IN THE SUPREME COURT OF FLORIDA

CRIMINAL APPEAL

CASE NO. 61,967

AUBREY ARTHUR LIVINGSTON
Appellant

vs.

THE STATE OF FLORIDA
Appellee

ON APPEAL FROM THE CIRCUIT COURT, CRIMINAL DIVISION, IN AND FOR BROWARD COUNTY, FLORIDA

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant was the Defendant in the lower court. The Appellee was the Plaintiff in the lower court. All parties will be referred to as they stand in this court. References to the record on appeal will be designated by the symbol "R". References to the transcript of the proceedings will be designated by the symbol "T". All emphasis added unless otherwise indicated.

STATEMENT OF THE CASE

The Appellant and co-defendant Douglas Jackson were indicted on March 25, 1981 for the crimes of first degree murder and kidnapping. (R.1113). On or about April 6, 1981, Appellant entered a written plea standing mute to the charges and demanding a trial by jury. (R.1128). The Court allowed Appellant 15 days in which to file motions. (R.1129). On April 6, 1981, Appellant filed his motion for severence of defendants (R.1130), motion to suppress identification (R.1131), motion to suppress confession (R.1133), and demand for reciprocal discovery (R.1136). On April 17, 1981, Appellant filed his motion for the appointment of investigator (R.1138), letter of appointment to examine tangible evidence(R.1140), motion for additional peremptory challenges (R.1141), motion for list of prospective jurors (R.1143), motion for disclosure of certain public records (R.1144), motion for production of favorable evidence (R.1146), motion for admission to bail (R.1149), motion for adjudication of insolvency (R.1151), motion for particulars relating to sentencing (R.1153), and motion for police and other investigative reports (R.1155). On April 29, 1981, Appellant filed his motion to compel the state to allow defendant to be present for depositions (R.1161). On May 28, 1981, the Court granted Appellant's motion to compel presence of defendant at depositions, motion for discovery on sentencing, motion to disclose public records, and motion for list of jurors seven days prior to trial. (R.1164). On

June 11, 1981, the Court denied Appellant's motion to admit him to bail. (R.1165).

On or about July 21, 1981, Appellee filed its answer to motion for particulars relating to sentencing. (R.1184). Jury trial was conducted before the trial court from November 16, 1981 through November 23, 1981. (R.1189). The jury was given written instructions which mistakenly had the co-defendant's name, Douglas Jackson, typed in and then crossed out. (R.1218,1222).

On Friday, November 20, 1981 at 4:24 p.m. the jury began its deliberations (T.1008). At 6:50 p.m. on November 23, 1981, the jury sent the Court the following note: "The jury cannot reach a unanimous decision".(R.1233). Over the objection of Appellant, the Court sent the jury home separately for the weekend until 10 a.m. Monday morning. (T.1011,1015). On Monday, November 23, 1981, the jury returned verdicts finding Appellant guilty as charged on all counts.(R.1234-1244). As to the convictions for first degree murder, the penalty phase was also held on November 23, 1981. Prior to commencing the penalty phase, Appellee entered into a stipulation with Appellant that for the purpose of the sentencing hearing Appellant had no significant criminal history. (R.1030). The trial jury recommended that Appellant be sentenced to life imprisonment without possibility of parole for 25 years on Counts I through V of the indictment. (R.1251-1255,1257).

On December 1, 1981, Appellant filed his motion for new trial which was denied by the Court on March 18, 1982.

(R.1275). On January 5, 1982, the trial court overruled the jury's sentencing recommendation of life imprisonment and sentenced Appellant to death on Counts I through V, and to life imprisonment on Counts VI through XI, each sentence to run consecutively. (R.1264-1268).

On February 25, 1982, Appellant filed his motion to correct sentence imposed on Counts VI through X (R.1273-1274), and said motion was denied by the Court on March 11, 1982. This appeal follows.

STATEMENT OF THE FACTS

Douglas Jackson, the co-defendant, grew up next door to Appellant, and they knew each other all of their lives. (R.1167, 1170). Douglas Jackson met Karen Jarrod in 1975 and in 1976 they were married. (T.652-654). Two children were born of this marriage, to-wit: Douglas Marshall Jackson, Jr., and Antoinette La Salle Jackson. (T.654). Douglas Jackson was very jealous of his wife (T.694) and Karen was frightened of her husband (T.697,659) who was a large man that stood 6'3" tall. (T.693). After the first year of their marriage, the relationship between the Jacksons began to deteriorate. (T.654).[1] Eventually Douglas began to physically abuse Karen on a regular basis.[2]

In approximately January of 1981, Karen Jackson "kidnapped" her two children and moved into the home of Walter Washington, Edna Manuel and their two children at 1151 Northwest 75th Street, Miami, Florida. (T.655). Karen never told her husband, Douglas, where she and the children

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1 The Jackson's serious marital problems started around the time that Karen was fired from Jefferson's Department Store as a cashier for stealing.

2 On several occasions, Douglas beat Karen with an electrical cord with her clothes off. (T.695). He once kidnapped Karen from work and broke one of her teeth.(T.695). On another occasion, Douglas took the children to the baby-sitter, stripped Karen naked, handcuffed her to the bed, used a deadbolt lock to lock her inside her bedroom, unplugged the phones and went to work. (T.695-696). Douglas also placed Karen's head in the commode and flushed it. (T.855).

were living because she said that she was afraid of him. (T.658). While living with Walter and Edna, Karen met a young man named Larry Finney. (T.655). Karen began having an adulterous affair with Larry Finney. (R.1121, T.780,785). Larry brought Karen to his home at 7776 Northwest 12 Avenue, Miami, Florida and introduced her to his mother. (T.552,558,559). Barbara Finney, Larry Finney's mother, was aware of the ongoing sexual relationship between her son and Karen Jackson. (T.543). Mrs. Finney was concerned about her son's sexual involvement with a married woman. (T.543, 563). She tried to get her son, Larry, to break off his relationship with Douglas Jackson's wife, (T.544,554,558), but her efforts met with negative results.

In late February of 1981, Douglas Jackson drove to the Finney residence in his 1978 brownish Chevrolet camper to investigate the whereabouts of his wife and two small children. Douglas spoke directly to Mrs. Barbara Finney. (T.538). Douglas Jackson told Barbara Finney to tell Karen, "to call me, I want to see my children." Douglas Jackson appeared to Mrs. Finney to be very irritated. (T.556,569). He identified himself as Karen's husband and questioned Barbara Finney concerning Karen's whereabouts. (T.539). After Douglas drove to the Finney residence questioning Barbara Finney about his estranged wife's whereabouts, Mrs. Finney told her son Larry that Douglas had come by looking for Karen and that the situation was getting dangerous. (T.558). Mrs. Finney also commanded Larry not to bring Karen Jackson back to the Finney residence. (T.558).

Barbara Finney testified at trial that Douglas Jackson came back to her again looking for his wife, but she never saw Appellant before the trial of this cause. (T.567).

On Saturday night, February 28, 1981, Douglas Jackson called Appellant at 8:00 p.m. and asked if he wanted to go riding. (R.1169). Douglas Jackson drove his camper to his mother's house next door to Appellant where they met. (R.1170). After they began riding, Douglas Jackson told Appellant that he was having some problems with his wife, (R. 1170); that his wife was having an affair with another man, and that he hadn't seen his kids in a couple of weeks. (R.1171).

After driving around for about an hour, Douglas Jackson drove to the residence of Edna Manuel and Walter Washington. (R.1171). Karen Jackson testified that she saw Appellant walk past the residence. (T.661). Douglas Jackson then drove into the yard real fast and Karen went to the bedroom, closed the door, locked it and hid inside the closet. (T.663-664,667).

Douglas Jackson went to the door of the residence and asked to see his kids, and an argument started. (R.1171). Douglas Jackson forced his way into the residence while Appellant remained in Jackson's camper. (R.1171-1172). Douglas came outside and told Appellant to come inside. (R.1171). Once inside, Appellant sat in the livingroom with Edna Manuel and her two children. (R.1172). Douglas Jackson went into one of the bedrooms and began arguing with

Larry Finney and Walter Washington. (R.1172, T.663). While Appellant was in the livingroom, Douglas handcuffed one of the men and tied the other man up with yellow rope. (R.1173-1174).

The Jackson's daughter, Antoinette, told Douglas that his wife was hiding in the closet.(T.664). Karen then came out of the closet and Douglas said, angrily, "(l)ook what you've been telling me." (T.664). Karen's lover, Larry Finney, was also found in the bedroom where she was hiding.

Karen testified that she saw Appellant with a gun inside the house (T.668) but that she never saw her husband, Douglas Jackson, with a gun. (T.673).

Douglas Jackson ordered his wife to pack her belongings and the children's belongings (T.670) and Karen and Douglas Jackson placed them in the back of his camper. (T.671). Douglas Jackson then placed Edna, Terrence and Reginald Manuel, Walter Washington and Larry Finney in the back of the camper with Appellant and closed the camper. (T.674). Douglas Jackson, his wife and two kids rode in front of the camper. (T.673).

Douglas Jackson told the victims that "he was going to take them over to (the Jackson's) house and hold them hostage like they held (his wife)". (T.674).

Douglas Jackson drove from the Washington/Manuel residence to his home, where he, his wife and children went into their home. (T.677). The Jackson's left their son Douglas Jr. home asleep (T.678) and took their daughter,

Antoinette, back with them to the cab of the camper. (T.678). Douglas Jackson drove to the Washington/Manuel residence so that Edna Manuel could get her son a jacket. (T.697).

Douglas Jackson then drove his camper to a desolate spot in Broward County located on U.S. 27 and Pines Boulevard where there was an abandoned vehicle beside the road. (T.680). Ralph Walker, a truck driver from Orlando, Florida testified that he saw the abandoned vehicle at the same location at approximately 5 p.m. on Saturday, February 28, 1981. (T.497-498). Mr. Walker also said that he noticed an oil slick behind the vehicle that followed off onto the shoulder of the road. (T. 498). It was later learned that that vehicle was owned by one Rolando Marquez, of Clewiston, Florida, who loaned the vehicle to his brother-in-law and said vehicle broke down at the location where it was found by Douglas Jackson and was then abandoned. (R. 1188).

Douglas Jackson exited the cab of the camper, leaving his wife and child inside, went to the rear compartment and ordered the three(3) adults and two(2) children into the abandoned vehicle. (T. 680). Karen Jackson testified that after the five victims were inside the abandoned vehicle she heard popping sounds (gunshots), but did not see her husband shoot the victims. (T. 708, 710). However, Karen's best friend, Patsy Roebuck told the jury that two(2) days after the incident Karen said that she had in fact seen the five people get killed (T.852), she saw the

whole thing. (T.853, 861). Patsy Roebuck testified that Karen told her that she was looking through the back window of the cab of the camper when she heard Walter Washington begging her husband for his life (T. 853), and Karen's boyfriend Larry Finney said to Walter, "(d)on't beg nobody for your life, man". (T. 853). Patsy Roebuck went on to tell the jury that Karen saw her husband turn and shoot Larry Finney first, then shoot the two adults that were in the back of the car, Walter Washington and Edna Manuel. (T.853). Patsy Roebuck testified that Karen told her that her husband then set the car on fire and left the people out there to burn. (T.853). Patsy Roebuck further testified that Karen admitted that Appellant did nothing while her husband shot and burned the victims. (T. 854).

Karen even admitted at trial that she was absolutely sure Appellant was inside the back of the camper at the time she heard the explosion and saw the fire start. (T. 680, 708). Karen testified that after the fire started her husband ran back to the camper, got inside and said that "he felt like he was on fire". Karen noticed that her husband was burned around the eyes. (T. 683, 708). Karen, or any other witness, never saw burn marks on Appellant. (T. 708).

Douglas Jackson drove away from the scene with his wife, child and Appellant seated in the cab of the camper. Douglas Jackson drove to a convenience store then drove Appellant home. (R. 1179). Douglas Jackson and Appellant had no conversation about the incident. (T.689).

Douglas Jackson told his wife that "he did it because he loved her" (T.717), and that "he wasn't going to let nobody or nothing come between (them)". (T. 718).

At 3:30 a.m. on Sunday, March 1, 1981, Officer Joe Primeau, Pembroke Pines, Police Department, received a call of a vehicle on fire at U.S. 27 and Pines Boulevard in Broward County, Florida. (T.482-483). Upon his arrival at the scene, the Fire Department was just extinguishing the vehicular fire. (T.483). Police investigation determined that the fire was intentionally set. (T.519). Five bodies were found in the vehicle, three adults and two children. (T.489). The five(5) victims were Larry Finney, Walter Washington (a/k/a) Bro), Edna Manuel (a/k/a Tiny), Terence Manuel, and Reginald Manuel. (R.1114). Photographs were taken of the bodies in the positions they were found in the vehicle. (T.492)

Yellow rope was found tying the hands of the adult male victims behind their backs. (T. 507). A box of yellow rope was found in Douglas Jackson's attic, with a portion cut off. (T.597,620). Fiber analysis, by a micro-analyst from the Florida Department of Law Enforcement, concluded that the rope taken from the hands of the victims and the rope taken from the box found in Douglas Jackson's attic could have originated from the same rope. (T.463).

The police found one pair of handcuffs approximately 15 feet from the burned vehicle (T.486), another pair of handcuffs in Douglas Jackson's camper (T.613), and a key on Jackson's key chain that could open both pairs of

handcuffs. (T.619).

Projectiles of .38 caliber were found in the back seat area of the floor board on the passenger side of the burned vehicle, in the bodies of the adult victims (T.734), and .38 casings were found in front of Douglas Jackson's home. (T.603). The .38 caliber projectiles found by the police could have been fired from the same revolver. (T. 732).

Appellant was not linked to the crimes charged herein by any of the physical evidence found and analyzed by police. (T. 784).

Karen Jackson never reported to the police the murders of her boyfriend, Walter and Edna Washington and their two children. (T.690).

Karen and Douglas Jackson spent most of Sunday, March 1, 1981 together. (T.703). They ate breakfast out at Denny's Restaurant (T.711), attended the Seaquarium (T.712), went to dinner at a friend's home (T.712), and "made love" Sunday night. (T.713).

On Monday, March 2, 1981, Karen spent the entire day alone with a friend named, Sherria McGregor. (T.690,703,713). Monday night, March 2, 1981, the Jacksons went to the movies at the Omni Hotel and shopping complex (T.713) and "made love" after they returned home from the movies. (T.714).

On Tuesday, March 3, 1981, Karen stayed with Patsy Roebuck, her close girlfriend. (T.703-704,714-715). Patsy Roebuck was called as a witness for Appellant after the

State claimed they could not find her and did not know her whereabouts. (T.803-807). Patsy Roebuck testified that she and Karen Jackson knew each other about one year and were "real good friends". (T.849). She testified she and Karen are still good friends and impeached Karen's testimony in several significant areas. (T.849).

Patsy Roebuck told the jury that Karen was brought to her house by Douglas Jackson on Tuesday, March 3, 1981 at approximately noon time (T.850), and that Karen remained until 9 a.m. Wednesday, March 4, 1981. (T.850). Patsy testified that Karen told her that "her and Larry was (sic) very close and that (Karen) thought she was pregnant for Larry (Finney)". (T.851). Karen told Patsy that on the night of the incident Douglas Jackson had yellow rope, tape, a gun and he was wearing gloves. (T.851).

Patsy Roebuck called Wayne Black, Dade County State Attorney's Office (T.903) and advised the authorities that Karen Jackson told her that Douglas Jackson had shot and burned the five victims. (T.903-906). Patsy Roebuck's call to the police and subsequent sworn statement led the police to Karen Jackson who then gave a sworn statement to the police. (T.908).

On March 5, 1981, Appellant was arrested at home pursuant to an arrest warrant. (T.56). After his arrest, Appellant gave a sixteen page sworn taped-recorded statement to police explaining how he got entwined in the lover's

quarrel between the Jackson's, admitting his presence at the scene of the crimes and recounting how Douglas Jackson killed his wife's lover and the family that gave Karen Jackson refuge. (R.1166-1181).

ARGUMENT
POINT 1

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY ON APPELLANT.

A. THE TRIAL COURT ERRED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY SENTENCING APPELLANT TO DEATH WHERE HE NEITHER TOOK LIFE, ATTEMPTED TO TAKE LIFE, NOR INTENDED TO TAKE LIFE.

In the recent landmark case of Earl Enmund v. Florida, 102 S.C. 3368 (1982) the Supreme Court held it to be cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the Unites Stated Constitution to sentence a person to death who neither took life, attempted to take life, nor intended to take life. The facts of the Enmund case were as follows:

> On April 1, 1975, at approximately 7:45 a.m., Thomas and Eunice Kersey, aged 86 and 74, were robbed and fatally shot at their farmhouse in central Florida. The evidence showed that Sampson and Jeanette Armstrong had gone to the back door of the Kersey house and asked for water for an overheated car. When Mr. Kersey came out of the house, Sampson Armstrong grabbed him, pointed a gun at him, and told Jeanette Armstrong to take his money. Mr. Kersey cried for help, and his wife came out of the house with a gun and shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed both of the Kerseys, dragged them into the kitchen, and took their money and fled.
>
> Two witnesses testified that they drove past the Kersey house between 7:30 and 7:40 a.m. and saw a large cream or yellow-colored car parked beside the road about 200 yards from the house and that a

> man was sitting in the car. Another witness testified that at approximately 6:45 a.m. he saw Ida Jean Shaw, petitioner's common-law wife and Jeanette Armstrong's mother, driving a yellow Buick with a vinyl top which belonged to her and petitioner Earl Enmund. Enmund was a passenger in the car along with an unidentified woman. At about 8 a.m. the same witness saw the car return at a high rate of speed. Enmund was driving, Ida Jean Shaw was in the front seat, and one of the other two people in the car was lying down across the back seat.

Enmund was found guilty of two counts of first degree murder, the jury recommended the death penalty, and the trial judge imposed a death sentence. The evidence against Enmund supported no more than an inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. The Supreme Court in Enmund stated that, "(p)utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just desserts". at page

In Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court stated thusly:

> The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement for imposing the death penalty. at page 605.

In the case sub judice, the motives for the killings was the jealousy of co-defendant Douglas Jackson for his wife, Karen. (T.60).

It is without question that Douglas Jackson alone ignited the explosion that burned the car and the five victims inside.[3] Karen Jackson, the only eyewitness, admitted that Appellant was inside the rear of her husband's camper when the fire started, and that when her husband, Douglas Jackson, returned to the cab of the camper he stated that, "he felt like he was on fire". Karen also saw that her husband was burned around the eyes. Karen testified that she saw no burn marks on Appellant at anytime.

As to the shooting of the three adults, Patsy Roebuck, Karen's close girlfriend, testified that Karen told her two days after the incident that she saw her husband shoot Larry Finney first, Walter Washington second and then Edna Manuel. Three days after the crimes, Patsy Roebuck told the lead investigator, Detective Mark Schlein, Karen's detailed and graphic account of how her husband personally shot the three adults and started the fire that caused the death of the children.

Even though Karen later denied seeing the shooting, it is important to remember that Karen was deathly afraid of her husband who was still at large when the police took her sworn statement. Additionally, it was Patsy Roebuck who called the Dade County State Attorney's Office to report that she had information about the crimes after Karen had

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3 During the penalty phase, Appellee told the jury "I think there is no doubt, at least in my own mind, that it is Mr. Jackson who set fire to those people in the car". (T.1037)

gone four full days without reporting these five murders to the police.

Appellant had nothing to gain from the kidnappings and murders committed in this case.[4] In fact, Appellant received no benefit whatsoever for aiding and abetting Douglas Jackson.[5]

Appellant admitted being present at all times but denied being armed and denied shooting anyone. (T.58).

Douglas Jackson's passionate confessions to his wife that "he did it because he loved her" really provides the "smoking gun" for the mounting evidence that Douglas alone actually killed the five victims. The evidence really is clear, even to Appellee that Douglas alone did the shootings.[6] Appellant had no reason to believe Douglas Jackson was going to kill anyone because Douglas kept telling the victims that "he was going to hold them hostages like they held (his wife)".

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4 The prosecutor told the jury during the penalty phase that "(Livingston) had nothing to gain from it". (T.1041).

5 The prosecuting attorney told the trial judge during the bond hearing that "Mr. Livingston aided and abetted the..." (T.55).

6 The prosecutor also told the jury the following during the penalty phase:

> For purposes of this, as far as I am concerned, you may as well assume--because in America we do give people the benefit of any reasonable doubt on things--I think you may well assume that Mr. Jackson pulled the trigger. (T.1037)

The trial judge in his sentencing order even noted that Douglas Jackson was the apparent leader in this episode. (R.1266).

The illegality of imposing the death sentence on Appellant is controlled by the Enmund case. Here, like in Enmund, supra, the death sentence should be reversed in the absence of proof that appellant killed, attempted to kill, intended to kill or contemplated that life would be taken.

Accordingly, the death sentences imposed in Counts I through V should be vacated.

B. THE TRIAL COURT ERRED IN OVERRULING THE ADVISORY VERDICTS OF THE JURY FOR LIFE SENTENCES.

Tedder v. State, 322 So.2d 908 (Fla. 1975), articulated the standard to be applied when this Court is asked to review a death sentence imposed subsequent to a jury recommendation of life imprisonment:

> ". . . A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. at page 910

In the instant case, the evidence is clear that it was the co-defendant, Douglas Jackson, and not Appellant, who shot the three adult victims and burned the two children to death. Appellant admitted to the police that he was present during the entire episode and implicated Douglas Jackson as the "trigger man" and the arsonist. Detective Schlein, lead detective, testified that there was no physical evidence which contradicted Appellant's version of the murders and there was no physical evidence which implicated Appellant as having physically killed any of the victims.

A review of the entire record indicates that the jury was apparently influenced in its recommendation for life imprisonment by the following factors: (1) Appellant had no motive to kill any of the victims nor did he receive (directly or indirectly) any benefit or revenge from their

deaths; (2) only one(1) gun was used to shoot the victims and casings of that gun's caliber were found in Douglas Jackson's front yard; (3) testimony from Patsy Roebuck that Karen Jackson saw her husband kill all five of the victims; (4) unrefuted evidence that Appellant did not set fire to the vehicle with the five victims inside; (5) Appellant's work with three and four year old kids in his mother's nursery; (6) the stipulation by Appellee that Appellant had no significant criminal history; (7) Appellant was not seen with Douglas Jackson or heard talking to Jackson the week before or after the killings; and (8) Appellant's age of 24 at the time of crimes.[7]

From the bond hearing the trial judge knew that Appellant was a high school graduate, was employed with the Longshoremen's Union at the time of his arrest, had previously held other jobs after finishing high school, had a mother who was a day care center supervisor for 28 years, and a father who has worked for the United States Postal Service for twelve years. (T.32-43).[8]

Given all the facts and circumstances, the jury recommendation of life was reasonable and should have been accepted by the trial court.

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7 The jury recommendation of life imprisonment took less than seventeen(17) minutes. (T.1069-1070).

8 The prosecutor at Appellant's bond hearing admitted to the trial judge that Appellant has ties to the community. (T.97).

C. THE TRIAL COURT IMPROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE APPELLANT IN COMMITTING THE CRIME KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

The Florida Supreme Court in Kampff v. State, 371 So.2d 1009 (Fla. 1979) provided the following discussion of the legislative intent of the above-described aggravating factor.[9]

> "When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some degree of risk of bodily harm to a few persons. Great risk means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to many persons. By using the word many, the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance. at pages 1009-1010.

The trial judge stated in his sentencing order that this aggravating factor applies because "in this case the defendant has been convicted of kidnapping six individuals of whom five were brutally murdered". (R.1265)

In the case at bar, the three adult victims were shot by Douglas Jackson at point blank range. Douglas Jackson set the car afire on a desolate and empty road in the woods. The closest home to the vehicle that was set afire by Douglas Jackson was a quarter of a mile away.

Only one person was present at the scene other than Douglas Jackson and Appellant, Jackson's wife Karen. In

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9 See Section 921.141(5)(c), Florida Statutes.

Johnson v. State, 393 So.2d 1073 (Fla. 1980), the Florida Supreme Court held that three people are not many persons as the phrase is interpreted in the context of Section 921.141(5)(c).[10]

Clearly since Douglas Jackson's wife was the only person present, other than Appellant, at the time the crimes were committed, proves without much question that a great risk of death to many persons was not caused in this case.

This aggravating factor certainly should not have been applied against Appellant in determining the sentence herein.

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10 See Brown v. State, 361 So.2d 696 (Fla. 1980); Lewis v. State, 377 So.2d 640 (Fla. 1979); and Dobbert 375 So.2d 1070 (Fla. 1979).

D. THE TRIAL COURT IMPROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE CRIMES WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

On April 24, 1981, Appellant filed his Motion for Particulars relating to sentencing. (R.1153-1154). On May 28, 1981, a hearing was held on that motion, along with other pre-trial motions.(T.11-32). At the hearing on the Motion for Particulars Relating to Sentencing, Appellee responded to said motion by stating as follows:

> "I have no objection to that motion being granted, your Honor; and in the near future I will provide any additional information I have." (T.13)

Appellee went on to say "all I can do at this time would be perhaps to list what I can consider may be aggravating circumstances". (T.14). The Court thereupon granted said motion. (T.14).

Paragraph 2(a) of Appellant's Motion for Particulars Relating to Sentencing requested "(w)hich aggravating circumstances the State intends to argue to the jury. (T.1153). Appellee in its response to said motion intentially omitted as an aggravating factor to be argued to the jury "that the crimes were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody". Appellee in its argument to the jury on this aggravating factor said:

> ". . . for the purposes of this proceeding, I would ask you <u>not</u> to include that, Okay." (T.1040)

Assuming arguendo that this Court condones Appellee's discovery ambush of Appellant, the law and facts still do not support the finding of a witness elimination motive made by the trial judge.

In Riley v. State, 366 So.2d 19 (Fla. 1978), this Court said that:

> A purpose to eliminate witnesses has been said to support the finding that a capital felony "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody". (citations omitted)
>
> . . . .
>
> In order for such witness elimination motive to support a finding of the avoidance of arrest circumstances when the victim is not a law enforcement officer, "proof of the requisite intent to avoid arrest and detection must be very strong. at page 22

In the case before the Court, the trial judge gave as his basis for finding Section 921.141(5)(c), Fla. Stat. (1975) to be applicable that "the murders eliminated witnesses to the kidnappings". (R.1265). The trial judges opinion flies in the face of every reasonable inference from the facts that Douglas Jackson killed the victims beause of his insane jealousy for his wife.

The trial judge erroneously considered this aggravating factor.

E. THE TRIAL COURT IMPROPERLY FOUND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial judge in its sentencing order said the following in support of applying the above aggravating factor:

> ". . . the victims had, on prior occasions, given safety and refuge to (Jackson's) wife during marital disputes. In an effort to prevent this from occuring again, it appears that (Jackson's) only alternative was to dispose of Walter Washington and his paramour, Edna Manuel. Also killed were Larry Finney, the alleged boyfriend of (Jackson's) wife."

The evidence shows that Douglas Jackson killed the five victims after he found his wife's lover in a bedroom with his children, and his wife hiding in the same bedroom closet.

Appellee's theory of the case was felony murder and Appellee cannot now argue premeditation to justify the trial judge using this aggravating factor in support of overruling the jury recommendation of a life sentence.

Prior to returning its guilty verdicts, the trial jury sent the following written message to the court:

> "The word Felony does not appear on the verdict sheets under the degrees of murder. Is it necessary before we sign the sheets?" (T.1233)

The jury convicted Appellant on the felony murder theory; yet the trial court applied an aggravating factor of premeditation.

F. THE TRIAL COURT COURT ERRED IN REFUSING TO FIND AS A MITIGATING FACTOR THAT APPELLANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

At the sentencing hearing, Appellee stipulated outside the presence of the jury that Appellant "has no significant criminal history". (T.1030). During his argument to the jury the prosecutor told the twelve jurors:

> "Aubrey Livingston has no significant history of prior criminal activity. That applies. Okay. That's one." (T.1044)

In reply to Appellee's stipulation, Appellant's counsel said the following to the jury during the penalty phase:

> "Now as to the mitigating circumstances, he has no significant criminal history, the prosecutor and I agree to that." (T.1056)

The trial judge supported his conclusion that this mitigating factor is inapplicable because "the defendant (has) previously suffered three arrests and (was) on probation for Burglary and Conspiracy at the time of the offense".(T.1266)

First, being arrested alone should never be counted toward a significant criminal history. Second, there is no credible evidence that Appellant was on probation at the time the instant offenses were committed. If Appellant was on probation, Appellee would have immediately endeavored to revoke said probation and request a stiff period of incarceration for Appellant to possibly be used against him in the penalty phase of this case.

Even assuming arguendo that the facts cited by the sentencing judges are correct, since Appellant has never been incarcerated in prison or county jail nor had his one probation sentence been violated, it can hardly be argued with any persuasion that his criminal history is significant. Especially in view of the fact that one of his three arrests was a minor marijuana case, and the burglary charge arose out of a dispute with the owner of his neighborhood dry-cleaning store, charges to which Appellant readily admitted his guilt.

G. THE TRIAL COURT ERRED IN NOT FINDING AS A MITIGATING FACTOR THAT APPELLANT WAS AN ACCOMPLICE IN THE OFFENSE AND THE APPELLANT'S PARTICIPATION WAS RELATIVELY MINOR.

The trial judge rejected this mitigating factor by flatly saying that Appellant's participation was not minor. (T.1267). The prosecuting attorney argued to the jury that:

> "You can consider that, and I am sure - - I don't mean to be presumptious, but I would think that during your deliberations - - you weigh back and forth the respective roles that Mr. Jackson played and that (Appellant) played. That particular mitigating circumstance is one you should consider in this case".
>
> . . . .
>
> "If you feel that his role was relatively minor, you can put it up there..."(T.1045)

Appellant's role was clearly minor because Douglas Jackson's wife was having the adulterous affair, Douglas Jackson initiated the idea to go looking for his wife and children on the date of the crimes. Douglas Jackson drove his camper, Douglas Jackson kicked opened the Washington's front door, Douglas Jackson had the gun, Douglas Jackson wore gloves, Douglas Jackson handcuffed and tied the men, Douglas Jackson told the victims he would hold them hostage, Douglas Jackson broke into the abandoned car, Douglas Jackson shot the three adults, Douglas Jackson set the car on fire with the kids alive, Douglas Jackson told his wife "he did it because he loved her", and Douglas Jackson lied to the police saying he was never at the scene of the crime

and that he burned his face cooking barbeque.

Clearly, Appellant was at best an aider and abettor who played a minor role in these crimes.

POINT 2

THE TRIAL COURT ERRED BY SEPARATING AND SENDING THE JURORS HOME FOR THE WEEKEND IMMEDIATELY UPON BEING ADVISED BY THE FOREMAN THAT THE JURY COULD NOT REACH A UNANIMOUS VERDICT.

At the outset of the trial, Appellant requested individual voir dire of the jurors (outside the presence of each other) concerning pre-trial publicity. (T.127-128).[13] The trial judge denied said motion. During the course of the week long trial, the trial judge advised the jury that reporters from the Fort Lauderdale News, Sun Tattler and Miami Herald have been in the court covering the trial. (T. 511).

The jury began deliberating this case at 4:24 p.m. on Friday, November 20, 1981. (T.1008). At 6:50 p.m., the jury sent the following note to the trial judge signed by the foreman: "The jury cannot reach a unanimous decision". (R.1233). The trial judge advised counsel for the parties that he was going to send the jurors home for the weekend.

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13 During voir dire examination, Juror Steinback said that he heard about the case on television and read about the case in the newspaper (T.407); Juror Washio heard about the crimes and his community was in an uproar (T. 358); Juror Silver read about the case and talked about the case with "everyone around" (T. 410); Juror Castro saw some news coverage about the case on television and in the newspapers (T.426); Juror Griffen said this case was spoken about, seen on television, in the papers an awful lot of times; Juror Brewster heard about the case from newspapers and television. (T. 448).

Appellant immediately objected to separating the jurors. (T.1011-1012). The trial judge nonetheless sent the jurors home for the weekend admonishing them not to discuss the case or come into contact with any news reports. (T. 1013). Appellant renewed his objection to this procedure and requested a mistrial on Monday, November 23, 1981 (T.1014-1015), said motion was denied by the Court who thereupon gave the jury the Allen Charge. (T. 1018-1019).

In the landmark case of Raines v. State, 65 So.2d 558 (Fla. 1953), the Florida Supreme Court reversed a bribery conviction where the jury was separated overnight without the protection of the baliff even though the defendant failed to timely object. The Court opinied that:

> There is no showing in the way of evidence that defendant's rights were prejudiced but trials should not be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights. The opportunity was open for tampering with the jury and the temptation to do so was such that we are not convinced that appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates. A fifteen hour absence... leaves too much room to question the bonafides of everything that took place during that time... at pages 559-560

Since Raines the Florida Supreme Court adopted Rule 3.370, Fla.R.Crim.P. which allows, under certain circumstances, the trial judge to separate jurors.

After the enactment of Fla.R.Crim.P. 3.370, the Third District Court of Appeal reversed a conviction for separating jurors in McDermott v. State, 383 So.2d 712 (Fla.

3d D.C.A. 1980). In McDermott, the trial judge continued the case after the jury was sworn to allow the State time to cure its witness problems. The Third District relied heavily upon the reasoning in Raines to reverse Mr. McDermott's conviction.

In the case sub judice, the prejudice is all too obvious. Appellant was on trial for five(5) counts of first degree murder and six(6) counts of kidnapping. The co-defendant's trial which resulted in a conviction, was tried in the same court less than one month previous. News media coverage was extensive pre-trial as evidenced throughout voir dire and during trial as evidenced by the trial judge's admonitions to the jury. For the trial court to allow the jury to commence deliberations and separate them for the weekend after knowing that a substantial number of them had agreed on a verdict, and publicity about the case was extensive on radio, television and newspapers, was to create too great a danger that outside influence would affect the verdict.[14]

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14 Jurors had the entire weekend with their families, friends, neighors, televisions, radios and newspapers after commencing deliberations in what is concedely one of the most notorious cases in Broward County history.

POINT 3

WHERE THE TRIAL JUDGE EXERCISES HIS SOUND JUDICIAL DISCRETION IN A CAPITAL CASE AND ORDERS THE STATE TO ALLOW APPELLANT TO BE PRESENT FOR THE TAKING OF DISCOVERY DEPOSITIONS IT IS REVERSIBLE ERROR FOR THE STATE TO IGNORE THE COURT'S ORDER.

Appellant filed a motion in this cause to be present for the taking of discovery depositions. The motion alleged that:

> The Defendant desires to be present at all depositions to assist his counsel in the preparation of his defense.
>
> The undersigned counsel needs the presence of the defendant at all depositions to assist him in preparation of the defense. at R.1161

The trial judge granted the motion stating:

> "My feeling is that a man who is charged with a serious offense as Mr. Livingston is, (sic) has perhaps greater rights than someone who is charged with a lesser offense." at T.23

Although there is no rule of criminal procedure, statute or constitutional provision mandating the presence of the defendant at a discovery deposition, a trial judge may allow the defendant's presence as a matter of sound judicial discretion. State v. Dolen, 390 So.2d 407, 409 (Fla. 5th D.C.A. 1980). And where the defendant is in custody awaiting trial, it is the obligation of the State to ensure his presence at discovery depositions to comply with the Court's order.

In the instant case, Appellant was successful in obtaining an order from the trial judge requiring his attendance at all discovery depositions. Since Appellant was incarcerated, the trial court ordered Appellee to take all depositions in the county where Appellant was incarcerated (T.24), and find an appropriate place for taking depositions with Appellant present. (T.24). The trial judge further advised the State that if they had problems with his order to request in camera proceedings.

Appellee, however, failed to request in camera proceedings, failed to request a protective order, failed to seek a writ of common law certiorari,[12] and refused to transport Appellant to said depositions as ordered by the trial court.

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[12] See, State v. Dolen, 390 So.2d 4091 Fla. 5th D.C.A. (1980).

POINT 4

THE TRIAL COURT ERRED BY SENTENCING APPELLANT ON COUNTS VI THROUGH X WHICH WERE THE UNDERLYING CRIMES IN EACH FELONY MURDER.

The trial court sentenced Appellant to consecutive life sentences as follows:

As to Court VI - Larry D. Finney
As to Count VII - Walter Washington
As to Count VIII - Edna Manuel Washington
As to Count IX - Terrence Manuel
As to Count X - Reginald Manuel

Appellant's convictions for kidnapping in Counts VI through X were predicated upon the felony murder theory. In Hegstrom v. State, 401 So.2d 1341 (Fla. 1981) this Court held that a person cannot be sentenced both for the felony murder and for the underlying felony.

The jury's question to the Court reveals perfectly their view of the evidence when they wrote to the court:

> "The word Felony does not appear on the verdict sheets under the degrees of murder. Is it necessary before we sign the sheets?" (T.1233).

Accordingly, the sentences in Counts VI through X should be vacated.

CONCLUSION

Based upon the foregoing reasons and citations of authorities, Appellant respectfully urges this Honorable Court to reverse the judgment of the lower court, vacate the imposition of the death penalty, and to remand this cause to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was mailed to Sharon Lee Stedman, Esquire, Assistant Attorney General, Palm Beach County, Regional Service Center, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 10th day of November, 1982.

H. T. SMITH, ESQUIRE