/19/87 - 1466).

Thereafter when a new panel of prospective jurors was called, Casteel's counsel noted that there were only twelve blacks amongst the eighty panelists which he described as an "underrepresentation of black Americans" (TR-6/22/87 - 61). Then such attorney said:

> "The State introduced the element of race into this trial in thejury selection procedure last Friday. I ask that the panel composed of a representative cross section of people be brought down so that we can continue with the jury selection process, specifically one that has adequate representation of black Americans." (TR-6/22/87 - 62)

That motion was denied (TR-6/22/87 - 62). There followed a discussion of how the race of each panelist could be noted--past, present and future -- and the trial court said that counsel could do such noting on the Record, which, of course, only took care of the present and the future (TR-6/22/87 - 62-64).

Subsequent thereto the State said it would "move to excuse" black juror Mr. Jackson and it appears that that was another exercise of a state peremptory challenge to keep a black person off the jury.

Immediately thereafter counsel for the other three defendants -- including Casteel -- joined in that request (TR-6/19/87 - 1481).

That request was not granted because the State didn't respond to it and because the trial court did not conduct a Neil inquiry.

The holding by this Court in the Neil case was, of course, rendered before the Supreme Court of the United States' latest pronouncement on the subject in Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), which overruled the earlier decision of that Court in Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965), and which like this Court in Neil, imposed upon the State to come forward with "a neutral explanation" for peremptory challenges of black jurors once the defense has made out a prima facie case of purposeful racial discrimination on the part of the State.

Thereafter, in Slappy v. State, 503 So.2d 350 (3rd DCA 1987), the Third District Court of Appeal again spoke to the matter of the state exercising peremptory challenges to exclude prospective jurors because of race, holding that at the hearing required by Neil, supra, the "offending party," i.e., the State, must articulate legitimate reasons which are clear and reasonably specific and which are related to the particular case to be tried. This was not done by the State in this case because the trial court did not order it done and because the State dared not to do so.

Furthermore, the "Third District Court of Appeal of Florida, which is, of course, the appellate district in which the instant case was tried, held in Castillo v. State, 466 So.2d 7 (3rd DCA 1985), that a criminal defendant, whatever his race, has standing to challenge the arbitrary exclusion of members of any race from criminal jury service.

POINT III

THE DEATH SENTENCE IMPOSED BY THE TRIAL COURT ON DEFENDANT DEE DYNE CASTEEL SHOULD BE REDUCED TO A LIFE SENTENCE UNDER THE STATUTE BECAUSE OF THE UNCONSTITUTIONALITY PER SE OF THE DEATH PENALTY AND FOR OTHER REASONS.

With possible exception of the abortion question, no issue tears at the collective soul of America more than that of the death penalty. In his argument to the judge as to whether the death penalty should be imposed on Loeb and Leopold for their thrill killing of a young boy, Clarence Darrow is supposed to have said that he had hoped he would live long enough to see an end to the practice of civilized society committing the crime of murder upon individuals who commit the crime of murder.

And so troublesome was this gut wrenching issue to the nine justices of the United States Supreme Court in their landmark decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which by a five to four vote had the effect of striking down the then existing death penalty laws in most of the states, including Florida, that the five justices on the prevailing side wrote five separate opinions concurring in a per curiam ruling. And although the four dissenting justices

joined in three dissenting opinions, there was nevertheless four dissenting opinions in all because Justice Blackmon wrote a separate dissenting opinion expressing his personal distaste for the death penalty which he said was buttressed by his conviction that it served no useful purpose.

Further, up until this very day two of the justices of the United States Supreme Court, Justices Brennan and Marshall, have steadfastly -- in every death penalty case coming before that court -- adhered to their deep convictions that capital punishment is per se violative of the Eighth Amendment of the U.S. Constitution proscription against the inflictions of cruel and unusual punishments process of law. Furman v. Georgia, supra: Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed 2nd 912 (1976); et al.

At the outset of this defendant's argument then as to why the penalty of death imposed upon Dee Dyne Cassteel should be reversed, she, too, would aver to the Court that the death penalty violates her above-described rights under the Eighth and Fourteenth Amendments to the U.S. Constitution and, as well, Sections 9 and 16 of Article I of the Constitution of the State of Florida. It is hard to concieve of a penalty that is more cruel and unusual than the death penalty and Florida's practice of publicly executing condemned persons is barbaric in the extreme smacking of the caliber of justice handed down under the fanatic Islamic law governing in Iran.

In California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77

L.Ed 2d 1171 (1983), the Court stated (at pages 998-999 of 77 L.Ed 2d), to-wit:

> "...the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."

And in State v. Dixon, 283 So.2d 17 (Fla. 1973), the Court said:

> "Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." (Emphasis added)

The holding in Dixon is, of course, a landmark Florida decision because it upheld the constitutionality of Florida'a "new" death penalty law passed by the Legislature, i.e., Sections 775.082 and 921.141, Florida Statutes, to cure the constitutional dificiencies in the prior statutory versions thereof.

Explaining this holding, in Dixon, this Court further said, in pertinent part (at p. 7):

> "It is proper, therefore, that the legislature has chosen to reserve its (i.e., the death penalty law's) application to only the most aggravated and unmitigated of most serious crimes. In so doing, the Legislature has also recognized the inability of man to predict the myriad tortuous paths which criminality can choose to follow. If such a prediction could be made, the Legislature could have merely programmed a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors included--with ranges of possible impact of each--and provided for the imposition of death under certain circumstances, and for the imposition of a

> life sentence under other circumstances. However, such a computer could never be fully programmed for every possible situation, and computer justice is, therefore, an impossibility. The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing progress is left to the careful scrutinized judgment of juors and judges. It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital." (Emphasis added)

Thereafter, the Dixon opinion describes "five steps between conviction and imposition of the death penalty" and explains that each step provides "concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient." The Dixon Court then lists the five (undersigned counsel thinks the involved steps only number four) steps as being (1) and (2) that punishment is to be reserved for a post-conviction hearing or trial to enable the judges and jury to hear other evidence (other than that adduced at the trial) regarding the defendant and the crime; (3) after the jury's recommending verdict the judge actually decides the issue of life or death; (4) the trial judge "justifies" his sentence of death in writing "to provide the opportunity for meaningful review by this court;" and finally step number five which the Court described in Dixon as follows (at page 8 thereof):

> "Review of a sentence of death by this Court, provided by Fla.Stat. Section 921.141 F.S.A.,

> is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution." (Emphasis added)

This defendant acknowledges that the above-quoted language from the Dixon case, supra, appears to give this Court a broader role than the Court itself envisages in its holding in Brown v. Wainwright, 392 So.2d 1327 (1981), where the Court appeared to recede to the view that an appeal in a death penalty case is governed by the usual appellate procedures.

But then neither did the Court in Brown v. Wainwright overrule the Court's earlier decision in Dixon.

She prays the Court to examine the arguments to be raised hereunder by her counsel and all other aspects of her case--even if not raised by her counsel -- because the death penalty is so clearly and unarguably different in degree and kind from any other type of punishment ever known to the human race. Lockett v. Ohio, 438 U.S. 586 605 (1978), and Gregg V. Georgia, 428 U.S. 156, 187 (1976).

(A) THE TRIAL COURT ERRED IN ASSESSING A NONSTATUTORY AGGRAVATING CIRCUMSTANCE AGAINST CASTEEL

Immediately following the sentencing of Casteel, the trial court made the following statement:

> "The Court takes the position in these cases that it will be unconscionable for the court

> to sentence to death the two executioners in this case and not, likewise, sentence those whose conduct led to those executions by paying, hiring and securing the deaths of the individuals involved." (TR-9/16/87 - 47)

Although the trial court made no reference in its Findings and Sentence to this matter of conscience, such nevertheless is clearly a nonstatutory aggravating offense which the trial court imposed upon defendant Casteel despite the clear language of Section 921.141, Florida Statutes, that "aggravating circumstances shall be limited to "the one's specifically enumerated in the said staute.

Further, the United States Supreme Court in Proffitt v. Florida, supra, made clear that aggravating circumstances are limited by the death penalty statute while mitigating ones are not.

Furthermore, the fact that the trial court made its statement of conscience in this regard raises a serious question as to whether its real reasons for imosing the death penalty are as is set forth in the Findings and Sentence or whether those reasons were arrived at for the primary purpose of equalizing the imposition of death penalties with respect to the "executioners," on the one hand, and the alleged procurers, on the other.

In this regard, Defendant Casteel would respectfully suggest to the Court that the wording of the "determination" in the trial court's Findings and Sentence at least suggests that the trial court may have, at least in part, prepared the Findings

Sentence as to justify the sentences it had decided to impose, rather than for the sole purpose, as required by the statute, "to set forth in writing its findings upon which the sentence of death is based." Section 921.141(3), Florida Statutes.

That "determination" is:

> "Based upon the foregoing findings the Court concurs with the jury's recommendation that the death penalty be imposed on the defendant Dee Dyne Casteel. The Court reaches this determination independent of the jury's recommendation. The Court further holds that sufficient aggravating circumstances exist for the rendition of the sentence of death, and that there are sufficient mitigating circumstances to outweigh the aggravating circumstances. Each aggravating circumstance as found by the Court standing along outweigh any and all mitigating circumstances in this case. It is therefore the judgment and sentence of this Court as to the first degree murder of Bessie Fischer, Dee Dyne Casteel be adjudicated guilty of Murder in the First Degree and that she be sentenced to death.. ..As to Count 11, the murder of Arthur Venecia, the Court adjudicates the defendant guilty of murder in the First Degree however overrides the jury's recommendation of death. After due consideration of aggravating and mitigating circumstances and applying the same procedure as in the murder of Bessie Fisher, instead imposes a sentence of life in prison with twenty-five years mandatory..."

In its determination it appears that the trial court is saying, on the one hand, is is imposing the death sentence on Casteel with respect to Fisher because each single aggravating circumstance outweighs any and all mitigating circumstances but that, on the other hand, it is overruling the jury's recommendation of the death penalty as to Casteel with respect to

the death of Venecia even though each single aggravating circumstance outweighs any and all mitigating circumstances.

While conceding the possibility that the trial court may not have intended to make such conclusion with respect to Casteel's role in the death of Venecia, this probable inconsistency on the part of the trial court would support the above-stated contention of defendant Casteel that, at least in part, the findings and conclusions, or determination, of the trial court were arrived at for the purpose of achieving uniformity of sentencing as betweent the two categories of defendants in this case.

Because of uncertainties caused by the above-described non-statutory addition to the statutory aggravating circumstances and by the inconsistency of the sentences imposed on Defendant Casteel with respect to the two victims, and for the further reason previously argued based upon this Court's holding in Dixon v. State, supra, this defendant would pray the Court to reserve the trial judge's imposition of the death penalty upon her.

(B) THE TRIAL COURT ERRED IN CONCLUDING THAT THE CAPITAL FELONY COMMITTED BY CASTEEL UPON FISHER WAS DONE IN A COLD CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Under the portion of the trial court's Findings and Sentence with respect to Casteel's involvement in the killing of Bessie Fisher, this trial court recites: "8. Finding (same as to James Allen Bryant) - The Court finds this to be an aggravating circumstance."

Paragraph number 8 of the Findings and Sentence with respect to Casteel's role in the death of Venecia, deals with aggravated circumstance 5(a), to-wit: "the capital felony was a homicide and was committed in a cold, calculated and premediated manner without any pretense of moral or legal justification."

Clearly, the focus of the trial court here is premeditation but, of course, premeditation is what non-felony first degree murder is all about and it is equally clear that it would be patently unconstitutionally impermissible for Casteel to be given the death penalty upon a conviction of premeditated first degre murder simply becasue of the presence of premeditation and, indeed, such a result could once again result in the United States Supreme Court declaring Florida's death penalty law unconstitutional.

Unfortunately, the trial court has not seen fit to explain in its Findings and Sentence as to what it based the cold, calculating circumstance upon other than to refer to the Findings and Sentence of co-defendant Bryant, which is not part of the Record on Appeal furnished to Casteel's appellate counsel. However, in looking to two other portions of the Findings and Sentence relative to Casteel, it appears that the trial court based the cold, calculating finding on premeditation and the alleged degree thereof.

The two portions of the Findings and Sentence of Casteel are paragraph number eight of the aggravating circumstances relative to the death of Venecia and the fact that under

paragraph number seven of the aggravating circumstances as to Fisher, the trial court concluded that Casteel's role in the death of Fisher was not so heinous, atrocious and cruel to use to the level of an aggravating circumstance.

This Court in Dixon, supra, utilized the terms "capital felony" and "capital aggravated felony" and it is clear that there must be something more than just premeditation for such to turn "captial felony" into an "aggravated capital felony."

In Jent v. State, 408 So.2d 1024, 1032 (Fla.,1982), the Court said:

> "As we stated in State v. Dixon, 283 (Fla., 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 295 (1974), the aggravating circumstances set out in section 921.141 must be proved beyond a reasonable doubt. The level or premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in sub-section (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the pre-meditation aggravating fact--cold, calculated.. and without any prentense of moral or legal justification."

And, finally, with reference to possible overlapping between the respective meanings of aggravating circumstances 5(l), i.e., cold, calculating, etc., and aggravating circumstance 5(b), i.e., heinous, atrocious and cruel (see Raulerson v. State, 358 So.2d 826 (Fla.1978)), Defendant Casteel would point out that the trial judge specifically found in his Findings and Sentence herein that her involvement was not sufficiently heinous, atrocious and cruel and found that aggravating circumstance

to be not applicable.

She prays the Court to examine the arguments to be raised hereunder by her counsel and all other aspects of her case-- even if not raised by her counsel -- because the death penalty is so clearly and unarguably different in degree and kind from any other type of punishment ever known to the human race. Lockett v. Ohio, 438 U.S. 586 605 (1978), and Gregg v. Georaia, 428 U.S. 156, 187 (1976).

(C) CASTEEL WAS DENIED A FAIR PENALTY PHASE TRIAL BECAUSE THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE CERTIFIED CONVICTIONS OF THE GUILTY VERDICTS IN THIS CASE.

The law is clear that during the penalty phase of a capital felony trial all the testimony and evidence that was adduced during the criminal liability phase of the trial can be considered by the jury and, indeed, the trial court so instructed the jury in the instant case (TR-7/30/87 - 508, 509).

In the comment to Section 210.6(3)(a), of the Model Penal Code (1980), at page 136 thereof, the following recitation appears:

> "Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggests two inferences supporting escalation of sentences: first, that the murder reflects the character of the defendant...and, second, that the defendant is likely to prove dangerous to life on some future occasion."

This defendant is aware of the following language that appeared in Ruffin v. State, 397 So.2d 277, 282 (Fla.,1981), with

reference to aggravating circumstance 5(b) of Section 921.141, Florida Statutes, (i.e., the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person), to-wit:

> "...this aggravating circumstance encompasses convictions in existence at the time of sentence for crimes committed after the murder for which a defendant is being sentenced."

However, and such language to the contrary notwithstanding, this defendant would urge upon the Court that because of the single basic fact that in this death penalty case, and in every other death penalty case that comes before it, this Court should never be unwilling to re-examine and reconsider its position on any issue related thereto and, in that spirit, she urges upon the Court her view that the clear intendment of the original drafter of aggravating circumstance 5(b) was that a prior conviction of a capital felony, etc., occurring before the commission of any of the crimes already before the penalty phase jury as a part of the testimony and evidence adduced at the trial can be considered as an aggravating circumstance going to the issue of repeat offending of the most serious of crimes as being even more reprehensible than the sole commission of the offenses charged in the instant case.

There was simply no evidentiary benefit that could accrue to the State by the introduction of the certified convictions except to possibly cause confusion as to whether the jury was entitled to recommend aggravation on enhancement to death based

upon a second consideration of the convictions that had been secured against Casteel.

(D) CASTEEL WAS DENIED A FAIR PENALTY PHASE TRIAL BECAUSE THE TRIAL COURT ALLOWED THE PROSECUTOR TO ARGUE NON-STATUTORY MITIGATING CIRCUMSTANCES TO THE JURY.

Section 921.141(5), Florida Statutes, provides, in pertinent part, "aggravating circumstances shall be limited to the following." Thereafter, in the statutes, appear the nine aggravating circumstances that may legally be considered by a death penalty jury in Florida.

Having lost his bid to have the opportunity to be able to make a rebuttal argument during the penalty phase, the prosecutor nevertheless argued to the jury that he anticipated Casteel's counsel would thereafter argue that Casteel had no history of violence (TR-7/30/87 - 404, 405). The prosecutor also argued that Casteel's counsel would argue that Casteel loved her children but that Venecia loved his mother, too, and that the type of mother that Casteel was shouldn't be rewarded (TR-7/30/88 - 406-413). The prosecutor further argued that Casteel's lawyer "may argue" that the prison guards and corrections officers who testified had said that Casteel was a good prisoner and a cell counselor, but that the jury should consider that she arranged the murder of Venecia when considering what a good prisoner she is (TR-7/30/87 - 415, 416).

The prosecutor then argued that the "last thing I would expect" Casteel's counsel to do would be to ask the jury to give

her leniency because she now says God has forgiven her and that she has remorse when she had no remorse for the killing of Venecia(TR-7/30/87 - 420, 422).

Aggravating factors are limited by statute while mitigating factors are not. Proffitt v. Florida, 428 U.S. 242 (1976).

(E) THE DEATH SENTENCE OF DEFENDANT CASTEEL SHOULD BE REDUCED TO LIFE IMPRISONMENT UNDER THE STATUTE UNDER THE PRINCIPAL OF PROPORTIONALITY REVIEW.

Proportionally, review is an important function of this Court in the review of death sentences. Brown v. Wainwright, 392 So.2d 1327, 1331-32 (Fla.1987).

In this regard, this defendant would pray the Court to review all cases decided by it since the effective date of the current death penalty statutes in which the imposition of the death penalty was upheld with respect to a defendant who did not personally kill some. It is believed that if the Court would undertake such a review it would determine that there has been only one such case, to-wit: White v. State, 403 So.2d 331 (Fla. 1981), cert.den. 454 U.S. 1000, 102 S. Ct. 542, 70 L.Ed 2d 407 (1981).

POINT IV

THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY A GENERAL VERDICT FORMS WITH REFERENCE TO EACH OF THE TWO FIRST DEGREE MURDER CHARGES ASSERTED AGAINST DEFENDANT CASTEEL WITH THE PREJUDICIAL RESULT THAT IT CANNOT NOW BE ASCERTAINED WHETHER THE JURY INTENDED TO FIND HER GUILTY OF THE FELONY MURDER

CHARGES OR THE PREMEDITATED MURDER CHARGES.

With respect to both Venecia and Fisher the trial court submitted forms, which were thereafter returned by the jury, reading as follows:

> "We the jury, at Miami, Dade County, Florida, this 17th day of July, A.D., 1987, find the Defendant, Dee Dyne Casteel, as to First Degree Murder upon (Arthur Venecia) (Bessie Fisher) as charged in Count (Two) (Four) of the Indictment. Guilty. So Say We All." (R-787, 789)

Uncontrovertedly, we cannot ascertain from these two verdict forms whether the Jury found Casteel (with respect to each of the murder counts) guilty of First Degree Felony Murder or First Degree Premeditated Murder and this is prejudicial to Casteel because under the evidence submitted to the jury in this case, she cannot have lawfully been found guilty of First Degree Felony Murder because in order to convict her for that offense the jury must have necessarily concluded that Casteel had entertained the mental element necessary to convict on one of the underlying felonies. Gursanous v. State, 451 So. 2d 817 (Fla. 1984).

Or as is stated in State v. Williams, 254 So.2d 548 (Fla.2d DCA 1971):

> "We hold, therefore, that the felony-murder statute is applicable only when an innocent person is killed as a reguential result of events or circumstances set in motion by one or more persons acting in furtherance of an intent or attempt to commit one of the felonies specified in the statutes."

The underlying felonies set forth in the Felony Murder portion of Section 782.04, Florida Statutes, which Casteel must have either have perpetrated or have attempted to perpetrate are "arson, involuntary sexual battery, robbery, burglary, kidnapping, escape, aggravated child abuse, aircarft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb," or....the unlawful distribution of any controlled substance,etc., "and there simply was no evidence adduced in this trial to show that Casteel perpetrated or attempted to perpetrate any of these offenses."

Therefore if the jury did, in fact, intend by its guilty verdicts on the two murder counts to have found Casteel guilty of First Degree Murder, those verdicts are wholly unsupported by the evidence and cannot stand.

Of course, it may have been that the jury intended to find Casteel guilty of Premeditated First Degree Murder but such simply cannot be ascertained from the two involved verdicts and it is therefore Casteel's contention that neither of these verdicts should be allowed to stand.

In making this assertion to the Court, Casteel is mindful of the so-called "two issue" rule which this Court followed in Colonial Stores, Inc. v. Scarbrouah, 355 So.2d 1181 (Fla. 1978), but in regard thereto she would point out that in adopting that rule this court recognized that there was "a weight of authority to the contrary" mandating a reversal "where error has affected one issue unless it is clear that the complaining party has not

been injured **thereby."** Further, Casteel would point out that the Colonial Stores decision dealt with a civil case, as did all of the decisions cited by this court in that case, while in the instant appeal the subject matter is not only a criminal case but the most serious type of criminal case known to the law.

Further, Rule **3.500,** Florida Rules of Criminal Procedure, provides as follows:

> **"Rule 3.500.** Verdict of Guilty Where More than One Count--
> If different offenses are charged in the indictment or information on which the defendant is tried, the jurors shall, if they convict tht defendant, make it appear by their verdict on which counts or of which offenses they find him guilty." (Emphasis supplied)

Clearly, the use of the word **"shall"** in Rule **3.500** makes it clear that it was the trial court's responsibility to have verdict forms prepared and submitted to the jury whereas the jury could "make it appear" whether it was convicting Casteel of First Degree Felony Murder or First Degree Premeditated Murder.

Further, it should also be pointed out that there is no counterpart provision to the said Rule **3.500** in the Florida Rules of Civil Procedure.

So, because this jury may have convicted Defendant Casteel of First Degree Felony Murder; because such would have been inappropriate under the law and the evidence adduced at the trial and because ---particularly in a case where the outcome determines the life or death of this defendant --- the two verdicts of guilty as to First Degree Murder --- with respect to

Venecia and Fisher -- should not be allowed to stand by this Court.

This defendant is aware of the contrary holdings by this court in Brown v. State, 473 So.2d 1260 (Fla.1985), and in Buford v. State, 492 So.2d 355 (1986), but would point out to the Court that in the instant case, unlike in the Brown case --- and as was argued above on this point -- there was not sufficient evidence to support both convictions and that the holding in Brown, supra.

POINT V

DEFENDANT CASTEEL WAS DENIED A FAIR TRIAL, A FAIR SENTENCING HEARING, AND THE DUE PROCESS OF THE LAW BY THE MISCONDUCT OF THE PROSECUTOR.

It began at the commencement of the voir dire examination by the prosecutor when he asked a prospective juror about whether she could follow the law with respect to "a theory of when people hire people to do criminal acts for them and their level of responsibility to which Casteel's objection was sustained (TR-6/15/87 - 221-225).

But this prosecutor was not to be deterred in his predetermined campaign to utilize the voir dire examination to precommit the prospective jurors to an unalterable position of finding the so-called "Principals," i.e., Casteel and Bryant, guilty of the acts of the two other defendants. Following his first above-described foray into this voir dire campaign, the prosecutor thereafter brought up the matter of "Principals," the

instruction on **"Principals,"** and his views thereon at the following places during the voir dire examination: (TR-6/16/87-230-237; 248, 249 (see the proscription asked for **"up** front committments;" 251-255; 295-298, 316) whereat the trial court said it would give a curative instruction, in part, to explain why it had instructed the jury relative to the law of Principals); 371; TR-6/17/87 - 803, 804; (see TR-6/18/87 - 1105, 1106, for the trial court's expression of frustration over the extent to which the question of **"Principals"** had gotten enmeshed in the voir dire process); TR-6/19/87 - 1261-1262); (one of the more outrageous examples of the prosecutor's **"Principals"** questions was when he asked a panelist whether his "internal sense of what is right and wrong, not the law again, does that tell you that both "the robber who holds the gun and the person who helps him commit the robbery but without a gun should be held equally accountable (TR-6/19/87 - 1265, 1267); 1265-1269; (TR-6/22/87 - 327, 329); (TR-6/24/87 - 639-657).

The prosecutor improperly referred to the fact that a grand jury had indicted the defendants on at least two occasions during his voir dire examination (TR-6/19/87 - 1270, 1271; and TR-6/24/87 - 603).

He asked improper questions and/or made improper statements relative to reasonable doubt at the following points in his voir dire examination, to-wit: Whether because this is a 1st degree murder case you go to a higher standard of all doubts rather than a reasonable doubt" (6/16/87 - 374, 386); "reasonable

doubt not shadow of a doubt" TR-6/19/87 - 1271-1277).

The prosecutor improperly tried to precondition the jury to be able to convict a woman (TR-6/15/87 - 197-199 and 6/24/87- 626-633).

And one of the most inexcusable parts of the prosecutor's misconduct was his unceasing campaign during the voir dire examination to precondition the prospective jurors into believing that their role in serving on the jury during the penalty phase was unimportant because the judge -- and not the jury -- would ultimately decide whether the respective defendants would receive the death penalty (TR-6/16/87 - 282-285); TR-6/22/87 - 298; 6/24/88 - 663, 664, 773).

These efforts to trivialize the jury's penalty phase role continued throughout the trial and into the penalty phase itself and were violative of defendant Casteel's right under the Eighth Amendment to the U.S. Constitution in that the effect of the prosecutor's misconduct in this area was to violate a death case defendant's right to a fair trial thereunder, i.e., neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, because "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed 2d 231, 240 (1985). In this regard, defendant Casteel also places her reliance in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986); Mann v. Dugger, 817

F.2d 1471 (11th Cir. 1987); and State v. Clark, 492 So.2d 862 (La. 1986).

The policy of the law in impanelling a jury is to secure jurors for that responsible duty whose minds are wholly free from bias or prejudice. Walsingham v. State, 61 Fla. 67, 56 So. 195 (1911). To the extent that an attorney -- particularly a prosecutor in a capital case -- subverts that process, that defendant has been denied his due process rights and justice has been denied.

The prosecutor improperly attempted to predispose the members of the voir dire panel to being able to convict a woman, i.e., Casteel (TR-6/15/87 - 197-199); TR-6/29/87 - 626-633).

And he repeatedly attempted to have prospective jurors excused for cause simply because they didn't favor the death penalty but without respect to whether they could nevertheless follow the law, which was violative of the law as is set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed 2d 776 (1968).

During his examination of the backhoe owner, Wayne Tidwell, at the trial, the prosecutor repeatedly asked leading questions and would summarize the witness's testimony (TR-6/29/87 - 391, 393). He cross-examined defendant Casteel by insinuating she had negotiated with co-defendant Irvine previously to have someone killed (TR-7/8/87 - 1422-1425). During further cross-examination of Casteel and with reference to the last time Casteel fed Fisher before Fisher was killed, the prosecutor asked

Casteel if she served Fisher "her last supper" (TR-7/8/87-1444).

In his final argument during the penalty phase, the prosecutor said, "I defy, I defy anyone of the defense attorneys in this case to come up to you, demand of them, demand of them---" (TR-7/31/87 - 398). What the prosecutor was demanding was that the defense lawyers explain how the murder of Venecia was other than cold, calculating and premeditated. The trial court, in effect, sustained defense counsel's objection thereto but the damage had been done. It is the State's burden to prove the existence of an aggravating circumstance beyond a reasonable doubt. Section 921.141, Florida Statutes. It is not the defendant's burden to have disproved the existence of an aggravating circumstance. Therefore this prosecutorial comment was a clear infringement on all of the defendants' rights to have the existence of the cold, calculating, etc., aggravating circumstance proven against them and it is akin to a prosecutor's discussing with the jury a defendant's failure to testify at the trial which is, of course, constitutionally impermissible. Griffin V. California, 380 U.S. 609/1964).

And, finally, as is set forth in detail in Casteel's Motion to Vacate Advising Recommendation of Trial Jury with supporting documents, including transcripts attached thereto (R-895-901; 904-1212), there is a serious question that was never resolved by the holding of an evidentiary hearing by the trial court, or otherwise, as to whether the prosecutor "deliberately,

engineered, coached and directed Dr. Valerie Rao (Assistant Medical Examiner) into willfully giving perjured testimony "at the penalty phase trial regarding her findings and conclusions as to how Venecia and Fisher died, whether and how much they probably suffered, etc., which testimony was different than that she gave pre-trial and at trial, i.e., that they each died by "unspecified means."

In Gonzalez v. State, 450 So.2d 585 (Fla. 3d DCA 1984), the court reversed and remanded a conviction because of "incredible prosecutorial conduct" even though "it appears, at first blush, that the evidence adduced was sufficient to sustain the jury verdict." The misconduct there consisted of repeated improper questioning, improper comments, and the continuous summarizing of testimony.

And, finally, in Berser v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed 1314 (1935), the Court stated, in pertinent part, to-wit:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and visor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate

> means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so planly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (Emphasis added)

POINT VI

THE STANDARD OF REVIEW IS WHETHER THE TRIAL COURT'S ERRORS ARE HARMLESS BEYOND A REASONABLE DOUBT.

With reference to all trial court errors, with the xception of the error charged under the Batson and Neil cases, supra, urged herein, defendant Casteel respectfully suggests to the Court as after the determination by this Court as to the existence vel non of each such charged error, and if that inquiry is answered in the affirmative, whether each such error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed 2d 705 (1967). If not, each such error is harmful and requires reversal.

CONCLUSION

The defendant Dee Dyne Casteel prays the Court to reverse the verdicts and judgments finding her guilty of two counts of first degree murder and of the lesser counts upon which she was convicted for the reasons described hereinabove; failing that to reduce her death sentence to life imprisonment under the statute; and/or to grant to her such other relief as the Court deems

necessary under the circumstances of this case.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief was mailed this 23rd day of September, 1988, to CHARLES M. FAHLBUSCH, Assistant Attorney General, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128; SHERYL J. LOWENTHAL, ESQ., Attorney for Michael Irvine, Suite 304, 2550 Douglas Road, Coral Gables, Florida 33134; GEOFFREY C. FLECK, ESQ., Suite 106, Sunset Station Plaza, 5975 Sunset Drive, South Miami, Florida 33143; and GARY W. POLLACK, ESQ., Suite 275, 1320 South Dixie Highway, Coral Gables, Florida 33146.

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