SUPREME COURT OF FLORIDA

DOUGLAS JACKSON,)

Appellant,)

vs.) CASE NO. 63043

STATE OF FLORIDA,)

Appellee.)

BRIEF OF APPELLANT

Appeal from the Circuit Court
17th Judicial Circuit
In and For Broward County, Florida
Judge Thomas M. Coker, Jr.

Prepared by:

Michael D. Gelety, Esq.
Counsel for Douglas Jackson
1700 E. Las Olas Boulevard
Suite 300
Ft. Lauderdale, Florida 33301
Phone: 305-462-4600

PRELIMINARY STATEMENT

The Appellant, Douglas Jackson, was defended in the trial court of the Circuit Court of the 17th Judicial Circuit, the Honorable Thomas M. Coker, Jr. presiding; Appellee, State of Florida, was the Plaintiff in the trial court. They will be referred to in this Brief as Appellant and Appellee or State.

TABLE OF CONTENTS

TABLE OF CONTENTS (con't.)

TABLE OF CITATIONS

Case Authority: Page No:

STATEMENT OF THE CASE

Appellant, Douglas Jackson, was arrested on the instant charges on a warrant, and was indicted by the Broward County Grand Jury, along with co-defendant, Aubrey Livingston, for five counts of first degree murder charging the deaths of Larry Finney, Walter Washington, Edna Manuel also known as Edna Washington, Terrence Manuel, and Reginald Manuel, as well as six counts of kidnapping of the five previously mentioned people, and of Karen Jackson. (Tr. Vol. 9, pg. 1562). On March 25, 1981, a hearing was conducted on Appellant's motion attacking the Grand Jury composition, specifically dealing with the low payment of the Grand Jurors which excluded working class black citizens, and such motion was denied. (Tr. Vol. 1, pg. 3). On July 2, 1981, a hearing was held on various motions by Appellant, including a motion to transfer the cause to Dade County and various motions to dismiss, which were denied by the court. (Tr. Vol. 1, pg. 27, 46). On August 11, 1981, a defense Motion for Continuance was granted, as was the Appellant's Motion for Severance (Tr. Vol. 1, pg. 67,71). On August 14, 1981, Appellant's Motion to Sever Counts (deaths of adults in Counts 1 through 3 from the deaths of the two children in Counts 4 and 5) was denied, but Appellant's Motion for Psychiatric Examination was granted (Tr. Vol. 1, pg. 105). On October 15, 1981, Appellant's Motion to Compel the State to Elect Between Prosecution Under the Theory of Premeditated Murder or Felony-Murder was denied, as was the Appellant's Motion to Compel

the State to Elect Between the Defendant or the Co-Defendant as being the person that allegedly shot the victims. (Tr. Vol. 1, pg. 124, 125). After a discussion of the possibility of stipulation to identification of the victims to alleviate the necessity for introducing photographs into evidence, Appellant made a Motion to Continue which was based upon Appellant's trial attorney being in poor physical and mental condition, and that motion was denied by the trial court. (Tr. Vol. 1, pg. 138). On October 19, 1981, a hearing was held on Appellant's Motions to Suppress Statements made and Evidence found pursuant to the execution of two search warrants, and, after initially stating that rulings would be deferred until the trial, (Tr. Vol. 1, pg. 173) the Motions to Suppress were denied by the trial court. (Tr. Vol. 2, pg. 246).

On October 19, 1981, the trial of the matter began, and on October 27, 1981 the Appellant was found guilty as charged to all counts in the indictment by the jury. (Tr. Vol. 10, pg. 1711-1721, Vol. 8, pg. 1439). Appellant was then adjudicated guilty to all counts. (Tr. Vo. 8, pg. 1454). The jury was then reconvened for the purpose of an advisory opinion, and on October 28, 1981, bu vote of 7 to 5, the jury recommended the death penalty on all five murder counts. (Tr. Vol. 8, pg. 1515, and Vol. 10, pg. 1730-1734). Appellant then requested a psychiatric examination to be included in the pre-sentence investigation, which request was granted, (Tr. Vol. 8, pg. 1519), and sentencing was deferred until the pre-sentence examination could be

completed.

On November 10, 1981, various post-trial motions by Appellant were denied, including a Motion to Interview Jurors and a Motion to Hypnotize the Co-Defendant (Tr. Vol. 8, pg. 1533, 1535). On December 2, 1981, Appellant came up before the court for sentencing, and Appellant's Motion to Continue the Sentencing was denied (Tr. Vol. 8, pg. 1546), despite the fact that there had been no psychiatric examination included in the pre-sentencing investigation as ordered by the court, and despite the fact that Appellant and his attorney had not had a chance to review the pre-sentence investigation. The court went on to find the existence of five aggravating circumstances and one mitigating circumstance, and imposed the death sentence upon the Appellant for each of the first five counts of the indictment, as well as consecutive life sentences on counts 6 through 11. (Tr. Vol. 8, pg. 1553 and Vol. 10, pg. 1751 through 1755).

On December 2, 1982, Appellant's Motion for New Trial and Motion to Vacate Sentence (filed in November of 1981 but set by the court for hearings) were denied (Tr. Vol. 8, pg. 1571). On March 3, 1983, Appellant's Motion for a Stay was also denied by the trial court. (Tr. Vol. 8, pg. 1572, 1580).

Before the Notice of Appeal in the instant matter was filed, various habeas corpus petitions were filed by Appellant with the Fourth Distrcit Court of Appeals, premised upon the Grand Jury challenge of the less-than-minimum wage being paid to black jurors (Tr. Vol. 9, pg. 1612),

and these petitions were denied by the Fourth District Court of Appeals (Tr. Vol. 9, pg. 1614, 1620). A separate habeas corpus petition was filed in the Federal Courts prompting Appellant's Motion for a Stay on March 3, 1983. The Notice of Appeal in the instant matter was finally filed on January 6, 1983 (Tr. Vol. 10, pg. 1770).

STATEMENT OF THE FACTS

On March 1, 1981, at approximately 3:20 AM, a burning automobile was located on US 27 south of Hollywood Boulevard in Broward County, Florida. (Tr. Vol. 3, pg. 489, 501). Although the same car was seen earlier empty and not burning, it was discovered that the burning car now contained five bodies which were beyond recognition. (Tr. Vol. 3, pg. 490, 505). Persons living in the area heard what they considered to be pistol shots approximately 3:00 AM on the night in question (Tr. Vol. 3, pg. 574, 581). Although it was the opinion of an arson expert that the fire was intentionally set (Tr. Vol. 3, pg. 556), the Medical Examiner testified that the three adults in the matter were shot and killed almost instantaneously (Tr. Vol. 6, pg. 1081), that the two children died from smoke and soot inhalation (Tr. Vol. 6, pg. 1067, 1068), and that the burns were post-mortem charring (Tr. Vol. 6, pg. 1080).

Based, in part, upon an anonymous phone call, Appellant and his wife, Karen Jackson, became known to investigators and were questioned regarding the incident. Appellant was questioned by Detective Schlein on March 3, 1981, (Tr. Vol. 5. pg. 977), and this conversation was before Karen Jackson had given a statement, and Appellant's statement was tape-recorded. From Appellant's statement, investigators learned of the rocky marriage to Karen Jackson, and Karen's habit of seeing other men. (Tr. Vol. 5, pg. 996). Appellant also explained the burns on his

face and arms by noting that he had been at a barbecue at the beach which blew up in his face. (Tr. Vol. 6, pg. 1008).

Karen Jackson was later questioned by the police and told the story of moving away from Appellant with Appellant's two children due to marital problems, and moving in with Walter and Edna Washington and the Washington's two children, Terrence and Reginald, at a house where Larry Finney sometimes lived. (Tr. Vol. 5, pg. 812-814). Karen Jackson then testified that on February 28, 1981, Appellant drove by the Washington house in his camper/truck causing Karen to hide in the bedroom and close the door. (Tr. Vol. 5, pg. 822). Appellant then came into the house with co-defendant Aubrey Livingston, and Livingston had a gun. After some altercation with the Washingtons and Finney, Karen was told to put her clothes and children in Appellant's car, and saw Walter Washington and Larry Finney come out of the house with their hands behind them. (Tr. Vol. 5, pg. 832). All five of the victims were placed in the back of the Appellant's camper with co-defendant Livingston, and the Appellant with Karen Jackson and their children sat in the front of the truck. (Tr. Vol. 5, pg. 833).

Appellant then drove around, according to Karen's testimony, until a car was found parked on the side of the road. After passing that car approximately four times, Appellant stopped and got out of the camper with the

co-defendant. Karen Jackson then saw nothing else, but heard the victims being told to get out of the camper and that they were going to be left in the car, and that they were going to be held hostage the way that Karen Jackson had been held hostage. (Tr. Vol. 5, pg. 832, 839). Karen Jackson then heard sounds that she thought were gunshots, and heard the co-defendant say "hurry up" , and heard a big explosion. (Tr. Vol. 5, pg. 839,840). Karen testified that the Appellant never had a gun, and that the co-defendant had the gun at all times, (Tr. Vol. 5, pg. 869, 870) and further, that she never saw Appellant shoot anyone, and never saw anyone start the fire in the car (Tr. Vol.5, pg. 871, 872). While driving back, Karen testified that she noticed that the Appellant's eyebrows and lashes were singed, and Appellant stated that he felt like his face was on fire (Tr. Vol. 5, pg. 909).

Karen did not call the police, although she saw the burning car on the news that evening, and, in fact, acted as if nothing happened going to work the next day after going out to breakfast and carrying on with her life with Appellant. (Tr. Vol. 5, pg. 841 and 883-893).

Appellant stipulated that the hands of Walter Washington were tied behind his back (Tr. Vol. 3, pg. 527), and Karen Jackson testified that the yellow plastic rope was similar to rope owned by the Appellant, which she saw at the time of the supposed kidnapping. (Tr. Vol 5, pg. 830).

There was a conflict in testimony, however, regarding the similarity and identity of the samples of rope from the bound hands of Washington, and the sample of rope taken from Appellant's house. (Tr. Vol. 5, pg. 959-960, and Vol. 6, pg. 1197-1199). The slugs taken from the bodies were found to be .38 slugs (Tr. Vol. 5, pg. 933, 934), which could not have been fired by the .44 pistol found in Appellant's home. (Tr. Vol. 5, page 941).

Appellant testified in his own behalf and totally contradicted the critical stages of Karen's testimony, stating that on the night in question, Appellant gave Karen the truck in question and he did not see her again for some time, while Appellant stayed home. (Tr. Vol. 7, pg. 1250, 1254). Appellant also explained the fact that he went to a barbecue on the following day and was burned during such barbecue (Tr. Vol. 7, pg. 1268, 1283-1284). Finally, Appellant testified that he had nothing to do with the killing and knew nothing about the fire in question (Tr. Vol. 7, pg. 1302). Other facts will be cited throughout the brief as appropriate.

POINT I

THE TRIAL COURT ERRED BY REFUSING TO CONTINUE THE TRIAL AT APPELLANT'S REQUEST.

On October 14, 1981, Appellant's attorney filed a Motion to Continue the trial which was then set for October 19, 1981. (Tr. Vol. 9, pg. 1656). Notwithstanding the legitimate and valid reasons to delay the trial, including the fact of newly revealed witnesses which were to be deposed, and the fact that some depositions had not been transcribed, the main thrust of the Motion to Continue was the trial attorney's physical injury and resultant treatment and medication which left him physically and mentally unprepared and unable to adequately defend the Appellant in a capital trial. After viewing a photograph of the trial attorney's injuries, the Assistant State Attorney handling the case did not object to the continuance of the trial and, in fact, deferred to the court's discretion in the matter. (Tr. Vol. 1, pg. 132). After reviewing the Motion, viewing the photograph, and hearing the attorney's presentation, the trial court denied the Motion to Continue (Tr. Vol. 1, pg. 138), and continued in that denial despite the attorney's statement, moments later, that "In my drowsiness, I'm not sure that Your Honor clearly ruled on the Motion to Appoint an Investigator." (Tr. Vol. 1, pg. 142). The trial court's refusal to allow Appellant's attorney to not only finish his preparation, but, more importantly, to be physically and mentally prepared and able to adequately and vigorously represent the Appellant, mandates

reversal.

The granting or denial of a Motion for Continuance is within the sound discretion of the trial court, and such decision will generally not be overturned absent a palpable abuse of discretion. Lusk v. State, F.L.W., Vol 9, pg. 39 (Fla. 1984). Page 39. A number of cases have found such an abuse of discretion and have resulted in convictions being reversed, with the most common factor in such cases being the defense counsel not having adequate opportunity to investigate and prepare a defense. See Palmer v. State, 380 So.2nd 476 (Fla. 2nd DCA 1980) where a conviction was reversed where the main public defender became ill and a substitute public defender, that had contact with the case in the past, was pressed into service for the trial. The court noted that it was an abuse of discretion to not grant a continuance once it became apparent that the Appellant would not be adequately represented. Page 478; Meadows v. State, 389 So.2d 694 (Fla. 2nd DCA 1980) original co-counsel pressed into trial without being adequately prepared; Brown v. State, F.L.W. Vol 8, pg. 475 (Fla. 1st DCA 1983) inadequate time to meet and deal with hypnotic evidence; see also Sumbry v. State, 310 So.2nd 445 (Fla. 2nd DCA 1975); Lightsey v. State 364 So.2d 72 (Fla. 2nd DCA 1978). Adequate time to prepare a defense is inherent in the right to counsel under the VI Amendment, and is founded on constitutional principles of due process and cast in the light of notions of a right to a fair trial.

Harley v. State, 407 So.2d 382 (Fla. 1st DCA 1981). Page 383.

The instant matter takes on a singular clarity as this court does not have to speculate regarding the effect of the denial of the continuance on the Appellant's right to a fair trial, since the record on appeal is replete with numerous examples of the trial attorney's physical and mental problems. Actual statements and complaints of the trial attorney and examples of serious mistakes of judgement and on the law demonstrate that Appellant did not receive reasonably effective assistance of counsel at his trial. Knight v. State, 394 So.2d 997 (Fla. 1981).

Aside from the written motion alleging the ill effects of the medication taken, and the attorney's affirmance of his drowsiness and lack of attention at the Motion on October 15, 1981, the attorney also mentioned his medication and slow and distorted speech during jury selection (Tr. Vol. 2, pg. 379), and, still during jury selection, the attorney stated to the court, when it was pointed out that he was wrong, "I made a mistake which I would submit is due to my drowsiness on the medication." (Tr. Vol. 3, pg. 445). Even before the jury was selected and sworn, and before jeopardy attached, the court was aware of the attorney's problems, yet still denied the continuance.

During the actual trial of the matter, the attorney notified the court that "I am not feeling good, and I forgot to do it", pointing out a mistake in the questioning of a State witness (Tr. Vol. 4, pg. 631). Later, during the

State's case, the State was about to put on an extremely pregnant witness at 5:00 PM in the afternoon. The trial court, after hearing the Motion to Exclude the Witness, adjourned for 20 minutes to let a depositon take place. After further discussion of the deposition, the trial attorney stated to the court, "the time is approximately 5:26 according to the courtroom clock - I do have physical problems. I am unable to effectively assist my client at this time under these conditions." (Tr. Vol. 4, pg. 773). After further discussion of the attorney's physical problems, the court determined that the pregnant witness's problems were more acute, prompting the attorney to make a Motion to Withdraw which was denied by the trial court. (Tr. Vol. 4, pg. 775). With the denial of Motion to Withdraw and in the middle of further discussions between the court, the prosecutor and the trial attorney. the attorney simply walked out of the courtroom without comment and without permission of the trial court. (Tr. Vol. 4, page 776). After a few more minutes and a deposition, the attorney returned, stating that he felt better but that, "I am at Your Honor's mercy. I'm shook up." (Tr. Vol. 4, pg. 778). After ascertaining that the attorney's Motion to Withdraw was made in earnest, the Motion was again denied by the court. (Tr. Vol. 4, page 779). Even after all of these affirmative statements by the defense attorney, the trial court continued on with the trial, refusing to delay the case, even after it was apparent that the attorney could

not adequately represent the Appellant. This denial was an abuse of discretion. Palmer , supra, pg. 478.

Aside from the affirmative statements regarding his physical condition and related statements to errors, mistakes and lack of comprehension listed above, many blatant errors and mistakes of law and judgement appear in the Record on Appeal, which certainly should have convinced the trial court of the seriousness of the attorney's condition. Before the evidence started, the attorney announced to the court that he waived opening statement, at which time the court informed/reminded the attorney that he could reserve his opening until the State rested. (Tr. Vol. 3, pg. 469). The attorney then insisted on a "package deal" stipulation of the identity of the victims as well as the cause of death. Although the State was willing on two separate occasions to accept a stipulation regarding the identity of the victims, the tandem stipulation was unacceptable to the State. Consequently, the State was allowed to bring in a great deal of testimony regarding articles found at the scene, as well as background testimony and, most importantly, highly inflamatory photographs to prove the identity. (Tr. Vol. 3, pg. 506, 600). Similarly, after the State informed the court and defense counsel that it did not intend to admit a .44 handgun found at the Appellant's home, nor the ammunition for it, (Tr. Vol. 3, pg. 442) the defense attorney then opened the door on cross examination, brought out the

fact that the pistol and ammunition were found in the Appellant's home, and allowed the state to place the gun into evidence. (Tr. Vol 4, pg. 756, 763). Further, defense attorney clearly had no organized idea of a defense at the trial, and randomly tried to argue a spurious "Cuban militant" theory based upon a poster found in the area and a friend of one of the victims named Jose (Tr. Vol. 3, pg. 497, Vol. 4, pg. 615), a drug-related killing based on drugs that the victim, Finney, could possibly get from the hospital (Tr. Vol. 5, pg. 862), and based upon personal character attacks upon the victim, Finney, while questioning Finney's mother (Tr. Vol. 4, pg. 616).

Finally, and very telling, was the repeated failure of the trial attorney to object to the introduction of, and testimony about, articles of evidence and statements which were the subjects of earlier Motions to Suppress. On October 19, 1981, a hearing was held on previously filed Motions to Suppress, the result of the search of the Appellant's house, his vehicle, and a Motion to Suppress taperecorded statements which were taken from the Appellant. Regarding the Motion to Suppress the two searches, both searches were premised upon search warrants which admittedly contained false statements in the affidavits (Tr. Vol. 1, pg. 179), were possibly based upon an illegal pretext search to gather evidence (Tr. Vol 2, pg. 239), and were definitely based upon the statement of Karen Jackson, who may or may not have been under hypnotism at the time of her statement (Tr. Vol. 6, pg. 1022).

Regarding the Motion to Suppress Statement, it was established that the tape recorded statement was given without the benefit of Miranda rights, that it was given without the Appellant being told that he was a suspect, and it was given after police officers entered Appellant's home without a warrant, and subjected Appellant to their apparent authority. (Tr. Vol. 1, pg. 163, 164). Despite the valid constitutional issues raised by both of these Motions to Suppress, Appellant's attorney, apparently due to his weakened mental condition, failed to object on constitutional grounds when the yellow rope and gas samples were admitted into evidence (Tr. Vol. 4, pg. 714, 719), and, further, Appellant was then questioned during his testimony and verified that the rope in question was his rope. (Tr. Vol. 7, pg. 1200). Regarding the handcuffs, holster, and keys found in Appellant's vehicle, there were no objections on constitutional grounds when these articles were presented and introduced into evidence (Tr. Vol. 4, pg. 725-738) and, the Appellant, in his testimony, admitted ownership of the holster (Tr. Vol. 7, pg. 1276). Finally, regarding the tape recorded statement of Appellant, there was no objection on constitutional grounds to the playing of the tape recording (Tr. Vol. 5, pg. 983), and, in fact, it was elicited from the Appellant during his testimony that he consented to such recording (Tr. Vol. 7, pg. 1291). Further, not only was there no constitutional objection to the tape recordings, but the trial attorney raised two totally meritless objections to the tapes: that the tape recording should not be admitted as the

police officer's testimony is the "best evidence" (Tr. Vol. 5, pg. 981); and that the tabs which were punched out on the cassette tape could possibly have been rebuilt to allow re-recording on the tapes. (Tr. Vol. 5, pg. 984-988).

When faced with these numerous examples of a trial attorney who is simply not mentally alert during the proceedings, it becomes clear to this court, as it should have to the trial court, that the physical and mental problems of the Appellant's trial attorney prevented Appellant from having reasonably effective assistance of counsel at the trial level. Just as it is reversible error for the trial court to fail to grant adequate time for a determination of the competency of a defendant for trial, Lane v. State, 388 So. 2d 1022 (Fla. 1983); Marshall v. State, F.L.W. Vol. 8. pg. 2714 (Fla. 1st DCA 1983), it is equally fatal to a conviction for the trial court to force an attorney into trial while he is physically and mentally hindered. The trial court refused a pre-trial continuance, refused to accept the obvious problems of the attorney during trial, and refused to grant a new trial, even in light of a doctor's affidavit supplied by the attorney which verified the allegations and the actions of the attorney (Tr. Vol. 10, pg. 1765). This abuse of discretion must be corrected with the granting of a new trial.

POINT II

APPELLANT'S RIGHT TO A FAIR TRIAL WAS DESTROYED BY COMMENTS OF THE TRIAL COURT AND TREATMENT OF THE TRIAL ATTORNEY.

During the course of the protracted trial of the instant case, the trial court, on several occasions, made various comments in the presence of the jury, which clearly indicated his dissatisfaction with the Appellant's trial attorney, showed his leanings toward the prosecution, and showed his disdain for the various theories of defense presented. While Appellant appreciates the fact that guiding a trial is a constant challenge to the ability and integrity of the trial judge, and that there may be instances where the conduct of counsel tries the patience of the court, the court must, nonetheless,

> Avoid the type of comment or remark that might result in inhibiting counsel from giving full representation to his client, or that might result in bringing counsel into disfavor before the jury at the expense of his client. Hunter v. State, 314 So.2d 174 (Fla. 4th DCA 1975) pg. 174.

In Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980) a conviction was reversed when the trial court became inpatient with the trial attorney, instructing such attorney to act in a more pleasant way. In reversing, the court recognized the strain under which the judge was compelled to work, but nevertheless, went on to find that:

> We cannot condone his manifestation of that strain in the presence of the jury. Our review of the complete

> record in this case indicates anything but an impartial atmosphere in which defendant received a fair trial. As was indicated in Hunter, supra, defense counsel's conduct should not be visited upon the defendant to the extent that his fundamental right to a fair trial is abridged. Page 134.

In the instant case, twice during voir dire the court lost patience with the defense attorney, once saying, "Could we go ahead and ask some more questions and finish up this process?" (Tr. Vol. 2, pg. 385), and once, out of the presence of the jury, yet more chilling, the following dialogue transpired:

> Mr. Cerf: Thank you. I would just like to consult my client for a minute.
> The court: Oh, come on. You've been consulting your client. You are holding up twelve or fourteen people here. (Tr. Vol. 2, pg. 394).

Later, upon an objection that photographs were gruesome, the court commented, before the jury, that he saw nothing gruesome about those photographs (Tr. Vol. 3, pg. 552), thereby showing Appellant's position to be without merit, and belittling the attorney. Later in the trial, during the testimony of Mrs. Finney, the witness was protected and chastised by the court, with added credence and believability given to the testimony when the court stated, "I told her to read it to herself. She listened to me. She has answered the question the best she can, she says. Next question." (Tr. Vol. 4, pg. 610).

Further, with Mrs. Finney, the court volunteered, "Don't argue with the witness. I think the jury can assess what they have heard. Next question." (Tr. Vol. 4, pg. 614). Clearly, this conduct by the court not only butresses the testimony of a State witness, but challenges the competence of the attorney in front of the jury, and has a chilling effect on the attorney, preventing him from zealously questioning witnesses or presenting his defense.

At many stages in the voir dire of exhibits when they were offered into evidence, the court lost patience, cut off the questioning of the defense attorney, and actually conducted the questioning of the State's witnesses with such questioning invariably resulting in the admission of the evidence. (See Tr. Vol. 4, pg. 703, 704, pg. 710, pg. 716, 717, Vol. 5, pg. 981). Similarly, the court at one point cut off the defense attorney in his objection during the testimony of the State's critical witness, Karen Jackson, and actually recited the following, "What you said was, 'Did you know the police were looking for you and that you were a suspect?'" And she said, "Yes." You said suspect, not her. Next question." (Tr. Vol. 5, pg. 905, 906). Not only did the court negate the cross-examination of this critical witness, but, again, the attorney was completely deflated before the jury by the court's brusque treatment. In a similar protection of the same witness, the court again interrupted cross-examination and explained away an inconsistency in an earlier statement by Karen Jackson before the jury regarding whether or not

Appellant and the witness had sex on the night after the crime: "She said she had sex. If she wanted to call it sex or love ...." (Tr. Vol. 5, pg. 898). Under that pressure, the attorney, of course, moved on to another subject of inquiry.

In an extreme example of the court's rough treatment of the attorney, the court again interjected into the attorney's cross-examination regarding the tape recorded statement, after the attorney had questioned regarding the tape tabs being rebuilt. Making the attorney's argument regarding the tabs being rebuilt with a piece of wood look completely foolish, the court interrupted and stated, "About fifteen minutes ago I asked you a question before we started about plugs, pencils, tapes and sticks and stones. I asked you if you had listened to the tape ... and what I asked you was that it was ... forgetting sticks and stones and pieces of paper and rocks and so forth,is what's on this tape the conversation you had with Mr. Jackson exactly as it was at that time?" (Tr. Vol. 5, pg. 987, 988). The court's opinion of the Appellant's argument on the tape was clearly conveyed to the jury. Shortly thereafter, regarding the tape, the defense attorney objected when the tape was played, as a sentence did not appear on the written transcript. The court immediately started to question the attorney as to whether or not he had the opportunity to hear the tapes before and after pinning the attorney into a corner, made the following statement in front of the jury, "Please don't interrupt.

You can cross-examine the tape or Sergeant Schlein or both after it's over with. Okay, Mark." (Tr. Vol. 5, pg. 992). Not only is the attorney put in his place, but the State's Chief Investigator, Officer Mark Schlein, is protected by the court and then shown favor by the reference to his first name.

Finally, dealing with the court's pro-prosecution leaning, aside from the court questioning the witnesses on exhibits and accepting exhibits into evidence, the court also commented that he considered some evidence probative (Tr. Vol. 4, pg. 772), commented to the prosecutor that he understood his theory of admitting a photograph (Tr. Vol. 5, pg. 909, 910), tells the prosecutor to object (Tr. Vol. 6, pg. 1030), and, most blatantly, in response to prosecutor Richard Garfield's request for a minute to check his questions, the court states,

> Just go ahead and check, Rick. Nobody's trying to rush you. You have an intolerable burden trying to keep all this stuff in line. I'm going to tell your boss about it, too. (Tr. Vol. 4, pg. 749).

As was the case in Jones, supra, these comments and interruptions certainly do not indicate an impartial atmosphere in which the Appellant received a fair trial. In Williams v. State, 143 So.2d 484 (Fla. 1962), this court held that:

> The judge's neutrality should be such that even the defendant will feel that his trial was fair. In the trial of a capital case, the judge's attitude or demeanor may speak louder than his words, in fact, it may speak so loud that the jury cannot hear what he says. Page 488.

It is obvious that the cumulative effect of the court's actions and comments was so prejudicial as to deny Appellant a fair trial, particularly in light of the fact that the instant case is a capital case, regardless of whether or not an exception was taken to the remarks or actions at the time. See Bennett v. State, 173 So. 817 (Fla. 1937).

POINT III

THE TRIAL COURT ERRED BY PREVENTING APPELLANT FROM SELECTING A FAIR AND IMPARTIAL JURY.

During the process of jury selection, the trial court prevented Appellant from selecting a fair and impartial jury by not allowing Appellant to back-strike jurors before the jury was sworn, after improperly causing Appellant to exhaust his peremptory challenges.

Under the Florida constitution, Article I, Section 16, a defendant in a criminal prosecution is guaranteed the right to a speedy and public trial by an impartial jury. This guarantee of an impartial jury is put into practice by Section 913.03(10) of Florida Statutes, which provides for jurors being challenged for cause if possessed of a state of mind that will prevent the juror from acting with impartiality. The Rule 3.300(c) of the Florida Rules of Criminal Procedure provides the vehicle for the elimination of such impartial juror by stating that the court shall excuse such juror from the trial if the juror is not qualified to serve at the trial. (see Rule 3.330 requiring the trial court to determine the validity of a challenge of an individual juror for cause). The final line of defense against impartial jurors comes from the granting of peremptory challenges whereby the parties can challenge a juror with impunity, up to the number designated by Rule 3.350. These challenges (both for cause and peremptory) may be exercised at any time before

the juror is sworn to try the cause and after being sworn if a showing of good cause is made. Rule 3.310.

In the instant case, after questioning of the prospective panel, the defendant uncovered prospective juror Kalos, who had read about the case in the paper, and who had discussed the case with friends and had possibly formed an opinion regarding the case (Tr. Vol. 2, pg. 307) and prospective juror Houck, who took an interest in the case as reported in the news and in the paper since he lived near the scene of the incident, and had discussed the case with a policeman friend of his, possibly forming an opinion (Tr. Vol. 2, pg. 313). Appellant's challenge for cause of these two jurors was denied by the trial court, necessitating the squandering of two peremptory challenges by the Appellant. (Tr. Vol. 2, pg. 340). Further questioning revealed prospective juror Kauffman who had an expressed doubt as to whether or not he had an opinion of the guilt or innocence of the Appellant, and the sensational publicity had him upset (Tr. Vol. 2, pg. 354, 376), and prospective juror Evans who had read about the case in the paper (Tr. Vol. 2, pg. 388). Again, Appellant's challenges for cause were denied by the court, causing the use of peremptories. (Tr. Vol 2, pg. 392-393). This court has held in Lusk v. State, F.L.W., vol. 9, pg. 39 (Fla. 1984), that the test for determining juror competency is whether the juror can lay aside any bias and prejudice

and render his verdict solely upon the evidence presented in the instructions on the law given by the court. While the initial determination of the juror's competence for cause lies within the discretion of the trial court, see Singer v. State, 109 So. 2d 7 (Fla. 1959), this discretion is not unlimited, and must be exercised subject to the essential demands of fairness. Leon v. State, 396 So. 2d 203 (Fla. 3rd DCA 1981). The trial court's determination of a challenge for cause is not limited to the mere words of the prospective juror, as the challenge should be granted notwithstanding the statement that the juror could be fair if it appears from other statements made by him, or from other evidence that he is not possessed of a state of mind which would enable him to be fair. See Singer v. State, supra, pg. 24. In Leon v. State, supra, a conviction was reversed for failure to grant a challenge for cause of a juror despite the fact that upon further questioning, the juror ultimately stated that she could be fair, after expressing doubts, with the court ultimately holding that:

> Where there is any reasonable doubt as to a juror's possessing the requisite state of mind so as to render an impartial verdict, the juror should be excused, Singer v. State, supra, and the defendant given the benefit of the doubt. Blackwell v. State 132 So. 468 (1931); Walsingham v. State, 56 So. 195 (1911). Page 205.

In the instant case, this court is faced with the much more serious situation in that, not only did the four prospective jurors mentioned earlier express doubts regarding their impartiality, but, some them (Kalos, Houck, and Kauffman) expressed the possibility that they had a preconceived notion of opinion regarding the case, and also, most of these jurors had considerable exposure to pre-trial publicity and newspaper accounts of the facts of the case. There certainly was a reasonable doubt regarding the impartiality of these jurors, and they should have been excused for cause.

This failure to excuse the jurors for cause at the request of the Appellant was error, as the Appellant was forced to exhaust his peremptory challenges on persons who should have been excused for cause as that had the effect of abridging Appellant's right to exercise peremptory challenges. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965); Stroud v. United States, 251 U.S. 15, 40 S.Ct. 50 (1919); Leon v. State, supra, pg. 205.

After being forced to use his peremptory challenges, the Appellant found himself in the position of having just one peremptory challenge left, which Appellant chose to save. (Tr. Vol. 3, pg. 443). Appellant was then informed that there would be no more questioning and no more opportunities to challenge jurors, and that there would be no back-strikes allowed. (Tr. Vol. 3, pg. 445). Upon being

so informed, Appellant then used his final peremptory challenge. (Tr. Vol. 3, pg. 445). After further questioning, Appellant was faced with the court's order that there would be no back-strikes of the previously accepted jurors, and, consequently, accepted the jury. (Tr. Vol. 3, pg. 460). It has long been the law in the state of Florida that a defendant has the absolute right to challenge a juror peremptorily at any time before the juror is sworn, and that no circumstances can bring such a right within the discretion of the court. O'Connor v. State, 9 Fla. 215 (1860) pg. 228, 229. It is noted that there has been no modification of such right since O'Connor. Shelby v. State, supra, 301 So.2d 461 (Fla. 1st DCA 1974), even in the unusual circumstance where a jury is accepted by a defendant one day, and a peremptory is tendered on the day of trial before the jury is sworn. See Shelby, supra; Jacobs v. State, 325 So.2d 425 (Fla. 1st DCA 1975). The court in Bocanegra v. State, 303 So.2d 429 (Fla. 2nd DCA 1974) dealt with a variation of the process, where the jurors were individually sworn after being accepted. Although this process was not found to be error, the court noted that "the better practice is to postpone the swearing until a full panel is obtained, to allow the longest possible time for peremptory challenges." See also King v. State, 169 So. 747 (Fla. 1936).

The jury selection practice of the trial court, Judge Thomas Coker, has been scrutinized in Grant v. State,

429 So.2d 758 (Fla. 4th DCA 1983), where Judge Coker announced that there would be no back-strikes, but, unlike the case at bar, swore the individual jurors after they were initially accepted by the parties. This individual swearing was affirmed by the court, consistent with Bocanegra, supra, but the court noted that "we disapprove of the procedure utilized by the trial judge in this case, for it served no purpose at all except to prevent the parties from accepting the jury as a panel ... therefore, we hold that the trial judge erred when he prohibited back-striking and immediately administered the jurors" oath for the sole purpose of preventing strike-backs." In the instant case, Judge Coker did not follow the procedure of individual swearing, but once the Appellant was caused to exhaust his peremptory challenges, the court simply announced that there would be no strike-backs and the Appellant accepted his fate. The fact that there was no further argument or objection by Appellant is meaningless, as a lawyer is not required to pursue a completely useless course where the judge has announced, in advance, that it will be fruitless. Thomas v. State, F.L.W., Vol. 7, pg. 148, (Fla. 1982), page 148.

Although not every imperfection merits reversal, the severity of the death penalty mandates careful scrutiny in review of any colorable claim of error. Zant v. Stephens, ___U.S.___; 103 S.Ct. 2733 (1983). In the case at bar, the trial court effectively prevented Appellant from chosing a

fair and impartial jury, by failing to excuse jurors for cause, and by preventing the Appellant from back-striking jurors. As in the case of Peek v. State, 413 So. 2d 1225 (Fla. 3rd DCA 1982), reversal is required as the essential demands of fairness were not met in this case. Although trial judges dislike the practice of back-striking (particularly Judge Coker) and the appellate courts sympathize with them, the law is clear, and the case must be reversed. See Blanco v. State, 438 So.2nd 404 (Fla. 4th DCA 1983).

POINT IV

THE TRIAL COURT ERRED BY ALLOWING GRUESOME PHOTOGRAPHS AND IRRELEVANT EVIDENCE TO COME BEFORE THE JURY.

The trial court erred by allowing the prosecutor to admit into evidence a sickening photograph of the five charred bodies, and by allowing the prosecutor to elicit testimony, on two separate occasions, regarding the fact that one of the victims was pregnant and a fetus was killed. In both cases, the evidence was not only irrelevant, but, highly prejudicial to the Appellant, preventing him from receiving a fair trial.

The basic test for admissibility of evidence is relevancy, and this includes photographs. Straight v. State, 397 So.2d 903 (Fla. 1981) page 906. The admissibility of photographic evidence is within the trial court's discretion and that court's ruling will not be disturbed on appeal unless there is a showing of clear abuse. Wilson v. State, F.L.W. Vol. 8, pg. 265 (Fla. 1983) page 265. However, inflammatory photographs should be received in evidence with great caution, and this caveat holds true when determining the relevance as well as the prejudicial effect. Thomas v. State, 59 So2d 517 (Fla. 1952). Although photographs are offensive to our senses and might tend to inflame the jury, it is conceeded that this alone is insufficient by itself to constitute reversible error if the photographs have some significant relevance. Young v. State, 234 So.2d 341 (Fla. 1970) page 347. Section 90.401 of the Florida Statutes (Evidence Code) defines

relevance as evidence tending to prove or disprove a material fact. More importantly, Section 90.403 states that:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Regarding the photograph in question, State's Exhibit #62, this photograph reflects the Medical Examiner standing in the County Morgue with five charred bodies lined up on five slabs. (Tr. Vol. 6, pg. 1078). This photograph was exhibited to the jury.

It is highly probative to note the position of the prosecutor in broaching the subject of the photograph coming before the jury. The prosecutor started off by initially stating to the court that "I want the doctor to identify some of these autopsy photographs that I feel should not be shown to the jury, but I think the record ought to reflect their content." (Tr. Vol. 6, pg. 1068) When questioned by the court as to why the photographs were being offered, the prosecutor stated that they were "to just have the means by which the State has used for the identification procedure in this case by circumstantial evidence." (Tr. Vol. 6, pg. 1070) When asked if the photographs were to be presented to the jury, the prosecutor asked the court what he should do. (Tr. Vol. 6, pg. 1070) Upon objection by the Appellant's attorney that the photograph is sickening and irrelevant, the court argues that

the jury is entitled to see the conditions of the bodies. The Medical Examiner then testified that the photograph does not show the soot found in the tracheas of the victims in question (Tr. Vol. 6, pg. 1072). In response the prosecutor admits that "As you can see, these are highly, these are relatively inflammatory photographs." (Tr. Vol. 6, pg. 1072). The photograph was admitted and the Appellant's objection and Motion for Mistrial were denied. (Tr. Vol. 6, pg. 1074, 1075). The photograph in question, Exhibit #62, shows, upon inspection, that it is of absolutely no value regarding the proof of the identity of the victims in question. This is also augmented by the testimony of State's witness Mayhew that, when he got to the scene, the five bodies were burned beyond recognition. (Tr. Vol. 3, pg. 505) Similarly, the flame damage was so extreme that only one of the victims (of five) had fingerprints left on their hands. (Tr. Vol. 4, pg. 758). It should also be noted that the photograph in question was taken as the morgue, and not at the scene where the incident occured or the bodies were found, making the need for a particular relevance even stronger. See Beagles v. State, 273 So.2d 796 (Fla. 1st DCA 1973) page 798. The photograph in question had no useful purpose regarding the identity of the victims involved, and was simply admitted to inflame the jury against the Appellant.

In Dyken v. State, 89 So.2d 866 (Fla. 1956), a murder conviction was reversed due to the admission of a photograph depicting the victim on the slab. Although the State argued

that the photograph was relevant since it showed the shotgun wound to the victim's head, the court found that the photograph was not relevant since the location of the wound was freely conceeded and abundantly proven by other evidence. The photograph did not include any part of the locus of the crime, and was too far in time and space therefrom to have any independent probative value. Page 867. The photograph in the instant case is even less relevant as wounds are not visible in the photograph nor is any relevant aspect of the trial other than the post-mortem charring of the already dead bodies. The photograph in question certainly is so inflammatory as to create an undue prejudice in the minds of the jury, and detract from a fair and unimpassioned consideration of the evidence. Young v. State 234 So.2d 341 (Fla. 1970) page 348.

Even more blatantly prejudicial and irrelevant than the photograph mentioned previously was the State's eliciting of the evidence of the pregnancy of victim Edna Washington, and the inadvertent death of the fetus. Initially, the prosecutor brought up the pregnancy and fetus in his questioning of witness Bosse, a deputy who attended the autopsy. (Tr. Vol. 3, pg. 517). An objection was immediately made and, the court agreeing with such objection, gave a curative instruction (Tr. Vol. 3, pg. 520). Later, during the examination of the Medical Examiner, the prosecutor specifically asked the Medical Examiner whether Edna Washington was pregnant, leading to a positive answer and a discussion regarding the earlier

objection and handling of matter. (Tr. Vol. 6, pg. 1065). The prosecutor then elicited from the Medical Examiner that the pregnancy of Edna Washington did not contribute to her death, that the cause of death was a gunshot wound and this testimony was followed by a second curative instruction by the trial court. (Tr. Vol. 6, pg. 1066, 1067).

The most important aspect of the testimony regarding Edna Washington's pregnancy was the fact that at no time during the trial was it proven or even implied that Edna Washington was pregnant before being killed. Consequently, the fact that the charred body of one of the victims was pregnant in no way corroborated the known pregnancy of Edna Washington, nor did it corroborate or tend to prove the identity of the pregnant charred body. There was absolutely no relevancy involved in bringing the pregnancy before the jury on two separate occasions, and mentioning the dead fetus on those occasions, other than inflaming the jury. Edna's mother, Cynthia Manuel, testified at the trial as did Edna's friends, Minnie Adams, Shirley Jackson, and Karen Jackson, yet none of these State witnesses testified or even hinted that Edna Washington was pregnant at the time of her death. Therefore, the fact of such pregnancy was absolutely irrelevant to prove identity, and had no probative value before the jury. Unique to the instant case is the fact that the reviewing court does not have to speculate regarding the prejudicial effect on the jury of the evidence regarding pregnancy of Edna Washington, as there is a very strong and clear indicator of such

prejudice: the effect of such testimony on the seasoned trial court. In his written sentencing order, the trial court included the fact that "at the time of death, the adult female was in advanced stage of pregnancy with the fetus also perishing as the result of this cruel and heinous offense." (Tr. Vol. 10, pg. 1752, 1753). The fact that this grisly and irrelevant testimony so affected the trial court, experienced in such matters and callous to improper prejudice, it is beyond question that the lay persons of the jury were equally prejudiced by such testimony.

Wherefore, based upon the cumulative impact of the sickening photograph presented to the jury and the irrelevant evidence regarding the pregnancy, Appellant's right to a fair trial was destroyed and a new trial must be granted.

POINT V

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION, AND, A NEW TRIAL IS REQUIRED IN THE INTEREST OF JUSTICE.

In the instant case, Karen Jackson was the only witness to implicate the Appellant in the kidnapping and eventual deaths of the five victims. Despite the fact that Karen Jackson testified directly that the Appellant, along with co-defendant Aubrey Livingston came to the Washington house, and abducted the victims, her testimony also reflected that the co-defendant, who was a drug addict (Tr. Vol. 5, pg. 867), had a gun, and, in fact, had the gun at all times with Appellant never having a gun in his possession. (Tr. Vol. 5, pg.869,870). It was further testified that Karen Jackson never saw Appellant shoot anyone and never saw anyone start the fire in question. (Tr. Vol. 5, pg. 871,872). Also, it was the testimony of Criminologist Dennis Grey that the slugs taken from the bodies were .38 caliber slugs which could have been fired by the same gun, but which could not have been fired by the Appellant's .44 caliber pistol. (Tr. Vol. 5, pg. 935, 941). Karen Jackson also attributed various statements to Appellant, regarding the kidnapping of the victims. As the victims were being driven in Appellant's vehicle, the Appellant allegedly stated that they were going to hold the victims hostage as they had held Karen Jackson hostage. (Tr. Vol. 5, pg. 832, 833). Appellant also allegedly told the victims that they were to get out of his vehicle because they were going to be left in the car on the side of the road. (Tr. Vol. 5, pg. 839).

The co-defendant was supposed to have told the Appellant to "hurry up" (Tr. Vol. 5, pg. 839) right before the Appellant and co-defendant left the scene of the fire.

While it is this court's concern in review to determine whether there is substantial competent evidence to support the verdict and judgement, Tibbs v. State, 397 So.2d 1120 (Fla. 1981), it must be remembered that there is a special standard of review of the sufficiency of the evidence when the conviction is based entirely upon circumstantial evidence, as is the case at bar:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Jaramillo v. State, 417 So.2d 257 (Fla. 1982) page 257.

The jury was also instructed on the law regarding circumstantial evidence at Appellant's request. (Tr. Vol. 10, pg. 1776). It is clear that the testimony of Karen Jackson was insufficient, standing alone, to exclude every reasonable explanation of innocence, including that of the killings being done by co-defendant with Appellant merely being present in a coercive situation. Further weakening the State's case is the fact that Appellant testified in his own behalf and presented a reasonable explanation of innocence, including a general denial of knowledge or guilt of the crime. (Tr. Vol. 7, pg. 1260-1267, pg. 1302). When applying the standards of review to circumstantial evidence, it has long been recognized that the version of events as related by the Appellant must be believed unless the circumstances show

that version to be false. Mayo v. State, 71 So.2d 899 (Fla. 1954). In the instant case, the evidence was simply insufficient to support a conviction.

In a similar yet distinct shortcoming, the evidence produced at trial was of such nature that a new trial is required in the interest of justice. While this court is concerned with the existence of substantial competent evidence to support a verdict and judgement, such verdict and judgement must also be in accord with fundamental concepts of justice. Although the court has recently eliminated the weight of the evidence as grounds for Appellate review and reversal, the vitality of a reversal in the interest of justice was reiterated:

> By eliminating evidentiary weight as a ground for Appellate reversal, we do not mean to imply that an Appellate court cannot reverse a judgement or conviction "in the interest of justice". The latter has long been, and still remains, a viable and independent ground for Appellate reversal. Rule 9.140(f), Florida Rules of Appellate Procedure (1977) provides the relevant standards:
>
> > In the interest of justice, the court may grant any relief to which any party is entitled.
>
> This rule, or one of its predecessors, has often been used by Appellate courts to correct fundamental injustices, unrelated to evidentiary shortcomings which occurred at the trial. Tibbs v. State, 397 So.2d 1120 (Fla. 1981) page 1126.

The testimony of Karen Jackson was not of such a nature to be convincing, and, in fact, bears the earmarks of falsehood and uncertainty, requiring reversal. Council v. State, 149 So. 13 (1933). Page 14.

Karen Jackson testified that she had witnessed the murder of five people by her husband, yet testified that the same night she had sex with the murderer, went out to breakfast the next morning followed by a day at the beach and the Miami Seaquarium, a barbecue at her friend's house and general socializing. (Tr. Vol. 5, pg. 888-893). She further testified that she spent the next day at a friend's house while the Appellant was at work, having Appellant's vehicle and, in fact, driving around town in it. Further, she went to the movies with the Appellant and continued to enjoy herself in the presence of the Appellant, without ever calling the police. (Tr. Vol. 5, pg. 895-896, pg. 901). When this testimony of Karen Jackson is taken in conjunction with Appellant's reasonable explanation of the situation, and, is further seen in light of the possible hypnosis of Karen Jackson before her statement and the various factual and evidentiary errors made by the trial court, it is clear that the verdict in the case was not in accord with the manifest justice of the case. Council, supra, page 13, 14. See Williams v. State, 130 So. 457 (Fla. 1930) (first degree murder conviction reversed with the court noting that the character and integrity of the witness go into a formula for determining the interest of justice); Troop v. State, 123 So. 811 (Fla. 1929) (first degree murder

conviction reversed despite the fact that two previous juries had found Troop guilty); Ming v. State, 103 So. 618 (Fla. 1925) (murder conviction reversed despite the existence of two eye-witnesses to the stabbing). See also Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978); McClain v. State, 353 So.2d 1215 (Fla. 3rd DCA 1977); Ferber v. State, 353 So.2d 1256 (Fla. 2nd DCA 1978); wherein convictions were reversed in the interest of justice.

As a human life is involved, it is only just and right that another jury should pass upon the issues in this matter. Platt v. State, 61 So. 502 (Fla. 1913).

POINT VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN VARIOUS EVIDENTIARY RULINGS.

Throughout the course of the trial, the trial court was called upon to make various rulings of fact and law effecting the presentation of testimony and evidence to the jury. In making many of these rulings, the trial court made errors of fact and law which, taken cumulatively, prevented the Appellant from receiving a fair trial and requiring reversal.

During the presentation of the State's entirely circumstantial case against Appellant, the only witness in any way implying Appellant had any connection to the crime was his wife, Karen Jackson. Appellant was entirely cooperative with the investigation of the case, and was not even a suspect in the case until the statement of Karen Jackson was taken by Detective Schlein. (Tr. Vol. 2, pg. 215, 216, pg. 218, 219). The statement of Karen Jackson, taken by Detective Schlein, was the basis for the arrest warrant, and for both search warrants used in the case against Appellant. (Tr. Vol. 1, pg. 178, Vol. 2, pg. 219, 220). During the cross-examination of Detective Schlein at the trial, it was brought out by Appellant's attorney that aside from being a detective, Schlein was also an attorney and an hypnotist. (Tr. Vol. 6, pg. 1017) The cross-examination then focused upon Schlein's knowledge of hypnotism and the possibility of suggesting the version of events to a subject under hypnotism. As Appellant's attorney tried to reach further into the investigation of the case, particularly the possibility of hypnotic suggestion

to Karen Jackson, in the taking of her statement, the trial court interrupted, and precluded Appellant's attorney from questioning any further on the matter based upon the statement by Schlein that he did not use hypnosis in the case. (Tr. Vol. 6, pg. 1022). Later, in the defense side of the case, Appellant attempted to present the testimony of Martin Seigel, a consultant in hypnosis. (Tr. Vol. 6, pg. 1177). In the proffer of Seigel's testimony, he testified that an hypnotist would assume a soft, gentle voice in interviewing a person, (such as Karen Jackson) and that a subject of hypnotism would be able to accept a recreation of events through suggestion or fantasy. (Tr. Vol. 6, pg. 1079), In dealing with the facts of the instant case, Seigel testified that hard feelings held by Karen Jackson against Appellant would be a factor in a hypnotic pseudo-fantasy, and that it would be impossible to tell whether or not the person, later testifying in an awake state, had been earlier hypnotized, with the possibility of disguised techniques being used to hypnotize the subject earlier. (Tr. Vol. 6, pg. 1179, 1180). Seigel then went on to state that hypnotism does not change the human nature of self preservation, and that a person can lie under hypnosis, and, more importantly, that since an hypnotist can lead a subject, a police officer should not be involved in the investigation as an hypnotist. (Tr. Vol. 6, pg. 1181). Based upon the fact that the lead investigator, Schlein, made the self-serving statement that no hypnotism was used in the case, the court found the testimony of Mr. Seigel to be irrelevant, and refused to allow the

testimony to come before the jury. (Tr. Vol. 6, pg. 1184, 1185). The trial court erred in his ruling, not only by making rulings which went to the evidentiary weight of the testimony of Schlein, but, more importantly, prevented Appellant from placing evidence before the jury which supported a theory of the defense in the case: that Karen Jackson was lying and/or manipulated in her testimony against Appellant.

Hypnotism, and testimony and evidence regarding hypnotically induced testimony has been accepted as admissible in trial courts in Florida. See Key v. State, F.L.W. Vol. 8, pg. 488 (Fla. 1st DCA 1983); Brown v. State, F.L.W. Vol 8, pg. 475 (Fla. 1st DCA 1983); Crum v. State, F.L.W. Vol 8, pg. 1862 (Fla. 5th DCA 1983). Consequently there was absolutely no reason for the trial court to exclude the proffered testimony by Appellant, and such exclusion prejudiced the Appellant in his presentation of his theory of the defense before the jury. The Appellant in the instant case was certainly entitled to present evidence upon the facts that were relevant to his theory of the case, as this theory was, in fact, supported in the law. Zamora v. State, 361 So.2d 776 (Fla. 3rd DCA 1978). Appellant's theory of the case at that stage of the trial, made known to the court, was that Karen Jackson was hypnotically manipulated to implicate Appellant in the murders, and that either Karen Jackson or someone else was actually responsible for said murders. It has long been the law in the State of Florida that one accused of a crime may show his innocence by proof of the guilt of another. Lindsay v. State, 68 So. 932

(Fla. 1915). Where evidence tends in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. Chandler v. State, 366 So2d 64 (Fla. 3rd DCA 1978). See also Watts v. State, 354 So2d 145 (Fla. 2nd DCA 1978). Page 70.

Although the evidence in question was not direct evidence of the participation of another party, it was certainly compelling evidence questioning the motives and credibility of the State's only guilt witness, Karen Jackson. Therefore, the exclusion of such expert testimony and cross-examination relating to the possible hypnotism of Karen Jackson precluded Appellant's theory of defense and, requires reversal.

In a similar fashion, the trial court repeatedly erred by limiting cross-examination by Appellant's attorney, not only effecting the presentation and development of a defense at the trial, but also limiting the impeachment of witnesses. While it is true that the wide latitude of cross-examination is defined by the court's sound discretion, subject to review only for a clear abuse of such discretion, Sireci v. State, 399 So2d 964 (Fla. 1981), it is essential that the trial court does not hinder the Appellant's attempt to impeach the credibility of the testimony of a witness at trial. Duncan v. State, F.L.W. Vol. 9, pg. 843 (Fla. 1st DCA 1984).

As part of Appellant's attempt to present the trial jury with the possible explanation of the death of Larry Finney and the other victims as being a drug-related/Cuban military crime, Appellant attempted to cross-examine

Barbara Finney (Larry's mother) regarding Larry's criminal past and regarding whether or not Larry had just been released from prison before the killing. (Tr. Vol. 4, pg. 616). Not only were the objections to these questions overruled, but the court, sua sponte, struck the questions from the record. Later, in the same vein, Appellant's attempt to elicit information regarding the procuring of drugs, by Finney, from the hospital where he worked, was blocked by the trial court sustaining an objection. (Tr. Vol. 5, pg. 862).

Also, the State's sole witness, Karen Jackson, portrayed the killings as the result of Appellant's jealousy directed toward Larry Finney and the Washington family. However, when the character and credibility of Karen Jackson was questioned by questions regarding Karen Jackson's sexual relationship with Finney and with a security guard named Roy, the court sustained objections. (Tr, Vol. 5, pg. 863, 864) The sexual activity with Roy was again prevented during cross-examination of Karen Jackson (Tr. Vol. 5, pg. 914, 915). The motivation of Appellant's jealousy, and the believability of Karen Jackson's story in general would have been greatly weakened by the simple fact that a sexual relationship between Karen Jackson and the security guard did not end in a jealousy-induced killing on the part of Appellant. Consequently, the trial court erred in restricting Appellant's cross-examination of Karen Jackson.

The trial court also erred by allowing photographs of Appellant to come before the jury, such photographs being ordered by arresting officers, after Appellant's arrest, without the benefit of a motion or a court order. (Tr. Vol. 1, pg. 175, pg. 229).

The trial court erred by failing to strike the jury panel as not having a representative number of black members (considering that Appellant is black) and for failing to strike the jury panel and/or find the method of selection of such panel to be unconstitutional by virtue of the fact that prospective jurors are paid less than the minimum wage, effectively excluding working-class people, particularly blacks, who would make up a jury of peers for Appellant. (Tr. Vol. 1, pg. 3, Vol. 3, page 459, 460).

The trial court erred in allowing critical stages of the proceedings to occur while Appellant was absent, with their being no waiver of his presence, no reason for him to be involuntarily absent, and there being no ratification of the actions and proceedings which occured in his absence. (Tr. Vol. 1, pg. 24). At one hearing, it was noted that the Appellant was present, (Tr. Vol. 1, pg. 96) which, logically, implies that Appellant was not present for many other critical stages. See Rule 3.180(a), Florida Rules of Criminal Procedure, and Francis v. State, 413 So.2d 1175 (Fla. 1982).

The trial court erred by limiting Appellant's access to his trial attorney, in violation of Appellant's VI Amendment right to effective assistance of counsel, during a critical

stage of the proceedings, the cross-examination of Appellant, by specifically ordering that there would be no contact between the Appellant and his attorney during a break in the cross-examination. (Tr. Vol. 7, pg. 1279, 1280).

The trial court erred by failing to transfer the case, for trial, to another venue due to the pre-trial publicity surrounding the case, and the effect that such publicity had upon the potential jury panel, and their ability to be fair and impartial. On July 2, 1981, Appellant's motion for a change of venue and/or to dismiss based upon pre-trial publicity was denied (Tr. Vol. 1, pg. 46). In support of such motion, copies of various newspaper articles were presented and made part of the record on appeal. (Tr. Vol.9, pg. 1573-1578). During the voir dire of the venire, many of the jurors admitted to being exposed to trial publicity in the form of television broadcasts and newspaper articles, with a great many of such jurors forming a preconceived notion of the case based upon such publicity. (See previous Point regarding jury). Consequently, Appellant could not receive a fair trial in Broward County due to such publicity, and the trial court erred in failing to transfer the case to a neutral county.

Notwithstanding the earlier discussion regarding the mentally incapacitated attorney and his waiver of various issues, the trial court erred by denying Appellant's Motion to Suppress the fruits of the search of his home and of his vehicle, as such searches were unreasonable and illegal, in

contravention of Appellant's Fourth Amendment rights to be free from unreasonable search and seizure, as the search warrants in question were illegally premised upon an unlawful pretext search, and the affidavits supporting such warrants contained false statements which were material to the finding of probable cause. Similarly,the trial court erred in denying Appellant's Motion to Suppress a tape recorded statement given to Detective Schlein, as Appellant was never warned of his rights per Miranda, and, therefore, such statement was not shown to be freely and voluntarily given. Further, the statement was tainted by the illegal pretext entry of the law enforcement officers into Appellant's home.

Finally, the trial court erred in failing to instruct the jury, as requested by Appellant (Tr. Vol. 7, pg. 1317, 1318). Despite the fact that it is incumbent upon the court to charge jury on every defense which is recognized by the law and sustained by a version of testimony which the jury has a right to accept, Palmes v. State, 397 So.2d 648 (Fla. 1981), the trial court denied Appellant's request for a specific instruction on circumstantial evidence, on felony murder and Appellant's explanation of the events, and on hypnosis and its use in the trial. Consequently, the jury was never adequately instructed on critical aspects of Appellant's theory of the case and defenses.

Based upon the cumulative prejudicial effect of the aforementioned errors, and the fact that this accumulation of

prejudice cannot be found harmless beyond a reasonable doubt, See Chapman v. California, 386 U.S. 18 (1967), a new trial is required.

POINT VII

THE TRIAL COURT ERRED BY ADJUDICATING APPELLANT ON THE UNDERLYING FELONIES OF KIDNAPPING, AND BY IMPOSING SEPARATE SENTENCES FOR THE UNDERLYING FELONIES.

On October 15, 1981, a hearing was held on Appellant's Motion to Compel the State to Elect Between the Theory of Premeditated Murder and Felony Murder, and that Motion was denied by the trial court. (Tr. Vol. 1, pg. 124). After the State rested, the Appellant renewed such Motion to Elect, which was again denied. (Tr. Vol. 6, pg. 1100). The trial court erred in failing to compel such election, as the Appellant was unable to properly prepare and present a defense to the charges as it was unknown, as late as the State resting its case, which theory of prosecution the State traveled upon, and which theory the jury would be instructed upon. As the State was allowed to present both theories as well as have the jury instructed on both theories, Appellant was effectively hindered in his defense.

Notwithstanding the error in the court's failure to compel the State to elect, such error was compounded by the court's adjudicating Appellant guilty of the underlying felonies and by imposing separate sentences for such underlying felonies. As there was only one witness to prove Appellant's guilt, that being Karen Jackson, and Karen Jackson's testimony clearly stating that she never saw the Appellant shoot anyone, never saw the Appellant start a fire, and that the co-defendant had

a gun at all times with the Appellant never having a gun, (Tr. Vol. 5, pg. 869-872), it is clear that the State relied upon circumstantial evidence to prove Appellant's actual involvement in the killings, and, more importantly, that the State relied upon the theory of felony murder (killing done in the course of kidnapping) to prove the first degree murder charges. Since the jury was instructed that kidnap would be an underlying basis for the first degree murder charge, and in fact, was the only basis as the State specifically abandoned the possibility of arson being an underlying basis (Tr. Vol. 7, pg. 1319), the kidnapping was clearly a lesser included offense of which the Appellant could not be convicted nor sentenced. Bell v. State, 437 So.2d 1057 (Fla. 1983). See also Snowden v. State, F.L.W. Vol. 9, pg. 733 (Fla. 5th DCA 1984) where, in a situation identical to the case at bar, the underlying felony in a felony murder conviction was reversed, as was the sentence.

Notwithstanding the propriety of the conviction to the underlying felonies, there was insufficient proof of premeditation in the State's circumstantial case against Appellant, and, with the only viable theory of conviction being felony murder, at the very least, the sentences for such underlying felonies cannot stand. Bell, supra, Hawkins v. State, 436 So.2d 44 (Fla. 1983).

POINT VIII

THE TRIAL COURT ERRED BY FAILING TO CONTINUE THE SENTENCING TO ALLOW A PSYCHIATRIC EVALUATION TO BE INCLUDED IN THE PRE-SENTENCE INVESTIGATION.

On October 28, 1981, the jury returned an advisory opinion recommending the death sentence by a 7 to 5 decision (Tr. Vol. 8, pg. 1515), at which time the defense attorney immediately requested a psychiatric evaluation of the Appellant, along with the pre-sentence investigation. The State had no objection to such request, and the court deferred ruling pending a motion and an order being submitted. (Tr. Vol. 8, pg. 1519). Apparently, such motion and order was never submitted to the court (probably another example of the trial attorney being at less than full mental capacity), and a psychiatric examination was never included in the pre-sentence investigation. On December 2, 1981, the matter came up for sentencing and the Appellant's trial attorney requested that the sentencing be deferred so that the co-defendant could be sentenced first, so that the pre-sentence examination could be examined, and so that a mental evaluation could be a part of the sentencing procedure. (Tr. Vol. 8, pg. 1545). It should be noted at this point that no psychiatric examination was considered at the time of the sentencing, nor was there one included in the pre-sentence investigation, there being a section on mental status at page 18 of the pre-sentence examination which was very perfunctory. Despite the earlier

request for a psychiatric examination and the request at the time of the sentencing for such examination to be a part of the sentencing procedure, the trial court denied the continuance of the sentencing. (Tr. Vol. 8, pg. 1546). Appellant was then sentenced to death without the benefit of a psychiatric examination. (Tr. Vol. 8, pg. 1553).

In Perri v. State, F.L.W.Vol. 8, pg. 398 (Fla. 1983), this court found that although a defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state. Therefore, since the trial court in Perri refused to order a psychiatric examination, the sentence of death was reversed by this court and remanded for a new sentencing hearing. The failure of the trial court in the instant matter to reset the sentencing to enable the psychiatric examination to be part of the proceeding takes on added importance in that the trial court actually considered and found the mitigating circumstance that the Appellant acted under extreme mental or emotional disturbance (Tr. Vol. 8, pg. 1552), and the State, in its argument to the jury, argued that such mitigation was present in the case. (Tr. Vol. 8, pg. 1472).

Under Rule 3.720(b) of the Florida Rules of Criminal Procedure, it is mandatory for the trial court to entertain submissions and evidence relevant to sentence with remand and resentencing being the result of their refusal.

See Miller v. State, F.L.W., Vol. 8, pg. 1513 (Fla. 3rd DCA 1983). This situation is much more crucial when it is considered that the ultimate sentence has been imposed. Therefore, the trial court erred in failing to reset the sentencing to allow a psychiatric evaluation to be secured and presented by Appellant.

POINT IX

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

The review of a death sentence by this court has two facets: to determine that the jury and judge acted within procedural rectitude, and to insure relative proportionality among death sentences which have been approved statewide. Adams v. State, 412 So.2d 815 (Fla. 1982). In the instant matter, not only are the procedural errors fatal to the sentencing, but, the sentence is not proportionate to statewide approved sentences. Not only did the trial court fail to continue the sentencing to enable Appellant to be examined by a psychiatrist and to have Appellant's attorney familiar with the facts pertinent to sentencing, but, the trial court improperly considered aggravating circumstances, ignored mitigating circumstances, and based its sentencing upon improper grounds.

In imposing the death sentence, the trial court found five aggravating circumstances to exist: murder during the course of the kidnapping, the murder being heinous, atrocious and cruel, the murder being committed in a cold and calculated manner, the murder creating a risk to many persons, and the murder being done to avoid arrest. (Tr. Vol. 10, pg. 1752-1755, Vol. 8, pg. 1549-1551). Of these aggravating circumstances, only the aggravating circumstance of the murder during the course of the kidnapping is arguably proper.

The entire sentencing procedure was flawed from its inception (notwithstanding the failure to continue, etc.), as the Appellant was misled in his preparation for sentencing, the jury was confused, and the trial court lax in its consideration due to the statements by the prosecutor in the case that the aggravating circumstance of avoiding arrest did not apply, in both his arguments to the jury (Tr. Vol. 8, pg. 1470), and in a pleading filed with the court and presented to Appellant (Tr. Vol. 9, pg. 1633). In this respect, Appellant was misled as the State all but conceeded that the proof was not beyond a reasonable doubt, that such aggravating circumstance existed. However, in the court's oral pronounciation and in his written order, the court found the existence of the aggravating circumstance of avoiding arrest, and, in fact, used this to help support the death penalty. In Riley v. State, 366 So.2d 19 (Fla. 1978), this court disapproved of a finding of the aggravating circumstance of avoiding arrest holding that:

> The mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. Page 22.

Later, this court, in Mendez v. State, 368 So.2d 1270 (Fla. 1979) found that an intent "to avoid arrest is not present at least when the victim is not a law enforcement officer unless it is clearly shown that the dominant or only motive for the murder was the elimination of a witness." Page 1282. The logic of the situation would demand that, if the intent to eliminate witnesses

to the kidnapping was the main motive for the murder, then Karen Jackson, the sole eyewitness, should have been killed. Whether or not this fact was considered by the trial court is impossible to determine, as the trial court failed to comply with Section 921.141 Florida Statutes, as no facts or reasons supporting that aggravating circumstance were set forth in either the oral pronouncement or the written sentencing order. (Tr. Vol. 10, pg. 1752). As the State conceeded that this aggravating circumstance was not proved beyond a reasonable doubt, as logic argues against it, and as this court has no way of knowing what factors were considered by the trial court, it becomes clear that the aggravating circumstance of avoiding arrest was improperly considered.

The trial court also found the aggravating circumstance of a risk to many persons (Tr. Vol. 10, pg. 1752). Although there were numerous victims killed, the instant situation is not one which was anticipated by the legislature, as such aggravating circumstance seems intended to deal with acts which endanger the general public. See Mason v. State, F.L.W. Vol. 8, pg. 331 (Fla. 1983) where the aggravating circumstance of risk to many people was disapproved despite the fact that there were numerous children in the house at the time of the killing; Bolender v. State, 422 So.2d 833 (Fla. 1982), where three defendants and four victims were present during the killing of the four victims, yet this aggravating circumstance was found not to apply; Fitzpatrick v. State, F.L.W. Vol. 8, pg. 273 (Fla. 1983), risk to many people found appropriate where there was a shootout with police in a bank which was open for business at the time. Therefore, the

aggravating circumstance of causing a risk to many people was not shown beyond a reasonable doubt, and was improperly considered by the trial court.

The trial court also erred in finding that the murder was heinous, atrocious and cruel beyond a reasonable doubt, as the evidence showed that despite the fact of post-mortem mutilation by burning, that all the victims died nearly instantaneously, the three adults by single gunshot wounds (Tr. Vol. 6, pg. 1081), and the two children dying very quickly from smoke and soot inhalation (Tr. Vol. 8, pg. 1462). Despite the fact that the burns were post-mortem charring (Tr. Vol. 6, p. 1080), the court seemed to be swayed by this burning, in finding the existence of the aggravating circumstance of heinous. Once the victim dies, the murder is completed, and the method of disposal of the bodies is not sufficient for the aggravating circumstance of cruel and heinous murder. Blair v. State, 406 So.2d 1103, see also Halliwell v. State, 323 So.2d 525 (Fla. 1975) where even the beating death of a friend with a 19-inch breaker-bar and hiding various parts in different areas substantiated the finding of heinous murder. It is well established in the State of Florida that a quick death through gunshot wounds is generally not sufficient for a finding of heinous, Oats v. State, supra,; Maxwell v. State, F.L.W. Vol. 8, pg. 506 (Fla. 1983); Randolph v. State, F.L.W. Vol. 8, pg. 444 (Fla. 1983); Sims v. State, F.L.W., Vol. 8, pg. 429 (Fla. 1983). There is no reason to believe that a quick death by other means, such as soot inhalation, would not be considered in the same manner.

More importantly, it must be noted that the trial court

considered and included the fact that Edna Washington was pregnant and the fetus also perished in his finding of heinous murder. (Tr. Vol. 10, pg. 1752, 1753). This factor was improperly brought before the jury, and had the added effect of swaying the trial court. Surely, the instant case is not an example of the killing which is accompanied by such additional acts as set the crime apart from the norm of capital felonies - the consciousless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So. 2d 1 (Fla. 1973). Page 9.

Finally, the trial court improperly found that the murder was committed in cold calculated manner. The prosecutor argued, and the trial court considered, the improper factor of a lack of remorse on the part of Appellant. (Tr. Vol. 8, pg. 1472, 1549, Vol. 10, p. 1753). This court has recently held in Pope v. State, 441 So.2d 1073 (Fla. 1983), that a lack of remorse is no longer a proper factor to consider. Therefore, not only did the trial court consider this matter, but, since it was argued by the prosecutor, it is logical that the jury also considered this improper factor.

In Preston v. State, F.L.W. Vol. 9, pg. 26 (Fla. 1984) this court held that the aggravating circumstance of cold and calculated has been found "when the facts show a particularly lengthy, methodic or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator". Page 28. The facts in the record on appeal seem to be to the contrary, as Appellant's statements reflected that he simply wished to hold the victims hostage and place them in the car

on the side of the road (per Karen Jackson). The facts, in the best light of the State, seem to indicate a spontaneous shooting by the co-defendant contrary to Appellant's stated intent to imprison. The record does not support a finding of a carefully planned execution-style murder. See Cannady v. State, FL.W. Vol. 8, pg. 90 (Fla. 1983); Vaught v. State, 410 So.2d 147 (Fla. 1982); Magill v. State, 386 S.2d 188 (Fla. 1979).

The problem of the court's considering of improper aggravating circumstance is further compounded by the court's failure to consider mitigating circumstances. Again, Appellant and the jury were misled by the prosecutor's statement that two statutory mitigating circumstances existed: that Appellant was under extreme mental or emotional disturbance at the time, and that the Appellant had no significant history of criminal activity. (Tr. Vol. 8, pg. 1473). Again, even after such concession, the court failed to consider the Appellant's lack of significant criminal history. (Tr. Vol. 10, pg. 1753). This failure was wrong, as there was no proof presented by the State to show that Appellant had prior convictions, and Appellant's testimony that he was never convicted of any crimes remained unrebutted. (Tr. Vol. 8, pg. 1466). Also, the fact that the court found Appellant to be under extreme mental and emotional disturbance yet failed to find the mitigating circumstance of diminished capacity to appreciate the criminality of the act points out not only an inconsistency in the court's

reasoning, but emphasizes the serious harm in failing to continue the sentencing until a psychiatric examination could be secured. The court's finding of mental and emotional disturbance is certainly reasonable cause to suspect further, more serious psychiatric problems, and a professional examination was mandated. Perri, supra. Emotional problems must be considered in the sentencing equation regardless of whether such problems fall short of a defense of insanity or diminished capacity. Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982). See also Ferguson v. State, F.L.W. Vol. 7, pg. 329 (Fla. 1982); Jones v. State, 332 So.2d 615 (Fla. 1976); Burch v. State, 343 So.2d 831 (Fla. 1977).

The trial court also erred in imposing the death penalty upon the Appellant, as there was no direct evidence to prove that Appellant was the person responsible for the shooting or of the setting of the fire. As was mentioned previously, not only did Karen Jackson testify that the co-defendant had a gun the entire time, that Appellant was never seen with a gun, and that she did not see who did the shooting or started the fire, even the prosecutor admitted that the State could not prove who, in fact, did the shooting. (Tr. Vol. 1, pg. 125). This court is then faced with a situation where Appellant was arguably present at the killing, but the evidence seems to point to the co-defendant as the person who not only did the killing, but the person who intended the killings to occur (Appellant stating he wanted the victims to be hostages as Karen Jackson was held hostage).

In Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368 (1982), the Supreme Court reversed a death penalty for a person who aided in a robbery but who did not do the actual killing, finding that a death sentence in such an instance would be a violation of the VIII Amendment and would be an excessive penalty. It is Appellant's position that Enmund controls the instant situation as the evidence does not establish Appellant as being any more than a principal, with co-defendant Livingston being the person responsible for the killings.

Finally, when this court compares the instant matter to cases where the death sentence has been approved statewide, it becomes evident that the death sentence would not be appropriate in the instant matter. The following cases have been reversed by this court: Drake v. State, 441 S.2d 1079 (Fla. 1983) although the victim was found with her hands tied and eight stab wounds; Herzog v. State, 439 So.2d 1372 (Fla. 1983), although the victim was forced to take pills, beaten, suffocated and eventually strangled with a phone wire, with her body being burned afterwards; McKennon v. State, 403 So.2d 389 (Fla. 1981), although the boss was killed by having her head beaten against the wall and floor, strangling her, slitting her throat, also breaking ten ribs and eventually stabbing her to death; Neary v. State, 384 So.2d 881 (Fla. 1980); Richardson v. State, F.L.W. Vol. 8, pg. 327 (Fla. 1983).

For further comparison, to show the death sentence to be inappropriate in the instant case, the following cases have been affirmed by this court:

Bassett v. State, F.L.W. Vol. 9, pg. 90 (Fla. 1984), where two 18-year old boys were kidnapped, robbed, taken to a swamp where unsuccessful attempts to beat them to death resulted in broken ribs and jaws. The victims were then stuffed into a trunk where an exhaust pipe from the car was put into the trunk, causing the victims to struggle. The struggle was ended when the victims were stabbed at with a knife numerous times until the fumes from the car caused a lingering death; Preston v. State, F.L.W. Vol.9, pg. 26 (Fla. 1984), where a robbery and kidnap victim was stabbed many times, had her throat slashed and an X cut in her forehead; Bottoson v. State, F.L.W. Vol.8, pg. 505, where a postmistress was kidnapped and after three days of imprisonment was stabbed fourteen times and run over by a car; Waterhouse v. State, F.L.W. Vol.8, pg. 81 (Fla. 1983), where the victim was raped, strangled and drowned, the victim being found with a tampon in her mouth, a coke bottle in her rectum and having suffered lacerations, bruises, defensive wounds, and having been hit with a tire iron; Bolender v. State, supra,; Francois v. State, 407 So.2d 85 (Fla. 1982); Smith v. State, 407 So.2d 894 (Fla.982).

Therefore, due to the errors in the sentencing procedure, the improper consideration of aggravating circumstances not proven beyond a reasonable doubt, the failure to consider mitigating circumstances, the failure to give proper weight to Appellant's past history and emotional problems, and based upon statewide comparison, the trial court erred in imposing the death sentence.

CONCLUSION

Based upon the errors of fact and law made by the trial court, as well as the trial court's comments and attitude exhibited toward Appellant's trial attorney, the Appellant was prevented from receiving a fair trial, and a new trial is mandated. Also, the death sentence in the instant matter is inappropriate and was improperly imposed after serious procedural errors and without regard to a statewide comparison.

Michael D. Gelety, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 26th day of April, 1984, to Attorney General's Office, 111 Georgia Avenue, West Palm Beach, Florida, 33401.

Michael D. Gelety, Esq.