IN THE SUPREME COURT OF FLORIDA

DOUGLAS MARSHALL JACKSON,

Appellant,

v.

CASE NO. 75,970

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Appellee accepts Jackson's Statement of the Case but would add the following facts relating to the February 28, 1981, first degree murders of Larry Finney, Walter Washington, Edna Washington, Terrance Manuel and Reginald Manuel.

Officer Eva Decambre of the Pembroke Pines Police Department testified that she was called to the crime scene around 4:30 a.m., on March 1, 1981, and secured pictures of the crime scene. (TR 364). An objection was raised to the admission of said photographs by defense counsel, arguing that the photographs were "too prejudicial" (TR 365). The trial court overruled the objection and published three photographs to the jury. (TR 366-368).

James Wolkup, an arson expert, testified that he viewed the crime scene at approximately 7:00 a.m., on March 1, 1981. (TR 372). It was his determination that the fire was intentionally set, specifically that an accelerant was used in a pour pattern. The fire commenced in the front seat area near the driver's side and spread throughout the interior of the passenger compartment. (TR 374-375).

Orren Bosse supervised the collection of evidence at the crime scene. (TR 398). He testified that he secured a piece of yellow rope from one of the bodies at the autopsy (TR 405), and also collected a social security card and manual and HRS forms with the name of Edna Washington from underneath one of the bodies in the car at the crime scene. (TR 406-407). He received from Lt. Schooley, items from Douglas Jackson's house,

specifically a holster, keys and two shell casings. (TR 410-411). Officer Bosse photographed Jackson when he was arrested on March 5, 1981, and testified that he noticed burns on Jackson's body, specifically on his face, shoulder area and the back of his right hand. (TR 412-415). On cross-examination, Officer Bosse testified that he photographed the bodies as they were removed from the crime scene and later collected jewelry depicted in the photographs of Larry Finney at the autopsy of Mr. Finney. (TR 422-423).

Officer John Pace testified that on February 12, 1981, he met Karen Jackson and Douglas Jackson when he was requested to come to the assistance of Karen Jackson at the Jackson residence. Karen was upset and crying and told him that her husband had handcuffed her to their bed. (TR 427). Officer Pace testified he then went to see Douglas Jackson at work at the Eagle Family Army Store at which point Jackson told him he was trying to keep his family together. (TR 428-429). Jackson later came by Officer Pace's office asking for help with regard to the domestic problems he was having. (TR 429). On February 28, 1981, Officer Pace went to see Jackson after he spoke to Karen and provided them with brochures regarding a domestic intervention program available. Jackson told Officer Pace that he would see his wife after work about 1:30 p.m., that day. Officer Pace testified that when he saw Jackson earlier on February 28, 1981, Jackson had no burns on his body. (TR 430). On March 4, 1981, Officer Pace again saw Jackson as a result of defendant's call to Pace's office. Jackson told him that he, Jackson, had been receiving

threatening phone calls from an unknown person. Pace went to see Jackson and noticed that Jackson was burned. When asked about the injuries, Jackson said that he was burned when fluids exploded while he was barbequeing on Sunday, March 1. (TR 431). Officer Pace testified on cross examination that after he spoke to Jackson on March 4, he received a call from the police asking him to help locate Karen Jackson. (TR 447). Officer Pace testified that he found her about 1:00 a.m., March 5, staying with friends at the Silver Blue Lakes Apartments. (TR 448).

Barbara Finney, Larry Finney's mother, testified that she knew Edna and Walter Washington as well as Karen Jackson. (TR 466). A couple of weeks before the murders, she saw a man in a camper drive up in her driveway. The man asked if she knew where Karen was and said that he was her husband and was looking for his children. (TR 466-467). Mrs. Finney testified that she told Jackson that Karen did not live there however, Jackson nevertheless left a message that he wanted Karen to get in touch with him. (TR 468). Mrs. Finney indicated that it appeared to her it was urgent that Jackson get in touch with Karen. (TR 468). Mrs. Finney testified that a couple of days after this incident, she again saw Jackson drive up in her driveway. He asked if she had heard from Karen. (TR 470). Mrs. Finney told her son that Jackson was looking for Karen and her son indicated that Jackson had started following him and the Washingtons. (TR 471). She decided to walk over to the Washington's residence because she saw the camper circling the neighborhood. When she arrived at the Washington's house, no one seemed to be home,

however when she walked to the back door, she heard voices. When Edna Washington recognized her, Edna let Mrs. Finney into the house. Edna said to come in quickly and shut the door. (TR 472).

On cross examination, Mrs. Finney testified that Karen and her son Larry, were dating however, when she found out that Karen was married, she told her son not to see Karen any longer. (TR 475-477). She further testified that she never saw her son or Karen using drugs. (TR 483).

Shirley Jackson testified that in 1981, she lived at 1144 S.W. 75th Street in Miami, Florida, across the street from the Washington's residence. (TR 489). Although she did not know the Washingtons very well prior to February 28, she knew who came in and out of the household. (TR 489). On February 28, 1981, Mrs. Jackson testified that late Saturday night she got up for some water and looked outside. She observed Jackson embracing his wife and talking to her. (TR 489-490). She returned to bed and then got up again and observed Tina getting into the back of the camper. She saw Jackson lock the door and drive off in the camper (TR 491).

Larry Schooley, a Pembroke Pines police officer, went to the Washington's residence on March 3, 1981, and took pictures of the house. (TR 507). He observed that the outside door looked like it had been forced open. (TR 510). On March 5, 1981, he went to the defendant's residence and found two spent casings in the swale area of the front yard and yellow rope in the attic. (TR 512, 515). On March 6, 1981, he searched Jackson's camper

and found a pair of handcuffs in the back of the camper and an empty holster in the truck. (TR 519, 521).

Mary Lynn Henson, a crime lab fiber analyst, testified that the rope found in Jackson's attic matched the rope used to bind the victims at the crime scene (TR 562, 565).

Karen Jackson was next called to the stand and testified that she married Douglas Jackson July 1976, however due to difficulties, they separated in early 1981. In February 1981, she went to live with her girlfriend, Edna Washington, and Edna's husband and two children. (TR 572). In mid-February 1981, she had called police because Jackson had forcibly taken her from her job and brought her to their old residence. Jackson handcuffed her, took off all her clothing and locked her in their bedroom. (TR 572-573). She testified that she got loose, dressed and went and called the police. After that point, she never returned to live with Jackson.

On the night of the murders, Walter Washington was home with her and her children and the Washington's children. Edna Washington and Larry Finney were at work (TR 576-577). Larry came home and Walter went to pick up Edna and then returned to the Washington residence (TR 577). Larry observed that he saw Jackson in his camper driving past the house and park across the street near the front yard (TR 577). Karen testified that at that point she ran into the bedroom and locked the door. When asked why, Karen Jackson testified that she was afraid of the defendant (TR 577-578). At some point thereafter, she heard Walter talking to Douglas Jackson informing Douglas that she was

not at the house (TR 578). Karen testified that she heard a disruption at the front door and at that point she got into the closet and hid (TR 578). She again heard Jackson ask where Karen was. Jackson came to the bedroom door and told her to open it up (TR 579). When she did not answer, Jackson broke into the bedroom and found her in the closet (TR 579). Jackson told her and the children to get their clothing because they were going with him. Karen Jackson said that she obeyed (TR 581). Jackson told her to put all her clothing and everything at the front door. She observed that Aubrey Livingston was in the front of the house at the front door making sure no one was going to leave (TR 582). Karen Jackson testified that Jackson told the Washingtons that he was going to his house and they were going to go with him as hostages just as they had held Karen hostage. Karen stated Livingston had a handgun (TR 583). It was also Livingston who brought Washington and Finney out from the bedroom and put them in the camper (TR 583).

When they arrived at Jackson's residence, Karen and Douglas took the kids into the house, brought the clothing into the house and put the children to bed. Jackson's daughter would not go to sleep and therefore she ultimately went with them that evening (TR 585). They left the Jackson residence and drove back to the Washington's house to get a jacket for the baby and then drove out 62nd street into a rural area (TR 586). Karen testified that they passed by what appeared to be a parked abandoned car just off the highway. Douglas drove past the car and then returned and stopped. Jackson got out of the car and went behind the

camper and spoke with Livingston (TR 586). Karen testified she next heard breaking glass which appeared to come from the car on the roadside and then the back of the camper was opened. She heard Jackson tell Washington and Finney that he was going to leave them there. Edna and Walter Washington, Larry Finney and the two children got out of the camper and were put in the car. Karen heard what she described as a popping sound and realized what happened. Livingston got back into the camper and yelled to Jackson to hurry up. She testified she next heard an explosion followed by the return of Jackson to the camper. Jackson's face was burned and he said he felt like it was on fire. They sped off. (TR 587).

Following the murders, Jackson drove to a Bogard's Grocery Store where Livingston purchased some milk and other items. Livingston was then brought to his home and dropped off and Karen and Douglas Jackson returned to their house. Karen testified that she heard on T.V. about the car and the fire. Jackson said to her not to think about it, nothing happened (TR 588). On cross examination, Karen Jackson was asked about the problems she was having with her husband and when she left him and moved in with Edna Washington (TR 594). She testified that the reason she did not go to the police immediately after the murders was because she was afraid of Jackson (TR 633, 638). Moreover, she testified that she never saw Jackson with a gun that evening (TR 627, 655). She testified that Larry Finney was just a friend and she had never had sex with him (TR 641, 652-653), and although she knew the police were looking for her, she did not believe she

was a suspect but rather, she believed they wanted to talk to her because she was a witness (TR 641, 643).

Karen Jackson testified that she sent letters to her husband in response to his letters sent to her while he was awaiting trial (TR 651).

Dr. Larry Tate, the forensic pathologist who did the autopsies, utilized photographs admitted at trial to help identify those persons and their positions in the passenger car (TR 669, 671, 673, 676). He testified that the three adults suffered fatal gunshot wounds to the head and chest area respectively, and that the burns sustained occurred after death (TR 665, 668, 669-670, 671, 672). He noted that Mrs. Washington was four to five months pregnant (TR 672). With regard to the death of the two Washington children, he testified that they were located in the rear floorboard of the passenger vehicle (TR 664-665). The children died from smoke and soot inhalation (TR 673). Both children were burned before they died, as evidenced by the "pugilistic attitude" assumed by both bodies. The medical examiner testified, this was indicative of people who died in fires. He testified that their blood was saturated with carbon monoxide and combustion products which meant they inhaled the smoke and fumes from the burning passenger car (TR 673-675). There was no evidence that the children were shot (TR 678).

The State next called Aubrey Livingston, who testified that he knew neither Larry Finney nor the Washington family before February 28, 1981 (TR 691). On February 28, Jackson called him around 8:00 or 8:30 p.m., and asked Livingston if he wanted to

ride with Jackson. They met at Livingston's mother's house and Jackson started talking about his kids and how he was worried about them (TR 693-694). They drove to the Washington house because Jackson suspected his wife was there. Jackson went up to the house while Livingston waited in the truck (TR 694-695). Livingston testified that all of a sudden he heard some sort of noise and heard the door crash in. He then heard Jackson scream to him to come in and help. Jackson told him to stand by the front door and not to let anyone leave (TR 695-696). Livingston testified that Jackson had a gun and he did not. He testified he stayed in the living room with the women and children while Jackson went into the bedroom to locate his wife and children (TR 696-697). After an hour or so passed, Karen finally came out of the bedroom and after more discussion, Jackson told her to pack her clothing and the children's stuff and put them in the truck (TR 698). Washington and Finney were brought out from the bedroom where they had been put in handcuffs and were placed in the camper with Edna Washington and her children. Livingston got into the back of the camper while Jackson, his wife and children sat in front (TR 698-699). Livingston noticed that Edna was pregnant (TR 701).

After driving around for over an hour, Jackson pulled over on the side of the road and parked for awhile and waited. Jackson got out of the truck and walked over to an abandoned car. Livingston testified he heard the windows break. Jackson then came over and let everyone out of the back of the truck. He then made them get into the car. Livingston returned to the truck (TR

702-703). He testified that he suddenly heard five or six shots and then saw flames coming from the abandoned car. Jackson threw an empty gas can in the back of the trunk and sped off (TR 703). They went to a grocery store following the incident and then he was dropped off at his house (TR 704).

On cross examination, Aubrey Livingston denied having committed any crimes the evening of February 28, 1981, and was impeached with his previous trial testimony and statements. He further acknowledged that he had previously testified that that evening he saw Jackson return to his house and bring out some yellow rope and a gas can and put it in the camper (TR 732).

Officer Mark Schlein testified that on March 3, 1981, he saw Jackson at his home at 1607 N.W. 72nd Street (TR 752). He told Jackson that he was attempting to locate Karen Jackson and her children and asked if he could talk with the defendant (TR 753). Officer Schlein took a statement from Jackson. It was published to the jury (TR 754-772). During the course of the statement, Jackson told the officer that he had last seen his wife approximately two weeks earlier (TR 755), and at that time she was going to see Officer Pace. Karen had left him approximately four weeks earlier and was living with Edna Washington (TR 756-757). Jackson was aware of the murders because his Aunt Jarrett told him (TR 757). Jackson stated that he argued with his wife about her dating other men and that he had sought the assistance of Officer Pace to try to work things out (TR 759, 761). Jackson stated that he did not know if his wife was seeing anyone else regularly and did not believe she had

a current boyfriend (TR 763). He said he had last been at Edna's house seven or eight days ago (TR 764). Jackson said he had physically fought with his wife and had hit her in the past and that she was afraid of him (TR 765-766). He observed that he had not spoken to her since Saturday, February 28, and did not know where she was (TR 767). He told Officer Schlein that he received the scratches on his face while barbequeing on Sunday and the scratches below his right and above his right eye, his nose area and chin were all caused by the flare of the barbeque fire (TR 769). He said the explosion occurred on Sunday, March 1, 1981, around 11:00 a.m. (TR 771).

Officer Schlein also took a sworn statement from Aubrey Livingston on March 5, 1981, two days after Douglas Jackson's statement (TR 775). The tape recording of that statement was published to the jury (TR 775-806). Prior to the publication of the statement, defense counsel objected to the admission and publication of Livingston's statement on the grounds that it was an effort to bolster Livingston's testimony already in evidence. The court denied said objection (TR 774-775).

Livingston's statement reflects that he found out that Jackson and his wife were separated the night of the murders (TR 782). He met Jackson about 8:00 p.m., after Jackson called him and asked him if he wanted to go riding. After driving around awhile, they drove up to the Washington's residence around 9:00 p.m. (TR 786). Jackson had told Livingston that he was upset about his wife leaving him and he was worried about his children. He "blamed the people in the house for influencing his wife" and

he had not seen his kids in about a week; he was mad about that (TR 785). He told Officer Schlein that Jackson went to the front door and asked if he could come in and talk about his kids. An argument ensued and at that point Jackson forced his way into the Washington house. Jackson then told Livingston to get out of the car and come into the house and watch the people in the front room and make sure nobody left. Livingston said that Jackson had a gun (TR 787). He observed that they stayed in the house four to five hours during which time arguments ensued and that he watched Edna and her kids in the front room (TR 788). They ultimately left the Washington's residence. Aubrey Livingston was in the back of the camper with two men who had their hands tied with ropes and handcuffs, Edna Washington and the two Washington children. Karen and her children were in the front seat with Jackson (TR 792). Livingston stated that they rode around for awhile and then finally pulled over near an abandoned car. Jackson took the people out of the camper and put them into the abandoned car and told Livingston to get back into the car and close the door (TR 793). Livingston said he heard six or more shots at which point Jackson returned to the car, retrieved a gas can and went back to the abandoned car and poured gas on the people and set the car afire. Before they drove off, Jackson returned the gas can to the back of the camper (TR 794). Jackson sustained burns on his face (TR 795). Livingston told officer Schlein that Jackson said they were not going to get off easy and Livingston observed that he thought the people knew what was going to happen (TR 796). Livingston said that Edna Washington

was pregnant but that he could do nothing to help. Livingston was afraid that Jackson would kill him and he was not about to get in Jackson's way (TR 799). When asked why he did not go to the police, he indicated that he was afraid and he was just along for the ride that night (TR 804-805). He closed his statement by observing that he did nothing wrong, he did not have a gun that night nor did he tie the people up (TR 805-806). At the conclusion of Officer Schlein's testimony, the State rested (TR 827).

The motion for directed verdict (TR 828), was denied (TR 829).

The defense called a number of witnesses, the most important of which was Karen Jackson who testified that she received letters from Jackson while he was in prison and in due course responded to said letters. The defense moved said letters into evidence without objection and at this point, Karen Jackson was asked to read highlighted portions from a number of letters (TR 850-860). The court, at this point, indicated that he was not going to allow Karen to read all the letters although the letters were available to the jury since they had been admitted into evidence and the jury would have them to review (TR 861-862). The court later observed, with regard to its ruling as to whether Karen Jackson had to read all the letters to the jury, that if defense counsel chose to read the contents of the letters during closing argument, counsel could read all the letters, however Karen Jackson's letters were in evidence (TR 877).

The defense called Douglas Jackson to the stand and he testified he was born April 25, 1956 (TR 878). He started working when he was in junior high school at the age of fifteen in a grocery store as a sales stock clerk and ultimately became an associate manager at a Pantry Pride Grocery Store in Coral Gables, Florida. He was married at age nineteen or twenty and worked as an associate manager at a Family Eagle Store up until the day of his arrest (TR 879-880). He testified that he went to Miami Northwest Senior High School and that after high school, took two years of technical training at Lindsey-Hopkins Vocational Center. As a youth, he saved his money and helped his parents with food and utlility bills and their mortgage (TR 880-881). He met Karen in 1975, and they were married July 1, 1976. Prior to their marriage, Jackson was instrumental in providing financial support for Karen's family and helped Karen by buying her clothing for school (TR 882-884). Jackson testified that he was having problems in the marriage and was about to divorce his wife and seek custody of his children. He had had problems and arguments with his wife regarding drugs and the fact that Karen was unfaithful (TR 886-887). Although he claimed never to have struck his wife, he testified that he found his wife in bed with Alan Rolle and had a list of names of the men that Karen had slept with (TR 888). He recanted and said he had struck his wife because of drug use but observed he never handcuffed his wife (TR 891). Although he had separated from his wife a number of times, the last separation occurred in January 1981. After the separation, he would see his children when he visited them at the

Washington house and would pick them up there (TR 893). Jackson admitted talking with Officer John Pace with regard to Karen and the divorce and custody of his children (TR 895-896). Jackson admitted that he kept a firearm because of his job as a manager and that he also had handcuffs because he occassionally had to arrest people at the store (TR 899-900).

Jackson knew Livingston since childhood and occassionally helped Livingston gain employment. Jackson testified that Livingston was a gun fanatic and observed that Karen and Livingston possibly used drugs together (TR 906). Just prior to February 28, Jackson admitted that he was having difficulty seeing his children and detailed to the jury about his meeting with Barbara Finney when he went to her house looking for Karen and the children (TR 908). On February 28, 1981, Jackson testified that he got up early that Saturday morning and waited for Officer Pace to show up at his house (TR 909). When Pace arrived, he gave Jackson a pamphlet and asked if Karen were available so that he could give her a pamphlet. Jackson testified that Karen came to the house around 6:30 or 7:00 p.m., that evening and let herself in. Karen expressed anger and said she was mad because people were taking her things and subsequently left, leaving the children with him (TR 911). Jackson testified that that night he worked on some music tapes for the store, ate dinner at home with the kids, played, watched T.V. and finally went to bed around 11:00 p.m., after Karen did not return (TR 912-913). He testified that he could not leave his house because Karen had his truck and he had the kids. He

did not go anywhere because it was chilly that night and he did not want to take the kids out into the cold night air. When he got up the next morning, he saw Karen sleeping on the couch in the living room (TR 913). When Karen woke up she looked tired, her hair was messed, she seemed dazed, her eyes were red and she was depressed. She said she was out with friends the night before and forgot to come back with the milk. Later that morning they went to breakfast at Denny's (TR 914-915). Jackson's testimony goes on to recall the events of the next couple of days and how he and Karen and his children spent them (TR 916-920). He testified that on Tuesday morning, he did not have to go into work so early, and he decided to do some cooking and have a little picnic in the back yard. At that time, he had an accident and burned himself when the coals flared up (TR 923). He testified that the photographs which showed burn marks on his face were the injuries that he had sustained in the barbequeing accident Tuesday(TR 924). In explaining inconsistencies with regard to his testimony at trial and his statement to Officer Schlein, Jackson observed that he was trying to protect his wife and therefore made statements that were different from his testimony at trial (TR 931-932, 934-936). He concluded his testimony by informing the jury he killed no one (TR 939).

On cross examination, Jackson admitted that the statements to officer Schlein were a bunch of lies made to protect his wife (TR 945, 952). He testified that he was shocked when he heard about the Washington murders and did not know nor had he ever heard of Larry Finney until the murders (TR 953). The defense rested (TR 980).

During jury deliberations, two inquiries were made: (1) the jury desired to hear the testimony of Shirley Jackson re-read (TR 1081-1096); and (2) the jurors asked whether the verdict form indicated felony murder - first degree (TR 1097). The jury returned verdicts of guilty as to all five counts of murder, writing in the word "felony murder" on the verdict form and returned guilty verdicts as to all counts of kidnapping (TR 1099).

On March 20, 1990, the penalty phase of this proceeding commenced. Following opening remarks by the court, the State announced that they would rely on the evidence presented at trial (TR 1110). The defense first called James Jackson, who testified that Douglas Jackson had started working when he was sixteen years old and worked his way up to an assistant manager post at the Eagle Army Navy Store (TR 1112). Mr. Jackson testified that Douglas invested money in electronics and was qualified as a disco jockey (TR 1113). The defendant was a churchgoer and Mr. Jackson testified that his son would give money to his mother and had provided money to Karen's family before they were married (TR 1114). Douglas helped by food, helped with the mortgage and was a wonderful student. He was class photographer for his 1975 yearbook (TR 1115). Mr. Jackson testified that he knew that Karen was not faithful to the defendant, however he never mentioned it to Douglas (TR 1115-1116). Douglas was helpful in the neighborhood (TR 1116).

Roy Bentley was called on behalf of Jackson and testified that he first met Jackson in Hialeah at a boat trailer

manufacturing plant where Jackson worked (TR 1117). Jackson worked on Mr. Bentley's trailer and saved Bentley money. They became friends and periodically he would come over and have dinner at the Bentley's home. Mr. Bentley thought Jackson was a remarkable young man. Their friendship developed into a father-son relationship and they would go fishing together and sometimes discuss Jackson's problems (TR 1118-1119). Mr. Bentley thought Jackson loved his kids and had in the past given Jackson advice to leave his wife but Jackson said he would not (TR 1119-1120). Mr. Bentley observed that there were continuous problems between Jackson and his wife and that she would periodically leave him. Jackson said he did not want to give his wife up (TR 1120).

Lucille Bentley, Roy Bentley's wife, testified she did not know of any criminal background of the defendant and never saw him use drugs. She felt he was an upright citizen and a family person who took care of his children (TR 1123-1124). She never saw Jackson drink and she observed that she knew the family for over three years.

The State, in its closing arguments, argued that the case spoke for itself, culminating in a determination that there was no excuse for these horrendous crimes (TR 1127-1137). Defense counsel argued that there was no question a kidnapping had been involved (TR 1140), however none of the aggravating factors really applied. Defense counsel argued with regard to mitigation that Jackson had never been involved in any crime before and that he had worked hard since he was fifteen years old to support his family (TR 1146). He asserted that Jackson wanted his family to

stay together and he would always help his family money wise. He asserted that Jackson was under emotional stress over losing his wife and kids and if anything, he was an accomplice, not the main character in this criminal endeavour (TR 1147). Defense counsel argued that there were inequities with regard to the sentences imposed since Livingston had received a life sentence and that Jackson's age of twenty-four should be considered as mitigation. He noted that although Jackson as a child lived in poverty, he tried to be good and up to this event, had led an exemplary life (TR 1148).

The jury returned recommendations of life as to all five counts of first degree murder (TR 1157). At sentencing on April 29, 1990, defense counsel argued to the trial court that the jury had changed the verdict form including the word felony murder in the verdict form thus concluding that there was either no premeditation or that Jackson was merely an accomplice to the crime. Defense counsel argued to the court that the jury believed Livingston committed the crime and that Jackson was merely an accomplice (TR 1168). Defense counsel renewed his motion for recusal, arguing that he believed the trial court would look at evidence outside the record and had a preconceived notion as to what the appropriate sentence would be (TR 1169). Defense counsel submitted a letter from Diana Weiner, which stated that Jackson was an exceptionally intelligent person who had worked well with other inmates and was a model prisoner (TR 1170-1171). A letter was submitted by Dr. Norman Carroll, a deacon at the prison, and letters were also submitted from the

Abundant Life Prison Ministry and St. Monico Church. Defense counsel argued to the trial court that Jackson had been a hard worker all his life, had no criminal history prior to this event, had always supported his family and deserved life (TR 1172).

The trial court, in its sentencing order, concurred with the jury's recommendation as to a life sentence for the first degree murders of Edna and Walter Washington and Larry Finney. The court however judicially overrode the life recommendations as to the two children. The court found that the murders were committed while Jackson was engaged in the kidnapping of these five people; that the murders were heinous, atrocious or cruel; that the murders were cold, calculated and premeditated and possibly that Jackson knowingly created great risk to many people and that the murders were committed for the purpose of avoiding or preventing a lawful arrest. [The trial court did not find that the evidence was proven beyond a reasonable doubt that at the time of the crime for which the defendant is to be sentenced, he had been previously convicted of another capital offense; to-wit: the other four murders, presumably he believed they were not "prior felonies".] (TR 1374-1376).

With regard to mitigation, the trial court found the statutory mitigating factor that defendant had no significant history of prior criminal activity. With regard to other mitigating factors, the court found:

> The father of the defendant and the Bentley's spoke of the defendant's premarital life, which reflected a good upbringing and no serious problems with the law.

(TR 1378).

The court, in addition, observed:

> By way of mitigation, prior to this disasterous episode, the defendant led a rather exemplary life, having no significant history of prior criminal activity, suffering arrests but no convictions; and being a good son to his father and helpful to the Bentley's.
>
> On the other hand, the aggravating circumstances far outweigh the mitigating circumstances, at least insofar as the deaths of Terrence and Reginald are concerned.
>
> The only question left remaining is: whether or not the punishment of the defendant should exceed that of his codefendant Aubrey Livingston?
>
> Defendant has attempted to exculpate himself of any involvement and to place the guilt on his wife, Karen Jackson, and his friend, Aubrey Livingston. The facts of the case as reflected during this trial simply do not support that premise. Karen Jackson was living with the Washingtons and shared a bedroom with her children. Would she have been forced to kick in the door to her own room? Would she, if conspiring with Aubrey Livingston, have found it necessary to force her way in the front door, damaging same? Is there any evidence to suggest any illicit relationship between Karen Jackson and Aubrey Livingston? The evidence adduced during this trial mandates only a negative response to these questions.
>
> Although the conduct of Karen Jackson after these murders leaves much to be desired, the victim Edna Washington, was her best friend since high school and no motivation has been suggested why she would wish to see her, her husband and children dead. In fact, the converse is more compatible since these people befriended her in her time of need and the victim, Larry Finney, was her alleged lover.
>
> Codefendant Livingston scarcely knew these people, if he knew them at all.
>
> All evidence points to the inescapable conclusion that the defendant stalked his

> wife and her friends, and enlisted the aid of his friend, Aubrey Livingston, whose assistance obviously allowed this egregious deed to be accomplished.
>
> While it may well be that the defendant did not commence this night's activity with the intent to commit cold-blooded murder, but rather only to kidnap his victims and to punish them in some fashion, at least insofar as four-year-old Terrence and fourteenth-month-old Reginald are concerned, it certainly ended that way.
>
> Based on the preceding opinion of fact, and it being the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death, and this Court after weighing the aggravating and mitigating circumstances, being of the additional opinion that no mitigating circumstances exist to outweigh the aggravating . . . that the death sentence be imposed for the murder of Terrence Manuel and Reginal Manuel.

(TR 1378-1380).

SUMMARY OF ARGUMENT

POINT I: The trial court properly concluded Jackson's motion to disqualify the trial judge was legally insufficient.

POINT II: No error occurred when the trial court overruled Jackson's objection to the publication of Livingston's sworn statement which was consistent with his trial testimony but was admissible pursuant to §90.801(2)(b), Fla.Stat.

POINT III: The trial court has the absolute right to control the trial proceedings. The comments made by the court in no way denied Jackson a fair trial.

POINT IV: The court did not restrict Jackson in the presentation of his defense. The court admitted the letters by Karen Jackson to her husband and allowed highlighted portions of those letters to be read to the jury. The court correctly ruled that the letters were in evidence and there was no need to read every word to the jury where the witness evidenced an unwillingness to do so.

POINT V: The trial court correctly overrode the life recommendations for the first degree murders of Terrence and Reginald Manuel, burned alive in the abandoned vehicle for which they could not escape.

POINT VI: A guidelines scoresheet was not prepared **sub judice**, presumably the **Holton** decision requires same.

POINT VII: The cumulative "errors" discussed do not warrant reversal **sub judice**.

ARGUMENT

POINT I

THE TRIAL JUDGE DID NOT ERR BY FAILING TO RECUSE HIMSELF

The record reflects that on three separate occasions, Jackson filed a motion for disqualification of the trial court premised solely on the basis that Judge Coker had been the trial judge in Jackson's previous trials. On October 16, 1989, the first motion for disqualification was filed wherein no specific facts were alleged other than that found in paragraph (3) which reads as follows:

> As this Honorable Court is aware, this case had been brought to trial on three separate occasions. On two of the three occasions, this Honorable Court was able to impose sentence as a result of the convictions obtained in the previously tainted trials. Each time, the sentence imposed was death by electrocution.
>
> The defendant respectively believes that in light of this Court's intimate knowledge of the case, he will be precluded from receiving a fair and impartial disposition through the course of this, his fourth trial.

(TR 1205).

A hearing was held on said motion and the motion was denied based on the trial court's finding that the motion for disqualification was insufficient on its face (TR 1210).

A renewed motion for disqualification of the trial judge was filed on February 27, 1990 (TR 1246-1253). This motion asserted that the trial court could not be fair because he had heard the case no less than five times, including two trials of codefendant Livingston:

> The Court's intimacy with the case, prior to the defendant's upcoming trial, infers an almost certain lack of impartiality by this Court.

(TR 1246).

Jackson further argues that:

> Specifically, the defendant claims comments were made by this Honorable Court that it was the facts of the case that convicted Mr. Jackson, not the Court itself. In addition, the defendant claims that comments were made, by this Court, that in his upcoming it will be the facts that convict him again. These statements heard by the defendant seem to infer a predisposition by this Court as to the facts that are expected to be presented at his new trial.
>
> Certainly, this Court's statements, as referred to hereinabove, leave the defendant to a well-founded fear that this Court has prejudged the facts of the case, thus lacking the impartiality that Mr. Jackson must be afforded in his upcoming trial.

(TR 1247).

On March 1, 1990, a hearing was held with regard to this motion as well as the defendant's motion in limine. After a discussion with defense counsel and Mr. Jackson concerning what specific concerns the defendant might have, the court concluded that the motion for recusal or disqualification was legally insufficient (TR 7-15). The trial court, in its written order, held that the disqualification motion and the supporting affidavits were wanting. The court further observed:

> In addition thereto, since this trial is scheduled to go forward on March 12, 1990, no further motions to disqualify will be considered. Rule 3.230(c).

(TR 1255).

Terminally, a third motion to disqualify or recuse the trial court was filed prior to the penalty phase of Jackson's trial, dated March 27, 1990 (TR 1328-1338). The gravamen of this complaint was that it was the firm belief of the defendant:

> In light of all the circumstances and comments made by the Court subsequent to the jury's recommendation, that it would be impossible for the defendant to receive a fair sentencing before this Honorable Court.
>
> Specifically, this Honorable Court, off the record, but in the presence of counsel for the defendant, advised the jury, 'I am still convinced that Douglas Jackson was more culpable than Aubrey Livingston'. This statement implies that this Court's position has not changed from before when it stated that . . . '[T]he facts condemned him, not me'. Hence, it clearly establishes that this Honorable Court is basing its position and opinion on matters considered at the previous trials.

(TR 1329).

The trial court, in denying this last motion, concluded that the motion was legally insufficient and was untimely pursuant to Fla.R.Crim.P. 3.230(c) (TR 1339-1340).

In **Tafero v. State**, 403 So.2d 355, 361 (Fla. 1981), the court observed the test of the sufficiency of an affidavit for disqualifying for prejudice was whether the sworn statement shows that the movant has a well grounded fear of not receiving a fair trial at the hands of the presiding trial judge. **See State ex rel Brown v. Dewell**, 131 Fla. 566, 179 So. 695 (1938). The court observed, in **Tafero**, that:

> The facts and reasons given in the sworn affidavit must tend to show personal bias or prejudice. This rule is not intended as a vehicle to oust a judge who has made adverse pretrial rulings. *Suarez v. State*, 95 Fla. 42, 115 So. 519 (1928).

Indeed, in reviewing all three motions for disqualification, it is evident, the sole basis for said motions was the fact that the trial court had been the presiding judge in Jackson's previous trials. That reason in and of itself is not a basis upon which sufficient legal basis can be drawn from the affidavits and motions submitted. For example, in **Livingston v. State**, 441 So.2d 1083 (Fla. 1983), the court concluded that Livingston's verified motion and supporting documents were sufficient under Rule 3.230, Fla.R.Crim.P., where in that case, there had been a history of animosity between the trial court and defense counsel. The court observed:

> . . . A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. As noted, the last incident involving Judge Fleet and Mr. Wade occurred just five months prior to the commencement of Appellant's trial. Given the record in this case identifying the disputes which have arisen between the judge and the lawyer over a substantial period of time, we must conclude that the Appellant could have a reasonable fear that he could not receive a fair trial. This is especially true in this prosecution for first degree murder in which Appellant's life is at stake and in which the circuit judge's sentencing decision is so important.

441 So.2d at 1087.

No such disputes were alleged **sub judice**. This case is controlled by **Dragovich v. State**, 492 So.2d 350 (Fla. 1986), and **Walton v. State**, 481 So.2d 1197 (Fla. 1985). In **Dragovich**, 492 So.2d at 352, the court observed:

> . . . Appellant's motion and affidavits and counsel's certification of good faith required by Florida Rule of Criminal Procedure 3.230(b), were premised on the fact

that the trial judge at Appellant's trial had previously presided over the trial of Echols and had therefore heard all of the evidence against Appellant and concluded that this was a contract murder procured by Appellant. As further grounds supporting disqualification, the motion recited that this judge had sentenced Echols to death in spite of the jury's recommendation of a life sentence and the judge would feel compelled, in the spirit of uniformity, to also sentence Appellant to death. . . .

. . . The essence of Appellant's claim of legal sufficiency here is that prior to Appellant's trial, this trial judge had formed a fixed opinion of Appellant's guilt. In *Nichols v. State*, 86 Fla. 208, 98 So. 497 (1923), we rejected a similar claim, holding that a judge's fixed opinion of a defendant's guilt, and even his discussing it with others, was legally insufficient to mandate disqualification. Facts germane to the judge's undue bias, prejudice or sympathy are required. 86 Fla. at 224, 98 So. at 502. *See also Suarez v. State*, 95 Fla. 42, 115 So. 519 (1928) (mere allegations of prior adverse ruling in a case are legally insufficient).

Appellant points out that the 'fixed opinion of guilt' rule is predicated in part on the fact that he jury, not the trial judge, will make the final determination of a defendant's guilt or innocence. Appellant urges that a capital sentencing case, where the trial judge is the ultimate arbiter of the life or death of a defendant, requires different considerations. We reject a similar claim in *Jones v. State*, 446 So.2d 1059 (Fla. 1984). There, the trial judge had complimented Appellant's counsel on the 'remarkable job' he had done at trial, and was the same judge he was to hear Appellant's ineffective assistance of counsel claim, pursuant to Rule 3.850, Florida Rules of Criminal Procedure. . . .

492 So.2d at 352.

The court went on to observe:

. . . We also hold here that without a showing of some actual bias or prejudice so as to create a reasonable fear that a fair

> trial cannot be had, affidavits supporting a motion to disqualify are legally insufficient. There has been no such showing *sub judice* that Appellant would not receive a fair trial before this judge. Without some other factual basis than was presented in these affidavits, it must be presumed that the trial judges of this state will comply with the law. In capital cases, we must assume the trial judge will fairly weigh the aggravating and mitigating circumstances unique to each defendant in determining the appropriate sentence.

492 So.2d at 353.

Similarly, in **Walton v. State**, 481 So.2d at 1199, the court rejected as legally insufficient a motion for disqualification premised on Walton's assertion that because the trial court presided at a codefendant's trial and was exposed to evidence that inculpated Walton, the trial judge must be disqualified because he might be "psychologically predisposed" regarding the culpability of the parties. **See also Engle v. Dugger**, 576 So.2d 696 (Fla. 1991).

Based on the foregoing, no relief should be forthcoming as to this issue.

POINT II

THE TRIAL COURT DID NOT ERR BY ADMITTING A PRIOR CORROBORATING STATEMENT BY AUBREY LIVINGSTON TO BE PLAYED BEFORE THE JURY

Jackson next argues that it was reversible error for the trial court to allow a statement by Livingston to the police at the time of his arrest to be admitted into evidence and published to the jury. Specifically, he argues that the trial court erred in allowing said admission because Livingston testified at Jackson's trial and his previous statement to police constituted

a prior consistent statement. The record reflects however that defense counsel, in the cross examination of Aubrey Livingston, attempted to extensively impeach Livingston's trial testimony with Livingston's prior trial testimony, his earlier deposition and, as reflected by one reference on page 725 of the record, Livingston's **statement to police shortly after this event occurred.**

At trial, defense counsel objected on the basis that Aubrey Livingston had already testified "clearly that's just a bolster." (TR 774). In response, the State argued:

> Its a prior consistent statement. After he brought up the agreement he made with the State, that's admissible to show he was saying the same thing before the agreement was made.
>
> MR. FRIEDMAN: Your Honor, number one, he has been impeached on numerous statements that he made. As Mr. Coyle is stating, its simply an attempt to show that is a consistent statement, which again, is going to the issue of bolstering his testimony. He did not introduce it and should have perhaps when Mr. Livingston was already here testifying. We can't talk now to Mr. Livingston about what he says on this tape anymore.

(TR 775-776).

As a result of this brief discussion, the trial court overruled the objection and admitted and allowed the publication of Livingston's tape recorded statement. Based on the circumstances of this record, it is difficult to comprehend Jackson's complaint. Indeed, in his brief he acknowledges that trial counsel for Jackson impeached Livingston (Appellant's Brief, p. 26-29), however it would appear Jackson is now suggesting that because there was no "**successful** attempt to

demonstrate improper influence, motive or recent fabrication", pursuant to §90.801(2)(b), Fla.Stat., reversible error occurred. Additionally, Jackson's reliance on the decision in **Jenkins v. State**, 547 So.2d 1017 (Fla. 1st DCA 1989), for this proposition is misplaced based on the facts of the instant case.

§90.801(2)(b), Fla.Stat., read in material part:

> a statement is not hearsay if the declarant testifies at trial . . . and is subject to cross examination concerning the statement and the statement is:
>
> (b) consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive or recent fabrication. . . .

In **Stewart v. State**, 558 So.2d 416, 418-419 (Fla. 1990), this Court, faced with a similar circumstance, concluded that the trial court did not err in the admission of a prior consistent statement where the defense had properly cross examined and in fact attempted to impeach the witness with regard to recent fabrication. The Court observed:

> Stewart claims that the trial court wrongfully allowed Detective Marsicano to testify as to what Stewart told Smith about the crimes. After he was arrested in connection with other offenses, Smith told Marsicano that Stewart had related to him details of the instant crimes. After Smith testified, the State called Marsicano. Defense counsel objected to the anticipated testimony as hearsay. The prosecutor countered that the prior consistent statement was non-hearsay since it was being offered to combat Stewart's claim that Smith had recently fabricated his testimony in return for favorable treatment by the State. The objection was overruled and Marsicano testified as to what Smith had told him. Stewart alleges that this testimony should not have been allowed under the recent fabrication provision because the same reason

> that was given for discounting Smith's in-court testimony existed at the time Smith spoke to Marsicano and thus the proper consistent statement was not made before the reason to falsify came into existence. We disagree. During cross examination of Smith, defense counsel indicated that Smith was not to be believed because he was attempting to obtain favored at sentencing on convictions that had been obtained on other charges. This was a recent situation; when Smith spoke to Marsicano, no conviction had been obtained and no sentences were pending. Marsicano's testimony was properly offered to combat Stewart's charge of recent fabrication. . . .

555 So.2d at 418-419. **See also Kelly v. State**, 486 So.2d 578, 582-583 (Fla. 1986); **Gardner v. State**, 480 So.2d 91 (Fla. 1985); **Jackman v. State**, 140 So.2d 627 (Fla. 1962), and **Dufour v. State**, 495 So.2d 154 (Fla. 1986).

Moreover, even assuming for the moment Jackson is correct with regard to the fact that additional information was presented through the presentation of the taped statement that was not testified to by Livingston at trial, said discrepancies do not warrant reversal. In **Alvin v. State**, 548 So.2d 1112 (Fla. 1989), this Court concluded that the admission of the portions of the tape containing the matters about which Remy did not testify to in court, might have been error, however said error was harmless error. The Court observed:

> . . . Regardless of the motive for the killing, the evidence clearly supports the conclusion that Alvin committed premeditated first degree murder. The fatal bullet came from a .38 caliber revolver found in the white Volvo, and both Powell and Remy testified that Alvin was firing a .38 revolver, while Simmons was firing a 9 mm. Luger.

548 So.2d at 1114-1115.

Additionally, in **Hutchinson v. State**, 559 So.2d 340, 341 (Fla. 4th DCA 1990), the court therein observed:

> In the instant case, the record reflects that at the time of the arrest Byrnes had not come forward to police because he was afraid of the electric chair. However, the plea agreement reached with Byrnes occurred after the statement to police. Moreover, there was no evidence presented at trial that Byrnes had been offered any deal at the time of the plea statement. We believe no improper motive arose. In the same vein, the admission of the statement did not give significant additional to Byrnes' testimony. *Parker v. State*, 476 So.2d 134 (Fla. 1985). Thus, even if the admission of Byrnes' prior consistent statement was error, we would find it harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

Based on the foregoing, the State would urge Jackson had demonstrated no basis upon which relief may be granted.

POINT III

WHETHER COMMENTS MADE BY THE TRIAL COURT PREVENTED APPELLANT FROM RECEIVING A FAIR TRIAL

Jackson next argues that the trial court, during the course of the trial, improperly interjected himself into the proceedings on a number of occasions resulting in a negative effect on the defendant's ability to defend. As a result thereof, he argues that the cumulative effect resulted in a denial of due process and prevented Jackson from receiving a fair trial in the instant case. Albeit, Jackson candidly admits that no objections or exceptions were taken to the court's comments, he presses forward asserting that relief should be granted on the premise that "a lawyer is not required to pursue a completely useless course where the judge has announced in advance that it will be fruitless." (Appellant's Brief, p. 37).

Interestingly, this same complaint occurred during Jackson's previous trial and was a point on appeal. This Court, in **Jackson v. State**, 545 So.2d 260, 264 (Fla. 1989), held that:

> . . . We find that the comments which Jackson claims were offensive, when viewed in the totality of this trial, reveal that the trial judge properly exercised his responsibility to conduct a fair trial for Appellant. We find no indication in the record that the trial judge was biased or pro-prosecution, and the record, in fact, reveals that the judge was mindful of his duties and sensitive to his judicial role. *Cf. Coley v. State*, 185 So.2d 472 (Fla. 1966).

It is submitted based on the entirety of this record, Jackson's allegations are simply not well-founded. **See Brown v. State**, 367 So.2d 616, 620, n.3 (Fla. 1979); **Hayes v. State**, 368 So.2d 374, 377 (Fla. 4th DCA 1979); **Lister v. State**, 226 So.2d 238, 239 (Fla. 4th DCA 1969).

Jackson acknowledges that he has failed to preserve this issue for review. His suggestion that his efforts would be futile is not borne out by the record. Nothing in this record demonstrates counsel should have been dissuaded from making a contemporaneous objection. Pursuant to **Pope v. Wainwright**, 496 So.2d 798 (Fla. 1986), and **Herzog v. State**, 439 So.2d 1372, 1376 (Fla. 1983), all relief must be denied. Clearly no fundamental error occurred in the case **sub judice**, and there is little disagreement that the trial court, not trial counsel, is responsible for the progress and the orchestration of the trial underway. **Murray v. State**, 154 Fla. 683, 8 So.2d 782, 784 (Fla. 1944). **See also Paramore v. State**, 229 So.2d 855, 860 (Fla. 1969). Moreover, the protection of witnesses under examination

is included in the court's responsibility to maintain the dignity of law in the courtroom. **Baisden v. State**, 203 So.2d 194, 196 (Fla. 4th DCA 1967). Therefore, in determining whether remarks made by the trial court are prejudicial, it is the burden of the defendant to demonstrate prejudice since the trial court is presumed to be in the best position to decide when a breach has been committed and what corrective measures are required. The court's remarks are to be considered in light of the circumstances with the ultimate consideration being what effect the language may have on the jury. **Baisden v. State, supra** at 197.

For example, the trial court instructed the jury on the charges against Jackson and erroneously included in those instructions the count charging kidnapping of Karen Jackson. The trial court denied defense counsel's motion for mistrial and instructed the jury to disregard Count XI of the indictment. The curative instruction herein was adequate to dispel any harm that may have resulted from the erroneous inclusion of Count XI in the court's recital regarding the charges.

With regard to the trial court's admonishment of defense counsel to stop backstriking jurors (TR 254), there is no objection or clarification or further argument by defense counsel with regard to the trial court's remarks. There is no further objection or comment made by defense counsel with regard to the jury selection process at the conclusion when the jury is selected. Presumably, the trial court's comments had no impact on Jackson's counsel's ability to secure jurors who he believed

could fairly and properly review the evidence and determine Jackson's guilt or lack thereof, with regard to the court's comments in front of the jury that the statements of defense counsel were not fair (TR 194-195). In fact, the record reflects that defense counsel asked prospective juror Mr. Poock:

> Would you say that well, he has got some special interest in the outcome of the case? (He being the defendant)

(TR 194).

In response to this, the court observed:

> THE COURT: Let me interrupt here. You know, this is not totally fair. I do not mean to suggest you are being intentionally unfair. But, you know, one of the instructions I am going to give to you, at the conclusion of the case I will be giving you criteria that you are to employ in weighing the credibility of any witness. I am not going to make a distinction between lawyers or cops or preachers or rabbis.
>
> The same criteria applies to every witness. Will you all agree that you will follow the instructions on the law and apply the criteria that I tell you to apply in weighing every witnesses credibility?
>
> JURY PANEL: Yes.
>
> MR. ZIMMERMAN: Okay. Has any one of the new five people ever been a witness to an accident? . . .

(TR 194-195).

Clearly, no objection was even remotely suggested at this juncture and to suggest that the trial court in any way placed the defense lawyer in a bad light in contrary to this record.

Jackson argues that the court erred in qualifying to defense counsel what a witness had said by suggesting "he didn't say that" thus putting defense counsel in a bad light (TR 382). No

objection was raised however, as observed in **Baisden v. State, supra**, no error occurred. Jackson argues that the trial court erred at (TR 404), presumably when the court stated, in denying the motion in limine, that the photographs were:

> . . . relevant to prove identity and circumstances surrounding the alleged murders and corroborate the medical examiner's testimony, I suspect.

(TR 404).

Although objections were made during this period, the objections were not to the "gratuituous" comments of the trial court, rather they were grounded as to whether photographs should be admitted based on their prejudicial value. The trial court did not err in making such a statement in clarifying his ruling. As to the objection to the trial court's "volunteered" objection before the jury that the question was totally improper (TR 540), the record reflects that the State did object although the State's entire objection was not completed. Said objection was in response to a question by defense counsel as to whether a police officer ever found out that one of the victims, Mr. Finney, was arrested for burglary or grand theft (TR 540-541). No error occurred at this juncture in the trial.

Jackson next "nitpicks" through cross examination of Karen Jackson and points to a number of circumstances where the court responds to objections by the State, (TR 607), or where defense counsel is being repetitive or moving the podium around or getting to close to the witness (TR 610, 611, 612, 615, 631, 636, 648). The record reflects that during the course of the trial, the jury passed a note to the trial court asking that the podium

not be placed between the jury and the witnesses because the jury could not see and hear what was happening (TR 1266).

With regard to the testimony of Aubrey Livingston, the record reflects that defense counsel laboriously attempted to impeach Mr. Livingston in an improper manner. The trial court finally observed at (TR 713), whether defense counsel was going to go through the entire prior trial transcript with regard to impeachment, Mr. Zimmerman observed:

> No, Your Honor, but I am going to cross examine him about prior inconsistent statements.
>
> THE COURT: You are not going to go through the entire transcript the way you are going through it now. We will be here all week. Just ask the man questions.
>
> MR. ZIMMERMAN: I intend to, Judge.
>
> THE COURT: Do it.
>
> MR. ZIMMERMAN: Trying to impeach also.
>
> THE COURT: Do it the way you are supposed to.

Terminally, Jackson points to a series of questions and answers presented by defense counsel to Officer Schlein, at which point the trial court noted that the question had been asked three times, objected to and three times the objection sustained (TR 812, 814). As previously observed, the trial court has the right and ability to control what transpires in his courtroom. To suggest that the aforenoted examples reflect either singularly or cumulatively (albeit no objection raised), that Jackson was denied a fair trial based on the trial court's observations is groundless. Clearly, this Court's ruling in **Jackson v. State**, 545 So.2d at 264 controls **sub judice.**

POINT IV

WHETHER THE TRIAL COURT ERRED BY RESTRICTING THE APPELLANT IN THE PRESENTATION OF HIS DEFENSE

Jackson next argues that "the trial court improperly restricted the presentation of evidence on behalf of the Appellant Jackson, and this restriction requires reversal of the conviction and sentence." (Appellant's Brief, p. 43). He points to a number of circumstances which demonstrate the supposed error. For example, he asserts that the trial court erred in not allowing defense to have Karen Jackson read all of her letters written to Jackson while he was incarcerated prior to trial. The record reflects that from the onset, Karen Jackson was asked to read a number of "highlighted passages" from her letters. After that, defense counsel decided he wanted to publish every word contained in the letters albeit the letters were, without objection, introduced into evidence. The court observed that it was not going to allow all the letters to be read and in fact, based on the word in this transcript, it appears that Mrs. Jackson was not evidencing an eagerness to do so.

In addition to not being allowed to publish every word of Karen Jackson's letters, Jackson points to the fact that the State was allowed to publish the entire statement of codefendant Livingston which "was nearly three times as long as the direct testimony by Livingston." (Appellant's Brief, p. 46). He notes also that the trial court prevented the presentation of evidence in support of the defense by effectively "eliminating the defense witness, Amos King." (Appellant's Brief, p. 46). The record

reflects that a motion in limine was filed to prevent the prosecutor from securing testimony from a Mr. King, a death row inmate, how he met and became familiar with Jackson while in state prison. Defense counsel announced that in light of the trial court's denial of the motion in limine with regard to this point, Amos King would not be used as a defense witness (TR 874).

He also points to the fact that he was prevented from impeaching state witness Officer Schlein regarding previous disciplinary proceedings against the officer (TR 740). **See Jackson v. State**, 545 So.2d at 264, where this same issue was raised in the first trial and a similar result was found to be a correct ruling.

Without saying how, Jackson argues that Karen Jackson should have been declared a hostile witness (TR 738). He argues that defense counsel was prevented from specifically ascertaining the nature of Aubrey Livingston's criminal record (TR 705), and reasserts the "interruption by the trial court of the defense's impeachment of codefendant Livingston." (TR 713). Clearly, none of the allegations either singularly or viewed in their cumulative impact resulted in prejudice to the defendant in his presentation of his defense. Counsel has presented no case authority nor basis upon which should be granted.

POINT V

THE TRIAL COURT DID NOT ERR IN IMPOSING THE DEATH SENTENCE ON THE APPELLANT

The jury recommended life sentences for each of the five murders for which convictions obtained (TR 1157). The trial court, at the April 20, 1990, sentencing, concurred with the jury's recommendation as to a life sentence for the first degree murders of Edna and Walter Washington and Larry Finney, but found that the death penalty was the appropriate sentence to be imposed with regard to the deaths of Reginald and Terrence Manuel (TR 1380).

Jackson's attack on the propriety of the sentences imposed is two-fold: (a) that the aggravating factors were not proven beyond a reasonable doubt, and (b) that the judicial override was not warranted in the instant case based on the mitigating evidence presented.

(A) Aggravating Factors

The trial court concluded that beyond a reasonable doubt the murders were committed while the defendant was engaged in the commission of kidnapping; that the murders were heinous, atrocious and cruel; and that the murders were cold, calculated and premeditated without any pretense of moral or legal justification. The court also found that Jackson knowingly created a great risk of death to many persons and the murders were committed to avoid or prevent a lawful arrest (TR 1374-1376). The trial court did not find, although the caselaw is clear that it was applicable, that at the time of the crime for

which Jackson was to be sentenced he had been previously convicted of another capital offense. **See: Zeigler v. State,** ____ So.2d ____ (Fla. April 11, 1991), 16 F.L.W. S257; **Tafero v. State,** 561 So.2d 557 (Fla. 1990); **Cook v. State,** 542 So.2d 964 (Fla. 1989); **LeCroy v. State,** 533 So.2d 750 (Fla. 1989); **Correll v. State,** 523 So.2d 562 (Fla. 1988); **Craig v. State,** 510 So.2d 857 (Fla. 1987); **Pardo v. State,** 563 So.2d 77, 80 (Fla. 1990).

Jackson first argues that the trial court erred in finding that the murder was done to avoid or prevent a lawful arrest. He points to the fact that the murders could not have been done to avoid arrest because the two children, Terrence and Reginald Manuel were one and a half and four years old, respectively. He asserts these victims could not have been witnesses to convict the Appellant of kidnapping as the trial court suggested. Jackson is wrong. The record reflects that neither of these victims were shot but rather they were placed in the car and trapped there after the passenger compartment was set afire. These children were around Karen Jackson and her children and as far a Reginald was concerned, he may very well have been able to identify Douglas Jackson being around his parents the last time he saw his parents. Indeed, in **Smith v. State,** 407 So.2d 894 (Fla. 1981), children of very tender years were able to lead the police to their mother's body and implicated Jimmy Lee Smith to the murders. 407 So.2d at 898. **Swafford v. State,** 533 So.2d 270 (Fla. 1988); **Hooper v. State,** 476 So.2d 1253 (Fla. 1985).

With regard to whether Jackson caused great risk of death to many people, the court found:

> . . . After leaving an automobile fully aflame, the defendant had no way of knowing, or caring, how many police officers, medical personnel, and/or firemen would respond to the scene. Had the flames reached the fuel tank, an explosion may well have risked a great risk of death to many persons.

(TR 1374).

Moreover, had the gas tank errupted or exploded on the scene, Jackson caused great risk of death to his wife, his two children and his codefendant.

While not unmindful that there must be strong proof of motive to avoid detection when the victim is not a law enforcement officer, **Scull v. State**, 533 So.2d 1137 (Fla. 1988), the instant case is similar to **Correll v. State**, 523 So.2d 562 (Fla. 1988); **Harmon v. State**, 527 So.2d 182 (Fla. 1988), and **Kokal v. State**, 492 So.2d 1317 (Fla. 1986), where the victims are killed to avoid identification especially when, as in this case, the victims are helpless and the murders are committed simply to prevent identification. Moreover, with regard to knowingly creating great risk of death to many persons, this Court found great risk to exist where six elderly people were asleep in a building and a fire was set in **Welty v. State**, 402 So.2d 1159 (Fla. 1981). Great risk has been defined to mean the likelihood or high probability, not mere possibility, of harm. **See King v. State**, 514 So.2d 354 (Fla. 1987). In the instant case, that definition has been met.

Moreover, as recently noted in **Jones v. State**, ____ So.2d ____ (Fla. May 16, 1991), 16 F.L.W. S387-388, reversal is not warranted where the trial court may have considered an

aggravating factor that was not fully established where the court provides a caveat that "the sentence of death would be imposed even if it (a particular aggravating factor) were not applied." **Sub judice,** three valid aggravating factors existed and therefore a new sentencing proceeding would not be required even if one of the two aforenoted were found to be inapplicable.

The trial court found that these capital homicides were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court specifically found:

> This aggravating circumstance applies in this case, at least with regard to Terrence and Reginald. This instant offense was a homicide with elements of it being done in a cold, calculated manner. From the evidence presented, it appears that the victims had, on prior occasions, given safety and refuge to the defendant's wife during marital disputes. In an effort to prevent this from occurring again, it appears that the defendant's only alternative was to dispose of Walter Washington and his paramore, Edna Manuel Washington. Also killed was Larry Finney, the alleged boyfriend of the defendant's wife. During the homicides of these three adults, two infants were apparently killed due to their being siblings of Washington and his paramore. 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 1376).

There was ample record support to demonstrate a particularly lengthy, methodic series of atrocious events that led up to the murders of these five people. **Card v. State,** 453 So.2d 17 (Fla.

1984); **see Rogers v. State**, 511 So.2d 526 (Fla. 1987) (redefining cold, calculated as a "careful plan or prearranged design"). Despite Jackson's statement to Karen Jackson that he was simply going to hold the victim's hostage and place them in the car on the side of the road, Jackson's actions demonstrated otherwise. While his initial crime "may" only have contemplated kidnapping, there is record evidence (TR 732), that Aubrey Livingston, on cross examination, testified that Jackson brought from the house and put in the camper some yellow rope and a gas can that evening. (TR 732). The record reflects that once Jackson had the victims in the back of his camper under the watchful eyes of Aubrey Livingston, he drove them from Dade County to Broward County until he found an abandoned car. At that point, he ordered the victims out of the camper and put them in the car. Then, depending upon whose testimony being reviewed, either Aubrey Livingston or Douglas Jackson shot the adults. The record reflects however that absent Douglas Jackson's testimony that he wasn't even at the crime scene that night, there is no dispute that Douglas Jackson poured gas in the passenger compartment of the abandoned car and Douglas Jackson set the car on fire, leaving Terrence and Reginald Manuel to perish in the inferno. It was Jackson, not Livingston, who had burns on his body, it was Jackson, not Livingston, who had motive, it was Jackson, not Livingston, who murdered Terrence and Reginald Manuel. **See Rose v. State**, 472 So.2d 1155 (Fla. 1985); **Turner v. State**, 530 So.2d 45 (Fla. 1988); **Jackson v. State**, 522 So.2d 802 (Fla. 1988); **Shere v. State**, ____ So.2d ____ (Fla. April 4, 1991), 16 F.L.W.

S246, S249, and **Valle v. State,** ____ So.2d ____ (Fla. May 2, 1991), 16 F.L.W. S304.

Jackson argues that the trial court erred in relying upon "the Appellant's lack of remorse to substantiate the finding of the aggravating factor of cold and calculated." (Appellant's Brief, p. 52). The record reflects that said finding, that Jackson demonstrated absolutely no feelings or remorse for the act (TR 1376), was clearly only an afterthought by the trial court in ascertaining the validity of this aggravating factor. This Court, in **Valle v. State, supra,** and **Randolph v. State,** 562 So.2d 331 (Fla. 1990), held that reference to no feeling or a lack of remorse may be harmless error based on the circumstances. In the instant case, a similar result should obtain.

Jackson concedes that the aggravating factor that the murder was committed during the commission of a felony has been proven, however he terminally/halfheartedly challenges whether the trial court properly found that the murders of Terrence and Reginald Manuel were heinous, atrocious and cruel. The trial court found:

> This aggravating circumstance does apply, without a doubt, in this case. From the evidence presented, the defendant unlawfully entered the residence and the victims were abducted at gunpoint, with the adult males being bound. The victims were placed in the back of the pickup truck with a camper top and were driven to an isolated area in Broward County, Florida. The victims were then forced into an abandoned vehicle, at which time the three adults were shot and killed. The car was then doused with a flammable liquid and set on fire, with the two infants being left to perish alive in the flames. Also, at the time of the death, the adult female was at an advanced stage of pregnancy with the fetus also perishing as a result of this cruel and heinous offense. If

> any credit can be given to the defendant in this episode, it must be that he, at least, brought a swift death to the adults rather than allowing them to suffer in the conflaguration. No such credit can be given as to the deaths of these two babies as the medical examiner testified that Terrence and Reginald died as a result of flames and/or smoke inhalation. In addition, these children were found beneath the legs of their parents and their charred bodies were found in a "fist fighting" posture, which is common for victims of fires in attempting to ward off the flames. These deaths can only be described not only as especially heinous, atrocious and cruel, but unspeakable.

(TR 1375-1376).

This Court has consistently held that burning a person alive is clearly a conscienceless or pitiless crime which is unnecessarily torturous to the victims. **Way v. State**, 496 So.2d 126 (Fla. 1986); **Bolender v. State**, 422 So.2d 833 (Fla. 1982); **Smith v. State**, 365 So.2d 704 (Fla. 1978).

Jackson's attempt to demonstrate that this aggravating factor is not applicable is wanting. His reliance on **Penn v. State**, 574 So.2d 1079 (Fla. 1991); **Irizarry v. State**, 496 So.2d 822 (Fla. 1986), and **Herzog v. State**, 439 So.2d 1372 (Fla. 1983), are all distinguishable in the sense that those murders were egregious but were not of the caliber as to the heinousness of the deaths **sub judice**.

Based on this record, it is clear that the aggravating circumstances far outweigh any mitigation presented by Jackson. The record reflects that the trial court found one statutory mitigating factor that Jackson had no significant history of prior criminal activity and as to nonstatutory mitigating factors, "the father of the defendant and the Bentley's spoke of

the defendant's premarital life, which reflected a good upbringing and no serious problems with the law." (TR 1378). The court further observed that Jackson had led a rather exemplary life prior to this incident and that he was a good son to his father and helpful to the Bentley's. The court recognized that Karen Jackson may not have been the best woman ever born, however there was nothing in this record to reflect that she in any way had anything to do with these murders. The court further observed that Aubrey Livingston did not even know the victims and although the desparity in sentencing of a codefendant may be mitigation:

> All evidence points to the inescapable conclusion that the defendant stalked his wife and her friends, and enlisted the aid of his friend Aubrey Livingston, whose assistance obviously allowed this egregious deed to be accomplished.

(TR 1379).

The record reflects that beyond per adventure it was Jackson who poured gasoline into the passenger compartment of the abandoned car which contained the dead bodies of Edna and Walter Washington and Larry Finney, and the two (alive) children, Terrence and Reginald. It was Jackson who set the car on fire. It was Jackson who killed Reginald and Terrence Manuel in this horrendous manner. The trial court was correct in concluding that there "are sufficient aggravating circumstances existing to justify the sentence of death, and this court, after weighing the aggravating and mitigating circumstances being of the additional opinion that no mitigating circumstances exist to outweigh the aggravating" (TR 1380), impose the death penalty for the murders of Terrence Manuel and Reginald Manuel.

(B) Judicial Override

Jackson recites a number of recent decisions by this Court where judicial overrides have been reversed because this Court found that the facts suggesting the sentence of death were not so clear and convincing that virtually no reasonable person could differ pursuant to **Tedder v. State**, 322 So.2d 908 (Fla. 1975). Citing **Downs v. State**, 574 So.2d 1095 (Fla. 1991), Jackson asserts that under the **Tedder** standard, a trial court errs in overriding a jury's recommendation if there is evidence in the record upon which a reasonable juror could rely to recommend life imprisonment. In the instant case, there is absolutely no basis for the jury's recommendation of life for the first degree murders of Terrence and Reginald Manuel.

This is particularly true in the instant case where there is no evidence that Jackson suffers from mental retardation or an abused childhood or was under any significant stress with regard to his life. The record reflects that he had contacted Officer Pace and was upset because he was not able to see his children just prior to the murders, however he did not direct his attention or his wrath against his wife or children, but rather he struck out against five people who were helping his wife. What is more egregious is he killed two children for absolutely no purpose.

With regard to the disparate treatment received by Aubrey Livingston, there was no disparate treatment. Jackson received life sentences as did Livingston for the murders of the three adults. This record reflects however that Douglas Jackson killed

the children and Livingston had no part in that. He was the perverbial "triggerman" in this instance.

With regard to the mitigation presented, there is no doubt that an individual's good prison record or charitable or humanitarian deeds, or potential for rehabilitation, or contribution to society, or an exemplary work ethic might be mitigating factors in a given case, however none of those could have been the basis upon a reasonable jurors determination that life was the appropriate sentence. As Justice Scalia opined in **Walton v. Arizona**, ____ U.S. ____ (1990), anything can be characterized as mitigation. The question is, is it mitigation in light of the murders in a given case. The answer in the instant case is no. This case falls within that rarified strata as does **Zeigler v. State**, ____ So.2d ____ (Fla. April 11, 1991), 16 F.L.W. S257; **Thompson v. State**, 553 So.2d 153, 156-158 (Fla. 1989); **Torres-Arboledo v. State**, 524 So.2d 403 (Fla. 1988); **Eutzy v. State**, 459 So.2d 755 (Fla. 1984); **White v. State**, 403 So.2d 331 (Fla. 1981); **Engle v. State**, 510 So.2d 881 (Fla. 1987); **see also Engle v. State**, 576 So.2d 696 (Fla. 1991); **Francis v. State**, 473 So.2d 672 (Fla. 1985), and **Bolender v. State**, 422 So.2d 833 (Fla. 1982), **see also Bolender v. Dugger**, 564 So.2d 1057 (Fla. 1990). Appellee would submit that the facts and circumstances in **Bolender v. State, supra**, provide an excellent comparison in support of the judicial override in the instant case. In **Bolender**, the Court approved the trial court's override of a jury's recommendation of life in a case where a victim was left in a car, the car was doused with gasoline and set afire.

As a caveat, Appellee would urge that should this Court determine any of the aggravating factors have not been proven beyond a reasonable doubt, this Court remand the cause to the trial court for reconsideration of the aggravating factors (including the prior violent felony aggravator), instead of summarily imposing a life sentence based on the jury's recommendation. The nature of the murders **sub judice** warrants the imposition of the death penalty.

POINT VI

WHETHER THE TRIAL COURT ERRED IN IMPOSING IMPROPER SENTENCES ON THE NONCAPITAL FELONIES

Jackson asserts that the failure of the trial court to set forth the written justification for the departure sentences and prepare guidelines scoresheets require reversal pursuant to **Holton v. State**, 573 So.2d 284 (Fla. 1990). In **Holton**, this Court observed:

> Next, Holton argues that his sentence for sexual battery and arson must be vacated because a guidelines scoresheet was not prepared. Rule 3.701(d)(1), Florida Rules of Criminal Procedure, provide:
>
> > A guidelines scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing. The State Attorney's Office will prepare the scoresheets and present them to defense counsel for review as to accuracy in all cases unless the judge directs otherwise. The sentencing judge shall approve all scoresheets.
>
> Thus, Rule 3.701(d)(1), mandates that a sentence be imposed based on a sentencing guidelines scoresheet that has been reviewed

> by the trial judge. (cites omitted). Therefore, we vacate Holton's sentences for sexual battery and arson and remand for resentencing after a guidelines scoresheet has been prepared and considered by the trial judge.

Appellee would suggest that the failure to prepare a scoresheet in the instant case is harmless beyond a reasonable doubt. Indeed, a casual review of Rule 3.988(i), Fla.Stat., reflects that no matter how you tabulate it, based on the number of counts and the nature of the crimes **sub judice**, life imprisonment for the kidnapping charges is warranted.

POINT VII

WHETHER THE CUMULATIVE EFFECT OF VARIOUS TRIAL COURT RULINGS REQUIRES A NEW TRIAL BE GRANTED

Jackson cites to a number of circumstances throughout the trial which he now asserts, based on their cumulative effect, warrant reversal for a new trial. Such a contention is without merit.

(A) Continuance

Jackson contends that the trial court erred in not granting him a continuance in order to prepare for his defense, citing **Harley v. State**, 407 So.2d 382 (Fla. 1st DCA 1981), and **Palmer v. State**, 380 So.2d 476 (Fla. 2nd DCA 1980).

The record reflects Jackson filed a **pro se** motion for continuance asserting that he was doing so on the advise of counsel and that an additional period of time was necessary in order for him to locate witnesses in formulating a meaningful defense; reviewing the trial transcripts from the three previous

trials and resolving other unnamed problems prior to the "start of trial" (TR 1261-1262). The trial court, on March 12, 1990, entertained Jackson's motion (TR 31-35), and after hearing argument, denied relief finding that the parties had agreed to the date for trial well in advance and no reason has been set forth to change the date. The record reflects that there was no renewed motion for a continuance at any time during the course of the guilt phase of Jackson's trial. Absent a showing that the trial court abused its discretion in denying Jackson's motion for continuance, relief will not be forthcoming. **See Lusk v. State**, 446 So.2d 1038 (Fla. 1984); **Diaz v. State**, 513 So.2d 1045 (Fla. 1987), and **Zeigler v. State**, 402 So.2d 365 (Fla. 1981).

(B) Restricting Impeachment of Officer Schlein

This Court, in **Jackson v. State**, found this identical claim wanting in Jackson's prior trial. He has not demonstrated any change in the facts which would question the correctness of that ruling. **Jackson v. State**, 545 So.2d at 264.

(C) Jackson as Co-counsel

Jackson next argues that the trial court erred in not allowing him to sit as co-counsel since he took an active role in his defense at this trial. Citing no authority, Jackson merely states that the trial court should have allowed Jackson to act as co-counsel. More importantly, the trial court, in its order (TR 1211-1212), concluded:

> The court denies defendant's motion to be appointed as co-counsel representing himself. The court finds that the defendant is presently represented by competent counsel

> who is a member of the Florida Bar, E. Ross Zimmerman, and that the defendant has no constitutional right to act as a co-counsel with his attorney. The defendant has not shown good cause to act as co-counsel which gives him the right to file separate motions and pleadings. *See Goode v. State*, 365 So.2d 381 (Fla. 1978); *Sheppard v. State*, 391 So.2d 346 (Fla. 5th DCA 1980); *State v. Thompson*, 444 So.2d 542 (Fla. 1st DCA 1982).

The trial court did not abuse its discretion in denying Jackson co-counsel status.

(D) Trial Court's Intimidation and Hinderance of Defense

The issue of whether the court restricted the "backstriking" during the jury selection process (TR 254), is highly suspect. Indeed, the record reflects that on only one occasion did the court even mention the backstriking and at that point it merely had to do with getting the defense counsel to move forward with the voir dire. Absent any demonstrable evidence that defense counsel was restricted with regard to the jury selection process, this issue is absolutely groundless.

(E) Reading of Count XI

The trial court erroneously read a charge for which Jackson had been previously acquitted in a previous trial. Specifically, during the reading of the indictment, the court read Count XI to the jury concerning the kidnapping of Karen Jackson. Defense counsel sought a mistrial which was denied and the court instructed the jury to disregard, specifically stating:

> The court reporter and the jury will disregard what I just read with regard to Count XI. That was an error on behalf of the court.

(TR 73).

All dicussions concerning the previous acquittal with regard to the charge of kidnapping of Karen Jackson were held at a bench conference outside of the hearing of the jury (TR 72-73). No error exists **sub judice.**

(F) Admission of Photographs

Citing to **Young v. State,** 234 So.2d 341 (Fla. 1970), Jackson argues that the admission of the photographs were so gruesome and inflammatory that reversal is warranted. The record reflects that the photographs were in fact used by the medical examiner with regard to identifying the bodies and their location in the passenger compartment. The photographs reflecting the two children show their location in the car as well as the "pugilistic attitude" each were found in which is indicative of persons dying in fires. The photographs were relevant to show identity as well as explain the circumstances of the death **sub judice.** Absent a showing of abuse of discretion, the trial court's admission of this evidence was valid. **See Jackson v. State,** 545 So.2d at 265; **Patterson v. State,** 513 So.2d 1257 (Fla. 1987); **Randolph v. State, supra,** and especially **Nixon v. State,** 572 So.2d 1336 (Fla. 1990).

(G) Problems Between Jackson and his Wife

The entire thrust of this trial was premised on the marital difficulties between Jackson and his wife. The admission by

Karen Jackson that she had been taken from her workplace and handcuffed to a bed in Jackson's home a couple of weeks prior to the murders, was valid evidence explaining the facts and circumstances leading up to the instant murders. This Court, in **Jackson v. State**, 545 So.2d at 264, concluded the admission of said evidence was not error, finding:

> We also reject Appellant's contention under this point that it was error to allow various witnesses to testify that Jackson had physically abused Karen Jackson, including handcuffing her to a bed and beating her. There was no objection to this testimony and, clearly, Jackson's marital problems and treatment of his wife were relevant to the motive for these crimes.

(H) Comments by the Prosecution

Jackson points to a number of circumstances where he suggests the misconduct of the prosecutor prevented him from receiving a fair trial. He notes that statements regarding the pregnancy of Edna Washington were inflammatory and prejudicial however, this Court in **Jackson v. State**, 545 So.2d at 265, found that the admission of evidence concerning Edna Washington's pregnancy was not error. The record reflects that the medical examiner, without objection, testified that Mrs. Washington was four to five months pregnant (TR 672).

With regard to the prosecutor's comments as to the mildness of the photographs, the prosecution, on his rebuttal closing arguments, stated:

> Mr. Zimmerman mentioned these photographs I introduced. These photographs show what that man did to those people and you're entitled to see them. There is a pregnant woman. There are two children. Out of those photographs, the ones you saw are very mild.

Closing argument continued without any objection by defense counsel.

Absent an objection, no relief may be forthcoming.

Jackson also argues that the prosecutor repeatedly made improper argument to the jury indicating that he had additional evidence that was not brought forward and referring to personal beliefs in an effort to bolster the State's case. No objections were made to the record cites provided by defense counsel, specifically (TR 1044-1045, 1051), and the only reference that "everyone knows that Appellant is guilty" found on page 1051, reads as follows:

> The evidence in this case is simply overwhelming. Karen Jackson, Aubrey Livingston, Shirley Jackson, the burns on Douglas Jackson, Douglas Jackson's lies. Mr. Zimmerman was right. **There is one thing that everyone knows, and now you know it. Douglas Jackson is guilty.**

(TR 1051) (emphasis added).

(I) Reference to a Second Holster

At the conclusion of all examination of Officer Pace, defense counsel Zimmerman moved for a mistrial on the basis that the State, during cross examination of Officer Pace, improperly brought up the fact that there was another holster. As part of this objection, defense counsel noted that the other holster had been lost by the State and that it was improper to bring this up (TR 957). The trial court, in reviewing the cross examination by the State of Officer Pace, concluded that the inquiry was not the location of the lost holster but rather, where Jackson kept the holster at the time of the crime. The court denied the motion

for mistrial (TR 958), and denied any request for curative instructions since no error occurred. Jackson has cited no authority to support his contention that relief should be granted as to this issue.

(J) Outburst of Shirley Jackson

The record reflects the State called Shirley Jackson to testify on behalf of the State. Ms. Jackson, throughout her testimony, made gratuituous remarks that she was sick of coming to court. At no time during any of her testimony did defense counsel request the trial court curb Ms. Jackson's remarks as to why she was tired of testifying. Moreover, although she repeatedly said she was tired of coming to court, she never indicated that she had testified previously but just reflected her displeasure at being there at the current trial.

(K) Failure to Call Karen Jackson as Hostile Witness

The instant issue is controlled by **Shere v. State,** ____ So.2d ____ (Fla. April 4, 1991), 16 F.L.W. S246, S249. With regard to the circumstances regarding whether Mr. Lambrix was ever to testify, the record reflects was a rebuttal witness subpoenaed by the State, not the defense. In fact, the trial record reflects on page 29 that defense counsel, Mr. Friedman, states: "Mr. Lambrix is not one of the witnesses that we had asked down here subject to your orders." (TR 29). It is difficult to ascertain exactly the error asserted herein.

(L) Double Jeopardy

Terminally, Jackson argues that his double jeopardy rights were violated because, as a result of the error requiring reversal in **Jackson v. State**, 545 So.2d 260, 261, to-wit: the State deliberately provoked the defendant into moving for a mistrial thus resulting in a new trial, and he should never have been re-prosecuted. **See Oregon v. Kennedy**, 456 U.S. 667 (1982), and **Robinson v. State**, 574 So.2d 108 (Fla. 1991).

Such a contention is without merit. Indeed, Jackson acknowledges that double jeopardy is generally no barr to reprosecution where a mistrial is granted following a defense's motion. He adds however that the mistrial was intentionally caused by the prosecutor in the instant case. The record reflects that although this Court reversed, finding the error could not be harmless error, the Court found:

> The prejudicial effect upon a jury of testimony that a defendant has been previously convicted of the crimes for which he is now on trial is so damaging that it cannot be said beyond a reasonable doubt that a jury would return a verdict of guilty absent the testimony. The trial concerned the credibility of Appellant versus that of his codefendant who had already been convicted of this offense and was awaiting sentencing, and that of the testimony of his estranged wife. The effect on a defendant's credibility can be devastating when the jury hears testimony that on a previous occasion another jury listened to the same testimony and believed beyond a reasonable doubt the defendant was guilty of these crimes. Therefore, we cannot conclude the error in this case was harmless.

545 So.2d at 263.

As noted in a similarly circumstanced case, **Robinson v. State**, 574 So.2d 108 (Fla. 1991), relief is not warranted on this basis. The Court observed:

> . . . Clearly, not all prosecutorial misconduct that mandates reversal is intended to provoke the defendant into moving for a mistrial. Although we found that the prosecutor's statement in this case amounted to overreaching and resulted in reversible error, we did not and do not perceive the prosecutor's comment to have been a deliberate attempt to provoke a mistrial. There is nothing in the record to indicate that the prosecutor wanted a mistrial or that a mistrial would have benefited the State in any way. This record does not support Robinson's claim of a double jeopardy violation. *See Rutherford v. State*, 545 So.2d 853, 855 (Fla.) (this Court's review of the record in the first case showed that the prosecutor's motive was to introduce evidence intended to convict the defendant, not to create error that would force a new trial), *cert. denied*, 110 S.Ct. 353 (1989); *King v. State*, 504 So.2d 396, 402, n.5 (Fla. 1987) ("in our view, the misconduct *sub judice* was engaged in by the prosecution in the heat of trial in order to win his case, and was not done intentionally to afford the State 'a more favorable opportunity to convict the defenant.'") (citation omitted).

Robinson v. State, 574 So.2d at 112-113.

Based on the foregoing, none of the issues singularly or cumulatively justify a new trial in Jackson's case.

CONCLUSION

Based on the foregoing, all relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Michael D. Gelety, Esq., 110 S.E. 6th Street, Suite 1220, Ft. Lauderdale, Florida 33301, this 10th day of June, 1991.

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