IN THE SUPREME COURT OF FLORIDA

DOUGLAS JACKSON	)	
Appellant,	)	Case No: 68,882
vs.	)	Trial Ct. No: 81-2081 CF
STATE OF FLORIDA,	)	
Appellee.	)	

BRIEF OF THE APPELLANT

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

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PRELIMINARY STATEMENT

The Appellant DOUGLAS JACKSON was the Defendant in the trial court of the Circuit Court of the Seventeenth Judicial Circuit, the Honorable Thomas M. Coker presiding; Appellee, State of Florida, was the Plaintiff in the trial court. They will be referred to in this brief as Appellant or JACKSON and Appellee or State.

STATEMENT OF THE CASE

The Appellant DOUGLAS JACKSON was arrested on March 4, 1981 and was indicted in Broward County, Florida for the first degree murders of five persons: Larry Finney, Walter Washington, Edna Washington, Terrence Manuel, and Reginald Manuel (Tr. vol. VII, pg. 117), as well as being charged with the kidnapping of the same people and of his ex-wife Karen Jackson (Tr. vol. VII, pg. 1179). The Defendant's first conviction and sentence of death was reversed by this court on January 31, 1985 (Tr. vol. VII, pg. 1182), and a subsequent attempt at a re-trial ended in a mistrial before the instant conviction and sentence of death. The current trial commenced on May 5, 1986 and ended with convictions of all Counts except the kidnapping Count regarding Karen Jackson (Tr. vol. VI, pgs. 1093-1096), and the Appellant was sentenced to death for the murders of Edna Washington,

Terrence Manuel and Reginald Manuel in accordance with the jury's recommendation. (Tr. vol. VI, pgs. 1158, 1174). Consecutive life sentences were imposed on all remaining Counts (Tr. vol. VI, pg. 1174).

This timely appeal followed.

STATEMENT OF THE FACTS

On February 28, 1981 shortly before midnight, Officer Primeau of the Pembroke Pines Police Department saw a deserted car on the side of State Road 27 in a desolate part of Broward County (Tr. vol. III, pg. 431). Upon returning to that area later on his patrol, at approximately 3:20 AM on March 1, 1981, he saw the same car which was burned, with bodies in the car (Tr. vol. III, pg. 432). At about that same time, a neighbor, Charles McGill, heard five (5) shots being fired (Tr. vol. III, pg. 421), and another neighbor, Tim Tighe, saw the car actually burning and called the fire department (Tr. vol. III, pgs. 442-443). Upon closer examination of the car by Deputy Orem Bosse of the Broward Sheriff's Office, it was determined that there were five burned bodies in the car, later determined to be the bodies of the victims involved: Walter and Edna Washington, Larry Finney, and two children, Reginald and Terrence Manuel (Tr. vol. III, pg. 458 and vol. III, pg. 518). It

was determined that the actual cause of death to Finney, Walter and Edna Washington was gunshot wounds, while the two children died of smoke and soot inhalation (Tr. vol. IV, pgs. 771-779).

A few days later, Detective Mark Schlein of the Broward Sheriff's Office went to the house of Appellant DOUGLAS JACKSON in his attempt to locate Karen Jackson for information regarding the deaths (Tr. vol. IV, pg. 705). During an ensuing conversation which was tape recorded, Detective Schlein noticed that the Appellant had scratches and marks on his face which were explained as being burns suffered at a barbecue (Tr. vol. IV, pg. 722). Karen Jackson was eventually located by the police and she gave a complete story regarding the Appellant and co-defendant Aubrey Livingston coming to the home of Edna and Walter Washington in conjunction with the Appellant's efforts to locate Karen Jackson, his estranged wife, and their children (Tr. vol. IV, pg. 605). Karen Jackson had been staying with the Washingtons and Larry Finney as she was separated the Appellant (Tr. vol. III, pgs. 592, 594). Both Karen Jackson and co-defendant Aubrey Livingston testified that Walter Washington and Larry Finney had their hands bound behind their backs (Tr. vol. IV, pgs. 609, 679), and all of the victims were herded into the Appellant's truck which had a camper top on the back, with the express

intention that the Appellant was going to hold them hostage like they held Karen Jackson hostage (Tr. vol. IV, pg. 610). After driving around for some hours, Appellant apparently came upon the abandoned car on State Road 27, stopped at the car and told the victims that he was going to leave them there in the car (Tr. vol. IV, pgs. 612-613). All of the victims were put into the car according to Karen and Livingston (Tr. vol. IV, pgs. 614, 685), and then popping sounds (shots) were heard and a sound of gasoline igniting was also heard (Tr. vol. IV, pgs. 614, 685). The Appellant then apparently rushed into the truck, claiming that his face felt like it was on fire (Tr. vol. IV, pg. 614). After dropping the co-defendant Livingston off at his home on what was now March 1, 1981, Appellant and Karen Jackson then returned to their home together, where Karen stayed with the Appellant and said nothing to the authorities (Tr. vol. IV, pg. 658).

The murder weapon was never found (Tr. vol. IV, pg. 761), and the Appellant, testifying in his own behalf, denied participation in the incident (Tr. vol. V, pg. 908).

Other facts will be cited through the body of the brief as appropriate.

POINT I

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS DESTROYED BY PROSECUTORIAL MISCONDUCT.

After the first conviction and sentence of the Appellant was reversed by this court, another effort was made to try the case without error. On March 3, 1986, during the deliberations of the jury in one of those attempted retrials, the trial court received a note from the jury indicating, "It was brought to my attention that the box carrying the rope has the result of the first trial, 10/81, indicated guilty on all counts, and that a death sentence was issued. Does this create a problem?" (Tr. vol. I, pg. 161. A conversation then ensued between the trial court and trial counsel, with the State taking the position that it was clear to the jury that the Appellant had been to prison on this case (Tr. vol. I, pg. 163), with the trial court noting that although it was very obvious from all the testimony that the Appellant had been in prison before, there was no way the trial court could avoid mistrial in the case. (Tr. vol. I, pg. 163). A mistrial was declared and the instant trial occurred very shortly thereafter, which was the fourth trial of the matter (Tr. vol. I, pg. 167). Although the same prosecutor had just suffered through a mistrial of the case, when the Appellant testified in the instant case in his own behalf, the State promptly elicited from the

Defendant that when he received letters from his wife while in prison, he was not just waiting for trial, but that he had already been to trial and had been convicted (Tr. vol. V, pgs. 910-911). The objection and argument and Motion for Mistrial which was denied (Tr. vol. V, pg. 911) did not deter the prosecutor from immediately continuing to elicit that the Appellant's status was not awaiting trial but the status was convicted (Tr. vol. V, pg. 911).

In the context of the testimony, it was elicited by the Appellant that he had received letters from his wife Karen who was now the star witness against him in the trial, and that his wife Karen was sorry for their break-up, that she still loved the Appellant and that she was now pregnant (Tr. vol. V, pts. 905-906). The prosecutor then commenced to specify to the jury why the Appellant was in prison, that being that he was previously convicted by jury in the case and that he had not yet been granted a new trial (Tr. vol. V, pg. 910). It was this highly prejudicial eliciting of testimony by the prosecutor which denied the Appellant a fair trial.

Initially it must be recalled that the testimony of the Appellant on direct examination was innocuous, admitting that he was in prison awaiting the trial, not for some trial advantage, but to set a predicate for the receipt of

the letters from now-State-witness Karen Jackson while he was incarcerated. Whether the Appellant was in prison awaiting trial or under sentence was absolutely immaterial to the fact that he received letters from his ex-wife while he was incarcerated. The mere fact that the question by the trial counsel to Appellant was couched in terms of "While you were awaiting this trial on these charges, did you receive any letters from your wife?" (Tr. vol. V, pg. 905) can in no way be construed as an attempt to mislead the jury in any material way. It, in fact, was the only way that the question could be asked to show the jury that the Defendant was incarcerated, and while incarcerated did receive the letters from his wife which were then admitted into evidence with this proper predicate. The only arguable tactical advantage that could have been gained by asking the question in this manner was to properly keep the jury from knowing that another jury had already convicted the Appellant - a factor which would have tremendous prejudicial effect upon the sitting jury in this trial. Nonetheless, in this context, the prosecutor brought the extremely prejudicial material before the jury that the prior jury had convicted the Defendant on these charges.

In a Fifth Circuit case, United States v. Williams, 568 F.2d. 464 (U.S.C.A. 5th Circ. 1978), the court was confronted with a situation which was similar to that of the case at bar, wherein Williams came to trial a second time

after the granting of a new trial upon the initial conviction. At the subsequent trial, some of the trial jurors were exposed to news reports which contained information that the Defendant Williams had been convicted at a previous trial but a new trial had been granted because of errors which occurred. The trial court polled the jurors and received assurances from those three jurors who heard the story that the knowledge of the prior convictions learned in the story would in no way influence their decision in the case. A Motion for Mistrial by the defense counsel was denied and the court gave the usual cautionary instructions to disregard everything not heard in court. The court then discussed various cases of prejudicial information which can get to a jury, discussing various cases in which other convictions of the Defendant were exposed in the media, with the question being hypothetically posed whether information about the Defendant's conviction in a former trial is as damaging as information about a Defendant's prior criminal acts. "We conclude that it is perhaps even more damaging." Page 470. The court went on to reverse the conviction despite the assurances of the jurors that they would not be influenced and despite the trial court's repeated cautionary instructions, stating that

> Indeed we are hard pressed to think of anything more damning to an accused than information that the jury had previously convicted him for the crime charged. Page 471.

Similarly, the Fourth District Court of Appeals in Cappadonna v. State, __So.2d.__; 11 F.L.W. 40 (Fla. 4th DCA 10/10/86) was faced with a similar situation and cited Williams, supra, with approval in reversing a conviction. In Cappadonna, a newspaper report indicated that Cappadonna had been previously convicted and sentenced and was now up for a retrial on the same charges. Again, jurors admitted reading the article or hearing it read and again staunchly stated that their knowledge of the contents of the article and of the prior conviction on the same charge would not prevent them from rendering a fair and impartial verdict, and again a Motion for Mistrial was denied. In reversing the Second Degree Murder conviction of Cappadonna, the court stated that "The issue is whether the prejudice inherent in jurors' knowledge of a prior jury conviction for the same offense for which the accused is presently being tried is sufficiently ameliorated by the described circumstances to restore an atmosphere conducive to a fair trial ... our review of the prevailing law convinces us that it is not ... we conclude that the subjective influences produced by the newspaper article imposed a burden on Appellant's defense which was an intolerable dilution of the presumption of innocence to which he was constitutionally entitled." Page 2079.

The case before this court presents a much more prejudicial situation, as the jurors did not inadvertantly

read a newspaper article about the prior conviction in the case but, instead, the prosecutor intentionally and willfully, from his position of authority, elicited that very prior conviction from the Appellant himself, over the objection of Appellant's counsel. Where the reports of a newspaper or other media may be subject to some doubt or skepticism on the part of the general public, elicited testimony from the agent of the State from the person on trial cannot be questioned - nor can the prejudicial effect on the new jury be questioned.

The State in the instant matter argued that the Appellant opened the door with a misleading statement (Tr. vol. V, pgs. 908-909), it is clear that the prosecutor's tactic was to bring in the extremely prejudicial matter under the guise of impeachment or clarification, and this type of tactic cannot be tolerated. In Robinson v. Florida, 487 So.2d. 1040, 11 F.L.W. 167 (Fla. 4/18/86), this court reviewed a death sentence case and in fact reversed the sentence because of a similar attempted tactic by the prosecutor. In cross examining several defense witnesses during the sentencing portion of the trial, the State brought up two crimes that occurred after the murder in question through the use of narrative questions, as "Are you aware ... that the Defendant went back to jail to commit yet another rape?" Page 168, note 3. As the State in the instant matter would argue a clarification of the misleading statement by the Appellant

or that the door was opened by the Appellant, the prosecutor in Robinson argued that the incidences in question would undermine the credibility of Robinson's witnesses as to good character. The prosecutor in Robinson went on to argue that giving such information to the jury by attacking a witness's credibility is permissible, yet a very fine distinction - a distinction that this court found to be a meaningless one, as

> It improperly lets the State do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the State went too far in this instance. Pg. 168.

The "back door" tactics of the prosecutor in the instant matter to bring before the jury the fact that another jury had convicted the Appellant can be no less tolerated than that effort in Robinson - particularly in light of the information brought before the jury being so much more prejudicial in the instant case. Certainly any arguable probative value of allowing the prosecutor to clear up the innocuous misleading question would be highly outweighed by the improper prejudicial effect of such evidence coming before the jury. See Washington v. State, 432 So.2d. 484 (Fla. 1983).

A new trial is required because of this misconduct.

Similarly, the prosecutor improperly brought before the jury, through the presentation of the co-defendant Livingston on rebuttal, the fact that the Appellant had been arrested with the co-defendant some years ago for robbery charges (Tr. vol. V, pg. 931), despite the fact that the prosecutor knew that the charges were subsequently dropped and dismissed against the Appellant (Tr. vol. V, pg. 933). Again, this 1974 arrest which resulted in a dismissal was extremely prejudicial in the eyes of the jury and was again elicited, over objection, under the guise of rebuttal - when actually it was another attempt to poison the jury as was previously discussed and as was discussed in Robinson, supra. The opening which the prosecutor attempted to squirm into with his prejudice came during the cross examination of co-defendant Livingston by Appellant's counsel, "Have you ever known Douglas Jackson to be in trouble with the law prior to this case?" "Yes, a few times." (Tr. vol. IV, pg. 697). Trial counsel then impeached Livingston with his former deposition showing the answer to the identical question previously given and relied upon by the Appellant's counsel to be "No, not particularly" (Tr. vol. IV, pg. 698, vol. VII, pg. 1253). The issue was immediately dropped by the Appellant's counsel and another area in cross examination was explored.

Although the trial counsel acted in good faith based upon the under-oath statements given at the deposition and although the trial counsel suffered the damage from the different answer given at the trial by Livingston implying that the Appellant had been in trouble before, the details were not exposed, as Livingston did not blurt out the nature of the problems. Not being satisfied with this terribly damaging testimony, the prosecutor then purposely recalled Livingston on rebuttal to bring out the details of the ten-year-old charge which was dismissed.

Of course, keeping in character, the prosecutor then improperly argued the prior trouble with the law that the Appellant had to the jury in his closing argument (Tr. vol. VI, pg. 1051), actually going so far as to minimize the impeachment of Livingston - all the while knowing that the case against the Appellant had been dismissed and also knowing that Livingston did change his testimony under oath.

Section 90.404(2)(a) of the Florida Statutes sets forth the law in the state of Florida regarding similar act evidence, which was previously stated in Williams v. State, 110 So.2d. 654 (Fla.) cert. denied 361 U.S. 847 (1959):

> Similar act 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 is inadmissible when the evidence is relevant solely to prove bad character or propensity.

In the instant case, there is absolutely no similarity between the 1974 arrest for Conspiracy to Commit Robbery and the First Degree Murder charge in the instant matter. This matter was brought out simply to show bad character and criminal propensity on the part of the Appellant and was a thinly veiled character assassination by the prosecutor under the guise of, again, the door being opened and impeachment. The prejudicial effect outweighed any probative value, as there was no proper probative value in the eliciting of such statements. Therefore, the admission of such improper collateral crime evidence is presumed harmful error because of the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged. Strait v. State, 397 So.2d. 903, (Fla., 1981), pg. 908. Parenthetically, it should also be noted that this information is also improper impeachment under 90.610(1) of the Florida Evidence Code, as it is clear that there was no conviction involved, nor was the information proper under 90.609 of the Florida Evidence Code, as the information involved did not go to character relating truthfulness and the information was not in the

form of proper reputation testimony.

Therefore based upon the improper character attack upon the Appellant, a new trial is required.

Finally, in regard to improper evidence and prosecutorial misconduct, the prosecutor purposely elicited another unrelated but prejudicial character attack incident, that being that Karen Jackson was allegedly handcuffed to the bed and beaten by the Appellant. During the direct examination of Cynthia Manuel on the State's side of the case, it was elicited that Karen had come to Ms. Manuel's house and made such an accusation against the Appellant (Tr. vol. III, pg. 549): in the direct examination of police officer John Pace, the prosecutor elicited that he had answered a call from Karen Jackson that Appellant had handcuffed her to a bed and beaten her (Tr. vol. III, pg. 576); and finally through the direct testimony of Karen Jackson herself it was brought out by the prosecutor that she had suffered physical abuse at the hands of the Appellant and that he took her clothes and handcuffed her to a bed (Tr. vol. III, pgs. 594-595). Again, as mentioned previously, this evidence was not proper similar act evidence, nor was it proper attempted impeachment, but was simply a character attack on the Appellant to show general criminal propensities, and as such, with its cumulative effect with the previously mentioned incidences of misconduct, a new trial is required. Groebner v. State, 342 So.2d. 94 (Fla. 3rd DCA 1977).

POINT II

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

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

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

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

but nevertheless went on to find that

> We cannot condone his manifestation of that strain in the presence of the jury. Our review of the complete record in this case indicates anything but an impartial atmosphere in which defendant received a fair trial. As was indicated in Hunter, supra, defense counsel's conduct should not be visited upon the defendant to the extent that his fundamental right to a fair trial is abridged. Pg. 134.

During the cross examination of Detective Bosse of the Broward Sheriff's Office, it was brought out by the Appellant's trial counsel that a .44 caliber handgun was found at Appellant's home during a search (Tr. vol. III, pg. 474). The theory behind this question apparently being that the murders were committed with a .38 caliber handgun which was never recovered (Tr. vol. IV, pg. 761) and that the Appellant owned and possessed a larger caliber handgun. Appellant's counsel had earlier brought a Motion in Limine to prevent the State from eliciting on direct examination that the handgun was found in the Appellant's house. When the Appellant's counsel chose to make the tactical decision of eliciting the information regarding the .44 gun on cross examination, the prosecutor declared in front of the jury, "Judge, I would object to this; didn't we have a pre-trial motion on this?" (Tr. vol. III, pg. 474). After overruling

the objection, the trial court allowed Appellant's trial counsel to continue on with questioning until spontaneously, the court interjected before the jury

> "You are right, Mr. Coyle - that revolver was the subject of a Motion in Limine filed by Mr. Zimmerman, and I ruled that the State couldn't introduce it. (Tr. vol. III, pg. 475).

This was the opening salvo in a sometimes open attack upon the trial counsel and upon the defense and defense tactics employed on the part of the Appellant, the cumulative effect of which require a new trial. To further aggravate the matter and emphasize the error, the prosecutor chose to specifically argue this pro-prosecution position in his closing argument:

> You heard the Judge say a couple of times that Mr. Zimmerman made a pre-trial motion so we couldn't introduce the guns; and he introduced it as if we are trying to hide something. (Tr. vol. VI, pg. 1050).

Later, during the cross examination of Officer Schooley, Defendant's trial counsel was cross examining regarding a holster which was found in the Appellant's vehicle and trying to elicit the fact that the .44 handgun involved would fit into the holster, to show that the .38 caliber murder weapon would not fit into the holster: "Do

you know whether or not defense exhibit A fits into the holster that you found?" "Judge, I will object to him talking about something not in evidence." The court then sustained the objection and again brought up the objection earlier raised by the Appellant: "Sustained. You objected to the State admitting it." (Tr. vol. III, pg. 509). Again, the court gratuitously informs the jury that the defense lawyer has been acting like a defense lawyer - obstructing justice by making objections. The court went further on the same page of transcription during the same cross examination to respond of his own accord to a question by the defense: "Did you ever find a .38 caliber gun, revolver?" The court: "That is rather broad ... did he ever find one?" (Tr. vol. III, pg. 509). Here, during legitimate cross examination to show that the murder weapon, a .38 caliber handgun was never found, the court interjects to make the defense counsel appear foolish and to take any effect out of his questions on cross examination.

Later, during the cross examination of State witness Barbara Finney, the mother of the victim Larry Finney, the trial counsel asked for just a momemt before continuing with his cross examination, leading the court to chastise him before the jury, "We really can't wait while you re-read all this stuff." (Tr. vol. III, pg. 570). It is clear from the next following questions that defense counsel was trying to ascertain a spot in a deposition which was immediately used

for impeachment purposes (Tr. vol. III, pgs. 570-571). This also gave the court opportunity to again belittle the trial counsel and the defense strategy as is clear from the following exchange: Question: "Now, you identified certain jewelry did you not as belonging to Larry Finney, is that correct?" Answer: "I did not say that." Question: "You did not say it belonged to him? That is correct?" Answer: "That is correct." The court: "Well, the jury heard what she said - ask her the next question." (Tr. vol. III, pg. 571). Again, during the cross examination of Officer Pace, defense counsel asked, "If you wanted to find him your could, he was either at work or at home?" The court: "How does he know that?" (Tr. vol. III, pg. 580). Again the trial court interjected during the cross examination, making it clear that he found the question objectionable although there was no objection by the State, and worse that the court found the question to be foolish and lacking in merit. Later, during the cross examination of the State's star witness Karen Jackson, the court interrupted the questioning and admonished the defense counsel, without objection by the prosecutor; "Please don't repeat the answer to the witness - you're just to ask questions, let the witness do the answering." (Tr. vol. IV, pg. 628). This comment came on the heels of the answer being given: "Only one that I know of" and the defense counsel saying, "Only one." This is certainly not the type of

exchange that invited the trial court's intervention on behalf of the state of Florida. Later during the cross examination, the following sequence occurred: Question by the defense counsel was asked: "Where did Aubrey Livingston live - do you know?" The court then interjected without objection by the State: "Asked and answered - next question." The next question by the defense counsel: "Who did he live next door to?" led the court to again interject without State objection: "Asked and answered - next question." In frustration, the defense attorney stated: "Not by me, Judge", leaving the court to again contradict him without objection: "By you - next question." (Tr. vol. IV, pgs. 649-650). In this exchange, not only does the trial court interject without invitation by State objection, but by the court saying that the questions were asked and answered, he's giving his recollection of the testimony up to this point, and by doing so, is also giving his indication as to what is important and what is not. Though the defense counsel felt it was important to go over this area, the trial court felt first of all that they had already been done, and secondly that it was not important enough to revisit. When this is tied together with the court contradicting the defense lawyer as to whether or not he had personally asked those questions, the resultant prejudice is clear. The same sequence, with different questions,

occurred a short while later in the cross examination where the court twice more interjected and prevented further questioning by stating that the questions had been asked and answered - again without objection by the State (Tr. vol. IV, pg. 656). Later with the same witness, the question was asked by the defense lawyer, "Why didn't they know where you were", leading the court to interject and again badger the Appellant's counsel, without objection by the State, "How could she know why they didn't know where she was?" (Tr. vol. IV, pg. 659). The court again on this occasion belittles the defense lawyer and the theory of the case, making the lawyer look ridiculous by showing that the question was asked in an inartful way. Although the jury can come to this conclusion as is their prerogative, it is improper for the trial court to so clearly choose sides before the jury and to point out the shortcomings to the side in disfavor.

During the cross examination of the Medical Examiner Larry Tate, the doctor was asked the point of being shown certain photographs, prompting an objection by the prosecutor. The trial court seized upon this opportunity to again show where his allegiances were: "Sustained. The point is that Mr. Coyle asked him." (Tr. vol. IV, pg. 782).

Finally, during the cross examination of Shirley Jackson, a neighbor of the victims, the court goes out of

his way to protect the State's witnesss while badgering the defense lawyer. During the impeachment of Shirley Jackson, in response to an objection, the court states: "Hold it. Too many voices going on at once. Ask the lady a direct question - she will give you an answer." (Tr. vol. IV, pg. 790). Later, the witness stated under cross examination that she didn't remember saying that, and the court volunteered: "She said she doesn't remember saying it." (Tr. vol. IV, pg. 791). The court then continues interjecting, when the witness is asked whether or not the Appellant was in the back of the truck with Karen Jackson, the court again says that "That's been asked and answered." And when the witness later says that she saw a leg getting into the camper before Edna Washington got into the camper, the court, without objection, interjects: "Next question. That's what she said. Next question." (Tr. vol. IV, pg. 795). This impatience and disgust came to surface two pages later when, after the witness answered a question with a simple "Yes", the court spoke up, and without objection stated, "That's what she said - twice." (Tr. vol. IV, pg. 797). Finally, at the end of the examination of the witness, following the prosecutor's last question, the court asks: "How about you, Mr. Zimmerman - anything else?" At which time the defense attorney asks for one moment. The court then leaps upon the defense attorney and says: "The lady is waiting." The defense lawyer apologises, prompting the court to further chastise him: "Hurry

up, will you? Let's get through with this witness so she can go home. If you have any more questions, ask her on recross." (Tr. vol. IV, pg. 799).

Although there were no objections to most of these statements, this court has repeatedly stated that a lawyer is not required to pursue a completely useless course where the judge has announced in advance that it will be fruitless, and as a practical matter, nothing could be more fruitless than objecting to the judge about a comment that he just made. In Bennett v. State, 173 So. 817 (Fla. 1937), this court held that in the review of a capital case,

> Although no exception was taken to the remarks of the court at the time it was made, and it was not the basis for an assignment of error, the remarks would be considered in a capital case.

The court continuously lost patience with the defense counsel and interrupted cross examination during the testing of the credibility of crucial witnesses, and in Karen Jackson's case, the only seemingly neutral eyewitness. The cumulative effect of these errors, both objected to and not, affected the substantial rights of the Appellant to a fair trial, and a new trial must be granted. Pollard v. State, 444 So.2d. 561 (Fla. 2d. DCA 1984); Pope v. Wainwright, __So.2d. __; 11 F.L.W. 533 (Fla. 10/24/86). This cumulative effect can

be capitalized by this court's holding in Williams v. State, 143 So.2d. 484 (Fla. 1962):

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

POINT III

THE TRIAL COURT ERRED IN RESTRICTING THE CROSS EXAMINATION OF STATE WITNESSES BY APPELLANT.

Although wide latitude is permitted on cross examination in a criminal proceeding, its scope and limitation lies within the sound discretion of the trial court and is not subject to review except for a clear abuse of discretion. Sireci v. State, 399 So.2d. 964 (Fla. 1984). Recognizing this strict burden, it is the Appellant's position nonetheless that the trial court erred to the prejudice of the Appellant by restricting the cross examination of Detective Schlein and of Barbara Finney regarding the character of the victim Larry Finney. Detective Schlein was a very critical witness against the Appellant, as he testified regarding scratches on the Appellant's face on March 3, 1981, a few days after the incident, and testified that the Appellant's explanation was that he burned his face at a barbecue. (Tr. vol. IV, pg. 722). Schlein also took a tape recorded statement from the defendant which was played to the jury, as well as a statement from the co-defendant Livingston which was played before the jury. However, upon cross examination, the trial court refused to allow defense counsel to inquire into investigations regarding Detective Schlein and unrelated cases wherein there was a purported demotion for perjury (Tr. vol. IV, pgs. 766-767). In the record of the earlier trial, a complete proffer was made and incorporated into the instant trial by reference. The

matter came before the court on the State's Motion in Limine to restrict the cross examination of Detective Schlein, leading to a proffer by the defense attorney that in two separate instances in the same Circuit, one in the case of State v. Hunwick and the other in State v. Overholser, the witness Schlein, was accused of and found guilty by his department for suborning perjury and trying to get a key witness to lie, and as a result, has a bad reputation in the police department for this type of activity, and it is a fact that Schlein was demoted for such activity and was known by reputation to have committed perjury (Tr. vol. I, pg. 71). The proffer went on to specify that in Hunwick, Schlein went into a house and searched it and then got a search warrant and pretended it was being done for the first time, and that in fact he was found guilty by his department of suborning perjury in that he counseled a junior officer to lie and that the junior officer did so. (Tr. vol. I, pgs. 72-73). Regarding the Overholser case, the proffer dealt with Schlein's attempt to get a witness to change her testimony, but she refused to do so (Tr. vol. I, pg. 74). Although Schlein vociferously denied the allegations, he later had to admit that he was in fact suspended from his department for three days as a result of his involvement in the Hunwick case. Further efforts to complete the proffer were not allowed by the trial court (Tr. vol. I, pg. 75).

It is fundamental that all witnesses are subject to cross examination for the purposes of discrediting them by showing bias, prejudice or interest. This is especially so where a key witness is being cross examined. Cox v. State, 441 So.2d. 1169 (Fla. 4th DCA 1983), pgs. 1169-1170. This right extends to cross examination about actual or threatened criminal investigations against the witness to show bias or self interest. Thorns v. State, 485 So.2d. 1357 (Fla. 1st DCA 1986). While the State argued and the court ruled that the cross examination of Schlein should be restricted based upon State v. Pettis, __So.2d.__; 10 F.L.W. 1878 (Fla. 4th DCA 8/16/85), Pettis was accused in the departmental reprimands that he received for the failure to report an officer's use of force, failure to report an accidental discharge of his weapon, mishandling a suspect's property, applying for unearned overtime pay, and unjustified striking of a prisoner. Further, there was no indication of evidence of reputation for character traits of untruthfulness. Finally, in Pettis, there was no allegation of an interest, bias or motive to lie. In the instant case, however, the allegations were specifically regarding perjury and perjury related activities such as suborning perjury with a witness and a lesser or junior officer. Also, there were specific allegations of departmental reputation for such perjurious activities. In this regard, the reputation of Schlein was

to be put in evidence and particular traits regarding credibility were to be brought to the forefront. Further, due to the admission by Schlein of departmental suspension for three days regarding the cases alleged, they would clearly be a motive to lie and a bias in this case to try to rehabilitate his reputation as a police officer and as a witness. See Ward v. State, 343 So.2d. 77 (Fla. 2d. DCA 1977), where perjury was seen to fall into a special catagory, as such a conviction has great weight against credibility of a witness. In Ward, the conviction was reversed for the exclusion of a 20-year old perjury conviction. Although there was no conviction per se for perjury in the instant matter, the fact that the charges dealt with perjury and suborning perjury make this type of impeachment essential to a crucial State witness, and the limitation of such was prejudicial error. See also Gambol v. State, __So.2d.__, 11 F.L.W. 1724 (Fla. 5th DCA 8/15/86), where a rape conviction was reversed for the exclusion of impeachment regarding the prosecuting witness's statement regarding her ability to tell the truth and her seeking of counseling to help with that problem. The defense attempt to present evidence to this regard was prevented by the trial court's ruling. So also in the instant matter, the Appellant was prevented from bringing in witnesses regarding the prior perjury related activities of Schlein for the jury to consider. This restriction on cross examination and impeachment was reversible error under the circumstances.

Regarding the restriction of cross examination of Barbara Finney, the question propounded dealt with the occupation of the victim Larry Finney and the proffer that he was understood to be a drug dealer (Tr. vol. III, pgs. 573-574). This restriction of cross examination takes on added importance in light of the fact that the initial theory of the case was that it was a drug related killing (Tr. vol. III, pg. 440). It has long been the law in the state of Florida that one accused of a crime may show his innocence by proof of guilt of another. Lindsay v. State, 68 So. 922 (Fla. 1915). Where evidence tends in any way even indirectly to prove a defendant's innocence, it is error to deny its admission. Chandler v. State, 366 So.2d. 64 (Fla. 3rd DCA 1978). Since there was a good faith basis for the cross examination regarding drug usage and since there was testimony regarding the suspicion of a drug related killing, the Appellant was entitled to present evidence upon the facts that were relevant to his theory of the case, as that theory was in fact supported by the law. Zamora v. State, 362 So.2d. 776 (Fla. 3rd DCA 1978). The restriction on the cross examination of Barbara Finney, in conjunction with such restriction regarding Detective Schlein, amounts to prejudicial error which requires a new trial.

POINT IV

THE CUMULATIVE EFFECT OF VARIOUS TRIAL COURT RULINGS REQUIRE A NEW TRIAL TO BE GRANTED.

Throughout the course of the trial, various rulings by the trial court and actions by the court and prosecutor resulted in prejudicial effect which require a new trial in the instant matter.

After the jury was sworn to hear the case, the defense attorney brought to the court's attention that his law clerk overheard a Broward Sheriff's Office employee state that he was a friend of Mr. Smith, a member of the jury, but when Mr. Smith was asked on voir dire, he denied such friendship with law enforcement officers. (Tr. vol. II, pg. 380). The court was then requested to inquire further of juror Smith regarding his friendship with any Broward Sheriff's Office employees, and that request to even perfunctorily inquire was denied by the trial court. (Tr. vol. II, pg. 381). It is fundamental that every defendant is entitled to be tried by a fair and impartial jury and that our system of law has continuously endeavored to prevent even the possibility of unfairness. In re Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955). The case at bar, like any other case in our judicial system, is to be decided only by evidence and argument in open court and not by any outside influence, including friendship. See Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556 (1907). The trial court erred by failing to inquire as to juror Smith's

friendship with Broward Sheriff's employees and about juror Smith's deceptive answers during voir dire when asked of these friendships by Appellant's counsel.

It was brought to the trial court's attention that the entire jury saw the Appellant in handcuffs at the elevator and a Motion for Mistrial was made and denied by the trial court (Tr. vol. III, pg. 415). As a general rule, a defendant in a criminal case has a right to appear before the judge and jury free from shackles and other physical restraints. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057 (1970). The presumption of innocence is a basic component of a fair trial under our system of criminal justice, and for this presumption to be effective, the courts must guard against practices which unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion. Harrell v. Israel, 672 F.2d. 632 (U.S.C.A. 7th Circ. 1982). As was stated by this court in Schultz v. State, 179 So.2d. 764 (Fla. 1938), every person is presumed to be innocent of the commission of the crime, and that presumption follows them through every stage of the trial until they have been convicted.

> It is therefore highly improper to bring a person who has not been convicted of a crime clothed as a convict and bound in chains to the presence of the venire or jury before whom he is to be tried for any criminal offense, and, when such condition is shown by the record to have obtained, in many cases it might be sufficient grounds for reversal. Page 765.

When it is recalled that the jury was told by the prosecutor that the Defendant had been already convicted by another jury of the crimes charged, this factor, in conjunction with the jury seeing the Defendant in handcuffs, rises to the level of prejudicial error and requires a new trial.

The trial court erred in allowing heinous and repulsive photographs to be admitted before the jury for the sole purpose of inflaming the passions of the jury to the prejudice of the Appellant. The photographs of the incinerated bodies, exhibits 7 through 12 of the State, were introduced over objection (Tr. vol. III, pgs. 459-460), and at the same time, they were published to the jury. Later, during the testimony of Medical Examiner Tate, the same photographs were again published to the jury. (Tr. vol. IV, pgs. 770-780). It was misconduct on the part of the prosecutor to display such prejudicial and inflammatory photos and error on the part of the trial court to allow such photos to come before the jury. The photographs in question, including depictions of bodies burned through, exposing underlying charred muscles (Tr. vol. IV, pg. 770), showing extensive charring, almost complete loss of skin, with post mortem evisceration with burning, where the bowel loops have literally burned through the abdominal wall (Tr. vol. IV, pg. 773), and depicting extensive disruption of the skull bones of a child's head with exposure of charred

brain tissue (Tr. vol. IV, pg. 778) were certainly so imflammatory as to create an undue prejudice in the minds of the jury and to detract from a fair and unimpassioned consideration of the evidence in the case. Young v. State, 234 So.2d. 341 (Fla. 1970), pg. 348.

Similarly, the prosecutor was guilty of misconduct and the trial court erred in allowing the State to elicit testimony that the victim Edna Washington was in the advanced stage of pregnancy at the time of her death (Tr. vol. IV, pg. 683, 777). This was not only to inflame the jury, but was elicited for the sole and improper purpose of appealing to the sympathy of the jury, to the prejudice of the Defendant. See Edwards v. State, 428 So.2d. 357 (Fla. 3rd DCA 1983). See also Vaczk v. State, 477 So.2d. 1034 (Fla. 5th DCA 1985) where a conviction was reversed because of the prosecutor's eliciting the fact that a victim was pregnant at the time of the First Degree Murder. The court found that the question was clearly erroneous and that the loss of the victim's unborn child was such an imflammatory fact that it could not be deemed harmless error. The emotional and prejudical effect of this testimony is clearly exhibited by the fact that this testimony was elicited at various times through various witnesses, including the Medical Examiner, who even opined as to the length of the pregnancy (Tr. vol. IV, pg. 777).

The trial court erred in failing to grant a mistrial upon the prosecutorial misconduct which occurred during the opening statement, wherein the prosecutor stated that the Defendant was not barbecuing hamburgers or hotdogs, it was people (Tr. vol. II, pg. 396). Again, this was simply an effort to inflame the jury and distract the jury from a fair consideration of the evidence. Young, supra.

Finally, the trial court erred in allowing the introduction of empty .38 caliber cartridges found near the home of the Appellant. (Tr. vol. III, pg. 489). These .38 caliber cartridges were the subject of a Motion in Limine presented at the earlier trial (Tr. vol. I, pgs. 7-10). These cartridges simply had no relevancy, as it was never alleged by any theory of the State's case that any of the shooting occurred at or near the home of the Appellant. The only hypothetical connection between the .38 caliber shells near the Appellant's home and the instant crime was the fact that the persons involved were killed with .38 caliber bullets. However, there was no connection whatsoever between the evidence involved, being the shells, and the crime in question.

> A mere 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. Peek v. State, __ So.2d. __; 11 F.L.W. 175 (Fla. 4/18/86), pg. 176.

The admission of those .38 caliber shells was mere character attack and a showing of propensity to commit crime, Strait, supra, page 908, and any arguable probative value would be certainly outweighed by the improper prejudicial effect and the speculation which would occur. See Washington v. State, 432 So.2d. 484 (Fla. 1983). Therefore, the admission of such evidence was error on the part of the trial court.

Due to the cumulative nature and effect of the aforementioned errors, and in conjunction with those previously discussed, a new trial is required in the instant matter.

POINT V

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

The review of a death sentence by this court has two facets: to determine that the jury and judge acted with procedureal rectitude, and ensure relative proportionality among death sentences which have been approved statewide. Adams v. State, 412 So.2d. 815 (Fla. 1982). In the instant case, not only are the procedural errors fatal to the sentencing of death, but the sentence imposed is not proportional in a statewide comparison of death sentences approved, particularly in light of the disparity of treatment between the Appellant and co-defendant Aubrey Livingston, who received a sentence of life. (Tr. Supp. vol.).

In imposing the sentence of death, the trial court found that the following aggravating circumstances existed: the Appellant had been previously convicted of other capital offenses (the other Counts in the same Indictment); that the killings were done during the commission of a felony, that being the kidnapping of the persons involved; that the crime was heinous, atrocious or cruel; and that the crime was committed in a cold and calculated manner. (Tr. vol. VIII, pgs. 1398-1399). The court also found that the

statutory mitigating factor of no significant factor of prior criminal activity applied (Tr. vol. VIII, pg. 1399). Of these factors, only the circumstances of prior convictions and murder during the course of kidnappings are arguably proper.

Turning first to the finding of cold and calculated, it must be noted that, after the factual recitation is completed, the trial court gave as justification for a finding of cold and calculated that

> Following these cruel and brutal executions, the bodies were disposed of in a most heinous way. After the commission of the offense, the subject returned to Dade County, Florida where he continued to maintain his lifestyle, showing absolutely no feelings or remorse for the act. (Tr. vol. VIII, pg. 1399).

It is interesting to note that the factual recitation given by the court under this justification is more appropriate in support of an emotion induced or spontaneous activity than a cold and cruel killing. More importantly, the court justified its finding with two clearly impermissible aspects of the case: the lack of remorse and the disposal methods of the dead bodies. Regarding the lack of remorse, it is beyond question that

under this court's holding in Pope v. State, 441 So.2d. 1073 (Fla. 1983), a lack of remorse is not a proper factor to be considered by the sentencing court. Regarding the disposal of the bodies, this court has stated with clarity that once the victim dies and the murder is completed, the method of disposal of the bodies is not sufficient for the aggravating circumstances of cruel and heinous murder. Blair v. State, 406 So.2d. 1103 (Fla. 1981); see also Herzog v. State, 439 So.2d. 1372 (Fla. 1983).

The statement attributed to the Appellant by Karen Jackson that he was going to take the victims and hold them hostage like they held Karen (Tr. vol. IV, pg. 610), and that the Appellant was going to put them in the abandoned car and leave them there (Tr. vol. IV, pg. 613), coupled with the fact that the Appellant drove aimlessly until stumbling upon the abandoned car on State Road 27, seemed to effectively contradict the trial court's finding of cold and calculated. The facts, in the best light of the State, seem to indicate a spontaneous deranged action instead of a carefully planned execution-style murder. See Vaught v. State, 410 So.2d. 147 (Fla. 1982). As a comparison, see Puiatti v. State, __So.2d.__; 11 F.L.W. 438 (Fla. 8/29/86), where the finding of cold and calculated was upheld during a kidnap and robbery of a woman from a shopping mall, as the victim was

made to cash her check, was then put out on the side of the road and shot, with the defendants returning three separate times to shoot her again until she finally fell dead. Also, in DuFour v. State, __So.2d.__; 11 F.L.W. 466 (Fla. 9/12/86), the finding of cold and calculated was upheld where DuFour announced his intention to rob and murder a homosexual, and put his plan into action, stealing jewelry and the victim's car and finally executing him with gunshots.

Finally, and as a closer comparison, is Wilson v. State, __So.2d.__; 11 F.L.W. 471 (Fla. 9/12/86), where a finding of cold and calculated was reversed despite the fact that during a family dispute, Wilson hit his mother and father with hammers, then shot his father, stabbed his five-year-old cousin with scissors, and shot his mother on numerous occasions as she hid in a closet. This court held that it was not a showing of cold and calculated, although Wilson sought his mother as she hid in the closet, as the murder was the result of a domestic confrontation. Certainly, based upon the improper consideration of lack of remorse and disposal of the already-dead bodies and the comparison to similar cases, this court cannot find that the finding of cold and calculated was supported by the record beyond reasonable doubt, and therefore, such aggravating circumstance should be stricken from consideration.

Turning to the finding of heinous, atrocious and cruel, the discussion invariably melds with a statewide review of the proportionality of the sentence of death. In this regard, the court's attention is respectfully drawn to the following cases where the death sentence has been found to be appropriate and where the sentence has been reversed. All of the cited cases exhibit facts which are more heinous and deserving of the death sentence than in the instant case. In the previously cited case of Wilson v. State, supra, the death sentence was reversed by this court despite the two Counts of First Degree Murder and one Attempted Murder in the First Degree, where Wilson, during a family dispute, beat his mother and father with a hammer and finally shot his father and sought out and shot his mother many times while she hid in a closet. He also stabbed his five-year old cousin with a pair of scissors. Although this court approved the finding of heinous, atrocious and cruel due to the brutal beatings while they were trying to defend themselves before they were shot, the court reversed the death sentence, stating that the incident was the result of a heated domestic confrontation, and that death was not proportionally warranted despite the jury recommendation of death in the case. In Irizarry v. State,__So.2d.__; 11 F.L.W. 568 (Fla. 11/7/86), a death sentence was reversed

although Irizarry murdered his wife with five (5) chops with a machete, almost decapitating her, and at the same time attempted to kill her boyfriend in the same manner. In Huddleston v. State, 475 So.2d. 204 (Fla. 1985), the death sentence was reversed by this court as being inappropriate although Huddleston, who worked at an Officer's Club at an Air Force Base, returned after being fired and beat, strangled and stabbed his female boss during a robbery, returning two or three different times to finish the murder, as the victim continued to live.

Drake v. State, 441 So.2d. 1079 (Fla. 1983) saw this court reverse a death sentence although the victim was found with her hands tied together after suffering eight stab wounds. In Herzog v. State, 439 So.2d. 1372 (Fla. 1983), the death sentence was reversed despite the fact that the victim was forced to take pills, was beaten and suffocated and eventually, when she refused to die, the victim was strangled with a phone wire, with each end of the wire being pulled by a separate perpetrator, with her body eventually being burned after being stuffed into a garbage can. See also McKennon v. State, 403 So.2d. 389 (Fla. 1981) and Neary v. State, 384 So.2d. 881 (Fla. 1980).

For further comparison, to show the instant case as being inappropriate for the imposition of the death sentence, the following cases have been found to be proper

death sentence cases: Atkins v. State, __So.2d.__; 11 F.L.W. 567 (Fla. 11/7/86), where a six-year-old was kidnapped, made to perform sex acts and then beaten to death with two separate beatings - the first with a steel rod, and eventually another beating with approximately thirty blows, resulting in multiple fractures of the skull and a broken jaw. The victim was found still alive, profusely bleeding and choking on his own blood, eventually lapsing into convulsions. This court noted in Affirming the death sentence that there was no evidence that the victim ever went into unconsciousness, and consequently there was an extreme amount of pain over the lengthy periods of the beatings and chokings. In Hooper v. State, 440 So.2d. 525 (Fla. 1985), the death sentence was found appropriate by this court where Hooper, a six-foot-three-inch, three hundred twenty-five pound man was living with his brother and his brother's family until he stabbed and mutilated his sister-in-law, strangled and cut the throat of his nine-year old niece and beat his twelve-year old nephew in the head, crushing his skull but failing to kill him. Gore v. State, 475 So.2d. 1205 (Fla. 1985) was found by this court to be appropriate for the death sentence, since Gore was convicted of two Counts of Kidnapping, one Count of First Degree Murder, and three Counts of Rape, stemming from a fourteen-year old and a seventeen-year old girl being picked up while hitchiking. Gore then tied up

the two girls, the fourteen-year old girl was raped three times and then executed with two shots, with the seventeen-year old girl eventually escaping, although only temporarily, as she was chased, caught and shot twice also. Roman v. State, 472 So.2d. 886 (Fla. 1985) was found to be appropriate for the death sentence, as Roman kidnapped a two-year old baby from the back seat of a car during a party, raped and choked the baby girl before burying her alive. In Bassett v. State, 449 So.2d. 803 (Fla. 1984), this court upheld the death sentence where two eighteen-year old boys were kidnapped, robbed and taken to a swamp, where unsuccessful attempts to beat them to death resulted in broken ribs and jaws. The two boys were then stuffed into a trunk, where an exhaust pipe from the car was put into the trunk, causing the victims to struggle, with the struggle being ended when the victims were stabbed with a knife numerous times until the fumes from the car caused their lingering deaths. See also Waterhouse v. State, 429 So.2d. 301 (Fla. 1983); Adams v. State, 341 So.2d. 765 (Fla. 1977); Thompson v. State, 389 So.2d. 1197 (Fla. 1980); Gardiner v. State, 313 So.2d. 675 (Fla. 1975).

When the statewide review for proportionality is considered, it is seen that while reprehensible, the instant case is not an example of a killing which is accompanied by

such additional acts as to set the crime apart from the norm of capital felonies - the consciousless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d. 1 (Fla. 1973).

The trial court also erred by failing to consider the mitigating factors of extreme mental and emotional disturbance and the resultant diminished capacity to appreciate the criminality of the acts. Although factually bizarre, it cannot be seriously doubted that the activities involved stemmed from domestic problems of a long-term nature between the Appellant and his wife, Karen. See Herzog, supra, and Wilson, supra. The record on appeal is replete with references to the Appellant searching for his wife and children (Tr. vol III, pg. 579; vol. IV, pgs. 604-605, 674), as well as examples of Karen having affairs with other men (Tr. vol. V, pgs. 866, 825-826, 815-816, and vol. III, pg. 562). This type of domestic problem, in and of itself a reason for life sentence, certainly points to extreme emotional problems which should be considered as a mitigating factor. Emotional problems must be considered in the sentencing equation regardless of whether such problems fall short of a defense of insanity or diminished capacity. Eddings v. Oklahoma, __U.S.__; 102 S.Ct. 869 (1982); see also Jones v. State, 332 So.2d. 615 (Fla. 1976); Burch v. State, 343 So.2d. 831 (Fla. 1977). Consequently,

the trial court erred in refusing to find and consider this mitigating factor, along with the mitigating factor which was found to exist: the lack of significant criminal history. When the improper aggravating circumstances of cold and calculated and heinous, atrocious and cruel are stricken and the additional mitigating factor of diminished capacity through emotional instability is considered, it becomes all the more clear, together with the statewide review, that a death sentence was not warranted in the instant matter.

Quite distinct from the proportionality question and the questions of procedural errors raised previously is the obvious and unconstitutional disparity in the treatment of the Appellant as opposed to the treatment of co-defendant Aubrey Livingston, the person said by Karen Jackson to have the gun involved at all times pertinent to the killings, with the Defendant never having the gun (Tr. vol. IV, pgs. 608, 626). Livingston was orinally tried, convicted and sentenced to death, with his case being reversed by this court. He was tried again, but this time testified for the State in the Appellant's instant trial, and was rewarded with a life sentence (Tr. Supp. vol.). The trial testimony of Aubrey Livingston was absolutely incredible, being totally at odds with the State's star witness Karen Jackson regarding such pertinent matters as his possession of the gun in question

(Tr. vol. IV, pg. 689) and his participation in the binding of the victims (Tr. vol. IV, pg. 679) and the fact that he claimed to have never gotten out of the truck at the scene (Tr. vol. IV, pg. 701). The most telling factor is the State's admission to the jury in closing argument that "it's obvious he (Livingston) is not telling the truth about how much he helped when he was in the living room. He is obviously not telling the truth about how much he helped when he was in the back of the truck. He is obviously not telling the truth about how much he helped when they got to the abandoned car, he's obviously not". (Tr. vol. V, pgs. 956-957). The State then goes on to admit to the jury, "If I hadn't put him on the stand I couldn't have played the tape and you couldn't have heard it". (Tr. vol. V., pg. 957). Therefore, this court is confronted with a situation where a witness was lying, the State knew that he was lying, but used it to the State's tactical advantage to play a tape recorded statement made some years earlier by Livingston. More importantly, this court is confronted with a co-defendant who had the gun in question at all pertinent times, who more than likely shot and killed three of the five victims involved, and who had an active participation in the initial break-in of the Washington house, of the binding of the victims and of the kidnapping of the victims, yet he is brought to court,

allowed to repeatedly perjure himself under the protection of the State, and is then rewarded with a life sentence in contrast to the death sentence imposed upon the Appellant. Also to be considered is the fact that Livingston participated in an absolutely cold and detached manner, not having the emotional strain and motivation being suffered by the Appellant. It is this disparity in treatment between the co-defendant Livingston and the Appellant which in and of itself requires the striking of the death sentence in the instant matter. The death sentence statute in Florida cannot be upheld under the requirements of Profit v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), if such disparities among equally culpable participants are ignored. See McCaskill v. State, 344 So.2d. 1276 (Fla. 1977), pg. 1280. It was held by this court in Meeks v. State, 339 So.2d. 186 (Fla. 1976) that when dealing with different sentences for equally guilty co-defendants,

> We are extremely sensitive to the demands of equality before the court in cases in which we consider whether the sentence of death should be upheld. Our reading of Furman v. Georgia, 408 U.S. 283, 92 S.Ct. 2726 (1972) convinced us that the identical crimes committed by people with similar criminal histories require identical sentences. It is this uniformity and predictability of the result which §921.141 of the Florida Statutes (1975) seeks to accomplish. Page 192.

In the leading case of Slater v. State, 316 So.2d. 539 (Fla. 1975), Slater was one of three co-defendants involved in a motel robbery in which the manager was shot and killed. The trigger man was given a life sentence, the wheel man was given a five-year sentence, and Slater received the death penalty. In vacating the death sentence, this court looked to the sentences of the two co-defendants:

> We pride ourselves in a system of justice which requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law. Page 542.

In the recent case of Brookings v. State, __So.2d. __; 11 F.L.W. 445 (Fla. 9/5/86), a death sentence was reversed by this court based upon the disparate treatment of the defendants involved. Brookings was hired by the mother of an unrelated defendant to kill the witness against her son. Brookings and his girlfriend set up the victim and Brookings shot the victim while the girlfriend drove over the body later. The girlfriend who participated got total immunity, while the mother who hired Brookings was allowed to plead to Second Degree Murder. This court found that such a disparate sentence could not stand, and the death sentence was

reversed. In Woods v. State, __So.2d.__; 11 F.L.W. 191 (Fla. 5/2/86), a death sentence was Affirmed for Woods after a joint trial with the co-defendant, wherein it was shown that Woods and his co-defendant, while inmates at the Union Correctional Institution, stabbed four guards, with one of the guards dying. This court specifically upheld the sentence of death for Woods, finding no disparity, with the justification being that Woods was the main attacker, Woods was the one who told the victim that he was going to die while the victim begged for his life, and that Woods was the one who prevented the rescue attempts. Also, it was noted by this court that Woods stabbed four persons, while the co-defendant only stabbed two and received the life penalty.

Finally to be considered by this court in the matter of disparity and in the matter of the general appropriateness of the death sentence is the case of Barclay v. State, 470 So.2d. 691 (Fla. 1985), where the death sentence was actually reversed despite the fact that Barclay, along with co-defendant Dugan, were self proclaimed members of the Black Liberation Army who drove around town looking for random victims, settling on a young white man who was then abducted, shot, stabbed and killed. Barclay then participated in the taunting of the victim's parents through

sending them tape recordings and giving recordings to the press. Although aggravating circumstances were found and no mitigating circumstances, this court reversed the death sentence, finding a disparity between Barclay and co-defendant Dugan since Dugan was the professed leader of the group. See also Herzog, supra, where the death sentence was reversed due in part to the disparate treatment of Herzog and the equally culpable co-defendants - one of which pulled one end of a telephone cord while Herzog pulled the other to strangle the victim.

There can be no doubt that a disparate treatment of the Appellant and co-defendant Livingston would result in an improper and unconstitutional application of the death sentence. Consequently, based upon the errors of the trial court in improperly finding aggravating circumstances and in failing to find mitigating circumstances, based upon the disproportionality of the death sentence in the instant matter when viewed in a statewide comparison, and based finally upon the disparity of treatment between the Appellant and the co-defendant Livingston, the death sentence must be reversed in the instant case.

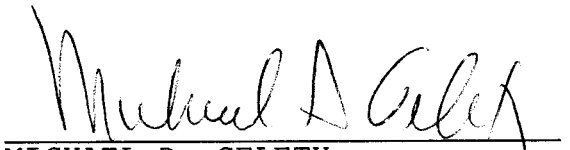
CONCLUSION

Based upon the errors of fact and law made by the trial court, as well as the trial court's comments and attitude exhibited toward Appellant's trial attorney, and the prosecutorial misconduct which was displayed throughout the trial, the Appellant was prevented from receiving a fair trial, and a new trial is mandated.

Also, the death sentence in the instant matter is inappropriate and was improperly imposed after serious procedural errors and without regard to a statewide comparison and without regard to the disparity of treatment between the Appellant and the co-defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellant was furnished, by mail, to the Attorney General's Office, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401, this 21st day of November, 1986.



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