IN THE SUPREME COURT OF FLORIDA

BERRY KESSLER,	:	
Appellant,	:	
vs.	:	Case No. 90,035
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

PAUL C. HELM
Assistant Public Defender
FLORIDA BAR NUMBER O229687

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831

(941) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

The Pasco County Grand Jury indicted the appellant, Berry Kessler, on May 2, 1994, for the first-degree murder of John Deroo on February 2 or 3, 1991. [I, R 1-2][1]

Kessler was tried by jury before Circuit Judge William R. Webb on December 9 to 20, 1996. [X, T 1; XXVII, T 2970] The jury found Kessler guilty of first-degree murder as charged. [III, R 462; XXVII, T 3103] The court adjudicated Kessler guilty of first-degree murder. [III, R 437-438; XXVII, T 3107]

The penalty phase of the jury trial was conducted on December 21, 1996. [VIII, R 1306] The jury recommended death by a vote of 9 to 3. [III, R 472; VIII, R 1429]

Judge Webb conducted a sentencing hearing on January 30, 1997. [VI, R 693] The court received sentencing memoranda filed by both the state and the defense. [IV, R 616-619, 620-640; VI, R 996] The court heard additional defense evidence and a statement by Kessler, [VI, R 997-1006] as well as arguments of counsel for both parties. [VI, R 1006-1019]

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[1] Page references to the record on appeal are designated by a Roman numeral for the volume number, R for the record proper, and T for the trial transcript. Page references to the appendix to this brief are designated by A.

On February 19, 1997, the court sentenced Kessler to death. [III, R 441, 443; IV, R 645-649; VIII, R 1297, 1304; A 1-5] The court found two aggravating circumstances: (1) that the murder was cold, calculated, and premeditated, and (2) it was committed for pecuniary gain. [IV, R 645-646; A 1-2]

The court found two statutory mitigating factors: (1) age -- Kessler was 69 years old at the time of the murder and 75 years old at the time of sentencing (slight weight), and (2) Kessler's lack of prior significant record (slight weight). [IV, R 646-647; A 2-3] The court found 17 nonstatutory mitigating circumstances: (1) Kessler would not be a danger to society as a septuagenarian in prison (slight weight). (2) During World War II Kessler served his country bravely and saved many lives (moderate weight). (3 and 4) Kessler received a purple heart and bronze star for his wartime bravery (moderate weight). (5) Kessler remained married to the same woman for 50 years and supported her, although he also lived with and supported his mistress (slight weight). (6) Kessler raised four children and raised them well (slight weight). (7) Kessler is of the Jewish faith, attended temple, and was generous to the children of the synagogue (slight weight). (8 and 9) Kessler was generous in business and helped taxpayers in his accounting business (little weight). (10, 11, and 12) Kessler was

gainfully employed at the time of the murder, but he was under financial and emotional stress (little weight). (13) Kessler exhibited good conduct during trial (little weight). (14) Kessler can be productive in prison and taught prisoners while awaiting trial (little weight). (15) Kessler's family support. (16 and 17) Kessler's lack of prior violent record (slight weight). [IV, R 647-649; A 3-5]

Defense counsel filed Kessler's notice of appeal on February 27, 1997. [IV, R 656] The court appointed the public defender to represent Kessler on this appeal. [IV, R 655]

On April 11, 1996, the state filed a motion for clarification of sentence at the request of the Department of Corrections to clarify whether the death sentence was concurrent with or consecutive to a life sentence imposed by the federal court in Ohio and which Kessler was serving at the time he was sentenced in this case. [VII, R 1207-1208] The court heard the motion on April 22, 1997, and ordered that the death sentence in this case will be carried out consecutively to the federal life sentence. [VII, R 1209-1210]

STATEMENT OF THE FACTS

A. Pretrial Motions

On August 27, 1996, the state filed a motion in limine or Williams rule notice seeking the admission of collateral crime evidence. The state alleged that in July, August, and September, 1993, Kessler conspired with Steve Barkett and Mike Walcutt, who were cooperating with federal authorities, to arrange the murder of Pearce "Bo" Yankee to obtain the proceeds of a life insurance policy. The state also alleged that in November, 1993, through February, 1994, Kessler conspired with Richard Vessey, who was also cooperating with federal authorities, to arrange the murders of Barkett and Walcutt, who were witnesses in this case and in a related federal case, and to tamper with another witness in both cases, Cheryl Hamilton. [I, R 34-37] Defense counsel filed a memorandum seeking denial of the state's motion in limine and to exclude the testimony about the collateral crimes. [I, R 183-187] The court conducted evidentiary hearings on the motion on September 10, October 10, and November 25, 1996. [V, R 660, 672-830; VI, R 843-992; VII, R 1039-1206; VIII, R 1213-1295] The court entered an order granting the state's motion on December 6, 1996, finding that evidence of the planned murder of Yankee was inextricably intertwined with Kessler's admissions regarding the death of Deroo and was strikingly similar to the murder of Deroo, that Kessler's alleged threats and efforts to exterminate witnesses were inextri-

cably intertwined with the evidence in this case and were relevant to show consciousness of guilt, and that the probative value of the latter evidence outweighed the prejudice to Kessler. [II, R 205-206]

On December 2, 1996, defense counsel filed a motion to suppress Kessler's statements to FBI informant Steve Barkett on the ground, inter alia, that the statements were involuntary because they were induced by a promise of $50,000 which would be unavailable unless the informant could convince the investor that Kessler had secured the murder of John Deroo for the purpose of collecting insurance proceeds. [II, R 189-194] The court conducted an evidentiary hearing on the motion on December 10, 1996. [XII, T 283-388; XIII, T 390-476] The court denied the motion. [XIII, T 476]

B. Jury Selection

On the first day of voir dire in the present case, two prospective jurors, Salerno and Ferry, indicated that they had knowledge about the case. [X, T 49, 60-62; XI, T 162, 167] Salerno and Ferry were excused for cause because they would automatically vote against the death penalty. [X, T 97-98; XI, T 139-140, 245] Defense counsel used seven peremptory challenges on other jurors. [XI, T 241, 246, 251, 252, 258, 260, 263]

When jury selection resumed on the second day of trial, the court noted that two more prospective jurors indicated that they had knowledge of the case. Costa, whose husband was a retired FBI agent, said she could put it aside. Rinaldi checked that she could not put it aside. The court excused Rinaldi for cause. [IV, R 498, 512; XIII, T 478-480] Defense counsel entered an article from that day's Pasco edition of the St. Petersburg Times titled "Murder-for-hire trial starts today" as defense exhibit 1.[2] [XIII, T 480] The court denied defense counsel's request to ask the prospective jurors if they read the Times. [XIII, T 481]

In response to questions from the court and the prosecutor, juror Mengel said he had some knowledge of the case from that

[2] The article appears as Court's exhibit 1 in the unnumbered record volume entitled "Evidence" and is reproduced in the appendix to this brief. [A 6-7]

morning's newspaper, but he could set it aside and reach a verdict based only on the law and the evidence. [XIII, T 488-490, 531] Juror Urgo also had knowledge of the case from the newspaper, and did not know whether he could set it aside. [XIII, T 488-490] The court excused Urgo for cause. [XIII, T 520-521] Jurors Costa and Freudenstein said they could put aside anything they heard or read and reach a verdict on the law and evidence. [XIII, T 490-491, 539-540]

In response to defense counsel's questions, Costa said she had not read anything about the case since the Sunday headline. [XIII, T 589] Freudenstein read the article in the Times, did not form an opinion regarding guilt, and would presume Kessler innocent until she heard the evidence. [XIV, T 593] Mengel read that day's article in the Times. He said, "I didn't form an opinion me personally, but I assumed that somebody else had formed an opinion and found him guilty." [XIV, T 594] Mengel said he presumed Kessler was innocent. [XIV, T 594-595]

Defense counsel exhausted his peremptory challenges by excusing Korrow, Mitchell, and Costa. [XIV, T 618-619, 621-623] The court denied defense counsel's cause challenges to Freudenstein and Mengel. [XIV, T 623-626] The court denied defense counsel's request for an additional peremptory to excuse Mengel. [XIV, T

624-626] The state excused Freudenstein. [XIV, T 625] Mengel served on the jury. [XIV, T 630]

C. The State's Case

Defense counsel renewed his objection to the court's ruling on the State's motion in limine, arguing that the evidence of Kessler's conversations with Barkett and Vessey was not relevant, was prejudicial, and would become a feature of the case, and that the jury should have no knowledge of the federal prosecution and convictions. The court overruled the objection. [XIV, T 665-666]

In 1990, John Deroo hired Gilberto Torres to be the assistant plant manager at Custom Craft Cabinetry, a cabinet manufacturing shop located at 9410 Eden Avenue in Hudson, Florida, which they built "from the bottom up." [XIV, T 746, 748-751] Berry Kessler was involved with the business and had been to the shop several times. [XIV, T 751-752; XV, T 817] Kessler lived in Ohio. He was building a residence in Pasco County and preparing to move there. [XIV, T 753-754] In December, Kessler brought his furniture down and stored it at the warehouse. [XV, T 819-820] On Friday, February 1, 1991, Torres learned that Kessler was coming to Pasco County. [XIV, T 757] On Saturday, February 2, Deroo, Torres, and other workers went to Kessler's house to install cabinets and fans. They left around noon. [XIV, T 758-759; XV, T 818-819]

At 10:00 a.m. on Sunday, February 3, 1991, Kessler called Torres and asked him to come unlock the shop because he had a meeting with Deroo and could not get in. [XIV, T 762-763] Torres arrived at Custom Craft in his car around 10:15. He noticed that Deroo's van was parked at an unusual angle. [XIV, T 765-766] Kessler was there with his friend George Ikimas. Kessler's Bronco was the only other vehicle present. [XIV, T 767] Kessler said they had gone out the night before, and Deroo had too much to drink and must not have gone home. [XIV, T 768] Torres unlocked the door and entered first, followed by Kessler and Ikimas. [XIV, T 768-769; XV, T 833] Torres did not see a watch on the floor as they entered. [XIV, T 771] Torres went towards the electric panel box to turn on the lights. He found Deroo's body lying on his back on the floor with blood around his head. He noticed gun shells and change on the floor near the body. Kessler and Ikimas approached and told Torres to call 911. None of them touched the body. [XIV, T 772-774; XV, T 833-836, 839, 841, 848-849] Torres went to a secretary's desk and called 911 to report the death. [XVI, T 774-777; XV, T 841-842] The state and the defense stipulated to John Deroo's identity as the deceased. [XV, T 865-66]

Torres, Kessler, and Ikimas opened the bay doors to the shop. Torres did not see Kessler leave the building or go to his car. He

did not see Kessler pick up anything near the door or near the body. [XV, T 792, 843, 856] Torres looked inside Deroo's van and saw a styrofoam plate. Torres went around the exterior of the building, but did not see anything. [XV, T 804-805, 844-845] The police came and kept them outside the building. Torres answered their questions, allowed them to search his car, and submitted to a gunshot residue test. [XV, T 806-807, 846-848] The police also performed residue tests on Kessler and Ikimas. [XV, T 847]

Pasco County Sheriff's Officer Robert Gattuso responded to the call and arrived at the scene at 10:28. He found Torres, Kessler, and Ikimas outside the warehouse. [XV, T 868-869, 876, 878] Gattuso went inside and found Deroo's body. There was blood around the head, and the face was still bleeding. [XV, T 670] He saw five shell casings on the floor. [XV, T 873] He did not see any signs that the body had been moved or that there had been a disturbance. [XV, T 874-875] Gattuso called for a homicide unit and checked to make sure no one else was in the building. [XV, T 871] Other deputies arrived. [XV, T 872-873]

Gattuso spoke to Kessler after the scene was secured. Kessler said he and Deroo were business partners. Kessler, Deroo, and Ikimas had dinner at Fast Eddie's restaurant the night before. Deroo was having financial problems, and Kessler gave him $2,500 in

$100 bills. Kessler last saw Deroo when he left the restaurant at 10:00 the night before. [XV, T 876-877, 883-884]

Detective Gary Kling obtained Kessler's signed, written consent to search his black Ford Bronco. [XV, T 890-896] Kessler told him he had two .22 caliber revolvers and an inexpensive watch in the Bronco. [XV, T 897] Kling found Kessler's briefcase in the Bronco, searched it, and found a receipt signed by Kessler for $2,500 for the Custom Craft account; it was dated February 2, 1991. [XV, T 898-901] Kling also found a .22 caliber bullet in the briefcase. [XV, T 902-903] The officers found a watch in the console. Mrs. Glenda Deroo identified it as belonging to her husband, John Deroo. [XV, T 915-916, 921, 955-960, 966] Kling saw what appeared to be blood on the face of the watch. [XV, T 917] The officers found a Derringer in the console. [XV, T 921] Kling also observed Deroo's body. He did not see any signs of a struggle. [XV, T 903] There were some coins, a cigarette lighter, and six shell casings on the floor near the body. [XV, T 904] The shell casings were sent to FDLE. One of the pants pockets was pulled partly out. [XV, T 907] Deroo was wearing a gold bracelet on his right wrist, a wedding band on a finger on his left hand, and a gold ring with three diamonds on a finger on his right hand. [XV, T 907-908, 963-964] It appeared that Deroo had worn a watch

on his left wrist, but it had been removed. [XV, T 922, 964] Deroo's wallet was missing. [XV, T 965]

Crime scene technician James Sessa photographed and recovered six .22 caliber shell casings in a circular pattern around the body, a cigarette lighter, and some change. [XVI, T 991-1002] Sessa photographed the body. [XVI, T 1003-1005] From the medical examiner, Sessa received a set of keys and a handkerchief from Deroo's right rear pants pocket, a Marlboro cigarette pack, a dime from the right front pants pocket, and two quarters and a dime from the floor. [XVI, T 1006-1007] A few weeks later, Sessa searched Deroo's van and found a small pack of cigars. He found $2,100 in $100 bills inside the pack. [XVI, T 1009-1012, 1018-1023] On February 3, another officer took photos of the van showing two styrofoam plates containing french fries and steak, a suitcase, and a pack of Marlboro cigarettes. [XVI. T 1013-1017]

Crime scene technician Scott Lennon searched and photographed Kessler's Bronco. [XVI, T 1047-1048, 1083] He found and photographed the watch in the center console. [XVI, T 1048-1051, 1075-1078, 1085-1086] A dry substance which appeared to be blood was on the face of the watch. [XVI, T 1060, 1081-1082] Lennon found a loaded .22 caliber long rifle handgun in the console and a loaded .22 magnum handgun in the left pocket of a blue jacket in the

Bronco. [XVI, T 1051-1059, 1079-1081, 1084-1085] He found a carton of Viceroy cigarettes in the back seat. [XVI, T 1060-1062]

Crime scene technician Jeffrey Boekeloo searched Deroo's van around 10:00 p.m. that night. [XVI, T 1102-1103] He found two Viceroy cigarette butts in an ashtray for the rear seat. [XVI, T 1103-1104, 1107-1108, 1111-1112, 1126-1127] He found two cigars and a Next cigarette in the glove compartment. [XVI, T 1109-1111, 1127-1128, 1132] He found an empty Marlboro cigarette pack on the front console. [XVI, T 1113, 1132] Boekeloo attended the autopsy and received several items from the medical examiner, a bullet, metal fragments, a gold bracelet, a gold ring, a tooth, and two vials of blood. [XVI, T 1114-1124]

Dr. Joan Wood, chief medical examiner for the Sixth Circuit, [XIX, T 1585-1586] arrived at the scene at 2:05 p.m. on February 3, 1991, and was taken to Deroo's body. [XIX, T 1600] She observed hard rigor mortis, an odor of alcohol, an odor of tissue gas which indicated he had been dead about twelve hours, and multiple gunshot wounds to the face. [XIX, T 1601-1603] Based on blood spatter patterns, Dr. Wood concluded that Deroo's left hand was over his abdomen when he was shot. [XIX, T 1603-1605, 1627-1629, 1646] The absence of tanning on the left wrist indicated the wearing of a watch, but there was no watch on the body. [XIX, T 1604] Diluted

blood spatter on Deroo's watch was consistent with the watch being on his wrist when he was injured and Deroo sneezing. [XIX, T 1629-1630, 1646-1647] When she rolled the body partly over, she found that the left rear pants pocket was empty and pulled partly out, while there was a handkerchief and a set of keys in the right rear pocket. [XIX, T 1642, 1644] She did not find a wallet. [XIX, T 1609, 1651]

The body was taken to the medical examiner's office for an autopsy. Dr. Wood removed a gold ring with a clear stone from the right ring finger, a gold ring with clear stones from the left ring finger, and a gold bracelet from the right wrist and gave them to an evidence technician. [XIX, T 1608-1609] There was a dime in the right front pants packet. There were no signs of a struggle. [XIX, T 1609] She found part of a tooth and part of a bullet in the left lung, which appeared to have been breathed into the lung. [XIX, T 1610-1611] A .22 caliber bullet was recovered from Deroo's shirt. [XIX, T 1611] Dr. Wood determined that Deroo died between midnight and 3:00 a.m. on February 3. [XIX, T 1613-1614, 1658-1659] He had a blood alcohol level of .11 grams percent. [XIX, T 1664]

There were six gunshot wounds to the face, all entrance wounds. Four of the bullets went through the skull into the brain,

causing Deroo's death. [XIX, T 1614-1616, 1631] Any of these four bullets would have rendered Deroo instantly unconscious. [XIX, T 1636-1637, 1641] One entered the nose, went to the back of the throat, and went down into the lung. Another bullet entered the left cheek, then exited the neck, and was found in the shirt. [XIX, T 1616-1619] Stippling and tattooing on the face indicated that at least two of the shots were fired at a distance of less than 24 to 30 inches. [XIX, T 1620-22, 1655-1656] A laceration and an abrasion on the back of the head was consistent with an unconscious person falling backwards onto a concrete floor. [XIX, T 1630, 1637-1638]

Ted Yeshion, a forensic serologist at the FDLE crime laboratory in Tampa, examined the watch and found a minimal amount of human blood on the face and watchband. [XVI, T 1137-1151]

At 12:26 p.m. on February 3, 1991, Detective Michael Schreck transported Kessler, who went voluntarily, from the scene to an office for the Criminal Investigation Bureau for an unrecorded, noncustodial interview. [XVII, T 1167-1172, 1207-1209] Kessler told him that Deroo was president and operating manager of Custom Craft Cabinetry. Frank Barton and George Ikimas were vice-presidents. Cheryl Hamilton was the treasurer and principal stockholder. Kessler was the secretary. [XVII, T 1173-1174]

Kessler said the business was not in financial distress, but it was not in the black. Kessler met Deroo when Deroo worked for another company, and they decided to start a business venture of their own. [XVII, T 1174] Kessler was a financial planner. [XVII, T 1176] Kessler and Ikimas came down from Ohio in a Ford Bronco. [XVII, T 1176-1177] Kessler stopped in Jacksonville, called Deroo, and told him he wanted to meet at the Quality Inn in Tarpon Springs at 5:30. [XVII, T 1177-1178]

Kessler said they met in his hotel room, had drinks, and discussed a new contract. Kessler gave Deroo $2,500 in $100 bills for an overdraft the business had. Deroo signed a receipt for the cash. [XVII, T 1179-1180, 1217-1218] Kessler, Ikimas, and Deroo went to Fast Eddie's restaurant. Kessler and Ikimas went in Kessler's Bronco, and Deroo drove his own van. They had drinks and dinner. [XVII, T 1180-1181] When they left the restaurant, Deroo wanted to go out partying, but Kessler was tired and wanted to return to his hotel room. They agreed to meet at Custom Craft at 10:00 the next morning. Deroo took some leftover food and drove away in his van. Kessler and Ikimas returned to the hotel to sleep. [XVII, T 1182-1184, 1220-1221]

Kessler said he woke up around 8:00 in the morning and tried to call Ikimas, but the phones were not working properly. Kessler

sent a hotel employee to get Ikimas, then they had breakfast at the hotel. [XVII, T 1184-1185] Kessler drove to Custom Craft, and they arrived at 9:15. Deroo's van was parked out front. [XVII, T 1185, 1222] They knocked on the door and called out to Deroo, but there was no response. They could not find an unlocked door, so Kessler used his cell phone to call Torres to come and unlock the door. [XVII, T 1186-1187, 1224] When Kessler entered, he walked towards the office. [XVII, T 1187-1188] Ikimas yelled that he found Deroo. Kessler, Ikimas, and Torres approached the body lying on the floor, but did not touch it. [XVII, T 1189-1190] Kessler noticed that one of Deroo's pockets was inside out, and change, a Bic lighter, and shell casings were on the floor. Torres went to the phone and called 911. Kessler and Ikimas went to the front door and stepped outside to wait for the deputy. [XVII, T 1190, 1224-1225] Kessler said that Custom Craft had a $400,000 life insurance policy on Deroo. [XVII, T 1191, 1225] He also said Glenda Deroo had life insurance on her husband. [XVII, T 1225-1226]

Detective William Lawless conducted another unrecorded noncustodial interview of Kessler at the sheriff's office on February 3, 1991. [XVII, T 1241-1245, 1310] Kessler said he and Ikimas drove to Florida in his Bronco. They left Ohio on Friday

and arrived Saturday afternoon. [XVII, T 1246, 1301] Ikimas was an investor interested in the business, which was in arrears. [XVII, T 1277, 1323] Kessler said he drove because he was moving to Spring Hill, had a gun collection, and did not want to transport the guns by airplane, so he brought them on this trip. [XVII, T 1256, 1278, 1327-1328] They stopped at Ikimas's nightclub in McClenney, near Jacksonville. Kessler called Deroo to tell him he was on his way to the Quality Inn in Tarpon Springs and arranged to meet at 5:30. [XVII, T 1246, 1301-1302] Kessler said Deroo met him at the hotel and they had a few drinks in the room. [XVII, T 1247, 1302] Kessler said Deroo had been depressed over the way the business was going. Cheryl Hamilton was the major shareholder, and Deroo and Frank Barton also had shares. [XVII, T 1279] Kessler told Lawless about a line of credit, efforts to arrange additional financing through Praetorian Finance, that the business was ready to go into production, and they had a contract to build several hundred cabinets. [XVII, T 1323-1324] Ikimas provided Kessler with $2,500 in $100 bills, which Kessler gave to Deroo to cover some overdrafts. Deroo gave him a receipt for the money. [XVII, T 1278, 1303-1304] He said neither he nor Ikimas had been in Deroo's van. They took separate vehicles to Fast Eddie's for drinks and dinner around 7:30. [XVII, T 1248, 1305-1306] Kessler

told Deroo that financing for the business had come through, they had a new contract, and things were looking good. [XVII, T 1248-1249, 1302-03, 1306] Deroo said he wanted to go out and party. [XVII, T 1307] Around 9:30 Deroo left in his van, and Kessler and Ikimas returned to the hotel in the Bronco. [XVII, T 1249, 1307]

Kessler said he got up at 7:30 the next morning. He tried to call Ikimas for breakfast, but there were problems with the phones, so he had someone go wake Ikimas to join him for breakfast. They went to Custom Craft for a prearranged meeting with Deroo at 10:00. [XVII, T 1250, 1308] Kessler found Deroo's van parked at an angle in front. Ikimas knocked on the door, but there was no answer. Kessler could not find an open door, so he called employees to get someone to open the shop and reached Torres. [XVII, T 1251, 1308] Kessler did not have a key. Torres came and knocked on the door, but there was no response. Torres looked for another way in, then unlocked the door. Torres, Ikimas, and Kessler entered. [XVII, T 1252] Kessler did not initially see Deroo, then he heard Torres scream. Kessler told Torres to call 911. Kessler and Ikimas opened a vehicle access door so the ambulance could come in. [XVII, T 1253, 1309]

Sam Fountis came to Custom Craft before Lawless left. Lawless obtained a statement from Fountis before he spoke to Kessler.

Kessler said Fountis called him at the hotel room between 11:00 and 11:30 p.m. on February 2, and they agreed to meet at 10:30 the next morning at Custom Craft. [XVII, T 1296-1298]

After a phone call from Detective Kling, Lawless asked Kessler whose watch was in his vehicle. Kessler said he told Kling he had an old watch and two guns in the Bronco. [XVII, T 1254, 1310, 1315-116] Kessler said it was an old watch he kept as a backup. Lawless asked about blood on the watch. Kessler said he did not know how it got there. [XVII, T 1255, 1316] Lawless left the room for 35 to 40 minutes. When he returned, Kessler said he found the watch on the floor and picked it up when he first entered the business. After observing the body, he then walked out and put the watch in the console in his Bronco. He thought it might be an employee's watch, and he would return it the next day. [XVII, T 1273-1276, 1316-1323] Lawless asked him to explain the blood on the watch. Kessler replied that employees frequently cut their hands in the shop. [XVII, T 1276]

Lawless was present when Kessler encountered Glenda Deroo at the sheriff's office on February 3. Kessler told her the financing had come through for the business and things would be okay. [XVII, T 1282-1283] Lawless received a box for a Seiko watch from Mrs. Deroo. The box contained a receipt for a Seiko watch with John

Deroo's name, dated 4-20-89. [XVII, T 1291-1293] Lawless spoke to Ann McCabe at Fast Eddie's restaurant. She identified photos of Kessler, Ikimas, and Deroo as having been there on the evening of February 2, 1991. [XVII, T 1293-1294]

On February 4, 1991, Detectives Schreck and Lawless conducted a second unrecorded, noncustodial interview of Kessler at the sheriff's office. [XVII, T 1193-1196, 1210, 1214-16] Kessler said they drove to Florida because it was a last minute decision, and it would have cost more to fly. [XVII, T 1196] Kessler had known Ikimas for 15 years. They were involved in business together for the past three weeks. Ikimas gave Kessler cash for investments. Kessler was in the financial planning business, and was involved in five separate companies, including bowling alleys and finance companies. [XVII, T 1197-1198] Kessler said he went back to his room after dinner on February 2 and never left the room during the night. Kessler brought down a .22 caliber handgun in his Bronco, and Deroo gave him a .22 caliber revolver at the restaurant. [XVII, T 1198] Kessler said one of these revolvers had never been fired, and the other was fired two and a half months before. That was the last time he had fired a weapon. [XVII, T 1225] Kessler had given Deroo a .22 automatic on another occasion. Kessler obtained guns and ammunition from Frank Barton. Kessler

said he thought the motive for the killing was personal rather than business; it might have been done for revenge. [XVII, T 1199] Schreck asked if Kessler would tell them if he knew who committed the offense. Kessler answered, "Yes, guaranteed it's going to be a real headache." [XVII, T 1200] Kessler said he picked the watch up about two feet from the wall inside the door and put it in his pocket. While waiting for the deputies, he put the watch in the Bronco. [XVII, T 1201, 1207, 1230] He could not explain why he picked up the watch. [XVII, T 1202] Kessler denied that he put the watch in the Bronco after Deputy Gattuso arrived. [XVII, T 1206]

On cross-examination, Lawless testified that Kessler said he had been indicted for tax evasion for the handling of a client's books. [XVII, T 1327] Over defense counsel's objections and motion for mistrial, the court admitted a plea agreement and judgments and sentences showing that Kessler pled guilty and was convicted of aiding in the preparation and presentation of false tax returns and of conspiracy to defraud the United States by impeding the function of the Internal Revenue Service. [XVII, T 1332-1336, 1340-1342, 1344-1351; A 8-9] Kessler received probation for the offenses. [XVII, T 1352; A 8-9]

Michael Hall, a firearms and toolmark identification expert from the FDLE crime laboratory, examined the two .22 caliber revolvers found in Kessler's Bronco and the six CCI brand .22 fired cartridge casings found at the scene and determined that none of the cartridge casings were fired from either of the revolvers. [XVIII, T 1468-1483, 1493] He determined that five of the cartridge casings had the same firing pin impression, while the sixth had a different firing pin impression, so the sixth was fired from a different firearm. All six were fired from semiautomatic firearms. [XVIII, T 1482-1484, 1494] Hall examined the recovered bullets and fragments. It cannot be determined whether the bullets were fired from the cartridge casings found at the scene. One bullet was .22 caliber. Two other bullets were .22 long rifle caliber. [XVIII, T 1485-1487] All three bullets displayed rifling characteristics of six lands and grooves with a right hand twist. They could not have been fired from the .22 magnum revolver because it had eight lands and grooves with a right hand twist. The .22 long rifle revolver had six lands and grooves with a right hand twist and could have fired the three bullets, but Hall could neither identify or eliminate this revolver as having fired the bullets. [XVIII, T 1488-1491, 1496, 1500] Hall examined a complete CCI .22 long rifle caliber cartridge which was consistent

with the fired cartridge casings. [XVIII, T 1490] Long rifle is the most common form of .22 caliber ammunition. [XVIII, T 1491] CCI is a major manufacturer of .22 long rifle ammunition. CCI ammunition could be purchased at any sporting goods store in the United States. [XVIII, T 1492]

The state presented videotaped testimony by Virginia Truell. [XVIII, T 1507] On Sunday, February 3, 1991, Truell and her husband were delivering newspapers and drove by Custom Craft twice around 2:15 to 2:30 a.m. [XVIII, T 1510-1512] Truell saw a two-tone blue Astro van parked at an angle in front of Custom Craft. She identified a photo of the van. [XVIII, T 1512-1514, 1526] She did not see any people or any other vehicles. [XVIII, T 1515, 1523-1524] She saw an exterior light on at the office door, as well as light coming from inside the building through the glass side of the door. [XVIII, T 1518, 1521]

Glenda Deroo testified that her husband John Deroo had been a sales and marketing executive with Formitex in Ohio and was knowledgeable about the cabinetry business. [XVIII, T 1361-1364] They moved to Pasco County in 1990 to start Custom Craft Cabinetry. Kessler was Deroo's partner in Custom Craft. [XVIII, T 1364] Kessler lived in Columbus, Ohio. Kessler had flown down several times with Cheryl Hamilton and had stayed at the Deroos' house.

[XVIII, T 1365-1366, 1417] Kessler was building a house in Spring Hill and had stored his furniture at Custom Craft. [XVIII, T 1417] He drove down twice in 1990, once after Christmas and another time with Frank Barton. [XVIII, T 1366-1367] The Deroos invested their own money in Custom Craft. They came to Florida with $24,000, and Mrs. Deroo left with $200 after her husband's death. [XVIII, T 1367-1368]

Mrs. Deroo wrote checks for Custom Craft, and sometimes had to use personal accounts to cover overdrafts in the Custom Craft accounts. [XVIII, T 1368, 1376] Custom Craft checks were entered in a register. [XVIII, T 1368-1372] The last entry, on February 1, 1991, showed a negative balance of $3,303. [XVIII, T 1372-1373] Mrs. Deroo had received checks from Kessler. Most of the checks were small, just enough to cover what was needed, or less. The checks were supposed to come every week for payroll and supplies. She often had to rush to the bank to have the checks deposited. [XVII, T 1375] She had received a fax concerning a contract for four kitchens a month. [XVIII, T 1414] During the week before Deroo's death, she had talked to the bank manager and a bank employee about borrowing enough money to be on their own. [XVIII, 1376-1377] Normally, Mrs. Deroo heard from Kessler on an almost

daily basis. [XVIII, T 1378] During the week before Deroo's death, they did not hear from Kessler. [XVIII, T 1379]

Deroo had his black and silver Astro van washed and cleaned on the afternoon of February 2, 1991. [XVIII, T 1382-1383] Mrs. Deroo did not see any cigarette butts in the van, but she did not look in the rear seat ashtray. [XVIII, T 1384, 1399] When Deroo left that afternoon, he said he was going to have dinner with Kessler and Ikimas. [XVIII, T 1384] Deroo called her around 9:45 p.m. and said Kessler and Ikimas had gone to the hotel, and he was on his way home. She knew it would take 45 minutes from Fast Eddie's, so she stayed up to wait. [XVIII, T 1385-1386, 1397-1398] She fell asleep around 4:00 a.m. When she woke up, she called the police and hospitals. [XVIII, T 1386-1387] She tried to call Kessler's room several times, but could not get through. She left a message at the Quality Inn. [XVIII, T 1387, 1415-1416] She got her daughter up and went to the shop. She spoke to Lawless about a watch. [XVIII, T 1387] Mrs. Deroo identified the watch and a photo of her husband wearing it. [XVIII, T 1387-1389, 1391] She identified her husband's financial records for the cabinet business which he kept in his computer. [XVIII, T 1389-1391] Deroo smoked Marlboro cigarettes. [XVIII, T 1391] Ikimas smoked cigarettes from a white package with an emblem. [XVIII, T 1392] In January,

Ikimas had come to Florida with Kessler and Cheryl Hamilton. They went out to dinner in Deroo's van, and Ikimas smoked in the van. [XVIII, T 1400]

Defense counsel asked Mrs. Deroo if she recalled having previously stated that the call was made at 9:15. The court sustained the state's improper predicate objection. [XVIII, T 1393] She had seen a Custom Craft phone bill for February 2, 1991. Defense counsel asked if she saw a phone number, (904) 660-1157. Mrs. Deroo said she could not remember the number, and could not remember her home phone number in Spring Hill. [XVIII, T 1394] Defense counsel then asked if the phone bill had that number on it. Mrs. Deroo replied, "In the federal court --" [XVIII, T 1394-1395] Defense counsel moved for a mistrial because he had not elicited the response and it was highly prejudicial. The court denied the motion. [XVIII, T 1395] The court instructed the jury to disregard the last statement of the witness. [XVIII, T 1396-1397]

Sylvia Simler Allen was the operations manager at Barnett Bank in 1991. [XIX, T 1676-1677] She dealt with both Deroo and Kessler regarding the business account for Custom Craft and their personal accounts. [XIV, T 1677-1678] There were problems with overdrafts and returned checks on the Custom Craft account. She would contact Deroo or Kessler, and they would send money, or someone would come

in to make a deposit. [XIX, T 1679, 1686] During the week preceding Deroo's death, Simler and another bank employee met with Mr. and Mrs. Deroo to discuss a loan to buy Kessler out. No action was taken on the proposed loan. [XIX, T 1680, 1684-1685]

In 1990 and 1991, Douglas Stammler was an independent agent with the Agency Insurance Office of Central Ohio and was authorized to sell insurance for General American Life Insurance Company. [XVIII, T 1418-1419] Stammler met Kessler in February, 1990. Kessler was interested in key man life insurance, insurance on the life of an employee who is key to an operation because of his experience, expertise, sales ability, marketing contacts, or knowledge. [XVIII, T 1419-1420] Stammler met with both Kessler and Deroo on March 2, 1990, to complete an application for the insurance. [XVIII, T 1446-1447] Stammler identified a key man life insurance policy issued on John Deroo through General American on April 25, 1990. The policy was purchased by Kessler, with Custom Craft as the owner and beneficiary. Quarterly premium notices were mailed from General American to Custom Craft in Hudson, Florida. [XVIII, T 1422, 1427-1429, 1432] Kessler applied for key man insurance on himself, but no policy was obtained. Because of Kessler's age and medical history, General American rejected the application, and Prudential wanted a high premium.

[XVIII, T 1430, 1448-1451] Deroo obtained a $150,000 life insurance policy on himself with his wife as beneficiary. [XVIII, T 1431, 1451] Stammler identified a letter from General American notifying Custom Craft that the policy lapsed because the premium was not paid. [XVIII, T 1423-1427, 1429-1430] Stammler was not aware the policy had lapsed before Deroo died. [XVIII, T 1432-1433]

On January 8, 1991, Stammler had lunch with Kessler. [XVIII, T 1433, 1454] Kessler asked in passing if everything was okay on the policy in Florida. Stammler replied that he had not been notified otherwise. [XVIII, T 1434, 1455] As they were leaving, Kessler asked if the amount on the key man policy could be increased from $500,000 to $1,000,000. Stammler explained they would have to get Deroo examined, complete an application, and send a cover letter explaining why they needed to increase the coverage. [XVIII, T 1435] Kessler did not ask him to follow up on this. [XVIII, T 1436]

On Monday, February 4, 1991, Kessler called and told Stammler about Deroo's death, that he was shot during a robbery. [XVIII, T 1436-1437, 1444-1445] The court overruled defense counsel's relevancy objection and allowed Stammler to testify that Kessler did not express any sympathy or sorrow for Deroo or his family.

[XVIII, 1438-1440] Kessler asked Stammler to check on both the business and personal policies. Stammler discovered that the business policy had lapsed. [XVIII, T 1440, 1445] Later in the week Stammler called Kessler and told him that the business policy had lapsed for nonpayment of premium, but the personal policy was in effect. Kessler responded, "oh, my God." Kessler expressed disappointment that he was not made aware of the fact the premiums had not been paid. [XVIII, T 1440-1441, 1443] Two days later the insurance agency received a letter from Kessler's attorney notifying the agency that it would be sued. Kessler subsequently filed a lawsuit against the agency and the insurance company. [XVIII, T 1442-1443]

Marlene Bedford was the corporate credit manager for A & M Supply Company in 1990 and 1991. The company supplied building materials to the cabinet and construction industry. [XIX, T 1689-1691] Custom Craft purchased between $2,000 and $5,000 worth of building materials a week. The account was in arrears. A & M filed a security lien on Custom Craft's equipment. [XIX, T 1691-1694] Following Deroo's death, Bedford spoke to both Drew Chupka and Berry Kessler about the account but received no money. She obtained a court order and repossessed Custom Craft's equipment and supplies. [XIX, T 1694-1697, 1703-1704, 1706, 1710-1711] The

Custom Craft account remained $15,000 to $20,000 in arrears. [XIX, T 1703]

Jean Young was an Ohio realtor who had known Kessler for 30 years. Prior to Deroo's death, Kessler told her that he was angry with Deroo because he had sent a lot of money to Florida for Custom Craft, but the business was failing. Kessler remained angry after Deroo's death. [XIX, T 1712-1717] Cheryl Hamilton was also angry about the business failing. After Deroo's death, Hamilton complained because Kessler had sent Deroo money to pay the insurance premiums, but Deroo had not paid them. [XIX, T 1717-1719]

In 1991, Dreama Nelson lived near Jacksonville. She had known Ikimas for 10 years. On February 2, 1991, Ikimas and Kessler stopped to visit her between 11:00 a.m. and noon. [XX, T 1725-1726] They made plans for her to bring a friend and go to Pinellas County that evening to stay at a motel and go out for drinks and dinner. [XX, T 1727-1728] She did not get off work on time to go. [XX, T 1729] She tried to call Ikimas and Kessler around 11:30 p.m., but she was told Ikimas was not registered, and there was no answer from Kessler's room. [XX, T 1730-1731, 1733-1734]

Rodney Burton met Deroo while working for Formitex in Ohio. Deroo talked to Burton about starting a cabinetry company in Hudson

and introduced Burton to Kessler. Burton agreed to take some machinery and supplies to Florida and was paid for his expenses. [XX, T 1736-1739, 1749-1750, 1762] In February, 1990, Burton met with Kessler and Deroo in Florida. At Deroo's request, Burton got the locks changed at custom craft. He gave two sets of keys to Harry Stiffler, the shop foreman. One of those sets was for Torres. Burton gave the other keys to Kessler in Ohio. [XX, T 1739-1742, 1756-1761] In October, 1990, Kessler told Burton Custom Craft needed money. Kessler said he had a way of getting it financed, but he did not want to use it if he could help it. [XX, T 1742] After Christmas in 1990, Burton took Kessler's furniture to be stored at the warehouse. [XX, T 1762-1763] During the week following Deroo's death, Burton was in Kessler's office with Kessler, Cheryl Hamilton, and Frank Barton. Kessler asked Burton if he could take over the operation of Custom Craft. Kessler received a call from the insurance agent about the key man insurance on Deroo. After the call, Kessler said the "son of a bitch" did not pay the premium. [XX, T 1743-1745, 1751]

Cheryl Trotter, formerly Cheryl Hamilton, lived with Kessler from 1982 to 1992. [XX, T 1775-1776, 1781, 1840] Kessler spent three nights a week with her and four nights a week with his wife. [XX, T 1843-1844, 1897] Hamilton and Kessler were involved in some

business ventures, including Custom Craft, in which her name was used. [XX, T 1775-1777] Kessler had no credit, so her name was used to obtain credit, and assets were put under a corporate name. [XX, T 1897] Hamilton met Deroo while working at Formitex selling cabinetry and introduced him to Kessler. [XX, T 1777, 1852-1853] Deroo wanted to start a cabinet business. [XX, T 1853] Kessler wanted to locate the business in Florida because he wanted to retire there. Hamilton was going to move there with him. [XX, T 1854] Kessler and Deroo became partners in Custom Craft, with each having half of the business. [XX, T 1778, 1800] Kessler told Hamilton that what was his was hers. [XX, T 1778, 1846-1847] Kessler, Hamilton, and Deroo went to Florida and found the building. [XX, T 1856] Kessler and Hamilton also found property on which to build a large house. [XX, T 1857] They sent their furniture to Florida and stored it at Custom Craft around Christmas. Kessler drove one of the trucks. [XX, T 1860] Hamilton had no responsibility for running the business. She did some decorating. [XX, T 1779-1780, 1863] The Custom Craft building was owned by one of Kessler's companies called Relssek Acres. [XX, T 1780-1782]

Kessler kept the records and books for Custom Craft. Hamilton identified the Custom Craft minute book. [XX, T 1782-1784] An

assignment of the voting rights of Hamilton's stock in Custom Craft dated 1-25-91 was signed with Hamilton's name in Kessler's handwriting. [XX, T 1784-1790] Kessler had Hamilton sign six stock certificates when they were blank. One said Hamilton owned 1060 shares of Custom Craft stock on March 30, 1990. [XX, T 1794-1795, 1816] The minutes of the first meeting of the board of directors for Custom Craft stated that Hamilton was president and treasurer, Frank Barton was vice president, and Kessler was secretary. Hamilton had never seen the document and had never acted as president or treasurer. [XX, T 1795-1796] However, she knew she had some position as an officer of the business that required her to sign corporate documents and loan applications. [XX, T 1861] She signed documents when Kessler asked and did not always know what she was signing. She signed as a witness to minutes of a board of directors meeting to authorize the purchase of key man life insurance on Kessler and Deroo on February 22, 1990, although she was not there. [XX, T 1796-1798] She was present for a March 1 meeting to set up a checking account with Deroo, Kessler, and herself authorized to sign. [XX, T 1798-1799] She signed the minutes of a meeting on March 29, 1990, which she did not recall attending. The minutes indicated that 2,000 shares of Custom Craft stock were issued, 400 to Deroo, 500 to Frank

Barton, 40 to Rod Burton, and 1,060 to Hamilton. [XX, T 1799-1800, 1816] Hamilton did not put any of her own money into Custom Craft. Deroo put in some money from the sale of his house. Most of the money came from Kessler and investors he found. [XX, T 1816-1817]

In late 1990, Kessler complained about sending money to Custom Craft and nothing being produced. He said if it did not fly by the first of the year, he would wash his hands of it. [XX, T 1817] Kessler was upset when he found out Deroo paid a Christmas bonus to the employees. [XX, T 1818] He said everyone gets paid back, everyone has their day. [XX, T 1819] Kessler tried unsuccessfully to arrange financing for the company through John Appelhaus and Praetorian. [XX, T 1865-1866] In January, 1991, Hamilton and Kessler went to Florida to see how the business was doing, and Kessler picked up the minute book from Deroo. [XX, T 1803-1804, 1861-1862]

Later in January, Kessler planned to drive to Florida with Ikimas to take $2,500 to Deroo for payroll and a couple of guns. Kessler initially told Hamilton she could not go because she did not like to ride in the car and it would be boring. When Kessler agreed to take her, she declined. [XX, T 1804-1805, 1879-1884] Normally, Kessler sent money by Federal Express. Kessler and Ikimas left on Friday, February 1, in Kessler's Bronco. Kessler

did not smoke, Ikimas smoked Viceroys, and Deroo smoked Marlboros. [XX, T 1806-1807] On Saturday, February 2, Kessler called Hamilton from the hotel between 9:15 and 9:45 p.m. He said they drove all night. They stopped in Jacksonville, and he bought some liquor. He said Deroo brought him a gun. He fixed Deroo a few stiff drinks at the hotel. They also drank when they went to dinner at Fast Eddie's. After dinner Deroo wanted to go out and party, but Kessler was tired and wanted to go to bed, so he sent Deroo on his way with some carry-out food. [XX, T 1807-1810] Normally, Kessler could lie down for an hour and jump back up like he slept for eight hours. [XX, T 1811] Kessler called Hamilton on Monday and told her that Deroo had been shot and killed in a robbery. He said the $2,500 he had given to Deroo was gone. [XX, T 1801-1802] Over defense counsel's relevance objection, the court allowed Hamilton to testify that Kessler did not express any sympathy or sorrow about Deroo's death. [XX, T 1812-1813]

After Kessler returned to Ohio, he told Hamilton that after they found Deroo's body, he found a watch on the floor as he was leaving the building. [XX, T 1813-1814] She asked Kessler if he killed Deroo, and he replied, oh, Cher. [XX, T 1817-1818] Hamilton was in Kessler's office when he received the phone call about the key man life insurance on Deroo. Kessler turned white as

a sheet and said the "son of a bitch" did not pay the payments. [XX, T 1814-1815] It was Kessler's idea to sue the insurance company. [XX, T 1862] After Deroo's death, the business collapsed. [XX, T 1864] Hamilton was present for a meeting on February 12, 1991, at which Drew Chupka was appointed as director of operations. Kessler sent Chupka to run the business. [XX, T 1800, 1866] By the end of Hamilton's relationship with Kessler, they had nothing left; Kessler sold it all. She was sued for foreclosure on some property. Her credit was destroyed. [XX, T 1896, 1900-1901]

Roger Klein was a mortgage broker. In late 1990, or early 1991, Klein met with Deroo and Kessler regarding financing for Custom Craft through John Appelhaus of Praetorian Financing in Toledo, Ohio. [XX, T 1912-1914; XXI, T 1921-1923] Within a week after Deroo's death, Kessler called to ask if he would still be able to get the financing. Klein told him it would be difficult because the man with the knowledge to run the business was no longer in the business. Kessler said he had a new partner with experience in the cabinetry business. [XX, T 1914-1916] Klein was unable to obtain any financing for Custom Craft. [XX, T 1914]

Harry Stiffler was the plant manager for Custom Craft. [XXI, T 1926, 1929] On February 2, 1991, Stiffler, Torres, and Topper

went to Custom Craft to get equipment to work at Kessler's house installing cabinet doors and fans, and returned to drop it off. The building was secured when they left. [XXI, T 1926-1927, 1935] Stiffler went out of town on Sunday. He did not receive any messages from Kessler that morning. [XXI, T 1927] Drew Chupka replaced Deroo after his death. Chupka had no knowledge of the cabinetry business. Chupka caused Custom Craft to lose a contract to build kitchen cabinets for an apartment complex. [XXI, T 1928, 1932, 1934] Most of the tools and equipment for cabinet making were repossessed, so Custom Craft could no longer make cabinets. [XXI, T 1929]

Detective Edward Wasem of the Columbus Police Department assisted FBI agents in their investigation of Kessler in 1993. He supervised the transcription of audio and video taped conversations between Steve Barkett and Kessler and made sure they were accurate. [XXI, T 1938-1940] Defense counsel renewed his objection and motion to suppress the conversations. The court overruled the objection. [XXI, T 1941-1942] Wasem identified the transcripts. Portions of the recordings were inaudible. [XXI, T 1942-1944]

Steven Barkett had been an FBI informant for 15 years. His supervising agent was Richard Witkowsky. [XXI, T 1952-53] Barkett met Kessler in 1991. They developed both a personal and a

professional relationship while engaging in several different business ventures, including a computer company. They lived together in Boca Raton for about a year. [XXI, T 1947-1949] In 1993, Mike Camarada told Barkett about Deroo's death at Custom Craft and the lawsuit concerning the insurance policy. [XXI, T 1950-1952] Barkett called Kessler at his office in Ohio and mentioned the conversation with Camarada. Kessler went to a pay phone to discuss the matter. [XXI, T 1954-1958] Barkett told Agent Witkowski about these conversations. [XXI, T 1952-1954, 1957-1958] Witkowski put Barkett in touch with FBI Agents George Huston and David Stout. Barkett consented to having his conversations with Kessler audiotaped and videotaped. [XXI, T 1958-1959]

On July 1, 1993, Barkett met with Kessler in his office, then they walked out to a parking area. Barkett identified recordings of his conversations with Kessler from July 1 through September 6, 1993. [XXI, T 1959-1961] Defense counsel renewed his motion to suppress Kessler's statements to Barkett and his objection to the court's ruling on the state's motion in limine. The court denied the motion and overruled the objection. [XXI, T 1961-1963] Barkett explained that Nora was Nora Carol, Mike was Mike Camarada, David Eller worked with Kessler and Barkett, Computer Dave was a friend of Eller's, and Christina Marsheon was Barkett's former

wife. [XXI, T 1971-1972] Barkett met with Kessler in hotel rooms on July 29 and August 4 in Columbus, Ohio, and on September 6 in Orlando. During the course of the meetings, Barkett received calls from Agents Huston and Witkowski pretending to be an investor. [XXI, T 1972-1974] The court instructed the jury that evidence of other crimes could be considered for the limited purpose of proving motive, intent, preparation, plan, knowledge, or identity. [XXI, T 1974]

Barkett testified that Kessler hoped to recover $500,000 from the lawsuit on the key man policy. [XXI, T 1975] Kessler needed money to hire a lawyer to litigate the lawsuit. The investor would receive part of the proceeds from the suit. [XXI, T 1976-1977] Kessler also needed money to obtain a $1,000,000 key man insurance policy on Bo Yankee, who was to be president of X.T.C. Leather and Lace, a business owned by Mike Walcutt. Walcutt came to one of the meetings and showed them the store. The investor would also receive part of the proceeds from that policy. [XXI, T 1978-1979, 1983] The FBI provided money for Barkett to give to Kessler. [XXI, T 1980] Kessler had to provide an assignment of the first policy, documents showing Deroo had worked for Custom Craft and there had been a policy, and documents regarding X.T.C. and the insurance policy there. [XXI, T 1980-1982] Kessler did not obtain

an insurance policy on Yankee because he did not have the money. [XXI, T 1985] Kessler called Yankee the perfect decedent. [XXI, T 1986-1987] Kessler flew to Florida for the September 6 meeting, at which he was arrested. [XXI, T 1985-1986]

When the state moved to introduce the tape recordings, defense counsel again renewed his motion to suppress and objections. The court overruled them. [XXI, T 1987-1988] The court gave a second limiting instruction to the jury. [XXI, T 1989] The court admitted the recordings. [XXI, T 1995-1996] The state agreed that the defense could have continuing objections to all testimony regarding Barkett's conversations with Kessler as to both the motion to suppress and the motion in limine. The court overruled the objections. [XXI, T 1996-1997]

State exhibit 98, the recording of the July 1, 1993, conversation was played for the jury. [XXI, T 1999-2015] Barkett complained to Kessler about telling Nora about the guy (Deroo) getting shot and the life insurance because it was murder. Kessler responded that he did not tell her about a murder, he said the guy got killed, and they were trying to work something on the insurance. [XXI, T 2001-2002, 2005] Barkett asked if Kessler was going to get in trouble. Kessler replied no and that he would not do something like that. [XXI, T 2005] Barkett suggested getting

someone else insured. Kessler replied that we were thinking about it, but you had to let it mature for a couple of years. The other one was sitting for six months. The guy was robbed. [XXI, T 2006-2007] Kessler said they would have to create some dollars. Barkett suggested using Dave Eller or Computer Dave. Kessler said they would have to create a company first to get a policy. [XXI, T 2008] Barkett suggested starting a company with Eller and getting Computer Dave insured. Kessler said you have to have a legitimate company and somebody that produced cash flow. [XXI, T 2009] Kessler said he was trying to get a grant for the business, then put someone in as manager. [XXI, T 2009-2010] Barkett said, "And then kill him." Kessler replied, "But you gotta." [XXI, T 2011] Barkett asked if there was any chance Kessler would get in trouble for the prior murder. Kessler replied no, but he had been through the ringer for five or six months. [XXI, T 2011] Kessler said the key man becomes a part of the company and gets insured for $100,000 to $1,000,000. [XXI, T 2013-2014]

State exhibit 99, a recording of Barkett's conversation with Kessler in a hotel room in West Palm Beach on July 13, 1993, was played for the jury. [XXI, T 2018-2037] Barkett and Kessler talked about the lawsuit concerning the insurance on Deroo. [XXI, T 2022-2025] Barkett replied, "So they murdered him." Kessler

said, "Yeah, for the insurance [inaudible] I was hoping it would put enough action so they just went down to kill him." [XXI, T 2025] Barkett suggested trying what Kessler had mentioned. Kessler said it takes money, and you have to be in business at least a year to show a pattern and expertise. Barkett suggested that he could get someone to put up some money to help. [XXI, T 2025-2026] Barkett remarked that Kessler had said it was not a problem, the guy did not mail the check. Kessler agreed. Barkett asked if there was any way Kessler could get in trouble, and Kessler responded, "Uh-uh." Barkett said he was willing to do anything Kessler wanted to do. Kessler said they should be able to do it. [XXI, T 2027] Kessler told Barkett that Walcutt was involved in a porno business, he needed about ten grand, and no one wanted to invest in that business. [XXI, T 2028-2032] The conversation ended at 12:00 with Barkett asking Kessler to leave the room so he could make a phone call. [XXI, T 2036]

State exhibit 100, a recording of Kessler's conversation with Barkett on the same day, beginning at 2:26, was played for the jury. [XXI, T 2039-2049] Barkett and Kessler discussed getting some money and insuring someone for $1,000,000. Barkett said he knew someone and would tell him he has a chance of getting insurance money from a key man thing. [XXI, T 2042-43] Kessler

said you would have to have an operation. Barkett said Kessler could not put his name on it because someone might get suspicious. Kessler replied that it's not his name, it's a corporation. [XXI, T 2045] Barkett asked how much it would cost. Kessler replied that you could do the whole thing for 25. [XXI, T 2046-2047] Barkett told Kessler to be careful of his buddy who was with him. Kessler replied that he did not know anything, and they thought he did it. He also said the police thought a Mexican employee did it. [XXI, T 2047-2048]

The taped conversation resumed at 3:11 p.m. the same day with Barkett talking to Witkowski on the telephone. The recording was played for the jury. [XXI, T 2049-2059] Barkett explained to the supposed investor that Kessler had a beef with an insurance company for denying a key man insurance claim because the bill was not paid. [XXI, T 2051] Barkett said for 30 grand Kessler could straighten that out, the policy was for half a million, and Kessler would set up a new company to insure someone else for a million. The investor would get 40 percent of both policies. [XXI, T 2052-2053] Barkett asked Kessler what guarantee or collateral he had. Kessler replied that he would give the investor stock in the new company and an assignment of the lawsuit. [XXI, T 2053-1055] Barkett asked how long the 30 grand would be tied up. Kessler

answered a maximum of 45 days to set it up, but the lawsuit would depend on the courts. The second part would take six months from the opening of the company. Kessler wanted the money as soon as possible. If he got half the money to start on the litigation, he wanted the second half as soon as they set up the company. [XXI, T 2055-2056] Barkett explained to the investor that it is key man life insurance, and the key man goes in a box. [XXI, T 2057] Kessler said they need the first half of the money right away and could get the investor an assignment right away. [XXI, T 2058]

State exhibit 106, another conversation on July 13, was played for the jury. [XXI, T 2060-2066] Kessler said they had to set the whole thing up and take time to find the right manager to run the company. [XXI, T 2061-2062] Barkett asked how much money it would take. Kessler estimated between two and five for the whole thing. Barkett asked, "When it comes time to handle whatever, if there's not gonna be a foul up?" Kessler said he did not see any problems. If there were problems it would be personnel. [XXI, T 2063] Barkett testified that when he asked about a foul up, he was referring to killing Yankee. [XXI, T 2067-2068]

Barkett met with Kessler again on July 29, 1993, at a hotel in Columbus, Ohio. Barkett gave Kessler some money. Kessler made

statements about the Deroo homicide and the plot to kill Yankee. The meeting was videotaped by the FBI. [XXI, T 2068-2069]

Barkett identified state exhibit 102 as an audiotape of his telephone conversation with Kessler on July 30, 1993. [XXI, T 2069-2070] The tape was played for the jury. [XXI, T 2070-2085] Kessler said he had talked to Walcutt and everything was perfect. Barkett asked about the employee, and Kessler said there was no problem. [XXI, T 2073] Barkett said his investor wanted some assurance they would be able to perform before he let any other money go. [XXI, T 2073-2074] Kessler said the deal should be started immediately because all the players were there. It was Walcutt's company, and the person who would be president was there. The corporate setup was finished, the inventory was there, and the store was doing business, selling porno tapes and wedding dresses. [XXI, T 2074-2075] Kessler said the store was doing about $100 a day in business and needed more inventory. In response to Barkett's questions, Kessler said he met with an attorney, Greg Lewis, who said it was mishandled before. Kessler gave him a partial payment. [XXI, T 2076]

Barkett asked if they needed another $45,000. Kessler said yes and that the money would mostly be used for inventory. Barkett asked how much the policy would cost, and Kessler replied it

depends on age, the guy is 56, and they had to pay taxes and make the thing run straight. [XXI, T 2077] Kessler said it was not difficult to entice Walcutt because he had known him a long time. Walcutt was not connected to anyone. Kessler would be in control. [XXI, T 2078] Kessler was sure Walcutt was the right one because the business was there and he needed money. [XXI, T 2078-2079] Ninety percent of the $45,000 would be used for inventory and set up. The corporation would be the beneficiary. The store was open for business, but it was not officially incorporated, so the corporation would be set up. [XXI, T 2079] Kessler said he knew what he was doing, and this was probably the best shot. He would try for $1,000,000, but he would have the insurance man give him his recommendation. They had not discussed who would help things along. Kessler was comfortable with Walcutt and was sure he would not back out. [XXI, T 2080] Kessler said they should get things rolling next week. Barkett asked when Kessler would have something in writing from the attorney about the other policy that he could give to the investor. Kessler replied the first of the week. Barkett said he needed correspondence from the attorney to show that the investor would get part of the corporation, then it would be easy to get the rest of the money. [XXI, T 2083] Kessler asked about the timing, saying that they needed to order inventory, and

he would meet with the attorney to finalize the corporation. Barkett said he needed an assignment of the policy from the first deal and to know the particulars for the second deal. Kessler said he could not give the particulars in writing and to tell the investor that the company was already started. [XXI, T 2084]

Barkett identified state exhibit 101 as a tape recording of his telephone conversation with Kessler on August 3, 1993. [XXI, T 2087-2088] The recording was played for the jury. [XXI, T 2091-2107] Barkett said he was going to come meet Kessler the next day and asked to talk to Walcutt then. [XXI, T 2094-2096] Barkett asked if Walcutt was aware of the whole plan, and Kessler replied definitely. Barkett asked if Walcutt would have any problem when it came time to do this deed, and Kessler replied negatively. [XXI, T 2098] Barkett asked if Kessler had made any progress and what the agreements said. Kessler said he had an assignment to be entered between the investor and Custom Craft. [XXI, T 2099] Barkett asked if Kessler had papers showing there was a real corporation, and Kessler said he had copies of corporate papers and the policy. Barkett asked if he had the death certificate. Kessler said no. [XXI, T 2099-2100] Barkett told Kessler to put Walcutt on alert for their meeting the next day and said he wanted to see the store. [XXI, T 2101-2102] Kessler said there would be

a televised grand opening for Leather and Lace involving a prominent sports announcer. [XXI, T 2102-2104] Barkett said he wanted to hear Walcutt say he knew what was going on and that he agreed to it. [XXI, T 2104-2105] Barkett said he would have the investor call on the phone so they could tell him what they were doing and ask when they could get the money. [XXI, T 2105] Barkett told Kessler to mail the papers that day. [XXI, T 2106] Barkett said to be sure Walcutt was available because he was just coming there to meet him and see the store. [XXI, T 2106-2107]

Barkett testified that he received a packet of stuff from Kessler which he gave to the FBI. [XXI, T 2107-2108]

On August 4, 1993, Barkett met with Kessler and Walcutt at a hotel in Columbus. The meeting was recorded by the FBI. Barkett gave Kessler and Walcutt some money supplied by the FBI. They left the hotel and went to Leather and Lace, then returned to the hotel for a further meeting also recorded by the FBI. [XXI, T 2108-2110]

Barkett had a conversation with Kessler on August 11, 1993, which was recorded by the FBI, State exhibit 103. [XXI, T 2110] The recording was played for the jury. [XXII, T 2115-2127] Kessler said everything was in line, but they were short of funds. [XXII, T 2117] Barkett asked if Kessler trusted Walcutt. Kessler said he did, and Walcutt was looking forward to getting everything

rolling. [XXII, T 2118, 2123-2124] Barkett asked if Walcutt could handle his end of the deal when it came time for "you know what?" Kessler replied, "No question." Barkett said his investor was out of town, and he had been running errands for him. [XXII, T 2119] Barkett and Kessler talked about meeting in Orlando the following week. [XXII, T 2119-2122] Barkett asked what they had done with the $3,000 they had received. Kessler said they used it for inventory, fixing up the store, and advertising. [XXII, T 2124] Kessler said they had a factory making clothes to their specifications, they would start a mail order thing, and this would be big business. [XXII, T 2124-2125] Barkett asked how it would go when it came time for the deceased. Kessler said, "A thousand our way." [XXII, T 2125] Kessler said he had all the quotes, and the policy would cost $4,300 or $5,300 for a year. [XXII, T 2126] Barkett testified that taking care of the murder of Yankee was Kessler's job. [XXII, T 2127-2128]

Barkett had a telephone conversation on September 2, 1993. [XXII, 2128] A recording of the call, state exhibit 104, was played for the jury. [XXII, T 2129-2137] Barkett told Kessler the investor was coming to Orlando for the weekend and would bring cash, so Kessler had to be in Orlando on Monday and to come alone. [XXII, T 2130-2132, 2136-2137] Barkett asked if Kessler had formed

the corporation. Kessler said he had. Barkett asked who the guy in the store was. Kessler said Bo. Barkett asked if Kessler had papers to show Bo was the president. Kessler said he did. [XXII, T 2133-2134] Barkett asked if Kessler had a policy from the insurance company. Kessler said he could not do that without money. Barkett said he would have to get his name on the policy or show what he was doing. [XXII, T 2134-2135] Barkett testified that he told Kessler not to bring Walcutt because he was working for another agency of the government. [XXII, T 2137-2138] Barkett and Kessler had not settled on a method for murdering Yankee, but Kessler had mentioned digitalis or a robbery. [XXII, T 2138-2140]

Another phone call occurred on September 3, 1993. State exhibit 105, a recording of the call, was played for the jury. [XXII 2140-2144] Kessler told Barkett he would fly to Orlando on Monday. [XXII, T 2142, 2144] They talked about "the deceased" working in Kessler's office. Kessler said it cost $30 a day to keep him. Kessler said they had to beg, borrow, and steal to keep the business going. Barkett said his guy would be there with money in hand. [XXII, T 2143]

Barkett testified that his final meeting with Kessler was on September 6, 1993, in Orlando. It was videotaped by the FBI. The purpose of the meeting was to give Kessler the rest of the money

and arrest him. [XXII, T 2145] Kessler gave Barkett some documents which were turned over to the FBI. [XXII, T 2146] The money was supplied and recovered by the FBI. [XXII, T 2146-2147] The FBI paid Barkett $20,000 for his assistance on this case. The money was paid after the arrest but before the trial. [XXII, T 2147] Defense counsel objected and moved for a mistrial because this was the second time a state witness had told the jury that there was a prior trial. The prosecutor responded that there was no suggestion that it was the federal trial. The court denied the motion for mistrial and instructed the jury to disregard the witness's last answer. [XXII, T 2147-2149] Based upon Barkett's knowledge of Kessler, he believed Kessler was serious about going through with the plan to have Yankee killed. [XXII, T 2151]

On cross-examination, Barkett testified that he had made approximately $125,000 by working as an informant for the federal government before the Kessler investigation. He was paid $20,000 in cash for the Kessler case by Agent Witkowski. [XXII, T 2152-2153] Kessler knew Barkett was an informant. Barkett introduced him to two agents. [XXII, T 2224-2225] Barkett contacted Kessler as the result of a conversation with Camarada. He asked Kessler about the insurance claim. [XXII, T 2153] Kessler went to a pay phone and called back. [XXII, T 2153-2154] In their July 1

conversation, Barkett told Kessler he did not want to talk on the phone. [XXII, T 2154-2155] It was Barkett's idea to leave Kessler's office. [XXII, T 2155-2156] Barkett initiated the conversation about setting up a new insurance policy on Computer Dave. [XXII, T 2158-2159] Kessler responded that we were thinking about it. [XXII, T 2230] Barkett's initial conversation with Kessler on July 1 was not included in the recording played for the jury. They talked about Kessler's pending bankruptcy which involved a man named Delspina. [XXII, T 2159-2160]

In the July 1 conversation, Kessler told Barkett that he needed money to fund the lawsuit to collect on the key man insurance policy. Kessler said he was broke. [XXII, T 2163-2164] Kessler did not initiate any conversations about the lawsuit between July 1 and July 13. [XXII, T 2168] In the July 13 conversation, Barkett asked if there was anything they could do with the lawsuit. [XXII, T 2168] Kessler talked about trying to make contingency arrangements on the lawsuit, the theory of the lawsuit, and that it was a long shot. [XXII, T 2168-2169] Kessler said that they murdered him. Barkett then said there was someone he could call who might be able to put up some money. [XXII, T 2169] Kessler began talking about the porno business and that he felt it would be profitable. [XXII, T 2173] Kessler talked about

someone who made $20,000 a week in the same type of business. They discussed a $1,000,000 policy on Yankee. [XXII, T 2174] At first, Kessler said it would take a year to make money back on the insurance policy. Kessler reduced the time to six months in response to Barkett telling him about pressure from his investor. [XXII, T 2175]

Barkett called Kessler on July 28, 1993, and told him he was going to try to get some money from the investor. [XXII, T 2191-2193] Barkett asked if Kessler was ready to perform. Kessler responded, "Well let's talk about it, I don't see why not." [XXII T 2193] Kessler said he was going to see the attorney to talk about the lawsuit the next day and invited Barkett. Barkett declined and said he did not want to talk on the phone too much. Kessler said they were talking about a business deal. Barkett asked how long it would take to get part of the $1,000,000. Kessler said at least a year. [XXII, T 2194, 2231] Kessler invited Barkett to come to his house to eat and talk about business. Barkett declined and said he would get a room nearby. He wanted Kessler to come over, so the investor could call while they were together. [XXII, T 2194-2195] Barkett asked Kessler if he had heard from Delspina, Nora Carol, or J.K. Levine. Barkett suggested getting $3,000 to $5,000 from the investor, and Kessler

agreed. [XXII, T 2196] Barkett called Kessler at 3:15 p.m. on July 29, prior to their meeting that day, and told him he had the cash. [XXII, T 2197-2199] Barkett called Kessler again at 4:58 p.m. on July 29, said he had calls in to his investor, and suggested referring to the "new thing." [XXII, T 2200-2201] On July 30, Barkett gave Kessler $5,000 and asked him how he killed Deroo. [XXII, T 2221] Barkett told Kessler his investor wanted some assurance before he let any other money go. [XXII, T 2201-2202] Barkett told Kessler he needed an assignment of the policy and particulars for the second deal. [XXII, T 2204-2205]

Barkett called Kessler on August 2, 1993. [XXII, T 2205-2206] Barkett said, "You, know, we can't get any more money until we, what have we done for him." Barkett could not recall Kessler's response and suggested that he might be able to decipher it if he heard the tape. Defense counsel asked if he had the chance to review the tapes when Mr. Wasem was preparing the transcripts. Barkett asked, "Are you referring to the federal trial of 1989?" [XXII, T 2207] Defense counsel objected that his question had not invited that answer and moved for a mistrial. The court denied the motion. [XXII, T 2208-2209] The court granted defense counsel's request to instruct the jury to disregard the last response of the witness. [XXII, T 2209-2210]

On August 2, Barkett asked Kessler about the assignment being done and said the sooner it was done, the sooner they would get money. [XXII, T 2210-2211] Barkett said the investor was not going to do anything until he saw some sign of good faith. [XXII, T 221] Barkett asked if they were going to move this guy into an executive position. Barkett said the investor was asking a bunch of questions for which he did not have answers. Barkett requested assurance that Walcutt was in agreement with the plan. [XXII, T 2211-2212] Barkett said his investor was aggravating him to death, he had not shown any good faith, and they had not done anything yet. [XXII, T 2213-2215]

On August 3, Kessler told Barkett about the televised grand opening of the business. [XXII, T 2215] Barkett told Kessler he was going to have the investor call, and he wanted to get together so they were on the same page and could get the money. Barkett insisted that Kessler mail some documents. [XXII, T 2215-2216] Barkett received blank insurance quotes regarding people with various heights, weights, and age groups, smokers or nonsmokers, with no names written in, as well as some corporate documents. [XXII, T 2216-2217] On August 11 or 16, Barkett asked Kessler what he did with the $3,000. Kessler told him about fixing up the store, buying good stuff, having a factory make the clothes,

starting a mail order business, and that it would be big business. [XXII, T 2217-2219] Barkett asked how it would go when it came time for the deceased. Kessler said 100 percent our way. Barkett said he did not want to hear about the porno business, he wanted to hear about what they started. [XXII, T 2219-2220, 2231-2232]

In 1993, Robert Layman was an insurance agent in Columbus. [XXII, T 2239-2240] In the last week of August, Kessler asked him for quotes on health insurance and key man life insurance. He wanted key man insurance on Bo Yankee, Walcutt, and Walnace for the X.T.C. business. He wanted a $1,000,000 policy on Yankee. Layman gave him preliminary quotes on the key man insurance. Kessler did not fill out an application or pay any money. Kessler said he was going to meet an investor in Florida. When Kessler went to Florida he was arrested. [XXII, T 2240-2247]

Michael Walcutt had known Kessler for twenty years. They had both a business and personal relationship. [XXIII, T 2265-2268] In 1990, Walcutt had a wholesale lighting and fixture business, Nationwide Liquidators, which provided furniture, lighting, and fixtures for Custom Craft. [XXIII, T 2268-2269] Walcutt and Kessler had frequent conversations in July, 1993. Kessler said he was hurting for money. [XXIII, T 2269-2270] Kessler called Walcutt on August 1, 1993, and asked him to come to his office,

then Kessler said he wanted to talk in the car while they rode to his condo. Kessler said he had a plan in which they could both make a great deal of money. [XXIII, T 2270-2271] Kessler wanted to take out key man insurance on Bo Yankee and have him murdered. [XXIII, T 2272] Walcutt was aware that Deroo had been shot and killed in 1991. [XXIII, T 2273] Walcutt first learned of Deroo's death from Cheryl Hamilton. When Kessler returned to Ohio, he said "somebody killed the son of a bitch." He also said he sent money to pay the premium on the key man life insurance, but Deroo used it to pay bills. [XXIII, T 2291-2292] Defense counsel renewed his objections to Walcutt's testimony regarding both the motion to suppress and the motion in limine. The court denied the motion and allowed the defense, with the state's agreement, to have a standing objection to all of Walcutt's testimony. [XXIII, T 2273-2274] The court gave another Williams rule instruction to the jury. [XXIII, T 2274-2275]

Kessler introduced Yankee to Walcutt in 1989, and they became friends. [XXIII, T 2275-2276, 2315] In 1993, Walcutt was starting an adult video store called X.T.C. Leather and Lace. [XXIII, T 2277] Walcutt asked Kessler to help him raise $30,000 for the business and to open additional stores. Walcutt thought the business could make $20,000 a week. [XXIII, T 2317-2319, 2340-

2341] Yankee helped Walcutt with deliveries. Kessler wanted to make Yankee president of a new corporation to be formed. [XXIII, T 2279] Yankee did not have the training and experience to be a key man in the business. [XXIII, T 2280, 2334] Kessler said an investor would put up some money. The following Saturday, Kessler told Walcutt the investor was coming and to be ready to meet with him on a moment's notice. [XXIII, T 2281, 2328-2329] On Monday, August 4, 1993, Walcutt and Kessler met with Steve Barkett. Walcutt met Barkett several months before at Kessler's office; Barkett was driving a Rolls Royce with a license plate "U WIN BIG." [XXIII, T 2282-2283] Prior to the meeting, Kessler told Walcutt to go along with him on everything he did and convince the guy that they could set this up and kill somebody. [XXIII, T 2283, 2329, 2343] Kessler discussed a couple of methods of killing Yankee, using digitalis to cause a heart attack or faking a robbery and shooting him. Kessler said he could have the shooting arranged. [XXIII, T 2283-2284] The store was in a high crime area, so Kessler felt it would not be unusual for someone to be murdered there. [XXIII, T 2278, 2284]

Walcutt had been an informant for the Internal Revenue Service since the early 1980s. [XXIII, T 2308] There had been a tax lien against him since 1983. With accumulated interest he owed more

than $40,000. He had not made any payments on the lien in the past five years. [XXIII, T 2323-2324] IRS began asking him about Kessler in the early 1990s. [XXIII, T 2308] In July 1993, Walcutt provided information about Kessler to Internal Revenue Agents John deVries and Liz DiSalvo. Walcutt tried unsuccessfully to contact them prior to the August 4 meeting. [XXIII, T 2284-2286, 2309] He called DiSalvo immediately after the meeting. She put him in touch with FBI Agent George Huston in Columbus. Walcutt agreed to cooperate with the FBI. [XXIII, T 2286-2287, 2310-2311]

Walcutt had frequent conversations with Kessler about getting Yankee a job and obtaining insurance. [XXIII, T 2287] Kessler said he would have total control of this one, and it would not be f___ed up like the Deroo thing. He would make sure the insurance premiums were paid. [XXIII, T 2288] At the August 4 meeting, Kessler gave Barkett an assignment on the lawsuit against the insurance company in exchange for an investment of $3,000. [XXIII, T 2288] Walcutt understood that the investor was putting up $50,000, and would receive money back from the lawsuit, or if Yankee was murdered first, the money from that insurance policy would be divided up. The policy was supposed to be for $1,000,000. [XXIII, T 2289, 2330] Walcutt told Barkett that he could get someone to kill Yankee for $2,000. [XXIII, T 2330-2331] Of the

$3,000 Barkett gave to Kessler, Walcutt received $700 to buy leather and $500 to $800 to pay rent. Kessler kept the rest for expenses for the insurance and filing corporate papers. [XXIII, T 2289-2290, 2331-2332] Yankee was given offices both at Leather and Lace and at Kessler's office. [XXIII, T 2290] X.T.C. Holding company was set up to raise money to start other stores. X.T.C. Enterprises was set up to manage the stores. Yankee was president and signed the incorporation papers at Kessler's office. The purpose was to make him look like a key man. [XXIII, T 2293] Walcutt felt that Kessler was sincere about going through with the plan to kill Yankee. [XXIII, T 2295] Kessler said everything was on schedule, and the investor was satisfied with the documents. [XXIII, T 2296] Kessler suggested taking out key man policies on Walcutt and two fictitious people, but Walcutt refused. [XXIII, T 2296-2297]

In the week prior to September 6, 1993, photos were taken of Yankee and the X.T.C. store. Kessler referred to them as the death pictures. He wanted a photo of Yankee so the right person would be "whacked." He gave Yankee money to have the photos developed. [XXIII, T 2298] On September 6, Kessler flew to Florida. Walcutt drove him to the airport. Kessler said his financial situation had worsened. He needed money to obtain a key man policy on Yankee.

He was going to Florida to obtain the rest of the $50,000. [XXIII, T 2299-2230] Kessler never said this was a ruse to get money from Barkett. [XXIII, T 2301] Kessler was arrested in Florida. [XXIII, T 2302] The FBI later paid Walcutt $10,000 for providing information about this incident. [XXIII, T 2302, 2324] Walcutt became an FBI informant on other cases for which he received $7,000 or $8,000 for expenses. [XXIII, T 2326-2327]

In 1993, Alfred Scudieri was the FBI agent in charge of the fraud unit in Tampa. [XXIII, T 2347-2348] He was present on September 6, 1993, when the meeting between Barkett and Kessler was videotaped and Kessler was arrested. The arrest was not videotaped pursuant to FBI policy. [XXIII, T 2352-2353] Barkett did not know he was going to be paid by the FBI. [XXIII, T 2350] Scudieri later determined that Barkett should be paid $20,000 because he had placed himself in jeopardy and devoted a significant amount of time to helping the FBI and because that was the maximum amount payable without approval from Washington. [XXIII, T 2350-2351] On cross-examination, defense counsel asked if that was the same $20,000 taken from Kessler's briefcase after Barkett gave it to him on September 6. Scudieri said no. Defense counsel then asked, "Do you recall giving testimony in March of 1994?" Scudieri asked, "In this -- in a trial?" [XXIII, T 2354] Defense counsel moved for a

mistrial because this was the fourth time state witnesses had referred to the prior trial in this case. The prosecutor argued that the response was invited, while defense counsel argued it was not. The court denied the motion. [XXIII, T 2355-2358] The court instructed the jury to disregard the question and answer. [XXIII, T 2364]

FBI Agent David Stout assisted Agent George Huston in videotaping meetings between Kessler and Barkett on July 29, August 4, and September 6, 1993. Walcutt also participated in the August 4 meetings. [XXIII, 2371-2377] Stout identified state exhibits 107, 108, and 109 as videotapes of the meetings. [XXIII, T 2377-2379] The court overruled defense counsel's renewed objections and admitted the videotapes. [XXIII, T 2379, 2386] The court gave the jury another Williams rule instruction. [XXIII, T 2384]

The videotape of the July 29 meeting was played for the jury. [XXIII, T 2386-2440] Barkett said he had $5,000 to get them started, and he needed to give his investor details. [XXIII, T 2390] In response to Barkett's questions, Kessler explained that the corporation, Custom Craft, was the beneficiary of a $500,000 policy. [XXIII, T 2391-2393] The investor would get 40% of whatever they collect on both cases, and Barkett would see proof that he had the policy the next day. [XXIII, T 2392] Kessler was

president or CEO of Custom Craft. [XXIII, T 2394-2395] The lawsuit was based upon the insurance agent failing to tell Kessler that Deroo never paid the premium. Kessler felt they had better than a 50/50 chance of getting at least $250,000. [XXIII, T 2395-2396]

Barkett asked how Kessler would use the $30,000 from the investor. Kessler said it would be used for legal fees, inventory, and expenses for the new case. [XXIII, T 2396-2397] Barkett suggested, and Kessler agreed that $30,000 might not be enough, they needed $50,000. [XXIII, T 2397-2398] Kessler said he was trying to get the attorney to do it on a contingency basis, but it would help if he gave him some extra money. Barkett asked about the police. Kessler replied they had not done anything. [XXIII, T 2398] Barkett asked how to tell the investor that what happened last time would not happen this time. Kessler said we are going to pay all the expenses ourselves, while last time we sent money to Florida and the bills were paid from there. [XXIII, T 2399] Barkett said he did not want to go to the attorney to talk about a murder. Kessler replied we are talking about an insurance case and would not mention murder. [XXIII, T 2399-2400] Kessler said Walcutt's Leather and Lace shop was the perfect business, and Walcutt had the perfect decedent there, Bo. [XXIII, T 2401-2402]

Kessler did not know if Walcutt would go along, but Kessler had suggested that Walcutt make Bo an officer and give him more responsibility. [XXIII, T 2403]

Barkett said his investor was a source of money, but it was hard for Barkett to get the $5,000. [XXIII, T 2405] Barkett asked how Kessler would handle the "whacking part," and how did they know it would not be like last time when there were problems. Kessler said the only problem was that the guy did not pay the insurance premiums, it was a clean deal. He could have killed the guy for not paying the premium. [XXIII, T 2406] Kessler said they were not going to have anything to do with the company. Barkett asked if he knew what kind of trouble they could get in. Kessler replied income tax trouble because they would not have to pay taxes on it. Barkett asked if he should ask the investor for fifty. Kessler said fifty would do it in case they had to start a new business. Kessler said they would split 60% three ways if he pulled Walcutt in. [XXIII, T 2407]

Barkett asked who was going to "whack the guy?" Kessler replied we do not know yet. [XXIII, T 2410] Barkett asked how to convince the investor they were capable of going through with it. [XXIII, T 2411] Kessler suggested two methods for killing the guy, they could use digitalis to cause a heart attack, or an accident

would be better. Walcutt and Kessler would be responsible for doing it. [2412-2413] Barkett said the other thing was stupid and asked who would shoot the guy. Kessler said he was robbed, but we did not do it. [XXIII, T 2413-2414] Barkett said the investor would want to know what happened last time. Kessler said the only problem was the insurance premiums were not paid, everything else went according to plan. Barkett asked, "What do you got to pay to do that?" Kessler replied, "Ten." [XXIII, T 2415] Barkett asked if it would be easier to pay somebody this time rather than get your hands dirty. Kessler replied that we might do that. [XXIII, T 2416] Kessler said he paid him half up front, then paid the rest. [XXIII, T 2417] Kessler said he hired a girl from Tampa to do it. [XXIII, T 2417-2420]

Barkett asked if he should ask the investor for fifty. Kessler said to tell him that's what it's going to be. [XXIII, T 2423] Barkett asked how to convince him Kessler was serious. Kessler said to tell him he could make all the papers in the world, if they couldn't trust each other, he ought not to do it. Barkett received a call from the supposed investor and asked Kessler what he would do to get this thing started. Kessler said he had a meeting with the attorney tomorrow. [XXIII, T 2424] Barkett told the investor the problem the last time was the guy didn't make all

his payments, it had nothing to do with the way it happened. Kessler said it was clean. [XXIII, T 2425] Kessler said whatever he said would happen. Barkett told the investor that $30,000 would not be enough. [XXIII, T 2426] Kessler said he might have to pay somebody ten grand for technical advice. [XXIII, T 2427]

Barkett told the investor that it could not be done for under fifty. [XXIII, T 2428] Kessler said they would probably need it. He said he would give him some paperwork on the company tomorrow. [XXIII, T 2429] Kessler told Barkett to take $1,000 of the $5,000. [XXIII, T 2430] Kessler reassured Barkett that the plan would work once they got the business going. [XXIII, T 243334] Barkett asked if Kessler was going to get the girl to help them. Kessler said no, never use the same one twice. [XXIII, T 2435] He said the girl's name was Julie. [XXIII, T 2436] Barkett asked what Kessler was going to do about getting the policy started for the new deal. Kessler said he had to get the entity started first. He reassured Barkett that he could do it. [XXIII, T 2436-2437]

State exhibit 108 was played for the jury. [XXIV, T 2454-2526] Kessler gave Barkett a package of papers and showed him the assignment on the proceeds, a paper showing Kessler had a legitimate corporation that he controlled, and the original insurance policy for the lawsuit. [XXIV, T 2465-2465] Barkett asked what

Kessler had told Walcutt. Kessler replied everything and said he had an insurance man giving him projections on insurance policies for everyone. [XXIV, T 2475-2476] Kessler said the business was being incorporated. They needed insurance and a set of books. It would be a profitable business. [XXIV, T 2478-2279]

Barkett received a call from the investor. [XXIV, T 2486] Barkett asked how it would happen. Kessler replied that it had not been worked out yet, but it would happen around the first of the year. He then said it would be a hold-up or an accident. [XXIV, T 2489-2491] Kessler said it would happen by January, the investor would get 40%, and they would split 60%. [XXIV, T 2493] Barkett told the investor that he would get 40%. Barkett asked if they would need more than $50,000. Kessler and Walcutt said that's it. [XXIV, T 2494] They assured Barkett that they would handle the murder. Barkett told the investor they would take care of their end. [XXIV, T 2495] Kessler asked how soon they could get some money because they needed leather goods. Walcutt said they needed twenty. [XXIV, T 2496-2497] They left to go to the store. [XXIV, T 2495-2498] Stout testified that Walcutt, Barkett, and Kessler left the hotel and went to X.T.C. Leather and Lace. They were observed by Columbus police officers. [XXIV, T 2574-2575]

When they returned, Barkett asked for Walcutt's assurance that he was committed to doing this. [XXIV, T 2499-2500] Kessler and Walcutt agreed that Bo was the right type. Kessler said the store was a perfect place for a hold-up. [XXIV, T 2500] Barkett asked how Kessler was going to get somebody to do this. Walcutt and Kessler said it was no problem. [XXIV, T 2501] Kessler said it would be paid out of their expense budget. Walcutt said it would cost about two grand. [XXIV, T 2502] Kessler reassured Barkett that there would not be any problems. [XXIV, T 2504] Kessler and Walcutt reassured Barkett that $50,000 would pay for everything. [XXIV, T 2510] Kessler said the investor would get his money back from the two deals. [XXIV, T 2513] Kessler said they were ready to start with the corporation, policies, inventory, and personnel. The store would have sufficient cash flow for the million dollar policy and would soon be doing $20,000 a week. [XXIV, T 2514-2515]

The investor called. Barkett described the video store and said they assured him they could get the job done. Barkett then told Kessler he could give him three grand. [XXIV, T 2517-2519] Barkett asked how much more he would need. Kessler said 42. [XXIV, T 2520] Barkett counted out the $3,000. [XXIV, T 2521, 2523] Kessler said they would pay the attorney tomorrow and get the inventory started. [XXIV, T 2523] Walcutt and Kessler assured

Barkett that they would stay within budget. [XXIV, T 2524] Barkett said the investor committed the 50 and that Kessler committed to the deal. Barkett wanted to see the policy. Kessler said he would. [XXIV, T 2525]

State exhibit 109 was played for the jury. [XXIV, T 2526-2571] Kessler showed Barkett some corporate papers for X.T.C. Holdings which showed that Yankee was president. [XXIV, T 2538-2539] Kessler showed Barkett photos of the store and Yankee and a specimen of the insurance policy. The policy would cost $3,900. [XXIV, T 2541-2543] Kessler said he just wanted this deal to go. He spent a lot of time on it and borrowed money to get it done. Barkett then gave him $20,000. Kessler said he had "to get this insurance 3500 back to the heavy guy." Barkett asked how he could prove to the investor that Kessler was going to put the policy on this guy. Kessler said when he gets back with this money. [XXIV, T 2547] Kessler said he wanted this to succeed because he needed it badly. He was under pressure for money. [XXIV, T 2547-2548]

Barkett asked if they had the guy lined up to do the hit. Kessler said yeah. Barkett asked if they would have to go back to the investor for more money. Kessler said no. [XXIV, T 2548] Barkett asked the name of the life insurance company. Kessler said Great West. Barkett told him to count the money, and said the rest

would have to come wired to an account. [XXIV, T 2549] Kessler counted the money and said it was $100 short. [XXIV, T 2558-2559] Barkett asked how Kessler would justify the million dollar key man policy. Kessler said he would make up the books to show sufficient sales. He would pay for the policy the next week and send the thing to Barkett. [XXIV, T 2565-2566] Kessler said the insurance would cost about five grand. He would have five grand reserved to have Yankee killed. [XXIV, T 2567] Kessler said he lined up a friend of Walcutt's to do it. [XXIV, T 2568] Kessler said he hoped the investor would send the other money. It was costing $30 a day for Yankee's food and room rent. [XXIV, T 2569-2570] Barkett put the money in the closet. [XXIV, T 2570] The tape ended with Agent Witkowski saying, "Hi, Berry." [XXIV, T 2571, 2575-2576]

Richard Vessey met Kessler while in the Pickaway County Jail near Columbus, Ohio, from November 21 to 24, 1993. [XXIV, T 2577-2587] Kessler told Vessey he was in jail for something regarding taxes. [XXIV, T 2588] Vessey agreed to help him collect money that was owed to him when Vessey got out of jail. In return, Vessey could keep half the money to help with his pallet business. [XXIV, T 2590-2591] Kessler gave Vessey lists of names of people to contact, state's exhibit 110. [XXIV, T 2592-2594] Defense

counsel renewed his objections to the court's ruling on the motion in limine. The court overruled the objections and admitted the exhibit. [XXIV, T 2594] The lists included Jerry Srmack, to whom Vessey was supposed to talk about picking up pallets. [XXIV, T 2595; XXV, T 2676] Kessler wrote "snake" by Mike Walcutt's name and told Vessey not to trust him. [XXIV, T 2595; XXV, T 2678] Kessler said Walcutt had some of his property. [XXIV, T 2598; XXV, T 2678-2679] Kessler wrote that Bo worked for Walcutt and was also a snake. [XXIV, T 2596-2597; XXV, T 2680] Kessler gave Vessey information about people to contact to find Steve Barkett and Cheryl Hamilton. [XXIV, T 2596-2599; XXV, T 2677, 2688-2690, 2692]

After Vessey got out of jail, Kessler called him several times and gave him a dog worth over $40,000. [XXIV, T 2599-2600; XXV, T 2682-2685] Vessey went to a nightclub and obtained Doug's phone number from Debbie Day. He then called Doug and asked how to contact Cheryl Hamilton. Doug was hostile. Vessey was unable to contact Hamilton. [XXIV, T 2601-2602] Vessey called a lawyer friend who told him something that made him unwilling to help Kessler. [XXIV, T 2603-2604] The next day FBI Agents Huston and Stout visited Vessey, asked what he was doing, told him he could get in trouble for tampering with government witnesses, and asked him to call if he heard anything. [XXIV, T 2603-2605; XXV, T 2719-

2725] Kessler called and said Hamilton was making waves, and he wanted her taken out of the picture. [XXIV, T 2606] Vessey called Agent Huston and consented to having his phone conversations recorded. [XXIV, T 2606-2607] Several calls from Kessler were recorded. [XXIV, T 2608; XXV, T 2695] Vessey also agreed to wear a recording device for a meeting with Kessler at the Franklin County jail on December 17, 1993. He identified the recording, state exhibit 111. The court admitted the recording over defense counsel's prior objection. [XXIV, T 2609-2611]

The recording was played for the jury. [XXIV, T 2612-2637] Kessler said he did not think Walcutt would ever pay and would be a bad witness. Kessler indicated that he wanted what happened to Jimmy Hoffa to happen to Walcutt. [XXIV, T 2614-2615, 2622] He told Vessey to, "Throw him away." [XXIV, T 2617-2618] Kessler also said Barkett would not pay and was the informer and to take care of him Jimmy Hoffa style. [XXIV, T 2617, 2622, 2629-2630] Kessler wanted Vessey to talk to Cheryl Hamilton to see if she was a threat and try to turn her around to be a good witness, but to do what he had to do. [XXIV, T 2618, 2624] Vessey said he had felonies in his past and needed to pick up something. Kessler told him to contact Jerry Srmack at Lee Brakes to get a shotgun and to contact Kessler's secretary to get a .45. [XXIV, T 2619-2621]

Kessler suggested that he might be able to get out of jail by trading clothes with an attorney. [XXIV, T 2634-2635]

Vessey met with Jerry Srmack at Lee Brakes on December 20, 1993, accompanied by a police detective. Srmack gave Vessey a bag, which Srmack turned over to Agent Stout. [XXV, T 2648-2650] Vessey received $5,000 from Agent Huston in 1994. [XXV, T 2651, 2669-2670] In a deposition, Vessey denied that he received any money from the FBI or U.S. Attorney's Office except for being paid $40 a day for each day he was in the courtroom. [XXV, T 2670-2671] Vessey testified that he forgot about the $5,000 during the deposition. The prosecutor asked him what materials the State Attorney's Office provided to help him prepare for the deposition. [XXV, T 2731] The prosecutor asked, "You were provided your trial testimony?" [XXV, T 2732] Defense counsel moved for a mistrial because this was the fifth or sixth time the word trial had been elicited by the witnesses or by a prosecutor's question. The court said the defense brought out that Vessey was paid $40 a day for trial. Defense counsel responded that it was for courtroom testimony and did not use the word trial. The court denied the motion. [XXV, T 2732-2733] The court instructed the jury to disregard counsel's last question. [XXV, T 2734]

FBI Agent George Huston of Columbus was present when Kessler was arrested in Orlando on September 6, 1993. [XXV, T 2753-2754] Kessler was incarcerated in Florida for awhile, then transported to Columbus where he remained incarcerated through December, 1993. [XXV, T 2754-55] The prosecutor asked, "And it was on the charges relating to an interstate conspiracy to commit murder?" Defense counsel objected on relevancy grounds and moved for a mistrial. [XXV, T 2755] The prosecutors argued that it was relevant to why Kessler was in jail, why Huston went to see Vessey, Kessler's motivation in seeking Vessey's help, and defense counsel's cross-examination of Vessey regarding the FBI accusing him of witness tampering. [XXV, T 2755-2757] Defense counsel argued that his cross-examination was invited by the state. He renewed his argument from the motion in limine hearing that the witness tampering evidence was not admissible because it had to do with the federal charges and not the state charge. He further argued that the Williams rule evidence had become a feature of the case. [XXV, T 2757-2759] The court sustained defense counsel's objection, but denied the motion for mistrial. [XXV, T 2759] The court instructed the jury to disregard the question and answer. [XXV, T 2760]

Huston told Vessey he had heard that Vessey was attempting to reach Doug Trotter, Cheryl Hamilton's boyfriend. Huston told him Hamilton was a witness in a case, any contact with witnesses could be construed as intimidating, and he could go to jail if convicted of intimidating a federal witness. [XXV, T 2761, 2767-2768] Huston remained in contact with Vessey, who consented to recording a series of phone calls. [XXV, T 2762] Agents Stout and Huston observed Vessey's meeting with Srmack. Vessey went to the meeting with a detective and obtained a bag from Srmack. [XXIII, T 2380-2381; XXV, T 2762] After the meeting, Vessey gave the bag to Stout. The bag contained several handguns. [XXV, T 2764-2765] Huston decided to pay Vessey $5,000 for his assistance in 1994. [XXV, T 2766-2767]

D. The Defense

Berry Kessler testified that he was born on July 22, 1921. [XXV, T 2786] He lived in Ohio and had been an accountant or financial planner with his own firm for 35 to 40 years. [XXV, T 2787; XXVI, T 2889] In 1990, his net worth was around five million dollars. [XXV, T 2788] He was married to Shirley and had a home worth $450,000. [XXV, T 2788-2789] Cheryl Hamilton was his girlfriend. [XXV, T 2789] A condominium and shares of stock in Custom Craft were held in her name, although Kessler's funds were used to acquire them. [XXV, T 2790] Kessler pled to the two federal tax charges for which he had been convicted. [XXV, T 2791-2792; XXVI, T 2885] He had been convicted of a total of 14 felonies. [XXV, T 2792]

Kessler and Deroo started the Custom Craft corporation in 1989. Deroo was an expert in sales and marketing of cabinets and was to run the business. Kessler's role was to create the financing. They originally planned a 50/50 deal, but it didn't work because of the cost of equipment and the location. [XXV, T 2794] Kessler's funds were used to purchase the building, but the title was held by the Relssek Realty corporation. Kessler was CEO of Relssek. [XXV, T 2795] Deroo was president of Custom Craft. [XXV, T 2796] Kessler was CEO and chief financial officer of

Custom Craft. [XXVI, T 2911] They issued 2,000 shares of stock. Deroo had 20%, Frank Barton had 25%, George Ikimas had 25%, and the balance of the stock was placed in Hamilton's name. She had over 1,000 shares. [XXV, T 2795-2796; XXVI, T 2916] Hamilton did not put any money into Custom Craft; the money was Kessler's. [XXVI, T 2913] The shares held in Hamilton's name dropped to about 500 in January, 1991, because Kessler gave shares to Grossman, his brother-in-law in exchange for money for another project. [XXV, T 2797-2798] Deroo's shares remained the same. [XXV, T 2798] After Deroo's death, Kessler filed a lawsuit against the insurance company because the key man insurance was not paid. Kessler gave himself a voting trust for the shares in Hamilton's name to show that he had the authority to act for the corporation in the lawsuit. [XXV, T 2798-2799]

From the time Custom Craft began, Kessler intended to move to Florida. He built a home in Spring Hill worth about $200,000 and moved furniture worth $100,000 to Florida. [XXV, T 2800-2801] Kessler usually flew went he went to Florida to visit Custom Craft. He drove the furniture down in a truck. [XXV, T 2801-2802; XXVI, T 2899]

Kessler came to Florida at the beginning of February, 1991, to arrange a meeting. [XXV, T 2802] Ikimas had some money to invest

in the company. [XXV, T 2802, 2805] Kessler had some guns from his gun collection he wanted to bring down and could not take them on a plane. [XXV, T 2803; XXVI, T 2897, 2900] He also wanted to avoid the expense of flying. [XXVI, T 2897] Custom Craft was a start-up company just ready to go into production. [XXV, T 2804] Kessler was paying $4,000 a month for the building. [XXV, T 2808] The employees were always paid and received a Christmas bonus. [XXV, T 2809] Kessler took $2,500 to Deroo for payroll. Deroo said he had some contracts. [XXV, T 2805, 2813; XXVI, T 2894, 2945-2946]

Kessler had a contract for accounts receivable, which he discussed with Deroo at the hotel on February 2. [XXV, T 2805-2806] They met at the hotel around 5:00. [XXV, T 2809] They had two drinks each at the hotel. They went to Fast Eddie's for dinner around 7:00. They had two more drinks each before eating. [XXV, T 2810-2811; XXVI, T 2927] They discussed business and planned to meet at Custom Craft the next morning at 10:30. [XXV, T 2811] Sam Fountis was supposed to meet them. He had contacts regarding financing. [XXV, T 2812] They left the restaurant around 8:00. Deroo departed in his own vehicle, taking left over food. Ikimas and Kessler returned to the hotel to go to bed because Kessler was tired from the trip. [XXV, T 2814] Kessler called Hamilton at

9:09. [XXV, T 2816-2817] Fountis called Kessler around 11:30. [XXV, T 2817; XXVI, T 2910-2911]

On Sunday, February 3, Kessler tried to call Ikimas, then asked a hotel employee to wake him. They met for breakfast around 8:00. [XXV, T 2818-2819] They went to Custom Craft for the meeting and found Deroo's van parked in front. Kessler found the door was locked and called Torres to come and let them in. [XXV, T 2819-2820] When they entered, Kessler saw a watch, picked it up, and put it in his pocket. Torres found the body. [XXV, T 2821; XXVI, T 2900-2901, 2906-2909] Kessler had a cellular phone, but he sent Torres to call the police and an ambulance. [XXVI, T 2910] Kessler was in shock. He went to his Bronco while the others checked the doors. He dropped the watch in the console. [XXV, T 2822; XXVI, T 2903, 2906, 2908-2909] Kessler denied knowing that the watch belonged to Deroo. [XXVI, T 2908] When the police arrived, Kessler gave them consent to search the Bronco. [XXV, T 2822-2823] He told them he had two guns and a watch in the car. [XXV, T 2823; XXVI, T 2905] The police kept the Bronco. [XXV, T 2828] Kessler voluntarily went to the sheriff's office and gave a statement. He gave consent to search his hotel room and to take his clothes and shoes. [XXV, T 2824-2826] He consented to having his hands tested. Kessler returned to Ohio. [XXV, T 2826]

The death of Deroo was a severe blow to the business. Kessler had purchased key man insurance on Deroo when the corporation was formed. [XXV, T 2827] He denied that he asked Stammler to increase the key man insurance, but he did check on the policy. [XXV, T 2828-2829; XXVI, T 2922] Kessler attempted to replace Deroo with Drew Chupka. [XXV, T 2829] Chupka was fired because he had a substance abuse problem, lost their contract, took their truck, and disappeared. [XXV, T 2830-2832] They lost their financing with Praetorian, and Custom Craft was closed. [XXV, T 2832-2833] Kessler moved his furniture back to Columbus and put the Spring Hill house up for sale. [XXV, T 2833] He initiated a lawsuit against the insurance company, but the suit died. He tried to sell the Custom Craft building, then rented it to someone. [XXV, T 2834]

Kessler met Barkett in New York in Spring, 1991, while trying to finance another project. They developed a personal and business relationship. [XX, T 2835, 2842] When they met, Kessler's net worth was around $2,000,000. [XXV, T 2842] Kessler invested over $1,000,000 in the computer business. [XXV, T 2842-2843] Other investors invested over $1,300,000. Kessler and the others never got any of their investments back. Kessler did not know what happened to the money. [XXV, T 2843-2844; XXVI, T 2886] Kessler

went to Germany to set up a corporation. He made a second trip to Germany with Norma Simmang, an investor in the company, David Eller, Barkett's bodyguard, and Nora Caroll. Eller had a $10,000,000 check made out to Simmang and Eller. Eller put the check in Kessler's locked briefcase. When they went to the bank to deposit the check it was gone. [XXV, T 2844-2847] The check was for money to distribute to the investors. Kessler expected to receive half of it. Instead, he got nothing. [XXV, T 2849] When his business relationship with Barkett ended, he had very little money left. Kessler filed for bankruptcy in 1993. [XXV, T 2850]

When Barkett called in June, 1993, it was Barkett's idea to use another phone. [XXV, T 2851] Kessler knew Barkett was an FBI informant. [XXV, T 2852-2854] When he met with Barkett on July 1, 1993, his intent was to try to get some of his money back. It was Barkett's idea to try to insure David Eller or Computer Dave. [XXV, T 2854-2855; XXVI, T 2887] Kessler never made any attempt to revive the lawsuit on the key man insurance. [XXV, T 2855-2856] He talked to Barkett about Walcutt and his porno business to try to get money from Barkett. Kessler did not intend to kill anyone, nor to take out key man insurance on Yankee. [XXV, T 2856] Kessler wanted $30,000 to operate and expand X.T.C. as a legitimate business. [XXV, T 2857; XXVI, T 2889] Barkett suggested that the

loan should be $50,000. [XXVI, T 2945] From the first $3,000 Kessler received, he paid an attorney $200 to set up the corporation, half went to Walcutt for his expenses, and he kept the rest for his expenses. Most of the rest of the money Kessler received went to pay for rent and inventory. He kept $1,000. [XXV, T 2859] Kessler never applied for key man insurance for Yankee or anyone else in the company. [XXV, T 2860] He hoped to repay the $50,000 loan through the cash flow of the business. [XXV, T 2861; XXVI, T 2888] He discussed giving the investor 40% of the lawsuit and new key man insurance because that was what he wanted to hear. [XXV, T 2861-2862] Kessler did not hire a hit person named Julie to kill Deroo. Julie was his dog. [XXV, T 2862-2863] He told Barkett he hired Julie to kill Deroo to show that he was a bad person capable of doing anything because he wanted to get the money. [XXV, T 2863; XXVI, T 2928, 2933-2935]

At the July 30 meeting, Kessler told Barkett that most of the money he received was being used for inventory. [XXVI, T 2868-2869] He never took any action towards placing the investor's name on any insurance policy as the beneficiary. He never got anything in writing from an attorney regarding the lawsuit. [XXVI, T 2869] Kessler explained Barkett's plan to Walcutt, told him he was going to pretend to agree to everything Barkett suggested, and told

Walcutt to go along with everything. [XXVI, T 2870-2871, 2929, 2935] Kessler never actually discussed a potential hit person with Walcutt. [XXVI, T 2872] Barkett told Kessler to bring the insurance papers to the September 6 meeting. Kessler brought a specimen policy with no names on it which he obtained from Layman. [XXV, T 2858; XXVI, T 2873-2874, 2930-2931] When Kessler was arrested at the end of the meeting, he told the FBI agents that he had been playacting to get the money, he was not going to do what was on the tape, and none of the threats were true. [XXVI, T 2876-2878]

Kessler gave Vessey lists of names of people who owed him money or had some of his possessions. He was trying to raise a defense fund. [XXVI, T 2878-2879, 2936-2937] He also wanted Vessey to talk to Hamilton about being a witness for him. [XXVI, T 2937-2938] Kessler asked Vessey to look after one of his dogs, which had cost $45,000, and never got it back. [XXVI, T 2879-2880, 2939] When Vessey told Kessler that people said to f___ off and denied having his property, Kessler was disappointed, angry, and frustrated. He made the statements about doing a Hoffa on some people. He was suffering from fumes from a trash burning plant and a glue factory, and would have said anything. [XXVI, T 2880-2881,

2939-2940] Kessler denied setting Vessey up with the handguns to assist him in eliminating witnesses. [XXVI, T 2942]

Kessler denied that he shot John Deroo, that he participated in someone else shooting Deroo, and that he hired someone to shoot Deroo. [XXVI, T 2881, 2943, 2950] Kessler agreed that he told Barkett that he arranged the death of Deroo. [XXVI, T 2882] He denied that he told Walcutt that he arranged the murder of Deroo. [XXVI, T 2882-2883, 2928] When Cheryl Hamilton asked, Kessler denied that he had Deroo killed. [XXVI, T 2883] Kessler denied killing Deroo when he was arrested. [XXVI, T 2944]

E. Penalty Phase

The state relied upon the evidence presented in the guilt phase of the trial and presented no additional evidence. [VIII, R 1314]

Samuel Lowenthal, a former Columbus, Ohio, retailer and real estate broker, testified about Kessler's good qualities as an accountant and businessman. [VIII, R 1314-1318, 1321-1323]

Roy Malden and Basil Ahearn testified that Kessler served as a medic in the United States Army in combat in the Pacific during World War II. [VIII, R 1326-1346]

George Faught, an investigator for the Public Defender's Office, testified that he called two witnesses who were unable to

appear in court because of health problems. [VIII, R 1347-1350] Jack Clark said he had known Kessler over 30 years both as his accountant and as personal friends. [VIII, R 1348-1349, 1352] Rabbi Samuel Rubinstein said he had known Kessler for 30 years as his accountant and friend. Kessler owned a bowling alley, was a member of the synagogue, and allowed members of the synagogue to use the bowling lanes free of charge. [VIII, R 1349-1351, 1353-1354]

Berry Kessler, who was 75 years old, testified about his background, family relationships, and prior convictions. [VIII, R 1356-1394]

At a separate sentencing hearing, Diane Goulder, Kessler's oldest daughter, testified about Kessler's family relationships, his good qualities as a father and businessman, and his useful activities in prison. [VI, T 997-1003]

SUMMARY OF THE ARGUMENT

Issue I The trial court violated Kessler's right to a fair trial by an impartial jury when it denied Kessler's cause challenge to juror Mengel. Mengel read a newspaper article which stated that Kessler had been convicted and sentenced to life in prison in federal court for the murders of John Deroo and an Ohio business man and that he was a suspect in five other unsolved murders. Mengel said he had not formed a personal opinion about Kessler's guilt, but he assumed someone else had done so. Although Mengel said he could presume Kessler innocent, it is unrealistic to believe he could completely set aside the very prejudicial and partly unfounded information he had read and base his verdict entirely on the evidence presented at trial and the court's instructions on the law. His knowledge of such information also raised the danger that he might convey it to the other jurors. There was a reasonable doubt about his ability to be impartial, so the trial court erred by denying the cause challenge. Defense counsel exhausted his peremptory challenges and requested another to excuse Mengel. The court denied the request, and Mengel served on the jury. The court's error in denying the cause challenge was properly preserved and violated Kessler's right to a fair trial.

The conviction must be reversed, and the cause must be remanded for a new trial.

Issue II The trial court violated Kessler's Fifth Amendment right against involuntary self-incrimination and Fourteenth Amendment right to due process by denying his motion to suppress his incriminating statements to FBI informant Steve Barkett. In his conversations with Barkett, Kessler initially denied any involvement with the murder of John Deroo. Barkett used promises of a loan of up to $50,000 and coercive demands for more information to induce Kessler's admissions that he hired a hit woman to kill Deroo to collect life insurance proceeds and Kessler's incriminating statements about plans to set up another corporation, insure Bo Yankee, and then murder Yankee for the insurance. Under the totality of the circumstances these incriminating statements were involuntary. The error in denying the motion to suppress was not harmless, because the recorded conversations were the state's most convincing evidence of Kessler's guilt of the murder of Deroo. The conviction must be reversed, and the case must be remanded for a new trial.

Issue III Collateral crime evidence is admissible when it is relevant to a material issue other than the defendant's bad character or propensity, but the court must not allow the state to

go too far and make the evidence a feature of the trial. Even relevant evidence is not admissible when its prejudicial effects outweigh its probative value. In this case, the trial court allowed the state, over defense counsel's repeated objections, to present extensive evidence that Kessler planned with informants Barkett and Walcutt to employ Bo Yankee in Walcutt's adult video store, obtain key man life insurance, then murder Yankee to collect the insurance proceeds. The court also allowed the state, over defense counsel's objections, to present evidence that after his arrest Kessler attempted to have informant Vessey kill Barkett and Walcutt and to try to influence the testimony of Cheryl Hamilton. This collateral crime evidence became an impermissible feature of the trial. Its prejudicial effects in showing Kessler's cold and calculating willingness to kill Yankee for financial gain and then to kill or tamper with witnesses outweighed the probative value of the evidence and deprived Kessler of a fair trial. The conviction and sentence must be reversed for a new trial.

Issue IV The trial court admitted, over defense counsels' objections and motion for mistrial, judgments showing that Kessler had been convicted for two prior federal tax offenses and that nine other unidentified charges were dismissed. This evidence was not shown to be relevant to any material issue other than Kessler's bad

character or propensity. The defense did not open the door to its admission by asking Detective Lawless about Kessler's statement that he had been indicted for tax evasion because the question and answer were not misleading to the jury. The judgments were not admissible to impeach Kessler's trial testimony because he correctly admitted the number of his prior felony convictions. Irrelevant evidence of prior crimes is presumed to be prejudicial. The prejudicial nature of the irrelevant evidence of Kessler's tax offense convictions and the nine dismissed charges outweighed its probative value. Kessler's conviction should be reversed for a new trial.

Issue V The trial court erred by admitting, over defense counsel's relevance objections, the testimony of two state witnesses in the guilt phase of trial that Kessler expressed no sympathy or sorrow for Deroo's death. This evidence of lack of remorse was not relevant to the issue of premeditation. The errors were not harmless in the guilt phase because it cannot be determined beyond a reasonable doubt that the jury did not consider the evidence in finding Kessler guilty of premeditated murder. In the penalty phase, the evidence of lack of remorse was not relevant to the aggravating factor of cold, calculated, and premeditated, nor to any valid aggravating factor. Instead, the testimony was

evidence of a nonstatutory aggravating factor. Consideration of such an invalid aggravating factor by the jury violates the Eighth Amendment. The errors were not harmless in the penalty phase because it cannot be determined beyond a reasonable doubt that the jury did not consider the evidence of lack of remorse in finding the CCP aggravating factor or as an invalid aggravating factor in recommending the death sentence. Kessler's conviction should be reversed for a new trial, or in the alternative, the death sentence should be vacated, and the case should be remanded for a new penalty phase trial.

Issue VI The trial court erred by denying defense counsel's motions for mistrial when the state's witnesses and the prosecutor made five separate remarks about Kessler's prior federal trial. Although the remarks did not state that Kessler had been convicted, there was other information in the record from which the jurors may have known or inferred that Kessler had been tried for and convicted of the murder of John Deroo. The cumulative effect of the remarks may have influenced the jury's verdict and made the denial of the motions for mistrial prejudicial error. The conviction should be reversed, and the case should be remanded for a new trial.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO TRIAL BY AN IMPARTIAL JURY BY DENYING HIS CAUSE CHALLENGE TO JUROR MENGEL.

"It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." Ross v. Oklahoma, 487 U.S. 81, 85 (1988); see also, Morgan v. Illinois, 504 U.S. 719, 726 (1992). The defendant is entitled to a fair trial by a panel of impartial, indifferent jurors whose verdict is based upon the evidence developed at trial. Irvin v. Dowd, 366 U.S. 717, 722 (1961). A juror should be excused for cause if there is any reasonable doubt about the juror's ability to render an impartial verdict. Turner v. State, 645 So. 2d 444, 447 (Fla. 1994); Bryant v. State, 601 So. 2d 529, 532 (Fla. 1992); Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989); Hill v. State, 477 So. 2d 553, 556 (Fla. 1985).

On the first day of voir dire in the present case, two prospective jurors, Salerno and Ferry, indicated that they had knowledge about the case. [X, T 49, 60-62; XI, T 162, 167] They were excused for cause because they would automatically vote against the death penalty. [X, T 97-98; XI, T 139-140, 245]

Defense counsel used seven peremptory challenges on other jurors. [XI, T 241, 246, 251, 252, 258, 260, 263]

When jury selection resumed on the second day of trial, the court noted that two more prospective jurors indicated that they had knowledge of the case. Costa, whose husband was a retired FBI agent, said she could put it aside. Rinaldi could not put it aside. The court excused Rinaldi for cause. [IV, R 498, 512; XIII, T 478-480]

Defense counsel entered an article from that day's Pasco edition of the St. Petersburg Times titled "Murder-for-hire trial starts today" as defense exhibit 1. [XIII, T 480; A 6-7] The article had a photo of Kessler with a caption stating that he "is serving a life sentence with no possibility of parole." [A 6] The article stated that Kessler "was a suspect in the previous killings of several business associates." It stated, "Kessler already has been convicted in federal court in the killing of Hudson cabinetmaker John Deroo and an Ohio businessman. Kessler is serving a life sentence in prison with no possibility of parole." [A 6] It stated that Kessler was "convicted of trying to arrange a second hit on another business partner, who was involved in a pornography shop with Kessler in Columbus, Ohio." It stated, "Columbus police said Kessler had been a suspect in at least five

other slayings of business associates. The cases have never been solved." [A 7] The court denied defense counsel's request to ask the prospective jurors if they read the Times. [XIII, T 481]

In response to questions from the court and the prosecutor, juror Mengel said he had some knowledge of the case from that morning's newspaper, but he could set it aside and reach a verdict based only on the law and the evidence. [XIII, T 488-490, 531] Juror Urgo also had knowledge of the case from the newspaper, and did not know whether he could set it aside. [XIII, T 488-490] The court excused Urgo for cause. [XIII, T 520-521] Jurors Costa and Freudenstein said they could put aside anything they heard or read and reach a verdict on the law and evidence. [XIII, T 490-491, 539-540]

In response to defense counsel's questions, Costa said she had not read anything about the case since the Sunday headline. [XIII, T 589] Freudenstein read the article in the Times, did not form an opinion regarding guilt, and would presume Kessler innocent until she heard the evidence. [XIV, T 593] Mengel read that day's article in the Times all the way through. He said, "I didn't form an opinion me personally, but I assumed that somebody else had formed an opinion and found him guilty." [XIV, T 594] Mengel

again said he did not form an opinion. He said he presumed Kessler was innocent. [XIV, T 594-595]

Defense counsel exhausted his peremptory challenges by excusing Korrow, Mitchell, and Costa. [XIV, T 618-619, 621-623] The court denied defense counsel's cause challenges to Freudenstein and Mengel. [XIV, T 623-626] The court denied defense counsel's request for an additional peremptory to excuse Mengel. [XIV, T 624-626] The state excused Freudenstein. [XIV, T 625] Mengel served on the jury. [XIV, T 630]

The information in the article about Kessler's prior federal conviction and life sentence for the murder of John Deroo was not admissible at his trial for the same charge in state court. See Jackson v. State, 545 So. 2d 260, 263 (Fla. 1989) (reversible error for trial court to allow prosecutor to cross-examine defendant about his previous trial and conviction for the same crimes). The article also asserted that Kessler was convicted in federal court of killing an Ohio businessman and was a suspect in the unsolved murders of five other business associates. Appellant is unaware of any factual basis for those assertions. No evidence of such collateral crimes was ever offered at trial, much less found to be relevant to a material fact in issue. Evidence of irrelevant collateral crimes is both inadmissible and presumed to be

prejudicial. Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Williams v. State, 692 So. 2d 1014, 1015 (Fla. 4th DCA 1997). A false allegation of a prior murder conviction would be even more prejudicial.

While juror Mengel said that he did not form a personal opinion as to Kessler's guilt and that he presumed Kessler innocent, it is unrealistic to believe that he could have entirely disregarded his knowledge of Kessler's alleged prior history set forth in the Times newspaper article. In Singer v. State, 109 So. 2d 7, 24 (Fla. 1959), this Court observed that "it is difficult, if not impossible, for any individual to completely put out of mind knowledge, opinions or impressions previously registered. Such cannot be erased from the mind as chalk from a blackboard." Moreover, this Court ruled,

> Too, a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so.

Id. Thus, it would have been difficult, if not impossible for Mengel to put out of his mind the prejudicial information about Kessler's federal conviction and sentence for the murder of Deroo and the unsupported allegations that he was convicted for the

murder of an Ohio businessman and that he was suspected of five other unsolved murders of business associates. This information from the newspaper article made it very unlikely that Mengel could return a verdict based solely on the evidence at trial despite his assurances that he had not formed a personal opinion as to Kessler's guilt.

Moreover, Mengel's knowledge of such information from the newspaper created the danger that he might convey it to the other jurors. The jurors may have discussed prior proceedings against Kessler because of references to his prior trial in federal court by Glenda Deroo [XVIII, T 1394-1395], Steve Barkett [XXII, T 2147, 2207], Agent Scudieri [XXIII, T 2354], and the prosecutor. [XXV, T 2732] See Issue VI, infra.

The denial of Kessler's cause challenge to Mengel is similar to the denial of the defendant's cause challenge in Reilly v. State, 557 So. 2d 1365 (Fla. 1990). In Reilly, a prospective juror read newspaper articles indicating that Reilly had confessed. The juror denied that he had formed an opinion about Reilly's guilt and said he could set aside his impressions from what he had read and decide the case on the evidence presented at trial. He said he would consider the confession if it were presented in court, but not because of having read it in the newspaper. The court denied

Reilly's cause challenge to the juror. The error was preserved because defense counsel used a peremptory challenge to excuse the juror, exhausted his peremptory challenges, requested more, and identified three jurors remaining on the panel as ones he wished to excuse. Id., at 367. This Court found reversible error because the confession had been suppressed and the juror was aware of an inadmissible fact more damaging than anything introduced in evidence. Id.. This Court explained,

> While Mr. Blackwell subsequently gave the right answers with respect to whether or not he could be an impartial juror, it is unrealistic to believe that during the course of deliberations he could have entirely disregarded his knowledge of the confession no matter how hard he tried.

Id.

Similarly, in Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989), this Court found reversible error in the denial of a defense cause challenge to a juror who stated that she had a preconceived opinion of Hamilton's guilt, although she eventually said she could base her verdict on the evidence at trial and the law as instructed by the court. Hamilton could have, but did not, use a peremptory challenge to excuse the juror. Instead, he exhausted his peremptory challenges and requested an additional one to backstrike

the juror in question. The request was denied, and the juror sat on the jury.

Juror Mengel's exposure to the prejudicial newspaper article raised a reasonable doubt as to his ability to serve as a fair and impartial juror, so the trial court erred in denying defense counsel's cause challenge. The error was both properly preserved and prejudicial to the defense because defense counsel exhausted his peremptory challenges and requested one more to excuse Mengel, but the court denied the request, and Mengel served on the jury. Hamilton, 547 So. 2d at 632; cf. Mendoza v. State, 700 So. 2d 670, 674-675 (Fla. 1997); Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990). Because Mengel did not possess the impartial state of mind necessary to render a fair verdict, the failure to excuse him deprived Kessler of his constitutional right to a fair trial. Hamilton, at 633. This Court must reverse Kessler's conviction and remand this case for a new trial.

ISSUE II

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS AGAINST SELF-INCRIMINATION AND TO DUE PROCESS OF LAW BY ADMITTING HIS INVOLUNTARY STATEMENTS TO FBI INFORMANT BARKETT.

In Bram v. United States, 168 U.S. 532, 542-543 (1897), the United States Supreme Court ruled that under the Fifth Amendment right against compulsory self-incrimination, a confession must be voluntary to be admissible. The Court quoted 3 Russell on Crimes, 6th ed., 478:

> But a confession in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Id.

In Malloy v. Hogan, 378 U.S. 1, 6 (1964), the Supreme Court held that "the Fifth Amendment's exception from compulsory self-incrimination is protected by the Fourteenth Amendment from abridgement by the States." The Court ruled that the admissibility of a confession in state courts is tested by the same standard applied to federal prosecutions in Bram. Id., at 7. This Court has applied Bram in determining the voluntariness of confessions, ruling that confessions cannot be obtained through direct or implied promises. Johnson v. State, 696 So. 2d 326, 329 (Fla. 1997); Brewer v. State, 386 So. 2d 232, 235 (Fla. 1980).

Moreover, the admission into evidence of a defendant's involuntary confession violates the Fourteenth Amendment guarantee

of due process of law. In Jackson v. Denno, 378 U.S. 368, 376 (1964), the Supreme Court declared,

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, . . . and even though there is ample evidence aside from the confession to support the conviction. [Citations omitted.]

When a confession is challenged as involuntary, the state must prove by a preponderance of the evidence that it was voluntary. Lego v. Twomey, 404 U.S. 477, 489 (1972); Johnson v. State, 696 So. 2d at 331; Roman v. State, 475 So. 2d 1228, 1232 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986). The voluntariness of a confession must be determined from the totality of the circumstances. See Arizona v. Fulminate, 499 U.S. 279, 285-286 (1991); Johnson, at 329; Roman, at 1232.

Defense counsel filed a pretrial motion to suppress Kessler's statements to FBI informant Steve Barkett on the ground, inter alia, that the statements were involuntary because they were induced by a promise of $50,000 which would be unavailable unless the informant could convince the investor that Kessler had secured the murder of John Deroo for the purpose of collecting insurance proceeds. [II, R 189-194] The court denied the motion [XIII, T 476] after conducting an evidentiary hearing. [XII, T 283-388;

XIII, T 390-476] Defense counsel renewed the motion at trial and objected to the admission of Kessler's statements. [XXI, T 1961-1963, 1987-1988] The state agreed that the defense could have continuing objections to all testimony regarding Barkett's conversations with Kessler as to the motion to suppress. The court overruled the objections. [XXI, T 1996-1997] Audiotape and videotape recordings of Kessler's conversations with Barkett were admitted into evidence and played for the jury during trial. [XXI, T 1999-2015, 2018-2037, 2039-2066, 2070-2085, 2091-2107; XXII, T 2129-2137, 2140-2144; XXIII, T 2386-2440; XXIV, T 2454-2571]

At the hearing on the motion to suppress, the state's evidence concerned the other grounds for the motion, Barkett's payment by the FBI and the alleged violation of Kessler's right to counsel. [XII, T 287-382; XXIII, T 418-463] At the state's request, the court took judicial notice of the testimony in prior proceedings. [XII, T 286-287]

At the September 10, 1996, hearing on the state's motion in limine, Steve Barkett testified that he was an informant for the FBI. [V, R 677-678, 749] Barkett met Kessler during a business transaction in 1991. [V, R 679-681, 750-751] Barkett and Kessler became involved in computer businesses together from 1991 to 1993. [V, R 681-682, 753-763, 808-810] They became friends and lived

together for a year from 1991 to 1992 in Boca Raton, Florida. [V, R 683] Kessler knew that Barkett was an FBI informant. Barkett introduced him to FBI Agent Witkowski. [V, R 679, 752-753] FBI Agents Witkowski and Scudieri visited them in 1992. [V, R 684-685]

In the summer of 1993, Barkett had a conversation with Mike Camarada, a business associate of Kessler. As a result of that conversation, Barkett called Kessler at his office in Columbus, Ohio, and asked him about the death of John Deroo and a pending insurance lawsuit. [V, R 685-686, 744] Kessler went to a pay phone to continue the conversation. [V, T 686-687, 744] Kessler said Deroo was shot and killed during a robbery. He was hiring a lawyer to recover the money from a key man insurance policy for which Deroo failed to pay the premium. [V, R 687-688, 745] Kessler said he needed money to do this. [V, R 745] Barkett called FBI Agent Witkowski in Tampa and told him about the conversation with Kessler. [V, R 689] Barkett then met with FBI Agents Huston and Stout in Columbus and agreed to allow the FBI to record further conversations with Kessler. [V, R 689-691]

In early July, 1993, Barkett met Kessler outside his office. Barkett identified state's exhibit 1 as a recording of their conversation. [V, R 692-695] Barkett brought up the Deroo homicide and suggested another plot to murder someone for a key man

insurance policy. Kessler responded that he already had something in the works. [V, R 698-701] An adult book store business was brought up as a place where this could occur. [V, R 702] This was the first time there was any discussion about setting up a new deal to kill somebody, and Barkett initiated it. [V, R 747-748] After this meeting, there were recorded telephone conversations in July, 1993, in which Barkett and Kessler discussed the lawsuit on the insurance on the past homicide or the new deal regarding a new key man policy and homicide. Kessler said he needed money for both. [V, R 703-705, 745-746] Kessler said that money was dry, and he was looking for investors. [V, R 748]

In late July, the FBI recorded a meeting between Barkett and Kessler in a hotel in Columbus. They discussed the past homicide and the new deal, which involved a "video porno shop" called X.T.C. owned by Mike Walcutt. Kessler was supporting Bo Yankee who was to be robbed and killed so Barkett and Kessler could split the proceeds of a new insurance policy. They also discussed what went wrong with the first homicide. [V, R 706-708] Barkett pretended that he had an investor, who was actually the FBI. The investor was going to supply the money for the new murder scheme and for a lawsuit to collect the money from the Deroo homicide. Barkett convinced Kessler to give him information about the Deroo homicide

to assure the investor that he had the ability to go through with the new deal. [V, R 708-709] Barkett questioned Kessler about what had gone wrong with the Deroo homicide. Kessler said money for the policy was sent to Deroo, but Deroo did not pay the premium on the insurance policy. [V, R 710] The FBI provided Barkett with $5,000 to give to Kessler, but Barkett kept $1,000 of it. [V, R 711, 790] They agreed that the store had to be stocked with tapes and a new key man insurance policy had to be bought. [V, R 712] Kessler needed around $25,000 to further the conspiracy to commit the new offense. He was trying to get the money from the investor. [V, R 713-714]

In early August, 1993, the FBI recorded Barkett's meeting with Kessler and Walcutt at a hotel in Columbus. Barkett did not know that Walcutt was also an informant. [V, R 714-715] They discussed the Deroo homicide, the X.T.C. homicide, money, the store, and the key man policy. Kessler said he was getting insurance, ordering inventory, and hiring Bo Yankee. [V, R 715-716] Barkett gave Kessler $3,000 from the FBI. [V, R 717, 790-791]

In early September, 1993, the FBI recorded a third meeting between Barkett and Kessler at a hotel in Orlando. [V, R 719] The purpose of the meeting was to give Kessler more money. [V, R 720] Kessler gave Barkett a packet of papers to show the investor. The

papers concerned the insurance, the incorporation of Walcutt's business, the lawsuit, and the incorporation of Custom Craft. [V, R 720-722, 787-789] Kessler was arrested after the meeting. [V, R 726]

Barkett testified that Kessler never denied that he was involved in the death of Deroo. [V, R 742-743] During their conversations, Kessler said he needed an investor and money. They were supposed to obtain $1,000,000 from the insurance on Yankee. The money was to be split among Kessler, Walcutt, Barkett, and the investor. The investor was to put up the money to get the insurance on Yankee. Initially, the investor was supposed to provide $30,000, then it went to $50,000. [V, R 723-724] Barkett asked how it was going to happen. Kessler said maybe digitalis. They also discussed a robbery. Kessler said X.T.C. was in a seedy area where it would be easy to get robbed. [V, R 724] Barkett repeatedly asked Kessler how to convince the investor he would go through with this. [V, R 791-792, 812] Barkett kept telling Kessler that before the investor would put up any more money, he had to have proof that they were setting up the corporation and the insurance was in place. [V, R 787] No insurance policy on Yankee was ever obtained. [V, R 786-787]

The state played state's exhibit 1, the recording of the initial meeting in July. [V, R 727-739] Kessler denied that he told Nora about any murders. [V, R 730] Kessler said "he" (referring to Deroo) was robbed. [V, R 734] Kessler said he could not get into trouble for it, and he would not do anything like that. [V, R 732, 736-737] At Barkett's suggestion, they discussed the possibility of setting up a business, insuring someone, and then killing him. [V, R 733-736] Kessler said they had to create some dollars. [V, T 735]

At the November 25, 1996, hearing on the state's motion in limine, FBI Agent Stout identified videotapes of the meetings between Kessler and Barkett and the court admitted them in evidence. [VIII, T 1213, 1217-1219] The court viewed the videotapes during the hearing, but the court reporter did not transcribe them for the record of the hearing. [VIII, T 1224-1227] The videotapes were transcribed when they were admitted at trial. [XXIII, T 2386-2440; XXIV, T 2454-2571]

At the July 29 meeting, Barkett said he had $5,000 to get them started, and he needed to give his investor details. [XXIII, T 2390] In response to Barkett's questions, Kessler explained the basis for the lawsuit to collect on the insurance policy on Deroo. [XXIII, T 2391-2396] He said the investor would get 40% of

whatever they collect on both cases, and Barkett would see proof that he had the policy the next day. [XXIII, T 2392] Barkett asked how Kessler would use the $30,000 from the investor. Kessler said it would be used for legal fees, inventory, and expenses for the new case. [XXIII, T 2396-2397] Barkett suggested, and Kessler agreed that $30,000 might not be enough, they needed $50,000. [XXIII, T 2397-2398] Barkett asked about the police. Kessler replied they had not done anything. [XXIII, T 2398] Barkett asked how to tell the investor that what happened last time would not happen this time. Kessler said we are going to pay all the expenses ourselves, while last time we sent money to Florida and the bills were paid from there. [XXIII, T 2399] Barkett said he did not want to go to the attorney to talk about a murder. Kessler replied we are talking about an insurance case and would not mention murder. [XXIII, T 2399-2400] Kessler said Walcutt's Leather and Lace shop was the perfect business, and Walcutt had the perfect decedent there, Bo. [XXIII, T 2401-2402] Kessler did not know if Walcutt would go along, but Kessler had suggested that Walcutt make Bo an officer and give him more responsibility. [XXIII, T 2403]

Barkett said his investor was a source of money, but it was hard for Barkett to get the $5,000. [XXIII, T 2405] Barkett asked

how Kessler would handle the "whacking part," and how did they know it would not be like last time when there were problems. Kessler said the only problem was that the guy did not pay the insurance premiums, it was a clean deal. He could have killed the guy for not paying the premium. [XXIII, T 2406] Barkett asked if he should ask the investor for fifty. Kessler said fifty would do it in case they had to start a new business. Kessler said they would split 60% three ways if he pulled Walcutt in. [XXIII, T 2407] Barkett asked who was going to "whack the guy?" Kessler replied we do not know yet. [XXIII, T 2410] Barkett asked how to convince the investor they were capable of going through with it. [XXIII, T 2411] Kessler suggested two methods for killing the guy, they could use digitalis to cause a heart attack, or an accident would be better. Walcutt and Kessler would be responsible for doing it. [2412-2413] Barkett said the other thing was stupid and asked who would shoot the guy. Kessler said he was robbed, but we did not do it. [XXIII, T 2413-2414] Barkett said the investor would want to know what happened last time. Kessler said the only problem was the insurance premiums were not paid, everything else went according to plan. Barkett asked, "What do you got to pay to do that?" Kessler replied, "Ten." [XXIII, T 2415] Barkett asked if it would be easier to pay somebody this time rather than get your

hands dirty. Kessler replied that we might do that. [XXIII, T 2416] Kessler said he paid him half up front, then paid the rest. [XXIII, T 2417] Kessler said he hired a girl from Tampa to do it. [XXIII, T 2417-2420]

Barkett again asked if he should ask the investor for fifty. Kessler said to tell him that's what it's going to be. [XXIII, T 2423] Barkett asked how to convince him Kessler was serious. Kessler said to tell him he could make all the papers in the world, if they couldn't trust each other, he ought not to do it. Barkett received a call from the supposed investor and asked Kessler what he would do to get this thing started. Kessler said he had a meeting with the attorney tomorrow. [XXIII, T 2424] Barkett told the investor the problem the last time was the guy didn't make all his payments, it had nothing to do with the way it happened. Kessler said it was clean. [XXIII, T 2425] Kessler said whatever he said would happen. Barkett told the investor that $30,000 would not be enough. [XXIII, T 2426] Kessler said he might have to pay somebody ten grand for technical advice. [XXIII, T 2427]

Barkett told the investor that it could not be done for under fifty. [XXIII, T 2428] Kessler said they would probably need it. He said he would give him some paperwork on the company tomorrow. [XXIII, T 2429] Kessler told Barkett to take $1,000 of the $5,000.

[XXIII, T 2430] Kessler reassured Barkett that the plan would work once they got the business going. [XXIII, T 243334] Barkett asked if Kessler was going to get the girl to help them. Kessler said no, never use the same one twice. [XXIII, T 2435] He said the girl's name was Julie. [XXIII, T 2436] Barkett asked what Kessler was going to do about getting the policy started for the new deal. Kessler said he had to get the entity started first. He reassured Barkett that he could do it. [XXIII, T 2436-2437]

At the August meeting, Kessler gave Barkett a package of papers and showed him the assignment on the proceeds, a paper showing Kessler had a legitimate corporation that he controlled, and the original insurance policy for the lawsuit. [XXIV, T 2465-2465] Barkett asked what Kessler had told Walcutt. Kessler replied everything. He said he had an insurance man giving him projections on insurance policies for everyone. [XXIV, T 2475-2476] Kessler said the business was being incorporated. They needed insurance and a set of books. It would be a profitable business. [XXIV, T 2478-2279]

Barkett received a call from the investor. [XXIV, T 2486] Barkett asked how it would happen. Kessler replied that it had not been worked out yet, but it would happen around the first of the year. He then said it would be a hold-up or an accident. [XXIV,

T 2489-2491] Kessler said it would happen by January, the investor would get 40%, and they would split 60%. [XXIV, T 2493] Barkett told the investor that he would get 40%. Barkett asked if they would need more than $50,000. Kessler and Walcutt said that's it. [XXIV, T 2494] They assured Barkett that they would handle the murder. Barkett told the investor they would take care of their end. [XXIV, T 2495] Kessler asked how soon they could get some money because they needed leather goods. Walcutt said they needed twenty. [XXIV, T 2496-2497] They left to go to the store. [XXIV, T 2495-2498]

When they returned, Barkett asked for Walcutt's assurance that he was committed to doing this. [XXIV, T 2499-2500] Kessler and Walcutt agreed that Bo was the right type. Kessler said the store was a perfect place for a hold-up. [XXIV, T 2500] Barkett asked how Kessler was going to get somebody to do this. Walcutt and Kessler said it was no problem. [XXIV, T 2501] Kessler said it would be paid out of their expense budget. Walcutt said it would cost about two grand. [XXIV, T 2502] Kessler reassured Barkett that there would not be any problems. [XXIV, T 2504] Kessler and Walcutt reassured Barkett that $50,000 would pay for everything. [XXIV, T 2510] Kessler said the investor would get his money back from the two deals. [XXIV, T 2513] Kessler said they were ready

to start with the corporation, policies, inventory, and personnel. The store would have sufficient cash flow for the million dollar policy and would soon be doing $20,000 a week. [XXIV, T 2514-2515]

The investor called. Barkett described the video store and said they assured him they could get the job done. Barkett then told Kessler he could give him three grand. [XXIV, T 2517-2519] Barkett asked how much more he would need. Kessler said 42. [XXIV, T 2520] Barkett counted out the $3,000. [XXIV, T 2521, 2523] Kessler said they would pay the attorney tomorrow and get the inventory started. [XXIV, T 2523] Barkett said the investor committed the 50 and that Kessler committed to the deal. Barkett wanted to see the policy. Kessler said he would. [XXIV, T 2525]

On the videotape of the September meeting, Kessler showed Barkett some corporate papers for X.T.C. Holdings which showed that Yankee was president. [XXIV, T 2538-2539] Kessler showed Barkett photos of the store and Yankee and a specimen of the insurance policy. The policy would cost $3,900. [XXIV, T 2541-2543] Kessler said he just wanted this deal to go. He spent a lot of time on it and borrowed money to get it done. Barkett then gave him $20,000. Kessler said he had "to get this insurance 3500 back to the heavy guy." Barkett asked how he could prove to the investor that Kessler was going to put the policy on this guy.

Kessler said when he gets back with this money. [XXIV, T 2547] Kessler said he wanted this to succeed because he needed it badly. He was under pressure for money. [XXIV, T 2547-2548]

Barkett asked if they had the guy lined up to do the hit. Kessler said yeah. Barkett asked if they would have to go back to the investor for more money. Kessler said no. [XXIV, T 2548] Barkett asked the name of the life insurance company. Kessler said Great West. Barkett told him to count the money, and said the rest would have to come wired to an account. [XXIV, T 2549] Kessler counted the money and said it was $100 short. [XXIV, T 2558-2559] Barkett asked how Kessler would justify the million dollar key man policy. Kessler said he would make up the books to show sufficient sales. He would pay for the policy the next week and send the thing to Barkett. [XXIV, T 2565-2566] Kessler said the insurance would cost about five grand. He would have five grand reserved to have Yankee killed. [XXIV, T 2567] Kessler said he lined up a friend of Walcutt's to do it. [XXIV, T 2568] Kessler said he hoped the investor would send the other money. It was costing $30 a day for Yankee's food and room rent. [XXIV, T 2569-2570] Barkett put the money in the closet. [XXIV, T 2570]

The state failed to carry its burden of proving that Kessler's incriminating statements to Barkett were voluntary. The totality

of the circumstances demonstrate that Kessler initially denied that he was involved in the murder of Deroo. Kessler was induced to make incriminating statements about the murder of Deroo and the planned murder of Yankee by Barkett's offers of substantial sums of money from the fictional investor and by his continuing insistence that Kessler had to supply more information to convince the investor that he was capable of murdering Yankee to collect insurance proceeds. Barkett wore down Kessler's resistance, resulting in Kessler's admissions that he hired a hit woman to kill John Deroo to try to collect life insurance proceeds and his incriminating statements describing the steps he was taking pursuant to the similar plan to kill Yankee. Because Kessler's incriminating statements to Barkett were induced by promises of money and coercive demands to supply information to get the money, the statements were involuntary. Thus, the trial court erred by denying the motion to suppress under the principles of Bram v. United States; Malloy v. Hogan; Jackson v. Denno; Johnson v. State; and Brewer v. State. This error violated Kessler's Fifth and Fourteenth Amendment rights against involuntary self-incrimination and due process of law.

The court's error in denying the motion to suppress is subject to constitutional harmless error analysis under the standard of

Chapman v. California, 386 U.S. 18 (1967), which this Court adopted and explained in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This standard places the burden on the state, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. Chapman, at 23-24; DiGuilio, at 1135.

The state cannot carry its burden in this case because the error in denying the motion to suppress was extraordinarily prejudicial to Kessler. The jury saw and heard on videotape Kessler admit that he hired a hit woman to kill Deroo to try to collect life insurance proceeds. The jury also saw and heard Kessler planning to commit a similar murder of Bo Yankee. In Arizona v. Fulminate, 499 U.S. at 296, (quoting Bruton v. United States, 391 U.S. 123, 139-140 (1968) (White, J., dissenting)), the Supreme Court explained,

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be used against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we doubt its ability to put them out of mind even if told to do so."

Under the circumstances of this case, the erroneous denial of Kessler's motion to suppress was not harmless. The conviction must be reversed, and this case must be remanded for a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO MAKE EVIDENCE OF OTHER CRIMES OR BAD ACTS BY APPELLANT A FEATURE OF THE TRIAL SO THAT THE DANGER OF UNFAIR PREJUDICE OUTWEIGHED THE PROBATIVE VALUE OF THE EVIDENCE.

Evidence of collateral crimes or bad acts committed by the defendant is admissible when it is relevant to a material fact in issue other than the defendant's bad character or propensity. Williams v. State, 110 So. 2d 654, 662-663 (Fla.), cert. denied, 361 U.S. 847 (1959); § 90.404(2)(a), Fla. Stat. (1995). However, even when such evidence is properly admissible, the state must not be allowed go too far in introducing such evidence nor to make the collateral crimes or bad acts a feature of the case. Steverson v. State, 695 So. 2d 687, 689 (Fla. 1997); Williams v. State, 117 So. 2d 473, 475 (Fla. 1960). Even relevant evidence is inadmissible if the danger of unfair prejudice outweighs its probative value. Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); Steverson, at 688-689; § 90.403, Fla. Stat. (1995). In this case, the state was

allowed to go too far with its presentation of evidence of collateral crimes or bad acts committed by Kessler, so that the evidence became a feature of the trial and the prejudicial effects of the evidence outweighed its probative value.

The state filed a pretrial motion in limine or Williams rule notice seeking a hearing to determine the admissibility of collateral crime evidence. The state alleged that in July, August, and September, 1993, Kessler conspired with Steve Barkett and Mike Walcutt, who were cooperating with federal authorities, to arrange the murder of Pearce "Bo" Yankee to obtain the proceeds of a life insurance policy. The state also alleged that in November, 1993, through February, 1994, Kessler conspired with Richard Vessey, who was also cooperating with federal authorities, to arrange the murders of Barkett and Walcutt, who were witnesses in this case and in a related federal case, and to tamper with another witness in both cases, Cheryl Hamilton. [I, R 34-37] Defense counsel filed a memorandum seeking denial of the state's motion in limine and to exclude the testimony about the collateral crimes, arguing that the evidence was not relevant and should not be admitted, that it must not be allowed to become a feature of the trial, and that it should be excluded because its probative value was outweighed by its prejudicial effects. [I, R 183-187]

The court conducted evidentiary hearings on the motion on September 10, October 10, and November 25, 1996. [V, R 660, 672-830; VI, R 843-992; VII, R 1039-1206; VIII, R 1213-1295] The court entered an order granting the state's motion on December 6, 1996, finding that evidence of the planned murder of Yankee was inextricably intertwined with Kessler's admissions regarding the death of Deroo and was strikingly similar to the murder of Deroo, that Kessler's alleged threats and efforts to exterminate witnesses were inextricably intertwined with the evidence in this case and were relevant to show consciousness of guilt, and that the probative value of the latter evidence outweighed the prejudice to Kessler. [II, R 205-206]

Defense counsel renewed his objection to the court's ruling on the State's motion in limine at the beginning of trial, arguing that the evidence of Kessler's conversations with Barkett and Vessey was not relevant, was prejudicial, and would become a feature of the case. The court overruled the objection. [XIV, T 665-666] Defense counsel renewed his objections to the court's ruling on the motion in limine when Barkett identified recordings of his conversations with Kessler. The court overruled the objections. [XXI, T 1960-1963] Defense counsel renewed his objections when the state moved to admit the recordings in

evidence. The court overruled the objections and admitted the recordings. [XXI, T 1987-1988] The state stipulated to the defense having continuing objections to all testimony regarding Barkett's conversations with Kessler. The court overruled the objections. [XXI, T 1996-1997]

The state presented Barkett's testimony about the conversations. [XXI, T 1954-1961, 1971-1986, 1999, 2015-2018, 2037-2041, 2049-1050, 2067-1070, 2087-1088, 2107-2110; XXII, T 2127-2128, 2137-2140, 2145-2147, 2151, 2229-2235, 2237] During the course of Barkett's testimony, the state played nine recordings of his conversations with Kessler, state exhibit 98 [XXI, T 1999-2015], exhibit 99 [XXI, T 2018-2037], exhibit 100 [XXI, T 2039-2059], exhibit 106 [XXI, T 2060-2066], exhibit 102 [XXI, T 2070-2085], exhibit 101 [XXI, T 2091-2107], exhibit 103 [XXII, T 2115-2127], exhibit 104 [XXII, T 2129-2137], and exhibit 105. [XXII, T 2140-2144]

The court denied defense counsel's renewed objection when Mike Walcutt testified. [XXIII, T 2274] The state presented Walcutt's testimony about his involvement with Kessler and Barkett. [XXIII, T 2270-2302, 2338-2343, 2346] FBI Agent Stout testified about his role in videotaping three meetings between Kessler and Barkett on July 29, August 4, and September 6, 1993, and identified the

recordings, state exhibits 107, 108, and 109. [XXIII, T 2371-2379] The court overruled defense counsel's renewed objection and admitted the recordings into evidence. [XXIII, T 2379, 2386] The recordings were played for the jury. [XXIII, T 2386-2440; XXIV, T 2454-2526]

The factual details of Barkett's testimony, Walcutt's testimony, and the recorded conversations and meetings are set forth in the Statement of the Facts and will not be repeated here. This evidence concerned their discussions of a plan to sue the insurance company to try to collect on the $500,000 key man insurance policy on Deroo; a plan to incorporate Walcutt's adult video store, install Yankee in a managerial position, obtain key man insurance on him, and then murder him to collect on the insurance; and efforts to convince Barkett's fictional investor that Kessler was serious and would carry out the plans in order to persuade the investor to provide up to $50,000 in loans to finance the projects. During the course of these discussions, Kessler made incriminating statements about the murder of Deroo, including his admission that he hired a hit woman to kill Deroo. However, the incriminating statements about the murder of Deroo comprised only a portion of this evidence, while the majority of it concerned the plan to kill Yankee and the steps taken in pursuit of this plan.

Appellant does not agree that this evidence was properly admitted as inextricably intertwined with Kessler's incriminating statements. Generally, evidence of other crimes is admissible as inextricably intertwined with evidence of the charged offense where it is necessary to adequately describe the events leading up to the commission of the charged offense, such as the theft of car keys in order to steal the car, or the theft of a gun used to commit a murder. Griffin v. State, 639 So. 2d 966, 968-970 (Fla. 1994), cert. denied, 115 S. Ct. 1317, 131 L. Ed. 2d 198 (1995). Evidence of a collateral crime is also admissible when intertwined with and relevant to show how the police solved the charged offense. Consalvo v. State, 697 So. 2d 805 (Fla. 1996). However, in this case the state could have presented testimony and/or redacted recordings concerning only Kessler's statements incriminating him in the murder of Deroo. The evidence of the plan to kill Yankee was not inseparable from, nor relevant to the murder of Deroo except to show a propensity to kill business associates to collect insurance proceeds.

Nor does appellant agree that the evidence of the plan to kill Yankee was properly admitted as similar fact evidence pursuant to the Williams rule. When the state seeks to establish the identity of a murderer through evidence of similar crimes with a common

modus operandi, the similarities must be pervasive and sufficiently unusual to point to the defendant as the perpetrator of both offenses. Hayes v. State, 660 So. 2d 257, 261 (Fla. 1995); Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981). In this case there were substantial differences between the murder of Deroo and the plan to kill Yankee. Custom Craft was created by Kessler and Deroo as a legitimate business to build and sell cabinets, and John Deroo was qualified to run the business. Kessler was building a home near the business and was in the process of moving there before Deroo was killed. There was no evidence that Deroo's murder was planned from the inception of Kessler's involvement in the business. In contrast, Kessler's involvement in the incorporation and expansion of Walcutt's adult video store was planned to set the stage for murdering Yankee. Yankee was not qualified to run that business and was selected solely to be insured and killed.

Assuming for the sake of this argument that the evidence about the planned murder of Yankee had some relevance to Kessler's motive for hiring someone to kill to Deroo, the court allowed the state to go much too far in presenting evidence about that plan and the steps taken in furtherance of the plan. The state's extensive evidence about the plan to kill Yankee virtually eclipsed the evidence of Kessler's incriminating statements about the murder of

Deroo and made it appear that Kessler was on trial for both offenses. Moreover, the recorded conversations and meetings in which the jury heard and saw Kessler coldly conniving to kill Yankee to collect insurance proceeds were very convincing evidence of Kessler's bad character and propensity to kill business associates for financial gain. Such evidence was extremely prejudicial and very likely to convince the jury to convict Kessler of the murder of Deroo. It was also very likely to convince the jury to find the aggravating circumstances of a cold, calculated, and premeditated murder committed for financial gain, and therefore to recommend death. Thus, the evidence of the plan to kill Yankee became an impermissible feature of the trial pursuant to Steverson v. State, 695 So. 2d at 689; and Williams v. State, 117 So. 2d at 475-476. Under the circumstances of this case, the prejudicial effects of the evidence of the plan to murder Yankee substantially outweighed its probative value pursuant to Sexton v. State, 697 So. 2d at 837; and Steverson, at 688-689.

The state further made evidence of other crimes or bad acts a feature of Kessler's trial by presenting evidence that after his arrest he conspired with Richard Vessey to kill Barkett and Walcutt and to tamper with the testimony of Cheryl Hamilton. Vessey testified that he met Kessler in jail in Ohio in November, 1993.

[XXIV, T 2577-2587] Vessey agreed to help Kessler collect money that was owed to him when Vessey got out of jail. [XXIV, T 2590-2591] Kessler gave Vessey lists of names of people to contact, state's exhibit 110. [XXIV, T 2592-2594] Defense counsel renewed his objections to the court's ruling on the motion in limine. The court overruled the objections and admitted the exhibit. [XXIV, T 2594]

After Vessey got out of jail, Kessler called him several times and gave him a dog worth over $40,000. [XXIV, T 2599-2600; XXV, T 2682-2685] Vessey went to a nightclub to obtain Doug Trotter's phone number, then called him in an unsuccessful attempt to contact Cheryl Hamilton. [XXIV, T 2601-2602] Vessey called a lawyer friend who told him something that made him unwilling to help Kessler. [XXIV, T 2603-2604] The next day FBI Agents Huston and Stout visited Vessey, asked what he was doing, told him he could get in trouble for tampering with government witnesses, and asked him to call if he heard anything. [XXIV, T 2603-2605; XXV, T 2719-2725] Kessler called and said Hamilton was making waves, and he wanted her taken out of the picture. [XXIV, T 2606] Vessey called Agent Huston and consented to having his phone conversations recorded. [XXIV, T 2606-2607] Several calls from Kessler were recorded. [XXIV, T 2608; XXV, T 2695] Vessey also agreed to wear

a recording device for a meeting with Kessler at the Franklin County jail on December 17, 1993. He identified the recording, state exhibit 111. The court admitted the recording over defense counsel's prior objection. [XXIV, T 2609-2611]

The recording was played for the jury. [XXIV, T 2612-2637] Kessler said he did not think Walcutt would ever pay and would be a bad witness. Kessler indicated that he wanted what happened to Jimmy Hoffa to happen to Walcutt. [XXIV, T 2614-2615, 2622] He told Vessey to, "Throw him away." [XXIV, T 2617-2618] Kessler also said Barkett would not pay, was the informer, and to take care of him Jimmy Hoffa style. [XXIV, T 2617, 2622, 2629-2630] Kessler wanted Vessey to talk to Cheryl Hamilton to see if she was a threat and try to turn her around to be a good witness, but to do what he had to do. [XXIV, T 2618, 2624] Vessey said he had felonies in his past and needed to pick up something. Kessler told him to contact Jerry Srmack at Lee Brakes to get a shotgun and to contact Kessler's secretary to get a .45. [XXIV, T 2619-2621] Kessler suggested that he might be able to get out of jail by trading clothes with an attorney. [XXIV, T 2634-2635]

Vessey met with Jerry Srmack at Lee Brakes on December 20, 1993, accompanied by a police detective. Srmack gave Vessey a bag, which Srmack turned over to Agent Stout. [XXV, T 2648-2650]

FBI Agent Huston testified that Kessler was arrested in Orlando on September 6, 1993. [XXV, T 2753-2754] Kessler was incarcerated in Florida for awhile, then transported to Columbus where he remained incarcerated through December, 1993. [XXV, T 2754-55] The prosecutor asked, "And it was on the charges relating to an interstate conspiracy to commit murder?" Defense counsel objected on relevancy grounds and moved for a mistrial. [XXV, T 2755] Defense counsel renewed his argument from the motion in limine hearing that the witness tampering evidence was not admissible because it had to do with the federal charges and not the state charge. He further argued that the Williams rule evidence had become a feature of the case. [XXV, T 2757-2759] The court sustained defense counsel's objection, but denied the motion for mistrial. [XXV, T 2759] The court instructed the jury to disregard the question and answer. [XXV, T 2760]

Huston told Vessey he had heard that Vessey was attempting to reach Doug Trotter, Cheryl Hamilton's boyfriend. Huston told him Hamilton was a witness in a case, any contact with witnesses could be construed as intimidating, and he could go to jail if convicted of intimidating a federal witness. [XXV, T 2761, 2767-2768] Huston remained in contact with Vessey, who consented to recording a series of phone calls. [XXV, T 2762] Huston and Agent Stout

testified that they observed Vessey's meeting with Srmack at Lee's Brake in Columbus. [XXIII, T 2380-2381; XXV, T 2762] After the meeting, Vessey gave a bag containing several handguns to Agent Stout. [XXIII, 2381-2383; XXV, T 2764-2765] No evidence was presented to connect these firearms with the murder of Deroo.

While the conversation between Vessey and Kessler at the jail regarding Kessler's desire to eliminate Barkett and Walcutt and to try to influence Hamilton's testimony had some relevance to Kessler's consciousness of guilt, the court again allowed the state to go too far in presenting the evidence of Vessey's involvement with Kessler. In particular, the evidence regarding Vessey obtaining handguns from Srmack at Kessler's direction was not relevant to any material issue in the trial. Its sole relevance was to Kessler's bad character and propensity. Also, the state went too far in examining Huston when the prosecutor named one of the federal offenses for which Kessler was originally incarcerated, interstate conspiracy to commit murder. Like the evidence of the plan to kill Yankee, the evidence of Kessler's attempt to have Vessey kill Barkett and Walcutt was extremely prejudicial to the defense because it showed Kessler's cold, calculating willingness to kill.

Thus, the collateral crime evidence became an impermissible feature of Kessler's trial. Steverson v. State, 695 So. 2d at 689; Williams v. State, 117 So. 2d at 475-476. Under the circumstances of this case, the prejudicial effects of the excessive evidence of the plans to murder Yankee, Walcutt, and Barkett substantially outweighed its probative value. Sexton v. State, 697 So. 2d at 837; Steverson, at 688-689. By allowing the state to go to far in presenting collateral crime evidence, the court denied Kessler his constitutional right to a fair trial. The conviction and sentence must be reversed, and this case must be remanded for a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT EVIDENCE OF APPELLANT'S FEDERAL TAX OFFENSE CONVICTIONS.

Detective Lawless testified about Kessler's statement to him on February 3, 1991. [XVII, T 1244-1257, 1272-1279] On cross-examination, defense counsel elicited further information about what Kessler told Lawless in that statement. [XVII, T 1295-1328] Defense counsel asked, "He also admitted to you that he had been indicted and charged with tax evasion for the handling of a client's books; correct?" Lawless answered, "Yes. He had." [XVII, T 1327]

During a bench conference, the prosecutors suggested that it would be appropriate to ask the result of the indictment and to introduce a certified copy of the judgment and sentence for that crime. [XVII, T 1332] The court required the state to proffer the evidence. [XVII, T 1333] In the proffer, Lawless testified that Kessler pled guilty to the charges, but he did not recall Kessler telling him that. [XVII, T 1334] Defense counsel objected because Lawless did not recall whether Kessler told him. [XVII, T 1335] The prosecutors then argued that the judgment and sentence were placed in issue by defense counsel's cross-examination, and that the conviction would come out anyway when Kessler testified. [XVII, T 1335-1337] Defense counsel asserted that he brought out the statement about the indictment under the rule of completeness, which allowed him to bring out other parts of what Kessler said during the conversation. When Kessler testified, the state could ask if Kessler had been convicted of a felony or a crime of false statement or dishonesty, and if Kessler answered yes and correctly answered as to the number of times, the actual conviction would not come in. [XVII, T 1337-1338] The court replied that the actual conviction would come in, but not the certified copy of the judgment and sentence. The court overruled defense counsel's

objection and ruled that it would admit the judgment and sentence. [XVII, T 1338]

Following a recess, defense counsel asked the court to review the decision in Cummings v. State, 412 So. 2d 436 (Fla. 4th DCA 1982). [XVII, T 1340] In Cummings, the Fourth District held that under section 90.610(1), Florida Statutes (1979), the prosecutor could ask the defendant two questions: "Have you ever been convicted of a felony?" and "Have you ever been convicted of a crime involving dishonesty or false statement?" Id., at 439. The court further held,

> If the witness admits the number of his convictions, the prosecution may not ask further questions regarding prior convictions, and in particular the prosecution may not question the witness as to the nature of the crimes. . . . If the witness denies a conviction, the prosecution can impeach him by introducing a certified record of that conviction, which will necessarily reveal the nature of the crime.

Id. Upon reading Cummings, the trial court said it did not alter the court's ruling. [XVII, T 1341] Defense counsel then argued that one judgment had nine counts that were dismissed, any probative value was outweighed by the prejudice, and it was a prohibited comment on a plea bargain. [XVII, T 1342]

On redirect examination, Lawless testified that after Kessler told him he had been indicted for tax evasion, he obtained

information about what had happened with those cases. The prosecutor asked Lawless to identify exhibits marked seven G and seven H. Defense counsel objected, "Hearsay, irrelevant, predicate." The court initially sustained the objection. The prosecutor moved the exhibits into evidence. [XVII, T 1345; A 8-9] The court asked counsel to approach the bench, then asked what were the grounds. [XVII, T 1346] Defense counsel argued that seven H included nine counts which were dismissed as part of a plea agreement, which was inadmissible against the defendant. [XVII, T 1346-1347; A 9] Following a discussion of the certification of the documents, the court overruled the objection and admitted the judgments as state exhibits 84 and 85. [XVII, T 1347-1349; A 8-9] Defense counsel moved for a mistrial based on the improper introduction of the exhibits. The court denied the motion. [XVII, T 1349]

Exhibit 84 showed that Kessler had been convicted of the following offense:

> did willfully aid and assist in, and procure, counsel, and advise that preparation and presentation to Internal Revenue Service, which were false and fraudulent as to material matter. (in violation of Title 26 United States Code, Section 7206(2)--Count 1.)

[XVII, T 1350-1351; A 8] Exhibit 85 showed that Kessler had been convicted of the following offense:

> conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful government functions of the Internal Revenue Service. (In violation of Title 18, United States Code, Section 371.--Count 1.)

[XVII, T 1351; A 9] Kessler pled guilty to both offenses. [XVII, T 1351; A 8-9] Exhibit 85 also stated that "Counts 2, 3, 4, 5, 6, 7, 8, 9 and 10 are hereby dismissed." [A 9]

The trial court erred by admitting this evidence of Kessler's prior convictions for federal tax offenses. As defense counsel objected, the evidence was irrelevant. [XVII, T 1345] Evidence of collateral crimes "is admissible if it is relevant to a material fact in issue; such evidence is not admissible where its sole relevance is to prove the character or propensity of the accused." Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959); § 90.404(2)(a), Fla. Stat. (1995). "Any implication of collateral crimes, not relevant to any material issue, should not be admitted." Williams v. State, 692 So. 2d 1014, 1015 (Fla. 4th DCA 1997). In this case, the prosecution made no effort to show that the judgments and the dismissal of nine other charges were relevant to any material fact in issue. Instead, the prosecutors argued that defense counsel's cross-examination of Lawless opened the door to the admission of the evidence, and the evidence would inevitably

be admitted when Kessler testified. They were wrong on both grounds.

"To open the door to evidence of prior bad acts, the defense must first offer misleading testimony or make a specific factual assertion which the state has the right to correct so that the jury will not be misled." Bozeman v. State, 698 So. 2d 629, 630 (Fla. 4th DCA 1997). Defense counsel's question and Lawless's answer about Kessler's indictment for tax evasion did not mislead the jury. Kessler was in fact indicted for federal tax charges. Because the testimony elicited by the defense was not misleading, the state had no right to correct it.

Nor were the judgments admissible to impeach Kessler's testimony in the guilt phase of trial. Prior to Kessler's testimony the state asserted, and the court agreed, that he had fourteen prior felony convictions to be considered as impeachment evidence. [XXV, T 2779-2782] Kessler testified that he pled to the two federal tax charges for which he had been convicted. [XXV, T 2791-2792; XXVI, T 2885] He had been convicted of a total of fourteen felonies. [XXV, T 2792] Kessler was entitled to explain that he pled to the tax charges as anticipatory rehabilitation. Lawhorne v. State, 500 So. 2d 519 (Fla. 1986). Such anticipatory rehabilitation did not open the door to the state asking Kessler to

identify each of the crimes for which he had been convicted. Hierro v. State, 608 So. 2d 912, 913-914 (Fla. 3d DCA 1992). Because Kessler admitted the correct number of prior felony convictions, the state was not entitled to impeach him by introducing the records of the prior convictions, nor by revealing the nature of the prior convictions. Gavins v. State, 587 So. 2d 487, 489-490 (Fla. 1st DCA 1991); Cummings v. State, 412 So. 2d at 438; see also, Fotopoulos v. State, 608 So. 2d 784, 790-791 (Fla. 1992), cert. denied, 508 U.S. 924 (1993).

The admission of the judgments for the federal tax charges was error because their sole relevance was to Kessler's bad character or propensity to commit crime; the admission of such evidence is presumed to be prejudicial. Czubak v. State, 570 So. 2d at 928; Williams v. State, 692 So. 2d at 1015. In Peek v. State, 488 So. 2d 52, 56 (Fla. 1986) (quoting Straight v. State, 397 So. 2d 903, 908 (Fla. 1981)), this Court explained:

> Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged."

Moreover, exhibit 85, the judgment for conspiracy to defraud, included the information that nine unidentified charges had been dismissed. This allowed the jury to speculate about what other crimes Kessler may have committed even though he was not convicted of them. Under these circumstances, the probative value of the evidence was outweighed by the danger of unfair prejudice, and the evidence should not have been admitted under section 90.403, Florida Statutes (1995).

Because the court committed prejudicial error by admitting the irrelevant judgments for Kessler's federal tax offense convictions, this Court should reverse his conviction and remand this case for a new trial.

ISSUE V

THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT AND PREJUDICIAL EVIDENCE THAT KESSLER DISPLAYED NO SYMPATHY OR SORROW FOR THE DEATH OF DEROO.

"This Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances." Jones v. State, 569 So. 2d 1234, 1240 (Fla. 1990); see also, Shellito v. State, 701 So. 2d 837, 842 (Fla. 1997); Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1984). In Jones, this Court held that the

prosecutor impermissibly commented upon the defendant's lack of remorse in guilt phase closing argument, and the trial court erred by allowing an officer to testify in the penalty phase that Jones showed no remorse. This Court urged the state "to refrain from injecting an issue that this Court has unequivocally determined to be inapplicable, causing us to vacate sentences in the past." 569 So. 2d at 1240.

In Randolph v. State, 562 So. 2d 331, 336-337 (Fla.), cert. denied, 498 U.S. 992 (1990), during the guilt phase of trial, the state elicited Randolph's girlfriend's testimony that Randolph did not act remorseful, ashamed, or sad for what he had done. Defense counsel objected that the testimony was irrelevant to the issue of guilt. The state argued that it was relevant to premeditation. The trial court sustained the defense objection, but denied a motion for mistrial. This Court held that the court was clearly correct in sustaining the objection. Id., at 338. This Court rejected Randolph's argument that the motion for mistrial should have been granted because the court warned the prosecutor not to mention remorse again, the prosecutor heeded the warning, and the improper question was harmless in both the guilt and penalty phases. Id.

In the present case, the prosecutor raised the question of Kessler's lack of remorse three separate times during the guilt phase of trial. In the first instance, the prosecutor asked Detective Lawless whether Kessler verbalized any expressions of sorrow or sympathy when he spoke to Glenda Deroo at the Sheriff's Office on February 3, 1993. [XVII, T 1282-1283] Defense counsel objected that the question was irrelevant and immaterial. The state asserted that it was relevant to Kessler's state of mind. The trial court sustained defense counsel's objection and instructed the jury to disregard the question. [XVII, T 1283-1285] The trial court's initial ruling was correct under Randolph, 562 So. 2d at 337-338, and no error would have occurred had this been the end of the matter. However, unlike the prosecutor in Randolph, the prosecutor in this case did not heed the court's ruling and raised the question two more times.

In the second instance, insurance agent Douglas Stammler testified that on Monday, February 4, 1991, Kessler called and told him about Deroo's death, that he was shot during a robbery. [XVIII, T 1436-1437] The prosecutor asked if Kessler expressed any sympathy. [XVIII, T 1438] Defense counsel objected that the question was not relevant and suggested lack of remorse, a nonstatutory aggravating circumstance which could not be presented

to the jury. The court overruled the objection. [XVIII, 1438-1439] The prosecutor then asked whether Kessler expressed any sympathy or sorrow for Deroo or his family, and Stammler answered, "No." [XVIII, T 1440] The trial court's admission of this evidence of lack of remorse was error under Randolph. See also, Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991) (reversible error to admit evidence of lack of remorse during penalty phase); Colina v. State, 570 So. 2d 929, 933 (Fla. 1990) (same); Jones v. State, 569 So. 2d at 1240 (same).

In the third instance, Cheryl Hamilton Trotter testified that Kessler called her on Monday (February 4) and told her that Deroo had been shot and killed in a robbery. [XX, T 1801-1802] Over defense counsel's relevance objection, the court allowed Trotter to testify that Kessler did not express any sympathy or sorrow about Deroo's death. [XX, T 1812-1813] Again, the court erred under Randolph.

The trial court's errors in twice allowing the state to present irrelevant evidence of Kessler's lack of remorse during the guilt phase of trial deprived Kessler of his right to a fair trial. The errors were prejudicial during the guilt phase because the evidence was not relevant to the issue of premeditation pursuant to Randolph, but the jury is likely to have considered the evidence in

finding Kessler guilty of premeditated murder. Harmless error review places the burden on the state, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The state cannot carry that burden in this case because it cannot be determined beyond a reasonable doubt that the improperly admitted evidence of lack of remorse did not contribute to or affect the jury's determination of guilt. Therefore, this Court should reverse both the judgment and sentence and remand this case for a new trial.

In the alternative, the errors were not harmless during the penalty phase, in which the state relied upon the evidence presented in the guilt phase. [VIII, R 1314] See Lovette v. State, 636 So. 2d 1304, 1308 (Fla. 1994) (evidentiary error held harmless as to guilt phase but not harmless as to penalty phase); Castro v. State, 547 So. 2d 111, 114-116 (Fla. 1989) (same). It cannot be determined beyond a reasonable doubt that the jury did not consider the evidence of lack of remorse either in support of the cold, calculated, and premeditated aggravating circumstance,[3] or as a nonstatutory aggravating factor. Lack of remorse is not

[3] § 921.141(5)(i), Fla. Stat. (1995).

relevant to the CCP circumstance, nor to any other statutory aggravating factor. Derrick v. State, 581 So. 2d at 36. Instead, "lack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing." Shellito v. State, 701 So. 2d at 842. The jury's consideration of an invalid aggravating circumstance violates the Eighth Amendment. See Espinosa v. Florida, 505 U.S. 1079, 1081-1082 (1992).

In Shellito, this Court found that the prosecutor's brief reference to lack of remorse in closing argument was harmless. The present case involves more than a fleeting reference in closing argument, which is not evidence. The prosecutor presented the testimony of two witnesses that Kessler expressed no sympathy or sorrow for Deroo's death. In Derrick v. State, 581 So. 2d at 36, Colina v. State, 570 So. 2d at 933, and Jones v. State, 569 So. 2d at 1240, this Court held that it was reversible error to allow the state to introduce evidence of lack of remorse during the penalty phase. This Court should hold that the admission of irrelevant evidence of lack of remorse in the guilt phase was prejudicial error in the penalty phase, reverse the death sentence, and remand for a new penalty phase trial with a new jury.

ISSUE VI

Before the trial in this case, Kessler was tried in federal court and convicted of twelve felonies arising from the same evidence. [XXV, T 2777-2779; VIII, R 1375-1376, 1393] Five times during trial a state witness or the prosecutor made a remark about Kessler's prior trial. Each time the court denied defense counsel's motion for mistrial.

The first incident occurred after Glenda Deroo testified that her husband called her around 9:45 p.m. and said he was on his way home. [XVIII, T 1385-1386] Defense counsel asked Mrs. Deroo if she recalled having previously stated that the call was made at 9:15. The court sustained the state's improper predicate objection. [XVIII, T 1393] She had seen a Custom Craft phone bill for February 2, 1991. Defense counsel asked if she saw a phone number, (904) 660-1157. Mrs. Deroo said she could not remember the number, and could not remember her home phone number in Spring Hill. [XVIII, T 1394] Defense counsel then asked if the phone bill had that number on it. Mrs. Deroo replied, "In the federal court --" [XVIII, T 1394-1395] Defense counsel moved for

a mistrial because he had not elicited the response and it was highly prejudicial. The court denied the motion. [XVIII, T 1395] The court instructed the jury to disregard the last statement of the witness. [XVIII, T 1396-1397] Mrs. Deroo's remark about the federal court was not invited error because it was unresponsive to defense counsel's question. Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990).

Steve Barkett testified that the FBI paid him $20,000 for his assistance on this case. The money was paid after the arrest but before the trial. [XXII, T 2147] Defense counsel objected and moved for a mistrial because this was the second time a state witness had told the jury that there was a prior trial. The prosecutor responded that there was no suggestion that it was the federal trial. The court denied the motion for mistrial and instructed the jury to disregard the witness's last answer. [XXII, T 2147-2149]

On cross-examination, Barkett testified that he called Kessler on August 2, 1993. [XXII, T 2205-2206] Barkett said, "You, know, we can't get any more money until we, what have we done for him." Barkett could not recall Kessler's response and suggested that he might be able to decipher it if he heard the tape. Defense counsel asked if he had the chance to review the tapes when Mr. Wasem was

preparing the transcripts. Barkett asked, "Are you referring to the federal trial of 1989?" [XXII, T 2207] Defense counsel objected that his question had not invited that answer and moved for a mistrial. The court denied the motion. [XXII, T 2208-2209] The court granted defense counsel's request to instruct the jury to disregard the last response of the witness. [XXII, T 2209-2210] Barkett's remark about the federal trial was not invited because it was not responsive to defense counsel's question. Czubak v. State, 570 So. 2d at 928.

FBI Agent Alfred Scudieri testified that he determined Barkett should be paid $20,000. [XXIII, T 2350-2351] On cross-examination, defense counsel asked if that was the same $20,000 taken from Kessler's briefcase after Barkett gave it to him on September 6. Scudieri said no. Defense counsel then asked, "Do you recall giving testimony in March of 1994?" Scudieri asked, "In this -- in a trial?" [XXIII, T 2354] Defense counsel moved for a mistrial because this was the fourth time state witnesses had referred to the prior trial in this case. The prosecutor argued that the response was invited, while defense counsel argued it was not. The court denied the motion. [XXIII, T 2355-2358] The court instructed the jury to disregard the question and answer. [XXIII,

T 2364] Again, the remark about a trial was unresponsive to defense counsel's question and therefore not invited under Czubak.

Richard Vessey testified that he received $5,000 from Agent Huston in 1994. [XXV, T 2651, 2669-2670] At defense counsel's request, the court instructed Vessey not to volunteer any information about the nature of his prior appearance in the courtroom at the defendant's federal trial. [XXV, T 2668-2669] In a deposition, Vessey denied that he received any money from the FBI or U.S. Attorney's Office except for being paid $40 a day for each day he was in the courtroom. [XXV, T 2670-2671] Vessey testified that he forgot about the $5,000 during the deposition. The prosecutor asked him what materials the State Attorney's Office provided to help him prepare for the deposition. [XXV, T 2731] The prosecutor asked, "You were provided your trial testimony?" [XXV, T 2732] Defense counsel moved for a mistrial because this was the fifth time the word trial had been elicited by the witnesses or by a prosecutor's question. The court said the defense brought out that Vessey was paid $40 a day for trial. Defense counsel responded that it was for courtroom testimony and did not use the word trial. The court denied the motion. [XXV, T 2732-2733] The court instructed the jury to disregard counsel's last question. [XXV, T 2734]

In Lawson v. State, 304 So. 2d 522 (Fla. 3d DCA 1974), during cross-examination by the state, a defense witness inadvertently mentioned that the defendant had been found guilty. The reference was to the defendant's earlier, vacated conviction for the same murder. The trial court initially granted a motion for mistrial, then reversed its ruling and denied the motion. The district court held that denial of the motion for mistrial was reversible error because the prejudicial effect in the minds of the jury could not be removed. Id., at 524.

In Jackson v. State, 545 So. 2d 260, 263 (Fla. 1989), this Court held that it was reversible error for the trial court to allow the prosecutor to cross-examine the defendant about the fact that he was previously tried and convicted for the same crimes. This Court also stated, "The fact that there has been a prior trial, although not admissible evidence, many times is inadvertently presented to the jury through various means during the course of a second trial." Id. Thus, the remarks by the state witnesses and the prosecutor's questions referring to Kessler's prior trial concerned inadmissible evidence.

In Jennings v. State, 512 So. 2d 169, 173-174 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988), this Court held that it was not error to deny Jennings' motion for mistrial when three jurors

discovered between the guilt and penalty phases that Jennings had been tried before for the same crime because there was no indication that the jurors knew what had occurred at the previous trial. Also, in Robinson v. State, 574 So. 2d 108, 111 (Fla.), cert. denied, 502 U.S. 841 (1991), this Court found no error in denying Robinson's motion for mistrial where a sign directing the jurors to the courtroom described the proceeding as a resentencing hearing because there was no indication that the jurors knew what had occurred at the previous trial.

Kessler's case is different from Jennings and Robinson because there are indications in the record that the jurors may have known or inferred what happened at the prior federal trial. On the second day of jury selection, the Pasco edition of the St. Petersburg Times ran an article about Kessler's trial, court's exhibit 1, stating, "Kessler already has been convicted in federal court in the killing of Hudson cabinet maker John Deroo and an Ohio businessman. Kessler is serving a life sentence in prison with no possibility of parole." [XIII, T 380; A] At least one of the jurors selected in this case had read that article. Juror Mengel said he had some knowledge of the case from that morning's newspaper. [XIII, T 488-490, 531; XIV, T 630] Also, when FBI Agent Huston testified that following his arrest Kessler was

incarcerated in Florida for awhile and was then transferred to Columbus where he remained incarcerated, [XXV, T 2753-2755] the prosecutor asked, "And it was on the charges relating to an interstate conspiracy to commit murder?" Defense counsel objected on relevancy grounds and moved for a mistrial. [XXV, T 2755] Although the court instructed the jury to disregard the question and answer, [XXV, T 2760] the fact remains that the jury was informed of the nature of the charges in the prior federal trial; the court could not "unring the bell" with the curative instruction. See Graham v. State, 479 So. 2d 824, 826 (Fla. 2d DCA 1985).

Moreover, Kessler testified that he had fourteen prior felony convictions, two of which resulted from pleas to tax charges. [XXV, T 2791-2792] The jury could then surmise that one or more of the other twelve convictions resulted from the prior federal trial for the charges related to the interstate conspiracy to commit murder.[4]

[4] In the penalty phase, Kessler testified that the other twelve prior convictions were in federal court for charges arising from the death of John Deroo and the other evidence presented in this case. [VIII, R 1375-1376, 1393] The convictions included using interstate commerce facilities in the commission of murder for hire, mail fraud, attempt to intimidate a witness, and attempt to kill a witness. [VIII, R 1393] He was sentenced to life without parole. [VIII, R 1377-1378]

In Merck v. State, 664 So. 2d 939, 941 (Fla. 1995), this Court found that the trial court did not abuse its discretion when it denied a defense motion for mistrial in response to an isolated and inadvertent reference to Merck's "last trial" (in which the jury had been unable to reach a verdict) by a detective during cross-examination by defense counsel. Kessler's case is different from Merck because there were five separate references to his prior trial. These repeated improper remarks "were collectively so inflammatory that they might have influenced the jury to reach its verdict." Ford v. State, 702 So. 2d 279, 282 (Fla. 4th DCA 1997); see also, Valdez v. State, 613 So. 2d 916 (Fla. 4th DCA 1993) (three improper remarks by prosecutor taken together required reversal).

Because of the danger that the jury was improperly influenced in reaching its verdict by the repeated references to Kessler's prior trial in federal court, particularly since the jury was aware that the trial was for interstate conspiracy to commit murder and at least one juror was aware that Kessler had been convicted in federal court for the death of John Deroo, the trial court committed prejudicial error by denying defense counsel's motions for mistrial. This Court should reverse the judgment and sentence and remand this case for a new trial.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse his conviction and death sentence for first-degree murder and remand this case for a new trial, or in the alternative, to reverse the death sentence and remand for a new penalty phase trial with a new jury.

TABLE OF CITATIONS (continued)

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol M. Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of November, 1999.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

PAUL C. HELM
Assistant Public Defender
Florida Bar Number O229687
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/pch