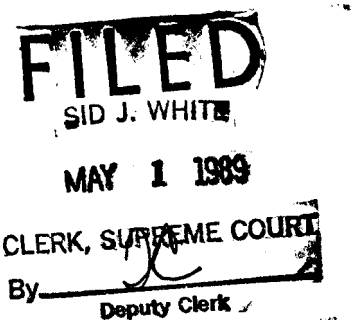
I N THE **SUPREME** COURT OF FLORIDA

CASE NUMBER: 357 **71-~~355~~**



DEE DYNE CASTEEL,

APPEUANT,

v.

THE STATE OF FLORIDA,

APPELLEE .

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

REPLY BRIEF OF APPEUANT DEE DYNE CASTEEL

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ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO SEWER THE TRIAL OF DEE DYNE CASTEEL FROM THE TRIAL OF JAMES ALLEN BRYANT THEREBY DENYING CASTEEL HER RIGHT TO A FAIR TRIAL AND THE DUE PROCESS OF LAW AS PROTECTED BY BOTH THE CONSTITUTIONS OF THE UNITED STATES OF *AMERICA* AND OF THE STATE OF FLORIDA.

The Attorney General accurately points out the following in his brief herein, to-wit:

> "The fact is, that Allen Bryant is the only defendant who didn't testify.....the only statement that Casteel, Irvine or Rhodes can complain of is the redacted statement of Bryant.. .." (SB-76)

To complete this scenario, the Attorney General should have added something to the effect that Casteel was by far hurt the most by Bryant's redacted statement being admitted, because of the very clear identification therein of Casteel as being **"someone"** Bryant had hired "as a waitress at the restaurant I was managing", followed by other equally clear "someone" references to Casteel, with the sum and substance of Bryant's said redacted statement being that as between he and Casteel, Casteel was the initiator of the hiring of a person or persons to kill the two victims.

It was vital that Casteel's counsel be afforded the opportunity of cross-examining Bryant on this point and, as well, the thesis of Bryant's counsel that Casteel initiated the involved killings, etc., which precise point and which thesis were laid out to the jury at the outset of the trial

by that counsel in his opening statement (TR 87-105).

The heart of the Attorney General's arguments as to why the denial of the defendants' respective severance motions was not error, and as to why the introduction of the redacted confessions of the respective defendants was appropriate, is not entirely clear to Casteel's undersigned counsel, but it appears that the argument is that the redacted confessions were all admitted in evidence because they are either interlocking and thus admissible; or that they are not interlocking, but are instead in conflict with each other, so they were admissible; and/or that each defendant's confession has "sufficient indicia of reliability" to be directly admissible against the co-defendants, so there was no error in each defendant's confession being introduced solely against the defendant who made it (AGB 76-79).

As to this latter contention, it is totally without merit. As is pointed out in a case relied upon by both the Attorney General and Casteel, to-wit: Cruz v. New York, 481 U.S._____, 109 S.Ct._____, 95 L.Ed 2d 162 (1987), the United States Supreme Court in its earlier case of Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed 2d 514 (1986), enunciated a principle of law that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating the other person, the accusation is "presumptively suspect and must be subjected to the scrutiny of cross examination." In Lee the Court

pointed out that the State of Illinois contended that the statement of the co-defendant there "bears sufficient 'indicia of reliability' to rebut the resumption of unreliability that attaches to co-defendant's confession." (Lee v. Illinois, at pg. **2063** of **106** S.Ct.)

Looking to the facts before it, the **Lee** Court ascertained that there were not sufficient indicia of reliability or trustworthiness for the co-defendant's statement to be admitted as evidence against the defendant without the defendants' Sixth Amendment Confrontation rights being violated. Specifically in **Lee**, supra, the Court found that the confession "was elicited only after Thomas was told that Lee had already implicated him..." (Lee v. Illinois, 106 S.Ct. at p. **2064**). The same was true in the instant case with respect to Bryant and his confession. He already knew that Casteel had confessed and had implicated him.

The Court in **Lee**, supra, further found:

> "The unsworn statement was given in response to the questions of police who having already interrogated Lee, no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel or its equivalent." (pg. **2064** of 106 S.Ct.)

Obviously, the same was true with respect to Bryant's confession.

In **Lee** the Court further pointed out, to-wit:

> "Although, as the State points out, the confession was found to be voluntary for Fifth Amendment purposes, such a finding

> does not bear on the question of whether the confession was also free from any desire, motive or impulse Thomas may have had either to mitigate the appearance of his own culpability by spreading the flame or to overstate Lee's involvement in retaliation for her having implicated him in the murders."

Again, the same is true in the instant case with respect to Bryant's confession and Casteel's Sixth Amendment confrontation rights.

Thereafter the Court in Lee v. Illinois, supra, announced it was also rejecting **"Illinois'** second basis for establishing **reliability,"** to-wit: "namely, that because Lee and Thomas' confessions interlock on some points, Thomas' confession should be deemed trustworthy in its entirety." (106 S.Ct. at p. 2064)

In the instant case, while there is concededly some interlocking between Bryant's confession and Casteel's confessions, there are also differences between them regarding the respective roles each of the defendants played in the initiation of the death of Venecia. This was the same situation found to exist in the **Lee** case, where the Court said:

> **"In** this case, the confessions overlap in their factual recitations to a great extent. However, they clearly diverge with respect to Lee's participation in the planning of her aunt's death, Lee's facilitation of the murder of Odessa, and certain factual circumstances relevant to the couple's premeditation..." (106 S.Ct. at p. 2056)
>
> "...The subjects upon which these two

> confessions do not 'interlock' cannot in any way be charactized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at the trial: the roles played by the two defendants in the killing of Odessa, and the question of pre-meditation in the killing of Aunt **Beedie."(106** S.Ct.at p. 2065)

As in Lee v. Illinois, supra, the discrepancies between the confessions of Bryant and Casteel go to the major issue in dispute at the trial below insofar as Casteel is concerned and that is the respective roles played by Bryant and Casteel in the initiation of the two killings.

And those issues were not just important to Casteel at the trial phase, they were equally vital to her case with respect to the sentencing phase,and she was unfairly prejudiced in the extreme in having Bryant's confession introduced at this joint trial without her attorney having the opportunity of making crystal clear to the jury through cross-examination of Bryant that as between the two of them, Bryant, in particular, was the initiator of the killings and that, in general, he was the more culpable of the two.

Without that opportunity, the trial court should have severed the trials of Casteel and Bryant.

In the aforedescribed opinion in Cruz v. New York, supra, the Court, after discussing "interlockingness," returns to the central issue of **"reliability"** and states its bottom-line holding as follows:

> "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." (95 L.Ed 2d at p. 172)

In one of the cases cited by the Attorney General in the decisions contained in its brief in support of its contention that there was no Confrontation Clause violation where the particular complaining defendant's name was replaced with "someone," "the other man," etc., to-wit: United States v. Garcia, 836 F.2d 385 (8th Cir. 1987), the court stated, in pertinent part, to-wit:

> "Cases sometimes arise in which the redacted statement alerts the jury to the fact that a name available to the prosecution has been purposely omitted, and this may improperly lead the jury to infer that the omitted name must be the defendant's."

That is most certainly what happened in this case with reference to the "someone" Bryant said he hired as a waitress. That person surely was not either one of the other co-defendants and if it had been anyone else but Casteel, there would have been no reason for "someone" to have been used in place of a person's name.

With reference to the cases cited by the Attorney General upholding the receipt in evidence of co-defendants' confessions with "someone", "the other person", etc., substituted for the respective complaining defendant's name,

Casteel would point out that none of them deal with the precise point involved here, and that is the admissibility of the confession of a co-defendant, Bryant, who is seeking to reduce his culpability by making another defendant, Casteel, appear more culpable than him without the latter defendant being afforded her right to confront the said co-defendant through cross-examination. In this regard and as was pointed out in Casteel's initial brief, Casteel would again point out to the Court that Bryant's trial attorney spent by far the bulk of his final argument attacking Casteel as being the ring leader in plotting the deaths of Venecia and Fisher (TR 7/14/87 - 359-384).

And as also was argued in Casteel's initial brief herein, the damage done to her by having Bryant's confession come into evidence with no concomitant right on the part of Casteel's counsel to cross-examine Bryant was not limited to the trial phase of the case but also carried over to the penalty phase and very probably had a direct adverse effect or aggravating factor 5(a) (of Section 921.141), to-wit: "the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." This, of course, was one of the aggravating factors assessed or found against Casteel by the trial court with reference to the Bessie Fisher killing.

And it was doubly unfair to Casteel that on top of the inflicting of this incurable unfairness upon her, the trial

court specifically refused to allow Casteel's counsel to comment in any respect whatsoever in his final argument to the jury that Bryant had not taken the stand and testified. In this regard, Casteel's attorney specifically argued to the trial court that he needed to make such a comment because Bryant's counsel in his opening statement had said that Casteel had said to Bryant, "Dee says go with these men" (to the Venecia house the night Venecia was killed). And, of course, the only testimonial verification of this assertion by Bryant's counsel was in Bryant's confession. But the holdings in 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) to the contrary notwithstanding, the trial court steadfastly refused to grant Casteel's counsel even this relief against Bryant's confession. And no severance either (TR 7/15/87 - 305-307, 319-327).

And, of course, these bases for a trial severance as between Casteel and Bryant mesh into the other reason why such a severance was necessary, and that is because the defenses between the two were hopelessly antagonistic.

The Attorney General argues that to be entitled to a severance upon this latter ground, a defendant must show specific and compelling prejudice and that defenses are not only antagonistic, but irreconcilable and mutually exclusive (AGB 92,93).

In order to ascertain whether the defenses of Casteel and Bryant are "not only antagonistic but irreconcilable and mutually exclusive" as well, the nature of each of those defenses must first be ascertained.

In his opening statement to the jury, Casteel's counsel argued, in pertinent part, as follows: Bryant was "a master manipulator" of people; Venecia was Bryant's victim; Bryant hired Casteel as a waitress and she was an alcoholic that he would exploit to the fullest; and Casteel drank upwards of a quart of liquor per day; when Bryant called Casteel and said he wanted to speak with her, Casteel thought he was going to fire her for drinking on the job, but instead he told her he had heard she knew somebody who would commit murder for a price; Irvine, who was a friend of Casteel's husband had previously told Casteel he'd get rid of her husband for a price and that this would be cheaper than a divorce; Casteel had taken what Irvine said as a joke; Casteel was relieved that Bryant wasn't going to fire her and only told her, "...all you need do, find out first if the guy is serious, and find out what it will cost"; Venecia told Casteel he was going to fire Bryant because the latter was stealing money from him and he had a new lover, Felix; after Irvine had half the money, Bryant wanted to know if they had killed Venecia yet; Bryant got angry at Casteel because Venecia hadn't been killed yet and because he had caught Venecia in bed with a mentally retarded nineteen year old male, Terry Huddleston;

Bryant wanted Venecia killed immediately because of this anger; Bryant gave a gun to Casteel and asked her to kill Venecia; Bryant and Casteel went to the Amoco station where Irvine worked and money passed from Bryant to Casteel to Irvine; Casteel had no motive and no intent to kill Venecia and only Bryant did; Irvine intended to kill nobody but only to shake Bryant up and take his money from him; that all three co-defendants ----- but not Casteel ----- went to Venecia's house (the night he was killed); Casteel had learned of Bessie Fisher's name from Bryant; that Bryant said he should have had Fisher killed **"at** the same time"; Casteel "bought this woman's life" in that she was a buffer between Bryant's desire to having her killed and such not being done; that Casteel took Fisher to the beauty parlor to avert her being killed when Venecia's body was to be moved; and that Bessie's death was ultimately brought on by her becoming anxious about Venecia being missing and because she saw his red truck (TR **6/29/87 - 75-97).**

In his opening statement to the jury Bryant's trial counsel argued as follows: "Dee Casteel was greedy"; she saw two homosexuals she could take advantage of; she knew the killers; she moved into Venecia's house; she took control of Venecia's business; she needed "the money"; Bryant got a phone call to come down to the restaurant and Casteel told him to "go with these men"; Bryant was afraid and he was intimidated (i.e., meaning by Casteel); Bryant never planned

"the murder or participated" including never giving anybody any money to commit "the murder"; the murder of his lover, Venecia, was committed in his presence and he was "totally distraught"; Casteel knew the killers and arranged for everything and could have had Bryant killed but didn't because she needed him; Bryant had (only) an 8th grade education and did not have the "sophistication" to plan the murders of either Venecia or Fisher; there was no Casteel plan to have Irvine scare Bryant because, "it was a plan to kill Arthur Venecia", etc., and then Casteel would take over Venecia's restaurant and house; and Casteel manipulated Bryant and this was easy to do because he had "a feeble type of mind and she was used to manipulating people" (TR 6/29/87 - 99).

And, finally, Bryant's counsel told the jury in his opening statement:

> "....it was Dee's idea to commit the murder of Bessie Fisher...Dee was in control." (TR 6/29/87 - 105)

In his final summation Bryant's counsel told the jury, to-wit: Casteel lied when she said she thought they were going to take Bryant out and rob him; Casteel said both that Bryant was angry because he had paid money and Venecia hadn't been killed and that he was angry because he caught Venecia in bed with Terry Huddleston; that if Casteel had only been acting as a courier for Bryant why was she counting "the money"; that Casteel told conflicting stories as to whether

she had previously known Fisher; that Casteel said she got the $2000.00 for the house down payment from her grandmother; and, finally, to-wit:

> "Now, it's simple for somebody to shift the blame to someone else in order to take some of the heat off themselves, very easy to do that, because that makes them appear to be less culpable." (TR 7/16/87 - 360-368)

Succinctly stated, the bottom line to be drawn from what these two lawyers told the jury is that Casteel's defense was that she was drawn into involvement in the two murders by Bryant and Bryant's defense was that he was drawn into involvement in the murders by Casteel. Concededly, Bryant's counsel did also argue that Bryant had nothing to do with the planning of the murders but this was clearly not his main theme.

The Attorney General argued to the court that Casteel was not entitled to a trial severance from Bryant based upon antagonistic defenses because in order to be entitled to a severance for this reason, the conflict in defenses must be so irreconcilable that a jury would infer the guilt of **all** defendants due to the conflict alone (AGB 93). Addressing this argument, Casteel would first say that her counsel's understanding of the decisions cited by the Attorney General to support this thesis is that the jury need not have to infer the guilt of **all** defendants but only the guilt of the defendants with the conflicting defenses.

But, more importantly, neither the Attorney General or

the said decisions relied upon by him in this regard address the real issue involved here and that is how devastatingly antagonistic the two involved defendant's defenses need be to have to give them a trial severance to insure that each get a fair trial and thus procedural due process under both the United States and State of Florida Constitutions.

In the first instance, it is the criminal defendant's right, by and through and with his counsel, of course, to determine what his or her theory of defense will be with the proviso, of course, that the trial court could prohibit a defendant from raising a defense contrary to the law. But other than suggesting to the trial court that a proposed defense would be contrary to law, the prosecution has no voice in the matter.

Thus, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense if there is any evidence to support such an instruction. Stiglitz v. State, 270 So.2d 410 (4th DCA 1972) and Canada v. State, 139 So.2d 753 (2d DCA 1962).

Furthermore, since it is a fundamental concept of our judicial system that a person charged with a crime is entitled to the presumption of innocence throughout each step of the trial until the presumption is overcome by evidence showing the guilt of the defendant beyond a reasonable doubt, it follows, a priori, that every criminal defendant ----- no matter how guilty he may appear to be ----- is entitled to

defend himself upon his theory of defense, however weak it may be.

It would be totally violative of the right of Casteel to present her theory of defense, because that theory might be something other than "I didn't do it" or "I had nothing to do with it", for this Court to hold that she should not prevail in this appeal on her contention that the trial court erred in not severing her trial from that of Bryant based upon antagonistic defenses because the defenses of these two defendants were not so irreconcilable that a jury would infer the guilt of both of the said defendants due to this conflict alone. Every accused person has a right to avail himself of any and all defenses, however technical, the law recognizes and permits. 22 C.J.S. 129 (Criminal Law, E. Defenses, Section 38, In General)

Her defense was that her conduct was less culpable than that of Bryant. That defense went to the premeditation trial issue and to the aforedescribed aggravating factor 5(a), i.e., "that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

This was her defense and it was hopelessly antagonistic to Bryant's defense and their being tried together denied her a fair trial and the due process of the law. In short, it is Casteel's prayer to this Court that it not decide that a trial severance need not have been granted to Casteel from

Bryant because her defense, which was antagonistic to his defense, was not a complete plea in bar, for that would mean that those criminal defendants with lawful but not complete defenses would be afforded less protection under the law than defendants with pleas in bar, i.e., complete defenses. Such a result is unfair on the face of it and it is Casteel's contention that it denies her federal and state constitutional fair trial, due process and equal protection rights.

For all the reasons enumerated herein and in the initial brief, Dee Dyne Casteel pleads to this Court in behalf of her life that she should not have been tried jointly with James Allen Bryant.

As to the other grounds raised by her in her initial brief, Casteel stands on the arguments raised there and, as well, on the truth and accuracy of her Statement of the Case and of the Facts.

And, finally, she again respectfully calls upon the Court to apply the standard of review set forth in Chapman V. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed 2d 705 (1966), with reference to all errors involving the violation of federal constitutional protections. And since all of the arguments of Casteel in both briefs, with the exception of the Batson and Neil cases, supra, argument need relate directly to whether Casteel received a fair trial, all such arguments dealt with a federal constitutional guaranty. See

State v. DiGuilio, 401 So.2d 1129 (Fla. 1986).

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 and appropriate.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was mailed this 27th day of April, 1989, 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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