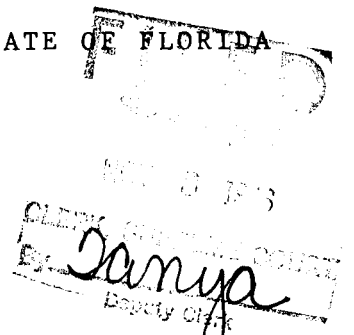
IN THE SUPREME COURT OF THE STATE OF FLORIDA



JERRY WILLIAM CORRELL,

Appellant,

vs.

CASE NO. 68,393

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

During the evening hours of June 30, 1985, Delores Taylor, who lived next door to 3004 Tampico Drive, Orlando, Florida, heard screams and sounds that sounded like thumps coming from the residence at 3004 Tampico Drive. (TR-607). Ms. Taylor heard these sounds at approximately 12:00 midnight. (TR-610).

On the morning of July 1, 1985, Mr. Michael Slavik and Mr. Paul Sloan traveled to the residence located at 3004 Tampico Drive. When they arrived at the residence they found the house to be closed up and locked. (TR-489). After receiving no answer at the front door, Mr. Sloan borrowed a kitchen knife from a neighbor and jimmied the front door open. (TR-490). When entering the residence, they noticed a very large pool of blood on the floor. (TR-491). As they searched the house, they found several bodies. (TR-493). Slavik and Sloan also noticed that the air conditioning was on and that it was chilly inside the house. (TR-496). The Orange County Sheriff's Department was then contacted concerning their discovery. Deputy Thomas J. McCann, who was the on-call investigator, received a communication to respond to 3004 Tampico Drive. (TR-585). He arrived at the scene at approximately 11:20 a.m. (TR-586)

While at the scene, Deputy McCann encountered the Defendant at approximately 1:00 p.m. (TR-596). Detective Diane Payne, of the Orange County Sheriff's Department, also had occasion to go to the scene at 3004 Tampico Drive. (TR-1073).

While at the scene she had the occasion to see the Defendant. On that same day, July 1, 1985, the Defendant went to the Sheriff's Department and gave Diane Payne a statement. (TR-1074).

The Defendant gave Diane Payne both an oral statement and then a tape recorded statement. (TR-1075). During the non-taped portion of the interview with the Defendant he indicated that he had been at the ABC Bar at Lancaster and Orange for a period of time and then he had met a girl named June or Junie, stayed with her there at the Bar, and then left and went to Central Park. (TR-1077). From Central Park they traveled to East Lake Toho in Kissimmee where they stayed for a period of time and then he returned home around 5:00 a.m. or 5:30 a.m. that morning. (TR-1077). The Defendant further indicated that he had last seen his ex-wife, Susan Correll, Friday night with a person by the name of Rick at a bar. (TR-1079). Following the Defendant's oral statement to Diane Payne, he gave a tape recorded statement to her. (Exhibit 199). While the Defendant was giving his statement to the Orange County Sheriff's Department, fingerprints were taken of him. (TR-1074). Deputy Elmer Green also took photographs of the Defendant, one photograph of the Defendant himself and five photographs of his hands and forearms. (TR-1104).

On July 1, 1985, Deputy Sherilyn Teri Ayers, who is a crime scene investigator, began to gather and collect items of evidence which might be of some evidentiary value. (TR-626). She also took numerous photographs of the scene which depicted

the bodies of the four victims, items within the residence that appeared to have been moved, as well as all the areas where the Orange County Sheriff Department had discovered what was suspected to be blood. Deputy Ayers also collected numerous items of evidence. All of these items were packaged and then submitted to the Sanford Regional Crime Lab. (TR-688). Ms. Ayers also searched the purses of Mary Lou Hines, Susan Correll, and Mary Beth Jones. In none of these purses did she find any paper currency. (TR-1309 through 1310).

On July 1, 1985, Deputy William G. Miller responded to the residence at 3004 Tampico Drive where he was assigned to assist in the processing and collection of evidence. (TR-895). Initially, an examination of the four victims was made by way of lasers in an effort to determine if there were any fingerprints on the body as well as hair and fiber evidence. (TR-895). As a result of the laser examination, no fingerprints were found on the bodies of the victims but some hair and fibers were located. (TR-896). Deputy Miller returned to the scene at 3004 Tampico Drive on July 2, 1985. (TR-897). At that time he gathered and collected numerous items of suspected evidence which consisted of numerous items that had what was suspected to be blood on them.

On July 1, 1985, John Frederick Fisher, a forensic analyst, with the Orange County Sheriff's Department, responded to the scene at 3004 Tampico Drive. (TR-928). Deputy Fisher responded to the scene to assist in the collection of physical

evidence and to provide any technical support that he might be able to provide. (TR-928).

Over a period of time and for several days, Mr. Fisher collected numerous items of evidence at the scene of the homicides. (TR-939). The items that Mr. Fisher collected were items that had what appeared to be blood on them. Mr. Fisher processed a pharmacy bag which had been gathered as evidence to determine whether or not it contained latent fingerprints. (TR-1312). Prior to processing the pharmacy bag, Mr. Fisher removed a suspected bloodstain. (TR-1312). Mr. Fisher also processed for latent fingerprints a MasterCard charge receipt that had been removed from the purse of Mary Lou Hines. (TR-1314). Mr. Fisher also removed a suspected bloodstain from the MasterCard charge receipt. (TR-1314). In the processing of the residence at 3004 Tampico Drive, Mr. Fisher also obtained a latent print in the area near the air conditioning thermostat in the living room and dining room area. (TR-1550). This print appeared to be in a substance believed to be possible blood. (TR-1550).

Mr. Fisher developed a print which was located in suspected blood located in the hallway adjacent to Tuesday Correll's room on the west wall which was approximately two and one-half feet from the floor. (TR-1556). Mr. Fisher also developed by way of a photograph a latent print in a substance which appeared to be blood which was located on the top surface of a drawer in Susan Correll's bedroom. It was a dresser drawer

in the upper left hand corner of the top drawer. (TR-1560). In all Mr. Fisher developed eighty-six (86) possible prints of which only twenty-eight (28) were suitable for comparison. (TR-1570).

All the prints that were discovered at the scene located at 3004 Tampico Drive were submitted to James Murray of the Orange County Sheriff's Department. Based on his examination of the prints Lt. Murray reached the following conclusion:

1. A partial palm print found in the hallway of the home located at 3004 Tampico Drive which led back to the bedrooms was identified as being a palm print of the Defendant. (TR-1587 through 1588).

2. The palm print that was located in the area close to the air conditioning thermostat of the residence located at 3004 Tampico Drive was determined to be the left palm print of the Defendant. (TR-1590 through 1591).

3. The print that was developed on the top ridge of the dresser drawer in Susan Correll's bedroom was identified as being the right thumb of the Defendant. (TR-1593 through 1594).

4. The latent fingerprint that was discovered on the MasterCard receipt was identified as being the right thumbprint of the Defendant. (TR-1596).

5. The latent palm print that was developed on the pharmacy bag was identified as being the left palm print of the Defendant. (TR-1597).

Mr. Murray further testified that he found numerous latent

prints that he could not identify. (TR-1611).

When the Defendant was arrested on July 2, 1985, Mr. Jose Lopez, who was employed in the Booking Office of the Orange County Jail, took some money from the Defendant. (TR-1186). This money, which consisted of $47.00, was eventually given to Deputy Harry Park. (TR-1219). Deputy Park turned the money over to Deputy Fisher who discovered a suspected bloodstain which he removed, from a $20.00 bill. (TR-955).

Deputy Dennis Volkerson of the Orange County Sheriff's Department, indicated that on July 1, 1985, he heard a broadcast to be on the lookout for a 1979 black Ford Hatchback, tag number 082 CLM. (TR-990). On July 1, 1985, at approximately 5:45 p.m., Deputy Volkerson observed a Mustang that fit the description of the broadcast located in the parking lot of the Versailles Shopping Plaza. (TR-991). On July 3, 1985, after the Mustang had been towed to Ace Auto Parts, Deputy Chester Blekfeld processed the vehicle. (TR-1000). During his processing of the vehicle he gathered a spot of suspected blood from the upholstery on the driver's side of the seat. (TR-1002).

Mr. David Baer, a senior crime forensic serologist at the Region IV Crime Laboratory in Sanford, Florida, received all the items of evidence that had been gathered by the Orange County Sheriff's Department from the residence at 3004 Tampico Drive that contained suspected blood on them. Mr. Baer examined these items for a period of three and one-half months. (TR-1325). He also received from the Orange County Sheriff's Department the

known blood samples of the Defendant and the four victims, Mary Beth Jones, Mary Lou Hines, Susan Correll, and Tuesday Correll. Using the known blood samples of the Defendant and the four victims, Mr. Baer was able to determine each of the five individuals blood type. Based on Mr. Baer's analysis and comparisons he determined that numerous blood stains could have possibly been the blood of the Defendant. Other blood stains could have possibly been the blood of Mary Beth Jones, Mary Lou Hines, or the Defendant and the remainder of the blood stains could possibly have been the blood of a particular victim.

Mr. Baer also examined the upholstery from the driver's side of the Mustang and found blood that possibly could have been the blood of Mary Beth Jones, Mary Lou Hines, or the Defendant. (TR-1426). He also examined a pair of blue jeans that had been seized from the Defendant's room during the execution of a search warrant and found blood that could possibly have been the blood of Mary Beth Jones, Mary Lou Hines, or the Defendant. (TR-1427). In conducting an examination of the vaginal swab that had been taken from Susan Correll, Mr. Baer noted the presence of sperm. (TR-1431).

Mr. Baer could not rule out the Defendant as being the person who deposited the sperm. (TR-1434). Mr. Baer also testified in relation to the blood stains that he could not definitely say that any of the stains of blood came from any particular person. (TR-1447).

On cross-examination, Mr. Baer testified that several

blood stains that he examined and determined could possibly have been the blood of the Defendant could also have possibly been the blood of a Richard Henestofel, a Harold Witt, and/or a Richard Schardt. (TR-1461 through TR-1464).

Dr. Thomas Hegert, the District Nine Medical Examiner for Orange County and Osceola County, Florida, testified that he arrived at the scene located at 3004 Tampico Drive on July 1, 1985. The bodies of the four victims were removed from the scene so that Doctor Hegert could then perform an autopsy on each body. During the autopsy Doctor Hegert noted that there was no evidence of any injury to any of Susan Correll's female genital area. (TR-756). During the autopsy of Susan Correll, Dr. Hegert noted numerous wounds including several defensive type wounds on her hands. (TR-773). Susan Correll's cause of death was from a massive hemorrhage produced primarly by the wounds of the left clavicle area, the left chest, and the stab wounds of the abdomen. (TR-777). In conducting the autopsy of Tuesday Correll, Dr. Hegert noted numerous cutting type wounds, none of which could be labeled defensive type wounds. (TR-796). Tuesday Correll died as a result of massive hemorrhage as a result of multiple stab wounds of the chest. (TR-798). In conducting the autopsy of Mary Lou Hines, Dr. Hegert again noted numerous cutting type wounds including several defensive type wounds of the left hand. (TR-808). Mary Lou Hines died as a result of massive hemorrhage to the chest cavity, associated with aspiration of blood. (TR-810). Finally, Dr. Hegert

conducted the autopsy of Mary Beth Jones. He noted numerous cutting type wounds including a defensive type wound on her right hand. (TR-822). Mary Beth Jones died as a result of a massive hemorrhage in her left chest and the hemorrhage into the abdominal cavity resulting from the stab wounds of the chest and back. (TR-824). Dr. Hegert conducted the autopsies at approximately 12:30 p.m. on July 1, 1985, and based on the extent of rigor mortis he observed on the bodies determined that the four (4) individuals had died approximately twelve (12) to sixteen (16) hours earlier. (TR-843). He also found no evidence of any sexual assault. (TR-839).

Judith Bunker was called by the State and the Court found her to be an expert in the area of bloodstain pattern analysis and crime scene reconstruction. Based on her investigation in this cause it was the opinion of Ms. Bunker that Tuesday Correll was in the opening to the hallway close to the west wall where she received two injuries. Then within one foot of the east wall she received further injuries and then fell to the floor where she received additional injuries. Tuesday Correll then laid face down on the carpet for a period of time and then was moved to the middle east bedroom and was placed on a bed. (TR-1534). It was Ms. Bunker's opinion that Susan Correll was first injured near the east wall almost at floor level where it appears that she was in more or less a fleeing position. Her assailant bent over her using a right overhand fashion to inflict injuries. Susan Correll then fell backward or was placed backward coming to rest

against the west wall with only the upper portion of her body in contact with the wall. At this time she received additional injuries whereupon she was eventually dragged into the bedroom where she was found. (TR-1535 through 1537). It was the opinion of Ms. Bunker that Mary Lou Hines was first injured at the door of the middle east bedroom and at some point in time fell into a lower position, most probably on her knees. She eventually was on a bed where she received additional injuries. (TR-1537 through 1539). Finally, it was Ms. Bunker's opinion that Mary Beth Jones first received her injuries in the area of the stove located in the kitchen. She then fell to her knees and eventually was lying on her back whereupon she was dragged into the family room. (TR-1539 through 1542).

Mr. Randy Linneman testified that he was the owner of Pine Castle Auto Body where the Defendant began working for him the Thursday prior to the murders. (TR-1108). Mr. Linneman testified that although the Defendant could have cut himself on Monday, July 1, 1985, the Defendant never complained to him that he had been cut on the job. (TR-1110).

A Mr. Lawrence Smith testified that he had met the Defendant in the Orange County Jail and while in jail together the Defendant had discussed his case with him. (TR-1258). Mr. Smith testified that the Defendant had told him that he and Susan Correll did not get along with each other. (TR-1259). Mr. Smith further indicated that the Defendant told him that he did not like his ex-wife dating other men, and that sometime

after they were divorced the Defendant had talked to a friend in a motorcyle club to make arrangements for the man to kill Susan Correll. (TR-1260). The Defendant further indicated to Mr. Smith that a woman by the name of June was going to be his alibi but that she had not been located. (TR-1261). The Defendant also told Mr. Smith that he had been at the residence at 3004 Tampico Drive on the night of the homicides, that he had taken several things out of the house, took a car from the house, and left it with the keys in it at a convenience store. (TR-1263). The Defendant further told Mr. Smith that he had taken a pack of Vantage cigarettes from the house. (TR-1263). The Defendant also told Mr. Smith that he had just taken things out of the house on the night of the murders but he never specifically talked about how the murders took place. (TR-1289). In fact, the Defendant always told Mr. Smith that he was innocent of the murders. (TR-1296).

Mr. Richard Schardt testified that he knew a woman by the name of Mary Beth Jones who resided at 3004 Tampico Drive. (TR-563). He was with Mary Beth Jones during part of the day of June 30, 1985. Mr. Schardt further testified that he and Mary Beth Jones visited some friends and that at approximately midnight Mary Beth Jones departed to return home. (TR-572). Finally, Mr. Schardt testified that Mary Beth Jones drove a 1979 Mustang. (TR-572).

Mr. Harold Witt testified that he also knew Mary Beth Jones. (TR-1008). He further stated that the 1979 Mustang

that was being driven by Mary Beth Jones was registered to him. (TR-1010).

Mr. Richard Henestofel testified that he had met Susan Correll through the Defendant. (TR-1020). On the evening of June 30, 1985, Mr. Henestofel went to the ABC Bar at Lancaster and Orange in Orlando where he saw the Defendant at approximately 6:00 p.m. (TR-1021). Mr. Henestofel testified that the Defendant left the ABC Bar prior to him leaving. Mr. Henestofel further testified that when he left the ABC Bar at approximately midnight, he went to his automobile where he discovered that each of his four tires were flat. (TR-1025). When he returned the next morning to his automobile, he noticed that each tire had two cuts in it. (TR-1026). He also discovered a set of keys on his trunk lid which had a unicorn on the keyring as well as a Marlboro emblem. (TR-1028). These keys were later determined to be the keys of Mary Beth Jones.

Patricia Babcock testified that she worked at the ABC Bar at Lancaster and Orange in Orlando, Florida, as a barmaid. (TR-1118). She further testified that she saw the Defendant in the bar at approximately 9:00 to 9:30 p.m. on the evening of June 30, 1985. (TR-1118). During the time that the Defendant was in the ABC Bar, she never saw him with anyone. (TR-1120). When the bar was getting ready to close at approximately 11:30 p.m., she noticed that the Defendant was no longer there. (TR-1120).

Mr. Guy Kettlehone testified that he saw the De-

fendant on the evening of June 30, 1985, at approximately 11:40 p.m. at his residence located at 820 Locust Street, Orlando, Florida. (TR-1166). The Defendant remained there until he left at approximately 12:20 a.m. (TR-1170).

Officer Elizabeth Peterka, of the Kissimmee Police Department, testified that she was on duty from the hours of 7:30 p.m. on June 30, 1985 to 7:30 a.m. on July 1, 1985. (TR-1126). She also testified that while on patrol during June 30, 1985, and July 1, 1985, she drove through the East Lake Toho area approximately three to four times after 10:00 p.m. (TR-1127). During the three to four times that she drove through the East Lake Toho area, she did not see a blue Charger. (TR-1127).

Joyce Stone testified that she is a Security Officer for ABC Liquors and that on the evening of June 29, 1985, while working at the ABC Bar at Orange and Michigan she saw Susan Correll and Mary Beth Jones. (TR-1061). On that same evening she also saw the Defendant at the rear entrance of the ABC Bar. (TR-1062). At that time the Defendant wanted to talk with Susan Correll. (TR-1063). Susan Correll, according to Ms. Stone, told the Defendant that she did not want to see him again whereupon the Defendant grabbed her by the arm. (TR-1064).

Mr. James Rucker testified that on May 15, 1982, Susan Correll was visiting him at his father's home. (TR-1138). At approximately 6:30 a.m. to 7:00 a.m., Mr. Rucker heard the Defendant outside the residence screaming for Susan Correll.

(TR-1139). When Mr. Rucker looked out the window he saw the Defendant standing by Susan Correll's white Chevette. At that time he observed the Defendant with a knife in his hand, heard air hissing out of the tires of the Chevette, saw the Defendant walk away, get into a car, and leave. (TR-1140). Mr. Rucker then went outside and saw that each of the four tires to the Chevette had slash marks in them. (TR-1141). At no time did Mr. Rucker see the Defendant slash the tires to the white Chevette. (TR-1142).

Mr. David Murray testified that in approximately 1982 to 1983, Susan Correll was residing with him and his wife. (TR-1242). On one occasion the Defendant came to the residence and knocked on the door wanting to see Susan Correll. (TR-1244). At that time Susan Correll did not want to go to the door, as according to Mr. Murray, she was afraid of the Defendant. (TR-1244). Mr. Murray further testified that Susan Correll finally went outside and talked with the Defendant whereupon the Defendant indicated that he wanted to have her back. (TR-1245). At that time Susan Correll began to cry, the Defendant got angry, and told her that he would kill her if she dated other men. (TR-1245).

The Defendant was arrested on July 2, 1985, and charged with four counts of First Degree Murder. (TR-3767). The Office of the Public Defender was appointed to represent the Defendant on or about July 3, 1985. (TR-3773).

An Indictment was returned against the Defendant

charging him with four counts of Murder in the First Degree on September 10, 1985. (TR-3820 through 3821).

On November 13, 1985, the Defendant filed a Motion for Change of Venue. (TR-3845 through 3873). On November 20, 1985, the Court reserved ruling on the Motion for Change of Venue. (TR-3875).

On or about November 25, 1985, the Defendant filed a Motion to Dismiss Indictment or to Declare That Death is Not a Possible Penalty, a Motion to Declare Florida Statute Section 921.141 Unconstitutional, a Motion for Evidentiary Hearing, a Motion to Bifurcate Voir Dire, a Motion to Preclude Challenge for Cause, a Motion for Additional Peremptory Challenges. (TR-3881 through 3896). Also, on November 26, 1985, the Defendant filed a Motion for Pre-Trial Hearing to Determine Admissibility of Photographs. (TR-3934 through 3935). On December 3, 1985, the Defendant filed a Motion to Suppress Statements. (TR-3939 through 3940). On December 4, 1985, the State filed a Motion in Limine. (TR-3944 through 3946).

The Hearing was held on the Motion to Suppress Statements filed by the Defendant on December 5, 1985, at which time the Court denied the Motion. (TR-3950). All of the Motions relating to the unconstitutionality of the death penalty were denied by the Court.

On December 9, 1985, after attempting to select a jury in the trial of this cause, the Defendant made an oral Motion for Change of Venue. This Motion was granted by the

Court. (TR-4017 and 4033).

On January 6, 1986, the State filed a Notice of Intent to Offer Similar Fact Evidence. (TR-4034). This similar fact evidence related to an alleged incident that occured on May 15, 1982, in which it was alleged that the Defendant punctured tires that were on an automobile belonging to Susan Correll.

On January 10, 1986, the Defendant's attorney notified the Court of a potential conflict of interest in representing the Defendant. A hearing was conducted on the Public Defender's Motion to Withdraw from further representation of the Defendant on January 13, 1986. The Court at the hearing denied the Public Defender's Motion to Withdraw from further representation of the Defendant. (TR-4161 through 4180).

Jury selection commenced in this cause at the Sarasota County Courthouse on January 27, 1986. On January 29, 1986, following the selection of the jury, the State of Florida began the presentation of its case in chief. On January 31, 1986, during the State's presentation of its case in chief, the State made an oral Motion to Redact certain portions of a statement made by the Defendant on July 1, 1985, to members of the Orange County Sheriff's Department. The Defendant objected to the State's oral Motion to Redact and after argument by the parties, the Court granted the State's Motion. (TR-877 through 891).

On February 5, 1986, after the State rested its case, the Defendant moved for a Directed Verdict of Acquittal based on the lack of evidence presented by the State. Following the

arguments of the Defendant and the State, the trial Court denied the Defendant's Motion for Directed Verdict of Acquittal. (TR-1690 through 1694). Following the Court's denial of the Defendant's Motion for Directed Verdict of Acquittal the Defendant presented several witnesses in his behalf. On the afternoon of February 5, 1986, after the Defendant rested the presentation of his case, he renewed his Motion for Directed Verdict of Acquittal. At that time the Court again denied the Defendant's Motion for Directed Verdict of Acquittal. (TR-1749).

On February 6, 1986, the jury in this cause heard the closing arguments of the parties as well as the jury instructions as presented by the trial Court. The jury then began its deliberations and at 5:37 p.m. returned verdicts of guilty of first degree murder as to all four counts of the Indictment. (TR-1852 through 1856). Despite the Defendant's request for a continuance of the penalty phase of this cause, the trial Court indicated that the penalty phase would commence on February 7, 1986, at 9:00 a.m. (TR-1856).

On February 7, 1986, the penalty phase of this cause commenced. After hearing further testimony from the State and the Defendant, including the testimony of the Defendant himself, the arguments of the State and the Defendant, and the law as instructed by the Court, the jury retired to consider its sentencing recommendation. At 3:05 p.m., the jury returned with its sentencing recommendation. The jury recommended that the Court impose the death penalty on each of the four counts of

the Indictment. (TR-4075, 4077, 4079, and 4081). Following the jury's recommendation, the trial Court imposed the sentence of death on the Defendant for each count of the Indictment. (TR-2025 through 2028). On February 7, 1986, the trial Court filed a written sentencing Order imposing the death penalty on the Defendant as to each count of the Indictment. (TR-4095 through 4098).

On February 14, 1986, the Defendant filed a Motion for New Trial. (TR-4108 through 4112). The Defendant also filed a Motion for Correction or Modification of Sentence. (TR-4113 through 4118). Both Motions were denied by the trial Court on February 19, 1986. (TR-4120 and 4121).

A Notice of Appeal was timely filed in this cause on February 24, 1986. (TR-4133).

SUMMARY OF ARGUMENT

The Defendant contends in Point I of this Brief that the trial Court erred in denying the Motion to Suppress his statements of July 1, 1985. The evidence established that the statements given by the Defendant were the result of a "custodial interrogation" and therefore he should have been advised of his Miranda warnings. This constitutes reversible error.

It is the Defendant's position in Point II that the trial Court should not have admitted into evidence the photographs that were objected to by the Defendant. These photographs were cumulative of other photographs presented by the State and/or were so gory and gruesome as to inflame the jury and deny the Defendant a fair trial. This also constitutes reversible error.

The Defendant contends in Point III that a conflict of interest existed in that the Office of the Public Defender, Ninth Judicial Circuit, represented both the Defendant and a State witness. Therefore, the trial Court should have allowed the Office of the Public Defender to withdraw from further representation of the Defendant. Since prejudice is presumed where a conflict is shown, this constitutes reversible error.

In Point IV, it is the Defendant's contention that veniremen Beiler and Cullen should have been excused for cause upon motion by the Defendant. Their attitudes in favor of the death penalty would have prevented or substantially impaired

the performance of their duties as jurors. Therefore, at the most the Defendant is entitled to a new trial or at the least is entitled to a new sentencing hearing.

It is the Defendant's contention in Point V that the trial Court erred in allowing Donna Valentine to testify that one of the victim's, Susan Correll, was afraid of the Defendant. The state of mind of Susan Correll was irrelevant, not at issue in this cause, nor was it probative of any material fact. Allowing this testimony of Donna Valentine constitutes reversible error which entitles the Defendant to a new trial.

In Point VI it is the Defendant's position that by granting the State's oral motion to redact the last six or seven pages of the Defendant's July 1, 1985, statement to Detective Diane Payne, the trial Court denied the Defendant the right to effective cross-examination since all of the Defendant's statement was relevant. The trial Court's ruling was not harmless as it prevented the Defendant from presenting, by legitimate cross-examination, his theory of the defense that other individuals had a motive to murder Susan Correll and the other three victims.

In Point VII it is the Defendant's position that the trial Court erred in allowing certain alleged Williams rule evidence into evidence. This alleged Williams rule evidence was irrelevant as it only showed the Defendant's bad character and/or his propensity to commit crimes. Additionally, the

Williams rule evidence was too remote in time to be relevant. Allowing this Williams rule evidence constitutes reversible error.

In Point VIII the Defendant contends that the trial Court erred in allowing David Murray to testify that during an incident in 1982 or 1983 Susan Correll was afraid of the Defendant and that the Defendant threatened to kill her if she dated or saw other men. This incident was too remote in time to be relevant. Additionally, it was testimony concerning the state of mind of Susan Correll which was also irrelevant and inadmissible. Allowing the testimony of David Murray constitutes reversible error.

In Point IX, the Defendant takes the position that the State failed to establish that the electrophoresis process was scientifically accepted as reliable. Therefore, the trial Court erred in allowing David Baer to testify concerning results of blood tests performed by the electrophoresis process. Allowing this testimony constitutes reversible error.

In Point X it is the Defendant's position that the trial Court erred in finding that Ms. Judy Bunker was an expert in the areas of crime scene reconstruction and bloodstain pattern analysis. Allowing Ms. Bunker to testify concerning crime scene reconstruction and bloodstain pattern analysis constitutes reversible error.

The Defendant contends in Point XI that the trial Court erred in denying his Motion for Directed Verdict of Acquittal. The evidence in this cause, which was entirely

circumstantial, was not inconsistent with every reasonable hypothesis of the Defendant's innocence. Therefore, the trial Court should have granted the Defendant's Motion for Directed Verdict of Acquittal.

The Defendant takes the position in Point XII that the trial Court did not conduct an adequate Richardson hearing prior to ruling that Barbara Pizzaroz could not testify on behalf of the Defendant. Failure to conduct such a hearing is reversible as a matter of law.

It is the Defendant's position in Point XIII that the many errors that occurred during the trial of this cause in and of themselves entitle the Defendant to a new trial. The accumulation of all the errors mandates that the Defendant's convictions be reversed and this cause remanded for a new trial.

The Defendant's contention in Point XIV is that the trial Court erred in not allowing him additional time in which to prepare for the penalty phase of this cause. Failure to allow the Defendant additional time to prepare prevented both the jury and the trial Court from learning potentially applicable mitigating circumstances. Therefore, the Defendant's four sentences of death should be reversed and this cause remanded for a new sentencing hearing.

The Defendant contends in Point XV that the trial Court erred in imposing the death penalty on the Defendant for the murders of Susan Correll, Tuesday Correll, and Mary Beth Jones due to the fact that no aggravating circumstances existed

surrounding the murders of these three individuals. Additionally, the trial Court erred in imposing the death sentence upon the Defendant for the murder of Mary Lou Hines due to the fact that although one aggravating circumstance existed surrounding her death, there were three mitigating circumstances that greatly outweighed this one aggravating circumstance. Therefore, the Defendant's four death sentences should be vacated and this cause remanded for the imposition of four sentences of life imprisonment without parole for twenty-five years.

The Defendant contends in Point XVI that the cumulative error that occurred during the trial of this cause, both during the guilt phase and the penalty phase, contributed to the Defendant receiving the four death sentences. Therefore, the Defendant's death sentences should be vacated and this cause remanded to the trial Court for the imposition of four sentences of life imprisonment without parole for twenty-five years.

POINT I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE DEFENDANT'S STATEMENTS OF JULY 1, 1985

On December 3, 1985, the Defendant filed a Motion to Suppress Statements that were made by the Defendant to members of the Orange County Sheriff's Department on July 1, 1985 and July 2, 1985. (TR-3939). A hearing on the Motion was conducted before the Honorable R. James Stroker on December 5, 1985. At this hearing it was established that the Defendant was observed by members of the Sheriff's Department at the scene of the homicides, 3004 Tampico Drive, Orlando, Florida, on July 1, 1985. Captain Buchanon indicated that he was at the scene of the homicides on July 1, 1985, when he ordered Detective Diane Payne to take the Defendant to the Sheriff's Department to obtain a statement from the Defendant as well as to obtain fingerprints. (TR-2116). Buchanon further stated that he was directed by the Sheriff of Orange County, Lawson Lamar, to tell Detective Payne to take the Defendant to the Sheriff's Department for a statement and fingerprinting. (TR-2117). The testimony of Detective Thomas McCann seems to indicate that the Defendant was a suspect in the homicides due to the fact that the Defendant was a relative of the four victims and that when the Defendant was observed at the scene of the homicides on July 1, 1985, prior to his July 1, 1985 statements, his arms had marks on them. (TR-2114).

Subsequently, the Defendant was taken from the scene of the homicides to the Sheriff's Department by his brother and sister-in-law where he was interviewed for one-half hour to one hour by Detective Diane Payne. (TR-2089 through TR-2090). The building where the Defendant was interviewed was also the site of the Orange County Jail. (TR-2093).

Prior to the interview of the Defendant on July 1, 1985, he was not advised of his Miranda warnings. (TR-2091). The Defendant discussed with Detective Payne his relationship with one of the victims, his ex-wife, Susan Correll, as well as his whereabouts on the night of the homicides. (TR-2098). The Defendant was also photographed and fingerprinted. (TR-2091). The photographs were taken to document the scratches, bruises, and marks that the Defendant had on his arms and hands. (TR-2112). After this interview the Defendant was allowed to leave. (TR-2092).

On July 2, 1985, Detective McCann took the Defendant to the Sheriff's Department. (TR-2103). At that time the Defendant was interviewed again. Following this interview the Defendant was arrested. (TR-2107).

During the trial of this cause the State introduced over defense objection, the Defendant's statements of July 1, 1985. (TR-1088) (Exhibit No. 199). Therefore, this issue has been sufficiently preserved for appeal. At no time during the trial of this cause did the State attempt to introduce into evidence the Defendant's statements of July 2, 1985.

It is the Defendant's contention that the trial Court

erred in denying the Motion to Suppress the statements of the Defendant that were made on July 1, 1985. It is clear from the hearing on the Motion that was conducted on December 5, 1985, that at no time prior to making the July 1, 1985, statements, was the Defendant ever advised of the Miranda warnings. The question narrows down to whether or not the Defendant was in custody during the time he was interrogated. If he was then he should have been advised of the Miranda warnings prior to questioning.

In making this determination "the ultimate inquiry is simply" whether there is a "formal arrest or restraint of freedom of movement". Roman v. State, 475 So.2d 1228 (Fla. 1985). This inquiry is approached from the perspective of how a reasonable person would have perceived the situation. Drake v. State, 441 So.2d 1079 (Fla. 1983), cert denied 104 S. Ct. 2361 (1984).

From the evidence presented at the hearing on the Motion to Suppress Statements, a reasonable man in the Defendant's situation would have understood himself to be in custody or at the least his freedom of movement restrained. The Defendant was told to go to the Sheriff's Department; when he arrived he was taken to a building that also housed the jail; he was told that the Sheriff's personnel wanted to take photographs of him as well as fingerprints; and at no time was he informed that he could leave whenever he wished. In light of the totality of the circumstances, it was reasonable for the Defendant to believe that his freedom of movement was restrained

at least until such time as he was informed otherwise. Therefore the Defendant should have been advised of the Miranda warnings prior to the Sheriff's personnel obtaining the statement of July 1, 1985. The Defendant not having been advised of the Miranda warnings leads to the inescapable conclusion that the Motion to Suppress the Defendant's statements of July 1, 1985, should have been granted. Failure of the trial Court to suppress these statements constitutes reversible error. Therefore the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE OVER DEFENSE OBJECTION, PHOTOGRAPHS THAT WERE CUMULATIVE AND SO GRUESOME AS TO UNDULY PREJUDICE THE DEFENDANT

On November 26, 1985, the Defendant filed a Motion for Pre-trial Hearing to Determine Admissibility of Photographs. (TR-3934 through 3935). Two hearings were conducted on this Motion, one on December 10, 1985, and the other on December 12, 1985. The hearing that was conducted on December 10, 1985, related to photographs that had been taken by personnel of the Orange County Sheriff's Department. During the hearing the Defendant objected to numerous photographs that the State proposed to offer in evidence on the grounds that they were cumulative with other photographs that the State intended to offer and/or they were particularly gruesome, and therefore highly inflammatory. The Court overruled many of the Defendant's objections.

On December 12, 1985, a hearing was held on the admissibility of photographs taken by the Medical Examiner, Dr. Thomas Hegert. The Defendant objected to the admission of numerous photographs also on the grounds that they were cumulative with other photographs that the State intended to offer and/or they were particularly gruesome and therefore highly prejudicial. The Court overruled many of the Defendant's objections.

At the time that these photographs were offered into

evidence at the trial of this cause, the Defendant renewed his objection to each and every photograph that had been objected to at the hearings conducted on December 10, 1985, and December 12, 1985.

It is the Defendant's position that the trial Court erred in admitting into evidence the photographs that were objected to by the Defendant at the pre-trial hearings on the admissibility of these photographs. Several hundred photographs were presented into evidence in the trial of this cause. A review of all the photographs presented during the trial establishes the fact that many of the photographs objected to by the Defendant were merely cumulative of other photographs presented. Therefore, they were irrelevant to any of the issues presented at the trial. The accumulative effect of the admission of those photographs objected to by the Defendant was to inflame the jury so that it would find the Defendant guilty in the absence of sufficient evidence of guilt. Additionally, other photographs were objected to by the Defendant on the grounds that they were gruesome and gory and that if they were in any way relevant, the prejudice to the Defendant in the admission of these gory and gruesome photographs greatly outweighed any relevancy they may have. The admission of these irrelevant gruesome and gory photographs so inflamed the jury as to create an undue prejudice in the mind of the jury.

This Court has held on numerous occasions that photographs will be admissible into evidence if they are relevant to

any issue required to be proven in a case. Wilson v. State, 436 So.2d 908 (Fla. 1983).

A review of all the photographs presented by the State in the trial of this cause establishes that the photographs that were objected to by the Defendant as being cumulative were in fact cumulative and should not have been admitted by the trial Court on the grounds of irrelevancy. These cumulative photographs in no way aided the jury in reaching its determination as to whether the State had proven the Defendant guilty beyond a reasonable doubt. The great volume of photographs only had the effect of prejudicing the jury to such a degree as to prevent the Defendant from receiving a fair trial.

As previously noted, the Defendant objected to the admissibility of other photographs on the basis that they were gory and gruesome and therefore any relevancy they may have had was greatly outweighed by the prejudicial effect the admission of the photographs would have on the jury. In the case of Alford v. State, 307 So.2d 433 (Fla. 1975), this Court indicated that when a photograph is relevent it is admissible, unless what it depicts is so shocking in nature as to overcome the value of its relevancy. This court further stated at page 440 that:

> "Once it has been established that the photographs are relevant, it must then be determined whether the gruesomeness of the portrayals is so inflammatory as to create an undue prejudice in the minds of the jury, and thereby overcomes the value of their relevancy."

In the case of Young v. State, 234 So.2d 341 (Fla.

1970), this court had to consider Young's contention that gruesome photographs denied him a fair trial. Forty-five photographs were admitted during the trial, including twenty-five photographs that showed the partially decomposed body of the victim. In reversing Young's conviction, this court stated that:

> "The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs, particularly in large numbers must have some relevancy, either independently or as corroborative of other evidence."

This court in Young further stated that:

> "We do not intend to invade the discretion of the state in the selection of evidence which it chose to present to the jury, or the discretion exercised by the trial court in admitting such evidence, but we must insure that both state and trial court act within reasonable limits. The very number of photographs of the victim in evidence here, especially those taken away from the scene of the crime, cannot but have had an inflammatory influence on the normal fact finding process of the jury. The number of inflammatory photographs and resulting effect thereof was totally unnecessary to a full and complete presentation of the state's case. The same information could have been presented to the jury by use of less offensive photographs whenever possible, and by careful selection and use of a limited number of the more gruesome ones relevant to the issues before the jury."

Applying this standard to the photographs that were objected to by the Defendant as being gory and gruesome, leads one to the conclusion that the trial Court erred in admitting these photographs into evidence. The error might not be so apparent if the State had not presented the several hundred photographs into evidence. The information that the State sought

to present to the jury could have been presented by use of the other photographs that were not objected to by the Defendant.

The trial Court committed reversible error in admitting into evidence the photographs that were objected to by the Defendant. Therefore, the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT III

THE TRIAL COURT ERRED IN DENYING THE ORAL MOTION TO WITHDRAW AS COUNSEL FOR THE DEFENDANT THAT WAS MADE BY THE OFFICE OF THE PUBLIC DEFENDER

On Friday, January 10, 1986, the Defendant's attorney, Assistant Public Defender, Peter Kenny, informed the trial Court that an individual by the name of Lawrence Anthony Smith had been listed by the State as a witness in this cause. (TR-4169). Mr. Smith was a defendant in other cases unrelated to this cause and was also represented by the Public Defender's Office of the Ninth Judicial Circuit.

On January 13, 1986, a hearing was conducted before the trial Court on the oral Motion to Withdraw as Counsel for the Defendant that had been made by the Office of the Public Defender, Ninth Judicial Circuit. During this hearing, Lawrence Anthony Smith testified that after consultations with Simeon S. Tyler, Esquire, he wished to waive his right of confidentiality that existed between himself and his attorney, Assistant Public Defender William Kinane. (TR-4168). The trial Court then found that Lawrence Anthony Smith's waiver of his privilege of confidentiality was intelligently made. (TR-4169).

When the trial Court inquired as to whether or not there had been any inducements made to Lawrence Anthony Smith in order to gain the waiver of confidentiality, Assistant State Attorney Belvin Perry informed the Court that the State Attorney's Office had indicated to Mr. Smith that he would advise

the prosecutor who was prosecuting Mr. Smith on his cases and the trial Judge before whom Mr. Smith's cases were pending that Smith had cooperated with the State of Florida and that that prosecutor and that Judge would make whatever disposition they felt free to as a result of that cooperation. Mr. Perry further informed the Court that Smith had been informed that as a result of waiving his confidentiality with his attorney, Assistant Public Defender William Kinane, that any incriminating statements that came out as a result of the waiver of confidentiality would not be used against him. (TR-4171 through 4172). The trial Court then denied the oral Motion to Withdraw. (TR-4176).

It is the Defendant's contention that the trial Court erred in denying the oral Motion to Withdraw as Counsel that was made by the Office of the Public Defender, Ninth Judicial Circuit. The trial Court should have allowed the Office of the Public Defender to withdraw from any further representation of the Defendant and then have appointed new counsel unassociated with the Office of the Public Defender to represent him. As this court stated in Foster v. State, 387 So.2d 344 (Fla. 1980), the Sixth Amendment right to the assistance of counsel contemplates legal representation that is effective and unimpaired by the existence of conflicting interests being represented by a single attorney. Glasser v. United States, 315 U.S. 60 (1942), Holloway v. Arkansas, 435 U.S. 475 (1978). In the case of Babb v. Edwards, 412 So.2d 859 (Fla. 1982), Babb, Public Defender for the Fifth Judicial Circuit certified to the trial court

that representation of a defendant conflicted with representation of another defendant in an unrelated case for whom he had previously been appointed to represent by the Court. He requested that the court appoint private counsel. This court reversed the trial court's denial of the Motion to Withdraw as Counsel that had been filed by the Office of the Public Defender, stating at page 862:

> "We do not agree that the legislature intended to place such a burden on either the Public Defender or the trial court. We find that the language in section 27.53(3) clearly and unambiguously requires the trial court to appoint other counsel not affiliated with the Public Defender's Office upon certification by the Public Defender that adverse defendants cannot be represented by him or his staff without conflict of interest. The statute does not require the consideration in weighing of those factors suggested by the District Court. . ."

By way of this court's opinion in Babb, supra, this Court rejected the District Court's assertion that the trial court could weigh the factors regarding conflict and make its own determination on the possibility of continued representation.

In this cause it appears that the trial Court did in fact weigh the factors regarding conflict and make its own determination on the possiblity of continued representation. During the hearing on January 13, 1986, the Court indicated that if Lawrence Anthony Smith was not willing to waive his right of confidentiality that a conflict of interest may well exist which would require that the Office of the Public Defender withdraw from at least one if not both cases. On the other hand,

the Court indicated that if Lawrence Anthony Smith wished to waive his attorney/client privilege there would be no conflict. (TR-4165).

The trial Court's reasoning in denying the oral Motion to Withdraw as Counsel was incorrect and did not seek to protect the Constitutional right to effective assistance of counsel on behalf of the Defendant. A conflict continues to exist where an attorney has previously represented a person who is now testifying against a current client, where impeaching information is known to the attorney by way of the prior representation. Olds v. State, 302 So.2d 787 (4th D.C.A. 1974).

Lawrence Anthony Smith's waiver of his attorney/client privilege should not have in any way effected the Defendant's right to have effective assistance of counsel. D.R. 5-105(c), Florida Code of Professional Responsiblity provides that:

> "In the situations covered by D.R. 5-105(a)(b), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each."

Even though Lawrence Anthony Smith waived his attorney/client privilege and basically consented to representation by the Office of the Public Defender, the Defendant at no time ever consented to the joint representation of himself and Smith by the Office of the Public Defender, Ninth Judicial Circuit. This

court in the case of Baker v. State, 202 So.2d 563 (Fla. 1967) stated at page 566 that:

> "Our canons of ethics also condemn an appointment which would require an attorney to simultaneously and jointly represent co-defendants unless those represented expressly consent. Rules 4, 5, 6 and 37, Code of Ethics Governing Attorneys, 32 F.S.A. et seq. While these canons were designed primarily to govern the conduct of attorneys privately retained by free choice of a client, the reasons for their adoption and the principles to be served are equally important in cases where counsel is furnished by order of court. That which an attorney cannot do when retained by a client is no less unethical when the representation is pursuant to court order."

Consequently, the trial Court erred in denying the oral Motion to Withdraw as Counsel for the Defendant that was made by the Office of the Public Defender, Ninth Judicial Circuit. Pursuant to the dictates of Holloway v. Arkansas, 435 U.S. 475 (1978) which holds that prejudice is presumed where a conflict is shown, the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT IV

THE TRIAL COURT ERRED IN NOT EXCUSING FOR CAUSE VENIREMEN BEILER AND CULLEN

During the individual voir dire Ms. Tamara Beiler was asked questions concerning her feelings toward capital punishment. During the questioning, the following took place (TR-81 through 82):

> MS. CASHMAN: Do you think anyone who's convicted of first-degree murder should be given the death penalty?
>
> MS. BEILER: If they are proven.
>
> MS. CASHMAN: All right. What I'm asking - when I ask you about the aggravating circumstances under the law, the Judge is going to instruct you that if we get to the second phase, before you consider the death penalty you will be instructed that you will need to find beyond a reasonable doubt that the aggravating circumstances are present.
>
> If you didn't find them to be present would you have a difficult time still voting for life if an individual had been convicted of first-degree murder?
>
> MS. BEILER: Yeah, without a doubt, you know.

Following the discussion, the trial Court further questioned Ms. Beiler whereupon she indicated that she could set aside her personal feelings concerning when the death penalty should or should not be imposed, follow the instructions of the Court, and apply it to the facts in this case in making a determination in accordance with the law. (TR-82). At the conclusion of the entire voir dire, the Defendant moved to have Ms. Beiler excused for cause. (TR-421). The trial Court denied

the Defendant's request that she be excused for cause.

Also during individual voir dire, Gloria Cullen was questioned concerning her views on capital punishment during which the following took place (TR-148 through 149):

> MS. CASHMAN: Okay. If by some chance you did, the Jury were to come back guilty of first-degree murder, and we got to the penalty phase, the Judge would explain to you certain aggravating factors, certain mitigating factors, the burden of proof and the law, and you understand that you would have to follow his instructions and then decide on either the death penalty or life in prison?
>
> MS. CULLEN: Right.
>
> MS. CASHMAN: Do you think you would have a problem voting for life in prison?
>
> MS. CULLEN: Probably.

Upon the conclusion of the individual voir dire of Ms. Cullen, the Defendant exercised a challenge for cause against her which was denied by the trial Court (TR-150 through 151). At the conclusion of the entire voir dire, the Defendant renewed his challenge for cause against Ms. Cullen which was also denied by the trial Court. (TR-423).

The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath". Wainwright v. Witt, 105 S.Ct. 844 (1985). This standard that was enunciated in Witt, supra, applies not only when excusing for cause a venire-

man who is opposed to capital punishment but also when excusing for cause a venireman who is in favor of capital punishment.

"The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given him by the Court." Hill v. State, 477 So.2d 553 (Fla. 1985), citing Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1983) cert denied 105 S.Ct. 229 (1984). In applying this test, the Courts follow the rule established in Singer v. State, 109 So.2d 7 (Fla. 1959).

> "If there is a basis for any reasonable doubt as to any juror's possessing that State of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or by the Court on its own Motion."

A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. Hill, supra. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause. Hill, supra, Thomas v. State, 403 So.2d 371 (Fla. 1981).

The record in this case clearly reflects that the views held by veniremen Beiler and Cullen towards capital punishment would have prevented or at least substantially impaired the performance of their duties as jurors. Based on the questions asked of these veniremen and their answers it was clearly established that they would automatically vote to impose

the death penalty in all first-degree murder cases or at the least they would have great difficulty in any first-degree murder case to vote to recommend life in prison regardless of the law and the evidence. Therefore, there was a reasonable doubt that these two (2) veniremen possessed the state of mind necessary to render an impartial recommendation as to punishment.

The trial Court's denial of the Defendant's motion to excuse veniremen Beiler and Cullen constitutes reversible error. Therefore, at the most the Defendant's convictions should be reversed and the cause remanded for a new trial. At the least, the Defendant's four death sentences should be vacated, and this cause remanded for a new sentencing hearing before a newly empaneled jury.

POINT V

THE TRIAL COURT ERRED IN ALLOWING DONNA VALENTINE TO TESTIFY THAT SUSAN CORRELL WAS AFRAID OF THE DEFENDANT

The fourth witness to be called by the State in the trial of this cause was Donna Valentine. Among other matters she testified that she was a close friend of one of the victims, Susan Correll. (TR-515). She also testified that she knew the other three (3) victims as well as the Defendant. (TR-516 through 517). During the course of her testimony, the following took place in her direct examination by the State (TR-527 through 529):

QUESTION: Were you familiar with their relationship during the period of their separation and ultimately after their divorce?

ANSWER: Yes.

QUESTION: How would you characterize their relationship?

At this point the Defendant objected to the characterization of a relationship but the trial Court overruled the objection. (TR-527). The questioning continued as follows:

QUESTION: How would you characterize the relationship between Susan Correll and the Defendant during the period of their separation and then after their divorce?

ANSWER: They were friendly with each other. Susan would get upset many times because of mental abuse.

QUESTION: All right. Now during this period of time, did she display or exhibit fear of the Defendant?

ANSWER: Yes, she had.

Once again the Defendant objected to this testimony on the basis that it was hearsay testimony and did not go to any question of whether or not the Defendant committed the acts charged in the Indictment. (TR-528). After some argument, the trial Court overruled the objection. (TR-529). The questioning then continued as follows:

QUESTION: The question was, did Susan Correll display or exhibit fear of the Defendant?

ANSWER: Was she afraid of Jerry?

QUESTION: Did she display anything that appeared to you as fear of the Defendant?

ANSWER: Yes, in language.

The testimony of Ms. Valentine that Susan Correll had told her that she was afraid of the Defendant was complete and total hearsay and should not have been admitted by the trial Court over defense objection.

It is well settled law that the state of mind exception contained in Florida Statute Section 90.803(3)(a) allows the admission of extra-judicial statements only if the declarant's state of mind or performance of an intended act is at issue in the particular case. Bailey v. State, 419 So.2d 721, 722 (Fla. 1st D.C.A. 1983); Kennedy v. State, 385 So.2d 1020, 1021-1022 (Fla. 5th D.C.A. 1980); Van Zant v. State, 372 So.2d 502, 504 (Fla. 1st D.C.A. 1979). It is equally clear that a homicide victim's state of mind prior to the fatal incident generally is neither at issue nor probative of any material issue raised in a murder prosecution. Hunt v. State, 429 So.2d 811, 813 (Fla. 2nd D.C.A. 1983). Moreover, even if the victim's state

of mind is relevant under the particular facts of the case, the prejudice inherent in developing such evidence frequently outweighs the need for its introduction. United States v. Brown, 490 F2d 758 (D.C. Cir. 1973).

While exceptions to this rule of inadmissability do exist, such as where the victim's state of mind is both relevant and necessary to rebut a defendant's claim of self defense or his assertion that the decedent committed suicide or suffered an accidental death while toying with the murder weapon, see Kennedy, 385 So.2d at 1021, none of the exceptions applies to the case at bar.

The Defendant's defense to these charges was that he was not the perpetrator of these four (4) homicides. His defense was not self defense or that the deaths were accidental. If his defense had been so, then the testimony of Donna Valentine that Susan Correll was afraid of the Defendant may have been admissible. But in this particular case, Susan Correll's fear of the Defendant added nothing to the determination as to whether or not the Defendant was the perpetrator of these crimes. Susan Correll may have also been afraid of other people, but that fear would not have constituted admissible evidence that they were the perpetrators of the crimes.

The only value this evidence had to the State's case was to attempt to impute the state of mind of the Defendant at the time of these homicides by way of the state of mind of Susan Correll. This is borne out by the State's closing argument. At one point in the State's closing argument Assistant State

Attorney Ray Sharpe said (TR-1767):

> "Now what else did he tell Detective Payne? He told her, when she asked him: "What is your relationship with your wife?"
>
> And his answer is "We've been divorced three years. We're really good friends."
>
> Is that borne out by the evidence of this case? You already heard from Donna Valentine about how good friends he is . . ."

Further in the closing argument Mr. Sharpe stated (TR-1773):

> "Donna Valentine, she was in that house before. She was in that house the day before. She said it was kept clean but for Tuesday's, a five year old child's room, which I think most of us who have children can accept.
>
> And she told you what the Defendant's relationship was ..."

The inference by this evidence and the State's closing argument as cited above was that Susan Correll was afraid of the Defendant and that this fear was justified by the fact that the Defendant was the individual who murdered the four (4) victims. The case law is quite clear that evidence cannot be admitted under the state of mind exception to prove the state of mind or motive of someone other than the declarant. United States v. Brown, supra at 771, Hunt, supra at 813, Bailey, supra at 772, and Van Zant, supra at 504.

Consequently the trial Court should not have allowed the testimony into evidence. The Court committed reversible error in having done so. Therefore the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT VI

THE TRIAL COURT ERRED IN GRANTING THE STATE'S ORAL MOTION TO REDACT THE LAST SIX OR SEVEN PAGES OF THE TRANSCRIPT OF THE DEFENDANT'S STATEMENT GIVEN TO DETECTIVE PAYNE ON JULY 1, 1985

During the course of the trial and outside the presence of the jury, the State informed the trial Court that a transcript of the Defendant's recorded statement that was taken by Detective Payne on July 1, 1985, had been made and that the last six (6) or seven (7) pages of the transcript contained discussions by the Defendant concerning Susan Correll's drug dealings, drug usage, as well as other matters. The State then made an oral motion to redact that portion of the recorded statement that represented these last six (6) or seven (7) pages of the transcript. The State wished to stop the tape of the Defendant's recorded statement at a point in the tape just before the conversations between the Defendant and Detective Payne which were represented on the last six (6) or seven (7) pages of the transcript (TR-877). The State's position was that this portion of the tape recorded interview had no relevance to the case and that the matters contained therein did not deal with any of the issues that the State intended to put in issue at the trial. (TR-877).

The Defendant objected to the Motion (TR-879). The Defendant felt that if the State wanted to put the Defendant's statement into evidence, it should not be redacted

just because some of the answers to specific questions asked by Detective Payne were not favorable to the State. (TR-881). The State could not introduce just those portions that they felt were most favorable to their case.

The State responded to this argument by stating that the Defendant could testify if he wanted to concerning the matters contained on the portion of the tape that the State was seeking to have redacted. (TR-882). The State just felt that it did not have to play the entire tape. (TR-882).

The trial Court felt that this portion of the Defendant's statement was not relevant to the State's case and further wondered if it was relevant to any aspect of the case. (TR-883). The Court noted that throughout that portion of the tape that the State was seeking to be redacted, the Defendant mentioned other people who were involved in drugs and who were bothering Susan Correll. (TR-884). The Court then seemed to feel that the entire tape should be admitted. (TR-884). The Court observed that the Defendant told Detective Payne that he felt the murders could be drug related. (TR-885).

The Court then wanted to know the relevancy of that portion of the Defendant's statement that the State was seeking to have redacted. (TR-888). The Defendant responded by indicating that it went to the questions of whether or not there were other people with motives who might have committed the murders. (TR-888).

The Court finally ruled that it would not require

the State to present evidence that constituted the Defendant's theory of defense. The Defendant could if he so wished. (TR-890). Therefore the State's oral Motion to Redact was granted.

At a later portion of the trial the Court stated that it found nothing objectionable about the redacted portion of the Defendant's statement. The Court's ruling was that the State was not required to present it. (TR-938). The Court further ruled that the Defendant could present it because it's ruling was not that it was inadmissible or entirely irrelevant but that the State should not be required to place before the Jury the self serving statements of the Defendant. (TR-938).

Detective Payne was subsequently called as a State's witness. The Defendant's taped statement of July 1, 1985, was offered into evidence in its redacted form. (TR-1085). The Court allowed the tape into evidence and indicated that a transcript of the taped statement with the last six (6) or seven (7) pages redacted from it would be submitted into evidence taking the exhibit number of the taped statement which was Exhibit Number 199. (TR-1088). The Defendant renewed his objection to the Court's ruling. (TR-1088).

There is no question but that the trial Court's ruling granting the State's oral Motion to Redact was erroneous. The Court ruled that the Defendant's statements in the redacted portion were in fact admissible but that the State did not have to present them. The Court also ruled that they were relevant. If these statements

were to be presented into evidence at all, the Defendant would have to present them himself.

In the case of Ackerman v. State, 372 So.2d 215 (Fla. 1st D.C.A. 1979), a State witness who had known Ackerman for several years testified that he had received three (3) or four (4) phone calls from Ackerman while Ackerman was awaiting trial. On cross examination the defense counsel asked the witness three (3) questions concerning whether or not Ackerman had told him who had done the stabbing. The State objected on the grounds that the questions called for self-serving declarations by Ackerman which were inadmissible. The prosecuting attorney acknowledged to the Court that if allowed to answer, the witness would have testified that Ackerman had stated that a Wendy Raduns was the one who did the stabbing. The trial Court sustained the State's objections.

Judge Larry G. Smith in a specially concurring opinion stated at page 215:

> "Where the State calls a witness to prove an incriminating statement made by the accused in a conversation, the accused is entitled to have the remainder of the conversation admitted into evidence even though favorable to him. Burch v. State, 360 So.2d 462 (Fla. 3rd D.C.A. 1978); Bennett v. State, 96 Fla. 237, 118 So. 18 (1928); Thalheim v. State, 38 Fla. 169, 20 So. 938 (1896); West v. State, 53 Fla. 77, 43 So. 445 (1907)."

In the case of Burch v. State, 360 So.2d 462 (Fla. 3rd D.C.A. 1978), a police officer testified as to certain statements allegedly made by Burch who was charged with killing her husband.

A witness for the defense was called who was present at the time Burch made the statement to the police officer who was going to testify that Burch had told the police that "she and Burch were struggling over the gun". The prosecutor objected on the grounds that the statement was self serving. The trial Court sustained the objection. The Appellate Court indicated in its opinion at page 464 that:

> "The ruling of the trial Court in that connection was incorrect. The Defendant had the right to have all that she said at the time received in evidence. Bennett v. State, 96 Fla. 237, 118 So. 18, 19 (1928); Thalheim v. State, 38 Fla. 169, 20 So. 938, 947 (1896); even though self-serving; West v. State, 53 Fla. 77, 43 So. 445 (1907)."

In the case of Echols v. State, 484 So.2d 568 (Fla. 1985), Echols argued that portions of a tape recorded statement should have been excluded because they unduly prejudiced Echols without showing that he was guilty of murder. This Court ruled that the entire recording was relevant. This Court further indicated that all relevant evidence was admissible until it was shown to be inadmissible for some lawful reason citing Heiney v. State, 447 So.2d 210 (Fla) cert denied 105 S.Ct. 303 (1984) and Ruffin v. State, 397 So.2d 277 (Fla) cert denied 454 U.S. 882 (1981). Therefore based on the trial Court's ruling that the redacted portions of the Defendant's July 1, 1985 taped statement were relevant and admissible the case law is clear that the trial Court erred in granting the State's oral Motion to Redact.

Additionally, the Court's ruling granting the State's oral Motion to Redact also had the effect of precluding the

Defendant from even cross examining Detective Payne concerning the redacted statements. As Judge Smith stated in his specially concurring opinion in Ackerman, supra at 215:

> "Since the right to cross examine stems from the constitutional right of the accused to be confronted by his accusors, Coco v. State, 62 So.2d 892 (Fla. 1953), improper curtailment of cross examination constitutes constitutional error. Such error may not be regarded as harmless if there is a reasonable possibility that the erroneous evidentiary ruling may have contributed to the defendant's conviction or if the error may not be found harmless beyond a reasonable doubt or if prejudice is demonstrated. Nowlin v. State, 346 So.2d 1020, 1024 (Fla. 1977) citing Chapman v. Californis, 386 U.S. 18, 87 S.Ct. 824, 17 LEd2d 705 (1967); Coxwell vs. State, 361 So.2d 148, 152 (Fla. 1978)."

This Court recognized in Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982), that a person accused of a crime has a right to a full and fair cross examination. This Court also recognized that cross examination of prosecution witnesses by exceeding the scope of direct examination was not an acceptable vehicle for presenting the defendant's case-in-chief. It would seem therefore that cross examination of prosecution witnesses within the scope of direct examination is an acceptable vehicle for presenting the Defendant's case-in-chief. The Defendant in this cause was not afforded full and fair cross examination of Detective Payne concerning the Defendant's recorded July 1, 1985, statement. The Defendant had every right to cross examine Detective Payne concerning those portions of the redacted statement, since such cross examination would have been within the scope of the State's direct examination, in order to estab-

lish his theory of the defense. The trial Court's ruling granting the State's oral Motion to Redact completely prevented him from doing so even though the trial Court had found it to be admissible and relevant.

It being clear that the trial Court erred in granting the State's oral Motion to Redact, the next question is whether or not the error was harmless. The error was not harmless because the jury in this cause was never able to consider the theory of the Defendant's defense. The jury never heard that other persons may have had a motive to murder Susan Correll along with the other three (3) victims as a result of drug related matters. The Defendant had an absolute right to remain silent and should not have been placed in a position by the trial Court of having to testify in order to present his theory of the defense when he had the right to develop that defense by way of the cross examination of Detective Payne, but for the trial Court's ruling on the Motion to Redact. There is a reasonable possibility that the trial Court's granting the State's oral Motion to Redact contributed to the conviction of the Defendant. Therefore the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE PURPORTED WILLIAMS RULE EVIDENCE

On or about January 6, 1986, the State of Florida filed a Notice of Intent to Offer Similar Fact Evidence whereby the State gave notice of its intent to offer evidence that on May 15, 1982, the Defendant did willfully and maliciously injure or damage the personal property of Susan Correll, to-wit: tires, by puncturing the said tires with a sharp instrument, causing damage to said property less than $200.00. (TR-4034).

During the trial of this cause a brief hearing was held before the trial Court concerning the admissibility of the evidence that the State intended to offer. At this hearing, the Defendant objected to the admission of this evidence on the grounds that the evidence concerning the slitting of Susan Correll's tires on May 15, 1982, was too remote and it did not relate to the crimes charged in the Indictment. (TR-437). The Defendant felt that this evidence merely was an attempt on the part of the State to show the bad character of the Defendant. (TR-438). Additionally, the Defendant objected to the admissibility of this evidence on the grounds that since there were no eyewitnesses to the alleged incident on May 15, 1982, the evidence was merely speculative. (TR-438). The State argued that the evidence tended to show identity and method of operation on the part of the Defendant. (TR-439). The Court thereupon denied the Defendant's objection to the admissibility of this

purported Williams Rule evidence. (TR-440).

The State subsequently called as a witness Mr. Richard Henestofel. Mr. Henestofel testified that on the evening of June 30, 1985, he went to the ABC Bar at Lancaster and Orange in Orlando, Florida. (TR-1020). At approximately 6:00 p.m. Mr. Henestofel observed the Defendant at the ABC Bar. (TR-1021). Also on June 28, 1985, Mr. Henestofel met one of the victims, Susan Correll, at the same ABC Bar, where Mr. Henestofel and Ms. Correll had a few drinks together. (TR-1022). The Defendant observed Susan Correll and Mr. Henestofel together. (TR-1023).

Mr. Henestofel further testified that at approximately midnight of June 30, 1985, he left the ABC Bar, went to his automobile, and discovered that he had four (4) flat tires. (TR-1025). When Mr. Henestofel returned to his automobile the next morning, he discovered that there were two (2) cuts in each tire. (TR-1026).

The State then called as a witness James Rucker who testified that in May of 1982 while at his father's home, he witnessed an incident involving Susan Correll's automobile. (TR-1138). Mr. Rucker testified that between 6:30 a.m. and 7:00 a.m. he heard the Defendant outside a window screaming for Susan Correll. (TR-1139). Mr. Rucker looked out the window and observed the Defendant standing by Susan Correll's white Chevette. (TR-1139). When Mr. Rucker looked outside and saw the Defendant, he heard some air hissing out of a tire, observed the Defendant walk away from the Chevette, get into his auto-

mobile, and leave. (TR-1140). At the time Mr. Rucker observed the Defendant, the Defendant was holding a knife in his hand. (TR-1140). After the Defendant left the scene, Mr. Rucker went outside and observed that all four (4) tires had a slash on the sidewalls. (TR-1141). Finally, Mr. Rucker testified that the Defendant returned to the scene and that upon his return, he told Mr. Rucker that he had seen an individual slash the tires and that he had left chasing this individual. (TR-1142). At no time did Mr. Rucker actually see the Defendant slash the tires. (TR-1142).

Florida Statute 90.404 provides in part as follows:

> (2) Other Crimes, Wrongs, or Acts
> (a)Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Florida Statute 90.404 is a codification of Williams v. State, 110 So.2d 654 (Fla. 1959) cert denied 361 U.S. 847 (1959).

It is the Defendant's contention that the trial Court erred in allowing the purported Williams Rule evidence into evidence in the trial of this cause. This collateral crime evidence lacked any probative value, was presented only to show the Defendant's bad character and/or criminal propensity, and, consequently was inadmissible. The State argued at the hearing on the admissibility of this evidence that this evidence went

to show identity and method of operation. In the case of Drake v. State, 400 So.2d 1217 (Fla. 1981), this Court stated at page 1219:

> "The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant."

In reversing Drake's conviction, this court stated at page 1219:

> "Even in assuming some similarity, the similar facts offered would still fail the unusual branch of the test. Binding of the hands occurs in many crimes involving many different criminal defendants. This binding is not sufficiently unusual to point to the defendant in this case, and it is therefore irrelevant to prove identity."

This standard was reiterated in the case of Peek v. State, 488 So.2d 52 (Fla. 1986). In reversing Peek's conviction this Court indicated that the dissimilarities between the Williams Rule evidence and the facts of the crime for which Peek was on trial greatly outweighed the similarities and that "the crime's common points are not so unusual as to justify admission of (the collateral crime) evidence".

In the case of Jackson v. State, 451 So.2d 458 (Fla. 1984), Jackson was on trial for the murders of Roger McKay and a Terrence Milton. During the trial the State called a witness,

Sylvester Dumas, who testified about an occasion when Jackson pointed a gun at him and boasted of being a "thoroughbred killer" from Detroit. This Court found this testimony not to be relevant to a material fact in issue and in the opinion, citing Paul v. State, 340 So.2d 1249, 1250 (Fla. 3rd D.C.A. 1976) cert denied 348 So.2d 953 (Fla. 1977), stated:

> "(There) is no doubt that this admission (to prior unrelated crimes) would go far to convince men of ordinary intelligence that the Defendant was probably guilty of the crime charged. But the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the Defendant to commit the crime charged, it must be excluded (citing to Williams)."

Applying these principles to this cause, it is clear that the trial Court erred in allowing this purported Williams Rule evidence into evidence. There was only one (1) point of similarity between the Williams Rule testimony concerning the slashing of the tires of Susan Correll's Chevrolet Chevette on May 15, 1982, and Richard Henestofel finding his four (4) tires slashed on the evening of June 30, 1985, to-wit: all four tires were slashed on both occasions. Many more dissimilarities existed including (1) the victims were different, Susan Correll on May 15, 1982, and Richard Henestofel on June 30, 1985; (2) the incident of May 15, 1982, occurred in the morning whereas the incident of June 30, 1985, occurred at night; (3) the incident of May 15, 1982, occurred at Mr. Rucker's father's house whereas the incident of June 30, 1985, occurred at an ABC Bar; (4) there

was one cut in each of Susan Correll's four (4) tires whereas there were two (2) cuts in each of Mr. Henestofel's four (4) tires. Additionally, the slashing of four tires was not sufficiently unusual to point to the Defendant and therefore was irrelevant to prove identity. This Williams Rule evidence was admitted only to show the bad character of the Defendant and/or his propensity to crime. This is admitted in the closing argument of the State Attorney, Ray Sharpe, when he stated at TR-1775:

> "Whose tires are they that got punctured? This supposed boyfriend of Susan's, Richard Henestofel. You'll find out that that's the way Jerry solved his problems. Whether he did the same thing when he thought Susan Correll was living with James Rucker; went over there and slashed her tires."

Secondly, this Williams Rule evidence should not have been admitted because no one witnessed the Defendant slash Susan Correll's tires on May 15, 1982, and no one witnessed him slash Richard Henestofel's tires on June 30, 1985. In the case of Chapman v. State, 417 So.2d 1028 (3rd D.C.A. 1982), the Court stated at page 1031:

> "In order to introduce evidence of another crime not only must the requirements of Section 90.404(2)(a) be satisfied, but the State must also prove by clear and convincing evidence the collateral crime and a connection between the defendant and that crime. State v. Norris, 168 So.2d 541 (Fla. 1964). Citing to State v. Norris, the Court in Dibble v. State, 347 So.2d 1096 (Fla. 2nd D.C.A. 1977) reversed a conviction where there was no proof that the similar crime was committed by the person on trial. Accord Franklin v. State, 229 So.2d 892 (Fla. 3rd D.C.A. 1970); Painell v. State, 218 So.2d 535 (Fla. 3rd D.C.A. 1969)."

There was not clear and convincing evidence that the Defendant slashed Susan Correll's four (4) tires on May 15, 1982. Therefore this Williams Rule evidence should not have been admitted.

Finally, the trial Court should not have admitted into evidence the Williams Rule testimony because the first incident on May 15, 1982, was too far removed in time from the second incident of June 30, 1985. While there may come some point in time after which evidence of a defendant's past criminal activity is too remote to be relevant, this point in time will vary from case to case. See McGough v. State, 302 So.2d 751 (Fla. 1974); Gluck v. State, 62 So.2d 71 (Fla. 1952). In this cause, after reviewing the entire record, the first incident was too far removed from the second incident. The Defendant and Susan Correll lived together for period of time between the two (2) incidents and when not living together were known to go out together.

For the reasons stated in this Point on Appeal, the trial Court committed reversible error in allowing the Williams Rule testimony into evidence. This error not being harmless, the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT VIII

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF STATE'S WITNESS, DAVID MURRAY

During the second week of the trial of this cause, the State called to the stand Mr. David Murray. Prior to Mr. Murray testifying, the Defendant objected to his testimony. (TR-1235). The basis of the Defendant's objection, was that Mr. Murray was going to testify concerning incidents that happened in 1982, and therefore his testimony was not relevant. (TR-1235). The State proffered to the Court the testimony of Mr. Murray. The State indicated that Mr. Murray would testify that sometime during 1982 or 1983, that Susan Correll and Tuesday Correll had moved into his home. (TR-1236). The State further proffered that one afternoon the Defendant came to the Murray residence, that Susan Correll would not answer the door, and that Susan Correll showed signs of being afraid of the Defendant. (TR-1236). Mr. Murray would further testify, according to the State, that at one time during the argument, the Defendant told Susan Correll that he would kill her. (TR-1236). Finally, the State proffered that Mr. Murray would testify that when he and his wife would leave at any time at night, that Susan Correll would lock up in the house, because she was afraid of the Defendant. (TR-1236 through 1237). The Court then overruled the Defendant's objection. (TR-1241).

Following the proffer of this testimony, the State called Mr. David Murray to the stand. Mr. Murray testified that

one evening in 1982 or 1983, the Defendant came to his residence, knocked on the door, and that Susan Correll would not go to the door. (TR-1244). Mr. Murray further testified that at this time, Susan Correll got white as a ghost and just total fear. (TR-1244). Mr. Murray then escorted Susan Correll outside to talk with the Defendant, whereupon the Defendant told her that he wanted her to come back with him. (TR-1244 through 1245). The Defendant then became quite angry whereupon Susan Correll started crying, and became very, very, very scared. (TR-1245). At this time Mr. Murray heard the Defendant tell Susan Correll that if she dated or went out with another man, that he would kill her. (TR-1245). Finally, Mr. Murray testified that when he and his wife would leave their residence, Susan Correll would lock all the doors, deadbolt them, make sure all the windows were locked, and bring the Murray's German Sheppard into the house. (TR-1246).

The trial Court clearly erred in allowing the State to present the testimony of David Murray for two reasons: (1) the incident was too remote in time to be relevant to the issue of the Defendant's guilt or innocence, and; (2) that Mr. Murray should not have been allowed to testify that Susan Correll was afraid of the Defendant, as it related to her state of mind some two and one half to three years prior to June 30, 1985, and was therefore also irrelevant to the issue of the Defendant's guilt or innocence.

In the case of Barwick v. State, 82 So.2d 356 (Fla. 1955), Barwick argued on appeal that the lower Court committed

error in sustaining objections to proffered testimony to the effect that three (3) or four (4) weeks prior to the homicide the deceased "cut" Barwick in an altercation. This Court found that the trial Court had properly excluded the testimony "for the reason that it was too remote to have any materiality to the subject of creating in the appellant's mind, as he contended, "the presence of imminent danger to himself at the hands of deceased" at the time of the homicide". Barwick, supra at 359. This Court further stated at page 359:

> "Remoteness is established not only by the passage of time but also by the admitted intervening fact that the appellant and deceased resided together continuously between the time of the prior altercation and the time of the homicide."

The Defendant's threat in 1982 or 1983 that if Susan Correll dated or went out with another man he would kill her was too remote in time to be relevant. It was too remote in time because this threat was made approximately two (2) to three (3) years prior to the homicides on June 30, 1985. It was also too remote because of the intervening facts that after this threat the Defendant and Susan Correll lived together for a period of time and when not living together, had a harmonious relationship. The testimony of Donna Valentine clearly established this. Ms. Valentine testified that Susan Correll and the Defendant had been divorced for three (3) or four (4) years. (TR-527). She further testified that after the divorce the Defendant was regularly invited to parties and other gatherings that Susan Correll and other people would have.

(TR-540). In fact the Defendant had been invited to a party on a Saturday before the homicides that had eventually been cancelled. (TR-540). The Defendant had also lived at the house at 3004 Tampico Drive where the murders took place and part of the time he lived there Susan Correll also lived there. (TR-540). This was after the Correll's divorce and also after the incident that Mr. Murray testified about. Finally, Ms. Valentine testified that Susan Correll had gone out with other people between the time she and the Defendant were divorced and the time that they both lived together in the house on Tampico Drive. (TR-542).

The Defendant realizes that the Barwick case dealt with alleged threats or acts of violence by a victim towards a defendant and not, as in this case, alleged threats by the Defendant towards a victim, Susan Correll. The theory relating to remoteness is the same though. Because of the passage of time in this case between the alleged threat made by the Defendant towards Susan Correll in 1982 or 1983, and the fact that they lived together and when not living together had a harmonious relationship, the trial Court should not have admitted the testimony of Mr. Murray. It was not relevant in any way to the issue of the Defendant's guilt or innocence, and if it was in any way relevant, the prejudicial impact on the Defendant greatly outweighed any relevancy it may have had.

The trial Court also erred in allowing Mr. Murray to testify that Susan Correll was afraid of the Defendant and that she would lock the doors and windows when Mr. Murray and

his wife left her alone. Susan Correll's state of mind in 1982 or 1983 had absolutely no relevance to this case.

The case law relating to the state of mind exception in Florida Statute Section 90.803(3)(a) was previously discussed in Point V of this brief so the Defendant will not restate it. The Defendant can conceive of absolutely nothing relevant to Mr. Murray's testimony concerning Susan Correll's fear of the Defendant during the 1982 or 1983 incident. Susan Correll's state of mind during this incident was neither at issue nor probative of any material issue raised in this prosecution. Hunt v. State, 429 So.2d 811, 813 (Fla. 2nd D.C.A. 1983). Neither was the fact that when Mr. Murray and his wife would leave their home, Susan Correll would lock the doors and windows.

All the testimony of Mr. Murray highly prejudiced the Defendant without being relevant to any issue. Therefore, for the reasons stated in this Point on Appeal, the trial Court erred in allowing Mr. Murray's testimony. Consequently the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT IX

THE TRIAL COURT ERRED IN ALLOWING DAVID B. BAER TO TESTIFY CONCERNING THE RESULTS OF BLOOD TESTS CONDUCTED BY WAY OF THE ELECTROPHORESIS PROCESS

The State called as a witness David B. Baer, who was employed as a senior crime forensic serologist at the Region IV Crime Laboratory in Sanford, Florida. (TR-1323). Mr. Baer testified that a forensic serologist is assigned to examine various articles in a criminal trial for the presence of blood and other fluids in an attempt to determine whether or not they could have come from a particular person. (TR-1324). The trial Court, after Mr. Baer testified as to his training in this area, determined that Mr. Baer was an expert in the field of forensic serology. (TR-1325).

Mr. Baer then testified that for a period of three and one-half months he worked full time analyzing and examining exhibits that had been submitted to him in this cause. (TR-1325). Mr. Baer indicated that in making examinations he first determines whether the suspected blood is in fact blood. (TR-1327). Then, if it is determined to in fact be blood, he tries to determine whether or not it is human blood. (TR-1328). After determining that it is human blood, he tries to determine which of the A, B, AB, or O blood group it is in. (TR-1329). Finally, by using a process known as electrophoresis, he tries to determine which of several types of a possible type of an enzyme is present in the human blood. (TR-1331).

At this point in Mr. Baer's testimony, the Defendant objected to any testimony concerning the results of any blood testing conducted by way of the electrophoresis process since the State had not shown the general scientific reliability of the process. (TR-1332). At that time, the trial Court withheld ruling on the Defendant's objection and allowed the State to continue its questioning of Mr. Baer. (TR-1337).

Mr. Baer then testified concerning the procedure he employs in making a determination as to the enzymes present in human blood. (TR-1337 through 1338). He further testified that he had found these tests to be reliable in his experience as a forensic serologist. (TR-1338). At this point, the State offered into evidence the known blood samples of the four victims in this cause. (TR-1340). The State then offered into evidence a chart marked 2-TT prepared by Mr. Baer that reflected the results of his tests on the blood samples of the four victims in this case and of the Defendant. (TR-1340). Upon questioning by the trial Court, Mr. Baer testified that the chart marked 2-TT contained the results of the blood tests conducted by way of the electrophoresis process. (TR-1342). Mr. Baer further indicated that he had performed the electrophoresis test hundreds of times; that he had previously testified in court concerning the results of the electrophoresis test; that this method of blood classification was generally accepted in the medical or forensic community as reliable but that outside the forensic community there was little need for it; and that there was a controversy

in the State of California in which the electrophoresis process was being attacked by an individual. (TR-1342). Finally, Mr. Baer testified that it was his opinion that the consensus of persons in the field was that the electrophoresis process was accurate and reliable. (TR-1342 through 1343).

At this point the Defendant again objected to Mr. Baer's testimony concerning the results of any blood tests performed by way of the electrophoresis process. (TR-1344). The trial Court then overruled the Defendant's objection and admitted the chart marked 2-TT into evidence as State's Exhibit 226. (TR-1347). Following the Court's ruling, Mr. Baer testified as to the blood and enzyme types of the four victims and of the Defendant. He also testified as to what percentage of the population had each blood and enzyme type. (TR-1350). Mr. Baer then testified as to his findings on the exhibits submitted for his analysis.

In the middle of Mr. Baer's testimony, the trial Court recessed for the day. (TR-1384). After the jury was excused further argument was held on the admissibility of the results of the blood tests conducted by the electrophoresis process. The Defendant argued that based on the two cases that had been provided to the Court, the burden was on the State to show that the electrophoresis process was in fact scientifically reliable, which the Defendant argued the State had failed to do. (TR-1388). The Defendant then moved to strike the evidence and testimony that had already been presented. (TR-1388 through 1389). The

Defendant further argued that based on the controversy in the State of California and the State of Michigan on the reliability of the electrophoresis process, the electrophoresis process was not a generally accepted scientific procedure and therefore the results of the tests should not be admitted in the trial of this cause without the State having laid a proper foundation. (TR-1389). This was especially true since many of the items of evidence that had been examined by Mr. Baer had not been examined for several months following the homicides that occurred on June 30, 1985. (TR-1387). At that time the trial Court indicated that it would allow the State to respond to the Defendant's argument the following day. (TR-1389).

The next morning the State responded to the Defendant's argument concerning the electrophoresis process. The trial Court ruled that the burden was on the Defendant to prove that the electrophoresis process was not scientifically reliable since the Court felt that the electrophoresis process was an accepted procedure. (TR-1397). The trial Court therefore denied the Defendant's Motion to Strike. (TR-1397).

When Mr. Baer was recalled to the stand by the State to continue with his trial testimony, Mr. Baer testified that the electrophoresis process was used by the FBI Crime Lab in Washington and was accepted by the FBI as reliable. (TR-1406).

The issues raised by the Defendant concerning the electrophoresis process have been discussed by the Supreme Court of Michigan and the Supreme Court of California. In the case of

People v. Young, 340 NW2d 805 (Mich. 1983), Young argued that the results of the elecrophoresis process were inadmissible without a prior showing that the technique of serological electrophoresis enjoyed general scientific acceptance among impartial and disinterested experts. The Michigan Supreme Court agreed with Young's position and found that the record did not establish that the electrophoresis process enjoyed general scientific acceptance among impartial and disinterested experts.

In the case of People v. Brown, 220 Cal.Rptr. 637 (Cal. 1985) Brown argued that the trial court committed error in admitting the results of the electrophoresis process since the prosecution had failed to demonstrate at trial the scientific acceptance of the tests performed. In the Brown case, blood stains from the crime scene were collected some eight (8) to twelve (12) hours after the victim's death. In one instance testing occurred some two and one-half (2 1/2) months later. The Court announced the rule for the admissibility of a new scientific technique: "the technique must be sufficiently established to have gained general acceptance in the particular field to which it belongs". Brown supra at 644. The Court further stated that:

> ". . . the proponent of the scientific evidence must establish "(1) the (generally accepted) reliability of the method . . ., usually by expert testimony, and (2) (that) the witness furnishing such testimony (is) properly qualified as an expert to give an opinion on the subject."

The California Supreme Court also noted who was a "qualified

expert" on the issue of scientific acceptance stating at page 645:

> "The witness must have academic and professional credentials which equip him to understand both the scientific principles involved and any differences of view on their reliability. He must also be "impartial", that is, not so personally invested in establishing the technique's acceptance that he might not be objective about disagreements within the relevant scientific community."

After reviewing decisions of the Courts of several different states concerning the electrophoresis process, the California Supreme Court stated at page 647:

> ". . . the acceptance of tests for typing stale body fluids is a matter of substantial legal controversy. Where that issue remains open, the party offering the evidence has the burden of proving in the trial Court that a consensus of scientific opinion has been achieved . . ."

After noting the applicable principles of law, the California Supreme Court reviewed the record in the Brown case to determine whether or not the prosecution had established that the electrophoresis process had gained general scientific acceptance among impartial and disinterested experts. At Brown's trial the prosecution presented testimony of two witnesses that the tests they had performed using the electrophoresis process were accepted and reliable.

In finding that the record was inadequate to establish the scientific acceptance of the electrophoresis process, the Court noted that although the prosecution's two witnesses were

competent and well-credentialed forensic technicians, their identification with law enforcement, their career interest in acceptance of the tests, and their lack of formal training and background in the applicable scientific disciplines made them unqualified to state the view of the relevant community of impartial scientists. Additionally, neither witness backed up his or her opinion with a discussion of the relevant scientific literature. Brown, supra at 647.

This Court has indicated that Courts are cautious to accept new methods of proof which have not been shown to be reliable. Bundy v. State, 471 So.2d 9 (Fla. 1985) (hypnotically refreshed testimony inadmissible); Walsh v. State, 418 So.2d 1000 (Fla. 1982) (polygraph examination evidence inadmissible); Zeigler v. State, 402 So.2d 365 (Fla. 1981) (results of sodium butathol test inadmissible). The electrophoresis process was not shown to be reliable in this cause. Mr. Baer's credentials appeared to have been no greater than the credentials of the two (2) witnesses who testified in the Brown case concerning the reliability and acceptance of the electrophoresis process. As were the two (2) witnesses in the Brown case, Mr. Baer was identified with law enforcement, having been employed with the Region IV, Crime Laboratory which is a branch of law enforcement; he had a career interest in the acceptance of the process; he lacked formal training and background in the applicable scientific disciplines so as not to be qualified to state the view of the relevant community of impartial scientists;

and even more importantly he failed to back up his opinion with a discussion of the relevant scientific literature. A portion of his testimony supports the Defendant's contention that the State failed to establish the reliability of the electrophoresis process as Mr. Baer testified that there was a controversy in California over the reliability of the process which was being led by Dr. Benjamin Grunbaum. Therefore, Mr. Baer's opinion that the electrophoresis process was reliable did not in fact establish its scientific acceptance by "impartial and disinterested" experts. The fact that the FBI Crime Laboratory in Washington employs the electrophoresis process also did not establish the scientific acceptance of the process. One could hardly label the FBI as being "impartial and disinterested" since its sole purpose is law enforcement and certainly would have a great interest in the acceptance of the process.

After a total review of the record it is clear that the State failed to establish the scientific acceptance of the electrophoresis process by "impartial and disinterested" experts. The trial Court should not have allowed Mr. Baer to testify as to the results of the blood tests conducted by way of the electrophoresis process. Consequently, the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT X

THE TRIAL COURT ERRED IN PERMITTING JUDITH BUNKER TO GIVE OPINION TESTIMONY CONCERNING BLOOD STAIN ANALYSIS

The State called as one of its last witnesses, Ms. Judith Bunker. In attempting to establish Ms. Bunker's qualifications as an expert in the area of blood stain pattern analysis and crime scene reconstruction, Ms. Bunker testified that

1. From 1970 to 1982, she was employed as the Assistant to and technical specialist for the District 9 Medical Examiner in Orlando, whose jurisdiction is Orange, Osceola, and Seminole Counties. (TR-1470).

2. As part of her duties, she assisted the Medical Examiner in the medical and legal investigations of death. (TR-1470 through 1471).

3. Besides her on the job training, which involved 2000 cases a year by 1980, she also completed over 200 hours of continuing education in various aspects of the medical and legal determination of death. (TR-1471).

4. She is a consultant to law enforcement agencies and criminal attorneys throughout Florida and the United States. (TR-1471).

5. She is a member of the International Association for Identification and the International Association of Blood Stain Pattern Analysis. (TR-1471).

6. In 1978, she conducted her first blood stain evidence workshop in the Orlando area, and she also conducted 40 hour workshops throughout Florida and the United States for

colleges and police training programs. (TR-1471).

7. She has qualified as an expert in the area of blood stain pattern analysis approximately twenty-five (25) times in the State of Florida, the State of Texas, and the State of Louisiana. (TR-1471 through 1472).

8. She has assisted in several thousand investigations involving bloodshed and several hundred cases involving crime scene reconstruction and blood stain analysis. (TR-1472).

9. What she has learned, she has learned basically on the job working with the Medical Examiner in Orlando and the several courses that she has taken from time to time. (TR-1473).

10. She has no advanced degree in the field of crime scene reconstruction and blood stain pattern analysis. (TR-1473).

When the State tendered Ms. Bunker as an expert in the area of blood pattern analysis and crime scene reconstruction, the Defendant objected on the basis that it was not established that she was an expert in these fields. (TR-1473). The trial Court ruled that it would permit Ms. Bunker to give opinion testimony concerning blood stain analysis. (TR-1474).

It is the Defendant's position that Ms. Bunker was not adequately qualified as an expert in the areas of crime scene reconstruction and blood stain pattern analysis. Therefore, she should not have been allowed to render an expert opinion in these areas. None of her so-called qualifications would lead a reasonable person to the conclusion that she was an expert, as she did not have adequate training in these areas. Most of the training that Ms. Bunker testified about was as an assistant

to the Medical Examiner and there was no testimony that this position involved crime scene reconstruction and blood stain pattern analysis. Although she is a member of several associations and has conducted several seminars in the areas of crime scene reconstruction and blood stain pattern analysis, she does not hold any advanced degree in these fields.

The Defendant realizes and understands that the trial Court has broad discretion concerning the range of subject matter upon which an expert may testify and absent a clear showing of error, that exercise of discretion will not be disturbed on appeal. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert denied, 457 U.S. 1111 (1982); Johnson v. State, 393 So.2d 1069 (Fla.1980), cert denied, 454 U.S. 882 (1981). In this particular case though there was not sufficient evidence presented to justify the trial Court permitting Ms. Bunker to render expert opinion in the areas for which she was tendered by the State as an expert.

The trial Court therefore abused its discretion in allowing Ms. Bunker to testify as an expert in the areas of crime scene reconstruction and blood stain pattern analysis. Consequently, the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT XI

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL

At the conclusion of the State's case on February 5, 1986, the Defendant moved for a directed verdict of acquittal. (TR-1690). The Defendant argued that there was an insufficient showing of pre-meditation to support a conviction of Murder in the First Degree. Additionally, the Defendant argued that there was no showing by the State that the fingerprints and palm prints of the Defendant that were found at the scene of the homicides, could only have been placed at the time the murders took place. (TR-1691). Following further argument by the Defendant and the argument of the State, the trial Court denied the Defendant's Motion for Judgment of Acquittal. (TR-1694). After the Defendant rested the presentation of his case, the Motion for Directed Verdict of Acquittal was renewed. The Court again denied the Defendant's Motion for Directed Verdict of Acquittal. (TR-1749). It is the Defendant's position that the trial Court erred in denying his Motion for Directed Verdict of Acquittal.

The evidence against the Defendant was entirely circumstantial and insufficient to prove that he committed the four homicides. This court in the case of McArthur v. State, 351 So.2d 972 (Fla. 1977), stated the legal standard to be applied in cases where a conviction is based on circumstantial evidence. This court stated in Footnote 12 at page 976 that: "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." This standard means that even though circumstantial evidence is sufficient to suggest a probability of guilt, it is not adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence. See McArthur, supra at 978; Peavy v. State, 442 So.2d 200 (Fla. 1983); Heiney v. State, 447 So.2d 210 (Fla. 1984); Ross v. State, 474 So.2d 1170 (Fla. 1985).

The evidence presented by the State at the trial of this cause established that there were no eyewitnesses to the four homicides nor did the Defendant admit to having commited the homicides. The only evidence that the State presented in its effort to place the Defendant at the scene at the time of the homicides was through the testimony of evidence technicians with the Orange County Sheriff's Department, Mr. David Baer, the senior forensic serologist with the Region IV Crime Laboratory in Sanford, Florida, and James Murray, fingerprint examiner with the Orange County Sheriff's Department.

Sherilyn Teri Ayers, William Miller, and John Fisher, all testified concerning items of physical evidence that were collected by them at the residence located at 3004 Tampico Drive, where the homicides occurred. All items of suspected blood were submitted by them to Mr. Baer at the Region IV Crime Laboratory and all latent fingerprints and palm prints were submitted to James Murray of the Orange County Sheriff's Department. Many of the items that were examined for the presence of blood by Mr. Baer had what could possibly have been the

Defendant's blood on them. Mr. Baer was never able to testify that these items definitely had the Defendant's blood on them. (TR-1447). The testimony of Mr. Baer standing alone certainly did not constitute evidence which was inconsistent with any reasonable hypothesis of innocence. This testimony did not place the Defendant at the scene of the homicides when they were alleged to have occurred.

The fact that James Murray of the Orange County Sheriff's Department was able to identify certain palm prints and fingerprints that were gathered from the scene of the homicides, as being those of the Defendant, still does not constitute evidence which was inconsistent with every reasonable hypothesis of the Defendant's innocence. There was absolutely no testimony presented by the State that proved that these palm prints and fingerprints of the Defendant could only have been placed at the scene of the homicides at the time the homicides occurred. This is especially true in light of the testimony of Donna Valentine who testified that the Defendant had last resided at the scene of the homicides at 3004 Tampico Drive approximately two months prior to the homicides and that since he had moved out of that residence, he had on occasion visited the home. The testimony of Donna Valentine establishes that these fingerprints and palm prints that were discovered by the evidence technicians of the Orange County Sheriff's Department could have been placed there at a time other than the time the homicides occurred. Therefore, proof that the Defendant's fingerprints and palm prints were found at the scene of the homicides was not incon-

sistent with Donna Valentine's reasonable explanation as to how the Defendant's prints came to be on the items in the four victim's home.

In the case of Jaramillo v. State, 417 So.2d 257 (Fla. 1982), this court reversed Jaramillo's conviction on the basis the State had failed to establish that Jaramillo's fingerprints could only have been placed on certain items in the murder victim's home at the time the murder was committed. The evidence in this cause is identical to the evidence that was developed at Jaramillo's trial. In this case, as in the Jaramillo case, there was a reasonable explanation as to how the Defendant's fingerprints and palm prints came to be on certain items located in the four victim's residence.

The State having failed to establish that the Defendant's fingerprints could only have been placed on the items at the time the murders were committed, the trial Court should have granted the Defendant's Motion for Directed Verdict of Acquittal. Failure to do so constitutes error. Therefore, the Defendant's convictions and sentences should be reversed and the Defendant forever discharged from this cause, or in the alternative, this cause should be remanded for a new trial.

POINT XII

THE TRIAL COURT ERRED IN NOT CONDUCTING A RICHARDSON HEARING IN DETERMINING WHETHER OR NOT TO ALLOW BARBARA PIZZAROZ TO TESTIFY ON BEHALF OF THE DEFENDANT

During a recess in the trial of this cause, the Defendant indicated a desire to call as a witness Barbara Pizzaroz since her name had been mentioned several times during the trial. (TR-1401). The Defendant had not expected to use her as a witness and therefore had not listed her as a witness on a witness list. (TR-1401). The Defendant felt that it was important to have Ms. Pizzaroz testify concerning her conversations with James Nagle and Guy Kettlehone on July 3, 1985. This had been mentioned during the testimony of Nagle and Kettlehone and in fact the State had questioned them about it at some length. (TR-1402).

The State objected to allowing Ms. Pizzaroz to testify on the grounds that she had not been listed as a witness and therefore the State had not had the opportunity to take her deposition. (TR-1402). Further, the State argued that it did not know what testimony Ms. Pizzaroz intended to offer. (TR-1403). The Defendant responded to the State's argument that he intended to call Ms. Pizzaroz to testify concerning conversations she had with Kettlehone and Nagle on July 3, 1985. (TR-1403). The trial Court indicated that it would not allow the Defendant to call Ms. Pizzaroz as a witness. (TR-1404).

The trial Court failed to comply with the dictates of Richardson v. State, 246 So.2d 771 (Fla. 1971) when making its

determination whether or not to allow the Defendant to call Barbara Pizzaroz as a defense witness. According to the dictates of Richardson the trial Court's discretion in attempting to remedy a discovery violation can be properly exercised only after the Court has made an adequate inquiry into all of the circumstances surrounding such violation. This inquiry should cover, among other things, such questions as whether the violaton is willful or inadvertent, trivial or substantial, and most importantly, what effect, if any, it has upon the ability of the aggrieved party to properly prepare for trial.

A Richardson inquiry is designed to ferret out procedural prejudice occasioned by a party's discovery violation. In ascertaining whether this type of prejudice exists in a given case, the trial Court must first decide whether the discovery violation prevented the aggrieved party from properly preparing for trial, and then must determine the appropriate sanction to impose for such violation. Smith v. State, 372 So.2d 86 (Fla. 1979). In exercising its discretion, the Court should inquire into the feasibility of rectifying any prejudice by some means short of excluding the witness. Adams v. State, 366 So.2d 1236 (2nd D.C.A. 1979). In O'Brien v. State. 454 So.2d 675 (5th D.C.A. 1984), the Fifth District Court of Appeals said:

> "Although it is within the Judge's discretion to exclude witnesses that most extreme sanction should never be imposed except in the most extreme cases, such as when purposeful, prejudicial, and with intent to thwart justice. No sanction should be imposed, least of all the most extreme, without an adequate hearing to determine the cause and effect of the failure to disclose."

The Richardson Rule has been applied by this Court to defense discovery violations. Bradford v. State, 278 So.2d 624 (Fla. 1973). In Bradford a judgment of conviction was reversed after the trial Court refused to allow the testimony of two defense witnesses whose identities had not been properly disclosed to the State prior to trial. See also Patterson v. State, 419 So.2d 1120 (4th D.C.A. 1982).

In the case of Peterson v. State, 465 So.2d 1349 (5th D.C.A. 1985) the State, after resting its case, moved to have certain defense witnesses excluded because the defense had failed to provide their names as required by Rule 3.220, Florida Rule of Criminal Procedure. The names of the defense witnesses who were excluded were provided eight days before the trial. The trial Court requested defense counsel to proffer what the witnesses would testify to at which time the defense counsel proffered the testimony of several, but not all of the witnesses. Before defense counsel could proffer the testimony of all of the witnesses, the Court inquired as to why these names had not been furnished earlier. Defense counsel explained to the Court the reason why the names had not been provided to the State earlier than they had been. The Court ruled that one of the witnesses could testify because the State could not claim surprise as to that particular witness, but excluded the testimony of the other witnesses because of the discovery violation.

The Fifth District Court of Appeals in reversing Peterson's conviction found that although the trial Court had inquired into the reasons for the delay in furnishing the names

of the witnesses to the State, no inquiry at all was made as to the prejudice to the State, nor did the State assert any prejudice except for the delay itself. The Fifth District Court of Appeals further found that there was not any attempt to determine if there was a remedy for the violation short of excluding the witnesses. Therefore, although there was some inquiry into the discovery violation by the defense, the Court found that the inquiry did not go far enough.

In the case at bar, the Defendant did attempt to make a proffer of the testimony of Barbara Pizzaroz as well as to explain to the trial Court the reason for the discovery violation. The trial Court then ruled that it would not allow Barbara Pizzaroz to testify without making any inquiry at all as to the prejudice, if any, to the State, nor in fact did the State assert any prejudice except for the fact that her name had not been provided as a witness. No attempt was made by the trial Court to determine if there was any remedy, such as allowing the State to take the deposition of Barbara Pizzaroz, for the violation short of excluding her testimony.

In refining Richardson, this Court has held that error committed under the Rule can never be harmless. Cumbie v. State, 345 So.2d 1061 (Fla. 1977). Therefore, the trial Court's error in failing to conduct a Richardson hearing in determining whether or not to allow Barbara Pizzaroz to testify on behalf of the Defendant is reversible as a matter of law. Consequently, the Defendant's convictions should be reversed and this cause remanded for a new trial.

POINT XIII

THE CUMULATIVE ERROR THAT OCCURRED IN THIS CAUSE ENTITLES THE DEFENDANT TO A NEW TRIAL

During the testimony of Delores Taylor, the State asked Ms. Taylor if someone from the Public Defender's Office had come to her and shown her a schedule of movies that were on the night of June 30, 1985. (TR-611). Following this question, the Defendant moved for a mistrial on the basis that reference to the Public Defender's Office was irrelevant and prejudicial to the Defendant. (TR-620). During the testimony of Mr. David Baer, he testified that he had received a blood sample of the Defendant that was submitted to him by the Public Defender's Office. (TR-1341). Following this testimony, the Defendant again made a motion for mistrial on the basis that the reference to the Public Defender's Office was irrelevant and prejudicial to the Defendant. (TR-1344). The trial Court should have granted the Defendant's Motion for Mistrial following the references to the Public Defender's Office or in the alternative at least have instructed the jury to disregard any reference to the Public Defender's Office. The references to the Public Defender's Office and the fact that the Defendant was represented by the Public Defender's Office indicated that the Defendant was indigent and therefore unable to afford to hire the services of an attorney to represent him in this cause. Such a reference to the Defendant's indigency placed his character in issue by the State. It is fundamental that unless the Defendant has first

placed his character in issue, the State is not permitted to adduce evidence the only purpose of which is to attack the Defendant's character. Jordan v. State, 107 Fla. 333, 144 So. 669 (1932), Albright v. State, 378 So.2d 1234 (2nd D.C.A. 1980). At no time did the Defendant place his good character in issue. Therefore, the trial Court erred in denying the Defendant's Motions for Mistrial following the reference to the Public Defender's Office by both witness Delores Taylor and witness David Baer.

Deputy Tom McCann was called to the witness stand by the State and during questioning of Deputy McCann was asked if he had done anything in an attempt to verify the Defendant's statement concerning his whereabouts during the evening hours of June 30, 1985, and the morning hours of July 1, 1985. (TR-1197). The Defendant objected to the question by the State and after some argument before the trial Court, the trial Court overruled the Defendant's objection. (TR-1199). Deputy McCann then testified that he did attempt to verify the Defendant's whereabouts on the evening hours of June 30, 1985, and the morning hours of July 1, 1985. He further testified that he was unable to verify the statements made by the Defendant to members of the Orange County Sheriff's Department. (TR-1199). The trial Court committed error in allowing Deputy McCann to testify that he had attempted to verify the Defendant's statement and that after investigation was unable to so verify it. These statements of Deputy McCann that were elicited by the State were not used to

explain and clarify testimony elicited by the Defendant during cross-examination of State witnesses that implied that the investigation in this cause was conducted solely to justify the arrest of the Defendant. This is what distinguishes this case from the case of Huff v. State, 11 FLW 451 (Fla. Sup. Ct., September 5, 1986). Therefore, the trial Court committed error in allowing this testimony of Deputy McCann.

At a hearing during the course of this trial, the State requested that two witnesses, James Nagle and Guy Kettlehone, be called as Court witnesses on the grounds that they were close friends of the Defendant and that their testimony would be that the Defendant was at their home at 11:40 p.m. on the evening of the murders. (TR-873). The State indicated that these two witnesses would present testimony that was favorable to the State, but that since these witnesses had visited the Defendant in jail numerous times, the State felt that it could be surprised by their testimony. (TR-876). At a later point in the trial, James Nagle and Guy Kettlehone were called by the Court as Court witnesses. (TR-1164). The trial Court erred in calling James Nagle and Guy Kettlehone as Court witnesses. This court in the case of Jackson v. State, 451 So.2d 458 (Fla. 1984), found that the trial court was in error in declaring a witness for the state to be adverse and therefore permitting him to be impeached. This court in Jackson, supra, indicated that:

> "It is very erroneous to suppose that, under this statute (Section 1101 Rev. Stat. Fla. (1892), precursor to Section 90.608(2), Fla. Stat. (1979)), a party

> producing a witness is at liberty to impeach him whenever such witness simply fails to testify as he was expected to do, without giving any evidence that is at all prejudicial to the party producing him. The impeachment permitted by the Statute is only in cases where the witness proves adverse to the party producing him. He must not only fail to give the beneficial evidence expected of him, but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him. When a party's witness surprises him by not only failing to testify to the facts expected of him, but by giving harmful evidence that is contrary to what was expected, then, as is the purpose of this law, he is permitted to counteract the prejudical effect of the adverse testimony of such witness, by proving that he has made statements on other occasions that are inconsistent with his present adverse evidence. It never was the purpose of this Statute to allow a party to put on a witness for the purpose of endeavoring to get from him beneficial evidence, and upon his simple failure to testify to the desired facts, to permit him to get the benefit of those expected facts, as substantive evidence through the mouth of another witness, under the guise of impeachment. . . ."

This court in Jackson perceived no reason to conclude that the principles enunciated were any less applicable to the current Florida Evidence Code, with the exception that Section 90.608 no longer required the calling party to be surprised by the prejudicial testimony. The State failed to show that they were "affirmatively harmed" by the expected testimony of James Nagle and Guy Kettlehone. Therefore, the trial Court erred in calling Nagle and Kettlehone as Court witnesses in this cause.

The State called as a witness in this cause Lawrence Anthony Smith. During the questioning of Mr. Smith by the State, the State asked Mr. Smith if the Defendant had said anything to him about attempting to escape. At that time the Defendant moved for a mistrial. (TR-1264). After argument by the State and the Defense the Court sustained the objection, denied the Motion for Mistrial, and instructed the jury to disregard the State's question. (TR-1267). The trial Court should have granted the Defendant's Motion for Mistrial. The State inferred by the question asked of Mr. Smith an illegal act on the part of the Defendant by improper means. Instructing the jury to disregard the question did not sufficiently cure the error occasioned by the State's question. The Court should have therefore granted the Defendant's Motion for Mistrial. Castillo v. State, 466 So.2d 7 (3rd D.C.A. 1985), affirmed 11 FLW 113 (Fla. Sup. Ct., March 20, 1986).

Donna Valentine testified that she had seen the Defendant act as though he was jealous that Susan Correll was seeing other men. This was objected to by the Defendant. (TR-530). Ms. Valentine also testified that approximately one week prior to the murders, the Defendant had gone to the residence of Susan Correll and that in spite of the fact that his daughter, Tuesday Correll was excited to see him, he paid no attention to her. (TR-532). This testimony was also objected to by the Defendant. (TR-531). Both objections were overruled by the trial Court.

The trial Court should have sustained the Defendant's objections as to this testimony of Donna Valentine. The testimony that the Defendant was jealous of Susan Correll dating other men was opinion testimony on the part of Donna Valentine for which there was no proper predicate established to indicate that she was able to testify concerning this matter. The fact that the Defendant ignored Tuesday Correll on one occasion approximately a week prior to the murders was irrelevant and highly prejudicial. If there was any relevancy to this testimony, the prejudicial effect that it had on the jury greatly outweighed any relevancy it may have had. Additionally, it was testimony that related to the character of the Defendant which should not have been admitted as the Defendant had not placed his character in issue.

During the closing argument by the State, Mr. Ray Sharpe argued at page TR-1781 as follows:

> "This case got moved to Sarasota County because of the publicity. Because the people in Orange County knew so much about this case that it couldn't be tried there."

The Defendant then objected to this argument and moved for a mistrial on the basis that what the State had said clearly implied that everybody in Orange County knew so much about the case that the Defendant was going to be found guilty, and that was the reason why the case had been transferred to Sarasota County. (TR-1781). The trial Court denied the Motion for Mistrial. (TR-1782). The trial Court should have granted the

Defendant's Motion for Mistrial. Inflammatory comments of a prosecutor mandate a reversal of a defendant's conviction unless the Appellate Court can determine from the record that the improper remarks did not prejudice the Defendant. Williard v. State, 462 So.2d 102 (2nd D.C.A. 1985), Pait v. State, 112 So.2d 380 (Fla. 1959). This remark was of such a nature that it poisoned the minds of the jurors and prejudiced them so that the jury could not reach a fair and impartial verdict based on the law and the evidence. See Blair v. State, 406 So.2d 1103 (Fla. 1981).

During the jury's deliberations in this cause, a written note was presented to the Court in which the jury inquired as follows:

> "Does it matter that they say the murder was committed June 30, when they could have been committed July 1?"

The trial Court answered the question in the following manner:

> "The State is not required to prove that the crimes were committed on any particular date."

(TR-4068). The Defendant objected to the Court's answer to this question. The trial Court erred in answering the question of the jury as it did. The trial Court's answer was incorrect due to the fact that the State had filed on or about September 11, 1985, a Demand for Notice of Intention to Claim Alibi between the hours of 8:00 p.m. on June 30, 1985, and 9:00 a.m. on July 1, 1985. Due to the State's Demand for Notice of Intention to Claim Alibi, it was required to prove that the

crimes were committed between 8:00 p.m. on June 30, 1985 and 9:00 a.m. on July 1, 1985. Therefore, the trial Court should have informed the jury in response to their question that the State had to prove that the Defendant committed the crimes between those hours. Failure to do so constitutes error.

It is the Defendant's contention that each one of these errors enumerated in this point on appeal in and of themselves require that the Defendant's convictions be reversed and this cause remanded for a new trial. At the least, the accumulation of all the errors committed by the trial Court as noted in this point on appeal and the other points on appeal raised by the Defendant in this Brief mandates that the Defendant's convictions be reversed and this cause remanded for a new trial. See Perkins v. State, 349 So.2d 776 (2nd D.C.A. 1977); Albright v. State, 378 So.2d 1234 (2nd D.C.A. 1980); Carter v. State, 332 So.2d 120 (2nd D.C.A. 1976); Richardson v. State, 437 So.2d 1091 (Fla. 1983).

POINT XIV

THE TRIAL COURT ERRED IN NOT ALLOWING THE DEFENDANT ADDITIONAL TIME IN WHICH TO PREPARE FOR THE PENALTY PHASE IN THIS CAUSE

Following the Court's charging of the jury on the applicable law in this cause, the jury retired to consider their verdict. Upon the jury leaving the Courtroom the Defendant requested of the Court that it allow the Defendant a day between the jury's returning of verdicts and the penalty phase, if the jury should return a verdict of guilty of first degree murder on any or all of the Counts in the Indictment. (TR-1850). The Defendant indicated that this period of one day was needed in order to allow the Defendant sufficient time to prepare any Motions that he wished to file, prepare any jury instructions that he wished to submit to the Court, to arrange and have present all the witnesses he wished to present at the sentencing phase, as well as to provide the defense attorney sufficient time to consult with the Defendant to determine whether or not he wished to testify during the sentencing phase, if there should be one. (TR-1850). The Defendant indicated that it would be impossible to prepare for the penalty phase if the trial Court did not allow him at least one full day preparation between the time of the jury's verdict and the commencement of the penalty phase. (TR-1850). The trial Court indicated that it would only allow the Defendant the remainder of the day to prepare for the penalty phase indicating that if the penalty phase should be needed, it would commence the following morning. (TR-1850).

The next morning following the presentation of witnesses during the penalty phase of this cause, the Defendant again requested that the penalty phase be continued. (TR-1977). The Defendant's attorneys indicated that following the jury's verdicts they had attempted to confer with the Defendant concerning possible mitigating circumstances such as the Defendant's mental state and drug consumption on the evening of the homicide, but due to his emotional state they were not able to discuss these matters with him. (TR-1977). Therefore, the Defendant needed additional time to compose himself so that he could discuss these matters with his attorney. (TR-1977). At that time the Court denied the Defendant's request for a continuance. (TR-1977).

The granting or denial of a motion for continuance is within the discretion of the trial court. Williams v. State, 438 So.2d 781 (Fla. 1983). This principle remains intact even in situations where the death penalty is of issue. Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert denied, 431 U.S. 925 (1977). This court in Cooper stated that:

> "While death penalty cases command our closest scrutiny, it is still the obligation of an Appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance."

The trial Court in this cause abused its discretion in not granting the Defendant's request that the penalty phase be continued. The Defendant had just been convicted of four counts of murder in the first degree in a highly emotional trial, there having been four victims one of whom was a young child,

that had lasted approximately two full weeks. Due to the fact that the Court had to change the venue of this trial, it was conducted in an area unfamiliar to both the Defendant and his attorneys. All these factors contributed to the inability of the Defendant to properly prepare for the penalty phase in the period of less than one day. Additionally, it was impossible for the Defendant himself, due to the emotional impact upon him of having been convicted of four counts of first degree murder, to adequately confer with his attorneys concerning any evidence he himself may have wanted to offer at the penalty phase of this trial.

Consequently, the denial of the Defendant's motion to continue the penalty phase to allow him additional time to adequately prepare, prevented both the jury and the trial Court from learning potentially applicable mitigating circumstances, including but not necessarily limited to the Defendant's state of mind and drug usage on the night of the murders. Since the trial Court did not order a pre-sentence investigation, but instead immediately following the jury's recommendations sentenced the Defendant to four death penalties, the Defendant was never able to present these potential mitigating circumstances.

The trial Court abused its discretion in refusing to continue the penalty phase of this cause in order to allow the Defendant adequate time to prepare. Therefore, the Defendant's four sentences of death should be reversed and this cause remanded for a new sentencing hearing.

POINT XV

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY ON THE DEFENDANT FOR THE MURDERS OF SUSAN CORRELL, MARY BETH JONES, TUESDAY CORRELL, AND MARY LOU HINES

The penalty phase in this cause was conducted on February 7, 1986. After presentation of testimony by both the State and the Defendant, closing arguments, and jury instructions by the Court, the jury retired to consider their sentencing recommendation. The jury subsequently returned with a recommendation by a vote of ten to two that the Court impose the death penalty upon the Defendant for the murder of Mary Lou Hines. (TR-4075). The jury returned with a recommendation by a vote of nine to three that the Court impose the death penalty upon the Defendant for the murder of Susan Correll. (TR-4077). The jury also recommended by a vote of ten to two that the Court impose the death penalty upon the Defendant for the murder of Mary Beth Jones. (TR-4079). Finally, the jury recommended by a vote of ten to two that the Court impose the death penalty upon the Defendant for the murder of Tuesday Correll. (TR-4081). The trial Court then sentenced the Defendant to the death penalty for each of the four murders. On February 7, 1986, the Court then filed a sentencing order enumerating the aggravating factors that it had found in imposing the death penalty for each of the four homicides. (TR-4095 through 4098).

In imposing the death penalty upon the Defendant for the murder of Susan Correll the Court found that the murder of Susan Correll was committed during the course of a sexual

battery. (TR-4095). It is the Defendant's position that this aggravating factor was not proven beyond a reasonable doubt. This Court has previously held that the burden is upon the State in the sentencing portion of a capital felony trial to prove every aggravating circumstance beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980); Clark v. State, 443 So.2d 973 (Fla. 1983). The evidence that was presented in this cause did not establish beyond a reasonable doubt that the Defendant had any type of sexual intercourse with Susan Correll between June 30, 1985, and July 1, 1985. The testimony of Dr. Thomas Hegert, the Medical Examiner, established that he found no injuries to Susan Correll's genital organ. (TR-756). Mr. David Baer, the forensic serologist, indicated that he examined a vaginal smear that had been taken from Susan Correll, and found the presence of spermatozoa which is the male reproductive cell. (TR-1431). He also found spermatozoa on a vaginal swab that had been taken from Susan Correll. (TR-1431). Additionally, Mr. Baer testified that he would expect to find spermatozoa up to eight hours after it was deposited, but that it was also possible to find it up to three days after it had been deposited. (TR-1433). Finally, Mr. Baer testified that based on his examination and testing of the spermatozoa he could not say that the Defendant was the source but he could also not rule out the Defendant as being the source. (TR-1434).

Judy Bunker, the forensic consultant in bloodstain pattern analysis and crime scene reconstruction, testified that based on her examination of a pillow that was found on the

stomach of Susan Correll, that the bloodstain patterns were consistent with the object that is transferring the pattern being in contact with the pillow. (TR-1525). She also testified that this bloodstain pattern was consistent with the object in contact with the pillow moving in an up and down fashion on the pillow. (TR-1525 through 1526).

Mr. Baer's testimony along with the testimony of Ms. Bunker was the basis for the Court finding that the murder of Susan Correll was committed during the course of a sexual battery. (TR-4095). This evidence does not establish beyond and to the exclusion of every reasonable doubt that the Defendant had sexual intercourse with Susan Correll. Mr. Baer could not determine when the spermatozoa had been deposited inside Susan Correll and he could not say that the Defendant deposited the spermatozoa. Ms. Bunker could not testify that the bloodstain patterns on the pillow could only have been made by way of the Defendant having sexual intercourse with Susan Correll. Therefore, the Court's finding that the Defendant committed a sexual battery upon Susan Correll was based on mere speculation and conjecture on the part of the trial Court.

Even if this Court determines that the evidence proved beyond and to the exclusion of a reasonable doubt that the Defendant had sexual intercourse with Susan Correll between June 30, 1985, and July 1, 1985, the evidence presented did not prove beyond a reasonable doubt that the murder of Susan Correll was committed during the course of a sexual battery. Based on the evidence presented during the trial of this cause there is

a reasonable hypothesis that the Defendant did not have sexual intercourse with Susan Correll until after she had died. As previously noted, Dr. Hegert did not find any evidence of injury to any of the female genital area. Additionally, Dr. Hegert testified that he would not expect to find genital trauma if there was sexual intercourse occurring after the death of Susan Correll. (TR-756 through 757). This testimony alone establishes that the sexual intercourse did not occur until after Susan Correll had died. Additionally, the testimony of Ms. Bunker established that Susan Correll was first assaulted in the hallway and then dragged to her bed. (TR-1535). If there was any sexual intercourse with Susan Correll, it could only have been while she was lying on the bed. (TR-1533 through 1534). This Court in the case of Eutzy v. State, 458 So.2d 755 (Fla. 1984), indicated that although every aggravating factor must be proved beyond a reasonable doubt, this did not proscribe the use of circumstantial evidence to meet this burden of proof, so long as that circumstantial evidence is inconsistent with any reasonable hypothesis which negates the aggravating factor. In this cause, the circumstantial evidence does not exclude every reasonable hypothesis to negate the Court's finding that the murder of Susan Correll was committed during the course of a sexual battery. A reasonable hypothesis is that the sexual intercourse occurred after the death of Susan Correll. Therefore, the trial Court erred in finding as an aggravating factor that the murder of Susan Correll was committed during the course of a sexual battery.

In support of the Court's imposition of the death penalty on the Defendant for the murder of Mary Beth Jones, the trial Court found that the murder of Mary Beth Jones was committed during the course of a robbery. This aggravating factor was not proven beyond and to the exclusion of every reasonable doubt. The evidence presented by the State did not establish that the death of Mary Beth Jones occurred as a consequence of and while the Defendant was engaged in the commission of a robbery, or that the death of Mary Beth Jones occurred as a consequence of and while the Defendant was attempting to commit a robbery, or finally that the death of Mary Beth Jones occurred as a consequence of and while the Defendant was escaping from the immediate scene of a robbery. A reasonable hypothesis based on the facts presented at the trial which negates this aggravating factor is that the taking of the car keys and automobile of Mary Beth Jones occurred after the death of Mary Beth Jones. The facts presented would indicate that the Defendant decided to take the automobile of Mary Beth Jones after she had died. The taking of Mary Beth Jones' car after the death of Mary Beth Jones is irrelevant in determining that this aggravating circumstance existed. Therefore, the trial Court erred in finding as an aggravating circumstance that the murder of Mary Beth Jones was committed during the course of a robbery.

In imposing the death penalty upon the Defendant for the murder of Tuesday Correll, the trial Court found that the murder of Tuesday Correll was committed in a cold, calculated,

and premeditated manner without any pretense of legal or moral justification. (TR-4096). This aggravating circumstance was not established by the evidence beyond and to the exclusion of every reasonable doubt. In the case of Bates v. State, 465 So.2d 490 (Fla. 1985), wherein Bates was convicted of murder, kidnapping, attempted sexual battery, and armed robbery, this Court found the evidence insufficient to prove beyond a reasonable doubt that Bates committed the murder in a cold, calculated, and premediated manner, stating at page 493:

> "This aggravating factor "is not to be utilized in every premeditated murder prosecution", and is reserved primarily for "those murders which are characterized as execution or witness elimination murders." Herring v. State, 446 So.2d 1057. This was not an execution or contract murder, and we have found the proof insufficient to support murder for the purpose of eliminating a witness. There was no heightened premeditation or evidence of reflective calculation. Instead, it is as likely that what started as burglary resulted in a situation simply getting out of hand."

Similar findings by this Court that the cold, calculated, and premeditated aggravating circumstance was not established beyond a reasonable doubt can be found in: (1) King v. State, 436 So.2d 50 (Fla. 1983) wherein the Defendant struck the victim (his girlfriend) on the forehead with a blunt instrument and then shot her in the head; (2) Peavy v. State, 442 So.2d 200 (Fla. 1983) wherein the Defendant broke into the victim's apartment, ransacked it, stole a television set and watch and then stabbed the victim several times; (3) Preston v. State, 444 So.2d 939 (Fla. 1984) wherein the Defendant robbed a night clerk

at a convenience store, abducted her, and murdered her by way of multiple stab wounds and lacerations resulting in near decapitation; (4) Brown v. State, 473 So.2d 1260 (Fla. 1985) wherein the victim was eighty-one years old, a semi-invalid, was beaten, raped, and killed by asphyxiation, her hands had been tied behind her back and a gag placed in her mouth, and that either the gag or a garrote placed around the victim's neck caused the death; (5) Cannady v. State, 427 So.2d 723 (Fla. 1983) wherein the victim was shot five times.

The reasons given by the trial Court in finding that the murder of Tuesday Correll was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification does not support the Court's finding that this aggravating circumstance existed. This aggravating circumstance emphasizes cold calculation before the murder itself. What is required is that the murderer fully contemplate effecting the victim's death. Hardwick v. State, 461 So.2d 79 (Fla. 1984). The evidence that was presented at the trial of this cause does not prove beyond a reasonable doubt the heightened degree of premeditation, calculation, or planning which this court has consistently held is required to find this aggravating circumstance. Therefore, the trial Court erred in finding that the murder of Tuesday Correll was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification.

The trial Court, in sentencing the Defendant to death for the murder of Tuesday Correll found that the murder of

Tuesday Correll was for the purpose of avoiding arrest. (TR-4096).

The trial Court, in imposing the sentence of death on the Defendant for the murder of Mary Beth Jones also found that the murder of Mary Beth Jones was committed for the purpose of avoiding or preventing a lawful arrest. (TR-4096). The State failed to prove this aggravating factor in both the death of Tuesday Correll and the death of Mary Beth Jones beyond and to the exclusion of every reasonable doubt.

In the case of Riley v. State, 366 So.2d 19 (Fla. 1978), this court indicated that the mere fact of a death is not enough to invoke the aggravating factor that a murder was committed for the purpose of avoiding or preventing a lawful arrest when the victim is not a law enforcement officer. Riley, supra, also established that proof of the requisite intent to avoid arrest and detection must be very strong in these cases. The mere fact that a victim might be able to identify an assailant is insufficient. Moreover it must be clearly shown that the dominant or only motive for the murder was the elimination of the witness.

In finding this aggravating factor in both the death of Mary Beth Jones and the death of Tuesday Correll, the trial Court stated that since both Mary Beth Jones and Tuesday Correll could identify the Defendant, there was no other reasonable explanation as to why the murders occurred. This finding of the trial Court is insufficient to support this aggravating factor.

This court in the case of Doyle v. State, 460 So.2d 353

(Fla. 1984), found that the evidence did not prove beyond a reasonable doubt that Doyle committed the murder for which he was convicted in order to avoid a lawful arrest. In the Doyle case the victim knew Doyle and could report the rape that he had committed on her. The trial court in the Doyle case then inferred that the murder was committed to prevent the report of the rape. This court found that the State had not proven beyond a reasonable doubt that the murder was committed in order to avoid a lawful arrest because it was not proven that the dominant motive for the murder was the elimination of a witness.

In the case of Rembert v. State, 445 So.2d 337 (Fla. 1984), this court again reversed the trial court's finding that the murder committed by Rembert was committed in order to avoid or prevent an arrest. In the Rembert case, Rembert and the victim had known one another for a number of years. The trial court reasoned that Rembert eliminated the victim who was the only witness who could testify against him. This court stated in Rembert, supra at 340 that:

> "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases."

In the trial of this cause, it is clear that neither Tuesday Correll nor Mary Beth Jones were law enforcement officers. The finding by the trial Court that Tuesday Correll and/or Mary Beth Jones could identify the Defendant was mere speculation on the part of the trial Court as there was no evidence presented that either Mary Beth Jones or Tuesday Correll witnessed a

murder or murders committed by the Defendant. Even if there was sufficient evidence to establish that Mary Beth Jones and/or Tuesday Correll witnessed a murder or murders, there is a reasonable doubt that the dominant motive for the murders of Mary Beth Jones and Tuesday Correll was the elimination of witnesses. There was insufficient evidence to establish that the murders of Mary Beth Jones and Tuesday Correll were reasoned acts on the part of the Defendant motivated primarily by the desire to avoid detection. Therefore, the trial Court erred in finding that the murders of Mary Beth Jones and Tuesday Correll were committed for the purpose of avoiding or preventing a lawful arrest.

In imposing the sentence of death on the Defendant for the murders of Susan Correll, Tuesday Correll, and Mary Lou Hines, the trial Court found that each of the three murders were committed in an especially heinous, wicked, atrocious, and cruel manner. (TR-4095 through 4097). This aggravating circumstance as to each of the three murders was not proven beyond a reasonable doubt.

The standard to apply in this particular aggravating circumstance is quite clear. According to the case of State v. Dixon, 293 So.2d 1 (Fla. 1973), this court stated:

> "What is intended to be included in the category of heinous, atrocious, and cruel are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies. . . . The conscienceless or pitiless crime which is

unnecessarily torturous to the victim."

Applying this standard to the facts as presented at the trial of this cause, both during the guilt phase and the penalty phase, and to the findings made by the trial Court concerning this aggravating factor, it is clear that the State failed to prove beyond and to the exclusion of every reasonable doubt that the murders of Susan Correll, Tuesday Correll, and Mary Lou Hines, were especially heinous, wicked, atrocious, and cruel. In making an analysis whether a homicide was especially heinous, atrocious, and cruel, this court must of necessity look to the act itself that brought about the death. The intent and method employed by the wrongdoer is what needs to be examined. Mills v. State, 476 So.2d 172 (Fla. 1985).

In the case of Teffeteller v. State, 439 So.2d 840 (Fla. 1983), this court set aside the trial court's finding that the murder was heinous, atrocious, and cruel. In so finding, this court stated at page 846:

> "The fact that the victim lived for a couple hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies."

The record in this cause contains no evidence that Susan Correll, Tuesday Correll, and/or Mary Lou Hines remained conscious more than a few minutes after they were assaulted. Therefore, they were incapable of suffering to the extent contemplated by this aggravating circumstance. The evidence pre-

sented does not establish that the murders of these three individuals were extemely wicked or shockingly evil, outrageously wicked and vile, and designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. See State v. Dixon, supra at 9. While the murders of Susan Correll, Tuesday Correll, and Mary Lou Hines were cruel and unjustifiable deeds, there was nothing about them to set these crimes apart from the norm of capital felonies. Therefore, the trial Court erred in finding that the murders of Susan Correll, Tuesday Correll and Mary Lou Hines were especially heinous, wicked, atrocious, and cruel.

Finally, in imposing the sentence of death on the Defendant for each of the four murders, the trial Court found that there were no mitigating factors. This constituted error on the part of the trial Court. The Defendant's mother, Dora Correll, testified that the Defendant had had a good rapport with his father and that when his father died in 1982, the Defendant took his death very hard. (TR-1894). Additionally, Dora Correll testified that the Defendant loved Tuesday Correll very dearly. (TR-1895). The Defendant's brother, Charlie Correll, testified among other things that he had never seen the Defendant to be violent. (TR-1897). The Defendant's sister-in-law, Shirley Correll, testified concerning the relationship between the Defendant and his daughter, Tuesday Correll; that the Defendant had been attending bible studies since his arrest, (TR-1902); and that these bible studies had

been beneficial to him. (TR-1904). The Defendant also called to the stand Dr. Michael Radelet, who had prepared a paper on families, prisons, and the death sentence. (TR-1908). Dr. Radelet testified as to the future non-dangerousness of the Defendant. Dr. Radelet testified that based on the characteristics of the Defendant, the nature of the Defendant, the victim relationship, and the relatively late onset of criminal behavior, coupled with the fact that the Defendant would be living his next twenty-five years in a carefully controlled environment, made the Defendant's probability of future dangerous behavior to be quite small. (TR-1928). Finally, the Defendant testified concerning his upbringing as a child, his relationship with his father, the types of employment that he had had, his previous drug usage, and the extent of the bible studies that he had been involved in since his arrest. Finally, a letter that was written by the Defendant to his brother and sister-in-law was read into the record for the benefit of the jury. (TR-1943 through 1945). The testimony of Dr. Michael Radelet concerning the Defendant's age and future non-dangerousness dictated that the trial Court should have found that the Defendant's age was a mitigating circumstance. Additionally, based on the testimony of the Defendant's drug usage as well as the testimony of Patricia Babcock, who was the barmaid at the ABC Bar at Lancaster and Orange, that he had approximately six drinks of rum and coke on the evening of June 30, 1985, the trial Court should have found pursuant to

Florida Statute 921.141(6)(b) that the murders were committed while the Defendant was under the influence of extreme mental or emotional disturbance. This mitigating circumstance is further supported by the fact that it appears that the murders were the result of an angry domestic dispute between the Defendant and Susan Correll. See Ross v. State, 474 So.2d 1120 (Fla. 1985). Finally, based on the testimony of the Defendant's mother, brother, and sister-in-law, as well as the letter written by the Defendant which was submitted into evidence, the trial Court should have found that non-statutory mitigating circumstances did exist.

It appearing from the record that no aggravating circumstances existed surrounding the murders of Susan Correll, Tuesday Correll, and Mary Beth Jones, the death sentences imposed on the Defendant for these three murders should be vacated, and this cause remanded to the trial Court for the imposition of a life sentence without eligibility for parole for twenty-five years for each of these three murders. Based on the fact that there is only one aggravating circumstance surrounding the murder of Mary Lou Hines, to-wit: that the Defendant had been previously convicted of another capital offense, but that there are three mitigating circumstances which greatly outweigh this one aggravating circumstance, the Defendant's sentence of death for the murder of Mary Lou Hines should be vacated and this cause remanded to the trial Court for the imposition of a life sentence without eligibility for

parole for twenty-five years for the murder of Mary Lou Hines. Alternatively, the four death sentences should be vacated and this cause remanded for a new sentencing hearing.

POINT XVI

THE CUMULATIVE ERROR THAT OCCURRED IN THE TRIAL OF THIS CAUSE, BOTH DURING THE GUILT PHASE AND THE PENALTY PHASE, CONTRIBUTED TO THE DEFENDANT RECEIVING FOUR DEATH SENTENCES

During the penalty phase of the trial of this cause, the Defendant called to the witness stand Dr. Michael Radelet. Prior to Dr. Radelet presenting his testimony, the Court required that his testimony be proffered before it was submitted to the jury. (TR-1906). During the proffer Dr. Radelet indicated that he would be testifying as to the cost of the Defendant being on death row versus the cost of the Defendant receiving life imprisonment. (TR-1910). Additionally, Dr. Radelet would be testifying concerning his investigation and documentation of cases in which innocent people have been convicted of homicide where the facts were similar to the Defendant's. (TR-1910 through 1911). Dr. Radelet would have also testified that based on statistics the death penalty does not have any deterrent value over and above the deterrent value of life imprisonment. (TR-1911). The proffer of Dr. Radelet's testimony established that based on statistics he would testify as to how frequently each aggravating and mitigating circumstance had been found. (TR-1911). Dr. Radelet would have also testified as to the effect of the imposition of the death penalty on the Defendant's family. (TR-1911 through 1912). Finally, the proffer of Dr. Radelet's testimony established that based on his research, he would testify as to the future non-dangerousness of the Defendant. (TR-1909). After hearing the proffer of Dr.

Radelet's testimony, the trial Court ruled that the Doctor would only be allowed to testify concerning the future non-dangerousness of the Defendant should he receive a sentence of life imprisonment, but that Dr. Radelet would not be allowed to testify as to the other matters that were presented during the proffer of his testimony. (TR-1914 through 1919).

The trial Court committed error in limiting Dr. Radelet's testimony to the future non-dangerousness of the Defendant should the Defendant receive life imprisonment. The other matters that were presented by Dr. Radelet during the proffer of his testimony were highly relevant and material to establishing non-statutory mitigating circumstances for the jury's consideration in determining what sentences it would recommend that the Court impose on the Defendant. The trial Court's ruling concerning the testimony of Dr. Radelet materially and substantially prevented the unlimited consideration of mitigating evidence as mandated by Lockett v. Ohio, 438 U.S. 586 (1978).

During the closing argument of the Assistant State Attorney, Ray Sharpe, Mr. Sharpe argued as follows: (TR-1991 through 1992):

> "Last July four bodies were driven to a cemetary in Orlando. Three big coffins were dropped into the ground and one little one. Dirt covered them up, and that was the end of those four people. And it was four people that died out there, not grisly faces in a slide. It was a loving grandmother and her two daughters and a little girl who had a whole lot to live for. So let's not forget about them.
>
> I'll agree with Mrs. Cashman, life is sacred.

> And their lives were sacred, and we should not forget them because we empathize during the course of this procedure with Jerry Correll, and the victims go forgotten.
>
> We call this our system of justice. But in this system who speaks for these people? Who sees to it that they receive justice?
>
> This trial and this procedure is not about revenge. It's not about sympathy. It's about the application of the law of the State of Florida and justice for Jerry Correll and justice for Mary Lou Hines and Susan Correll and Mary Beth Jones and Tuesday Correll. And in order to do that, to see that those people receive justice, you have to speak for them."

These remarks by the Assistant State Attorny for the State of Florida constitutes prosecutorial overkill which requires a new sentencing hearing. This argument by the State Attorney attempted to elicit the jury's sympathy for the four victims in this cause. These remarks were so prejudicial as to have influenced the jury to render a more severe recommendation than it would have otherwise. Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

It is the Defendant's contention that each one of these errors enumerated in this point on appeal in and of themselves contributed to the Defendant receiving four death sentences. At the least, the accumulation of the errors committed by the trial Court in this point on appeal and the other points on appeal raised by the Defendant in this Brief contributed to the Defendant receiving the four death sentences. Therefore, the Defendant's death sentences should be vacated and this cause remanded to the trial Court for the imposition of four life sentences without eligibility for parole for twenty-five years.

CONCLUSION

Based upon the foregoing facts and arguments of law, it is clear that the trial Court erred on the many points cited by the Appellant in his brief. As a result of the Court's failure to grant the Defendant's Motion for Judgment of Acquittal, this cause should be dismissed. Other errors committed by the trial Court entitle the Defendant to a reversal of his convictions and a new trial; having the four (4) death sentences commuted to life imprisonment; or at the very least, vacating the four (4) death sentences and remanding this cause for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished to Richard Martel, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, 32014, by mail delivery this 31 day of October, 1986.

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