IN THE SUPREME COURT OF FLORIDA

DOUGLAS MARSHALL JACKSON, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO: 75,970 Trial Ct. No: 81-2081 CF

BRIEF OF THE APPELLANT
Appeal from the Circuit Court
Seventeenth Judicial Circuit
in and for Broward County, Florida
Judge Thomas M. Coker, Jr.

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE

The Appellant, DOUGLAS JACKSON, was arrested, along with co-defendant Aubrey Livingston, on March 5, 1981 by Broward Sheriff's Office Detective Mark Schlein and charged with the first degree murders of five persons: Larry Finney, Walter Washington, Edna Washington, Terrence Manuel, and Reginald Manuel, as well as being charged with the kidnapping of the same five people, as well as the Appellant's ex-wife, Karen Jackson (Tr. vol. IV, pg. 772; vol. VIII, pg. 1183-1184).

The Appellant was tried, convicted and sentenced to death in front of Judge Coker, but the initial conviction and sentence of death was reversed by this court on January 31, 1985, Jackson v. State, 464 So.2d 1181 (Fla. 1985).

The initial reversal by this court dealt with the trial court's abuse of discretion in denying a continuance, with a secondary emphasis on the right of a party to challenge any juror at any time, a right to back-strike jurors. No other isues were addressed by the court.

A later retrial of the Appellant JACKSON ended in a mistrial when boxes containing evidence which were sent to the jury during deliberations also contained court documents indicating the previous conviction and sentence of death.

A third trial was held starting on May 5, 1986, ending with a conviction on all counts except the kidnapping count regarding Karen Jackson (the wife) and the Appellant was sentenced

to death in accordance with a jury recommendation for the murders of Edna Washington, Terrence Manuel and Reginald Manuel.

This second conviction and sentence of death was reversed by this court in Jackson v. State, 545 So.2d 260 (Fla. 1989), with the reversal being premised upon the trial prosecutor cross examining the Appellant JACKSON and revealing information to the jury that the Appellant had been previously convicted and sentenced to death for the same charges as were pending.

Before the retrial, conviction and sentence which is the basis of the instant appeal, the Appellant JACKSON filed several motions, including motions for disqualification of the trial judge on 10/19/89 (Tr. vol. VIII, pg. 1205; Supp. R.). A second Motion for Disqualification was filed on 2/27/90 (Tr. vol. VIII, pg. 1246; vol. I, pg. 5-15), and a final Motion to Disqualify or Recuse filed after the verdicts on 4/3/90 (Tr. vol. VIII, pg. 1328).

These three Motions to Disqualify or Recuse the trial judge were denied (Supp. R., pg. 4; Tr. vol. VIII, pg. 1211-1212, 1254-1255).

On March 12, 1990, the Appellant's fourth trial commenced, with the Appellant JACKSON being convicted of the five counts of First Degree Murder and the remaining Kidnapping counts (Tr. vol. VI, p. 1099-1100). It should be noted that on the verdict form, the jury specifically added "felony murder" as opposed to "premeditated murder" on all of the guilty verdicts (Tr. vol. VI, pg. 1105; vol. VIII, pg. 1296-1300).

After a sentencing proceeding was held, the jury recommended life sentences for all of the murders by an unspecified vote on March 20, 1990 (Tr. vol. VIII, pg. 1323-1327). On April 20, 1990, the trial court sentenced the Appellant to consecutive life sentences for the murders of Larry Finney, Walter Washington and Edna Washington, and sentenced the Appellant to death for the murders of Terrence Manuel and Reginald Manuel (Tr. vol. VI, pg. 1178; vol. VIII, pg. 1173). The Appellant JACKSON was also sentenced to consecutive life sentences without parole for twenty-five years on the remaining Kidnapping counts (Tr. vol. VIII, pg. 1168-1172; vol. IX, pg. 1392). No guideline scoresheets were prepared for the non-capital counts.

This timely appeal followed.

STATEMENT OF THE FACTS

As late as February 1981, the Appellant JACKSON was having serious marital problems with his wife, Karen Jackson, and Appellant actually came to the Metro-Dade Police Department asking Officer John Pace for help to get Jackson's family back together. (Tr. vol. III, pg. 429). These domestic problems were very serious, as one of the victims involved, Larry Finney, was having "an intimate relationship" with the Appellant's wife, Karen, and this relationship would occur at the home of victims Walter and Edna Washington - all according to Larry Finney's mother, Barbara Finney (Tr. vol. III, pg. 475). In fact, Officer Pace responded to the Washington home on February 12, 1981, where he made contact with the Appellant JACKSON and Karen Jackson on a domestic call (Tr. vol. III, pg. 427). The Appellant's wife, Karen, was living at the Washington home during this time, with the Appellant's young children, and this was causing extreme problems between the Appellant JACKSON and his wife Karen (Tr. vol. III, pg. 438, 597). In fact, through their numerous separations, the Appellant discovered that his wife had been having affairs with five or six different men and Appellant in fact caught his wife in bed with one of these men. (Tr. vol. IV, pg. 888, 893).

On February 28, 1981, late at night, Shirley Jackson, a neigbor who lived across the street from the Washington house,

saw the Appellant outside of the Washington house, hugging his wife Karen and she recognized the Appellant from seeing him twice before at the Washington house (Tr. vol. III, pg. 490). Shirley Jackson saw no guns, no fighting, no one running or screaming, and in fact saw no disturbances at all at the time (Tr. vol. III, pg. 501). She simply saw Edna Washington get into the camper/ truck (seeing no one else get into the truck) and saw the Appellant drive away (Tr. vol. III, pg. 491). Later that evening, at approximately 3:00 AM, a car was seen on Hollywood Boulevard near U.S. 27 in Broward County, with flames coming from the hood and from the inside (Tr. vol. II, pg. 339-340). Officer Primeau of the Pembroke Pines Police Department was dispatched to the scene and found some handcuffs about 15 to 20 feet away from the car, but found no guns and no spent shells (Tr. vol. II, pgs. 350, 353). Officer Owen Bosse of the Broward Sheriff's Office went to the scene and discovered five bodies in the car, as well as various identification (Tr. vol. II, pg. 399) and these bodies were later identified as being the bodies of the five victims as charged in the Indictment (Tr. vol. II, pg. 574-575; vol. IV, pg. 664-665). The three adults: Larry Finney, Edna Washington and Walter Washington, died of gunshot wounds, with .38 caliber bullets being used (Tr. vol. III, pg. 550; vol. IV., pg. 665, 669, 672). The two children found in the car: Terrence Manuel and Reginald Manuel Washington, died of smoke and soot inhalation (Tr. vol. IV, pg. 674-675).

On March 4, 1981, the Appellant JACKSON again met with Officer Pace regarding threatening phone calls that he was receiving and regarding his concern over his family. (Tr. vol. III, pg. 431). It was noticed by Officer Pace that the Appellant had some fresh burns which the Appellant described as being from a beach barbecue (Tr. vol. III, pg. 431-441). Ultimately, Karen Jackson testified that the Appellant and the co-defendant Aubrey Livingston came to the Washington home on 2/28/81 at a time when Karen Jackson was staying at the Washington home (Tr. vol. III, pg. 572, 576). Karen Jackson testified that co-defendant Livingston had a gun during the whole time at the Washington home, that the Appellant put Karen Jackson's clothes into the Appellant's truck, and eventually during that time that the Appellant allegedly put Edna and Walter Washington, Larry Finney and the two Manuel children into the truck (Tr. vol. III, pg. 583). The Appellant then drove aimlessly around in the truck, with the victims in the back, with co-defendant Livingston, and with Karen Jackson and one of the Jackson children in the cab of the truck with the Appellant. (Tr. vol. III, pg. 584). The Appellant told Karen Jackson that he was going to hold the people hostage like they held her (Karen Jackson) hostage. (Tr. vol. III, pg. 584).

Parenthetically, while driving around, it became chilly and the Appellant drove back to the Washington home so that Edna Washington could retrive a jacket for one of the children (Tr. vol. III, pg. 585).

After driving around, the Appellant happened upon an abandoned car in a rural area and eventually stopped at that car with the Appellant telling Karen Jackson that he was going to leave the five victims there in the car (Tr. vol. III, pg. 586-587). The victims, the Appellant and the co-defendant Livingston got out of the truck and Karen Jackson then heard some popping sounds. The co-defendant then got into the truck and told the Appellant to hurry up. Karen Jackson then heard an explosion and the Appellant returned to the truck with his face being burned. (Tr. vol. III, pg. 587). At the time that Karen Jackson heard the shots, both the Appellant and the co-defendant Livingston were out by the car and Karen Jackson stated that the Appellant never had a gun in his possession (Tr. vol. IV, pg. 626-627).

Co-defendant Aubrey Livingston testified that he had been arrested for the murders, was previously convicted and sentenced to death, but then made a deal to testify (Tr. vol. IV, pg. 692, 707). Pursuant to this deal, Livingston testified that the Appellant had a gun and that he, Livingston, had none (Tr. vol. IV, pg. 696). Livingston then testified that they found the abandoned car and the Appellant took the victims out while the co-defendant got back into the truck, so Livingston did not know what was happening. (Tr. vol. IV, pg. 703). Livingston then heard shots and the sound of gas igniting and saw flames.

The Appellant threw an empty can into the truck and said his face was burning. (Tr. vol. IV, pg. 703-704). Livingston's tape recorded statement to Detective Schlein was played to the jury, in which it was stated that the victims were tied up with their hands behind their backs, with two of the adults being tied with yellow rope and one being handcuffed (Tr. vol. IV, pg. 791).

The Appellant was later arrested and interviewed by Detective Schlein and gave a tape recorded statement which was played before the jury. The recorded statement indicated that the Appellant had not seen Karen for two weeks and that the Appellant had been burned at a barbecue at the beach (Tr. vol. IV, pg. 769). The Appellant testified at the trial and explained that he was burned at a barbecue at which his wife was present, but didn't mention it earlier since the Appellant was aware that the police were looking for Karen in connection with the murders (Tr. vol. V, pg. 934). Both Lucille and Roy Bentley testified that on the day after the murders, March 1, 1981, the Appellant and his family were over to the Bentleys for dinner and the Appellant had no burns on his face (Tr. vol. V, pg. 968, 978).

At the time of his arrest on March 5, 1981, the Appellant did have some burns on his shoulder, arms, hands and face which were photographed by Officer Bosse (Tr. vol. III, pg. 411-412, 415). Officer Larry Schooley of the Pembroke Pines Police Department went to the Appellant's house after the arrest of March 5, 1981 and found some yellow rope in the attic, found

some handcuffs in the Appellant's truck and found a .44 caliber handgun in the bedroom (Tr. vol. III, pg. 515, 519, 531). Mary Henson of the Florida Department of Law Enforcement testified that the yellow rope found at the Appellant's home was manufactured by the same company that manufactured the yellow rope used to tie two of the adult victims found in the car (Tr. vol. III, pg. 565). Dennis Gray testified that the .44 caliber handgun could not fire the .38 caliber bullets used in the killings. (Tr. vol. III, pg. 550, 553).

After the jury verdicts of guilty to the five counts of felony murder (as specifically designated by the jury) (Tr. vol. VI, pg. 1099, 1105) and after the jury recommendation of life in prison (Tr. vol. VI, pg. 1157), the trial court entered a sentence of death for the killings of the two children (Tr. vol. VI, pg. 1178). In deciding to overrule the jury recommendation of life, the trial court found three aggravating circumstances were proven beyond a reasonable doubt: the murders were done during the commission of a kidnapping; the murders were heinous, atrocious and cruel; and they were done in a cold and calculated manner. The court also found that two aggravating circumstances "may well apply": the Appellant created risk of death to many persons and the murders were done to avoid arrest. (Tr. vol. VIII, pg. 1373, 1378).

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

SUMMARY OF THE ARGUMENT

The trial court erred by failing to step aside and recuse himself, after creating an adversarial situation in response to the Appellant's Motion for Disqualification. Specifically, the trial court repeatedly addressed the allegations made by the Appellant and repeatedly denied prejudice, which was an improper litigation of the issues - well beyond the determination of the sufficiency of the Motion.

The trial court erred in admitting a prior tape recorded statement by the co-defendant Livingston, as such statement was not justified through the cross examination of the co-defendant, as there was no indication of fabrication or other such justification.

Similarly, the recorded statement, almost three times as long as the trial testimony of the co-defendant, contained several critical elements and factors of evidence which were not elicited through the trial testimony of the co-defendant.

The trial court erred by restricting the presentation of the defense, specifically restricting the publishing of various letters to the jury, and effectively preventing the Appellant from presenting witnesses and evidence to the jury.

Also, the trial court erred by exhibiting before the jury a hostile attitude meant to intimidate defense counsel and which blatantly exhibited to the jury the trial court's disdain for the defendant, defense counsel and the defense being presented to the jury.

The trial court erred in various evidentiary rulings, including but not limited to, the failure to dismiss the current action on double jeppardy grounds, after the Appellant's previous conviction was reversed due to intentional misconduct on the part of the prosecutor in bringing before the jury the fact that the Appellant had been previously convicted of the same charges by an earlier jury.

The trial court erred in sentencing the Appellant to death, as the trial court improperly relied upon aggravating circumstances which were not supported by the record, and improperly applied the weighing procedure of the aggravating versus mitigating circumstances. The death sentence was inappropriate under the facts of the case and under a proper weighing of the mitigating circumstances.

Also, the imposition of the death sentence was improper, as it was the result of an invalid override of the jury's recommendation of life, a recommendation which was firmly supported by the record, including evidence of the disparate treatment of the Appellant and the co-defendant Livingston and evidence of the Appellant's good character, lack of criminal record, work history, etc.

Finally, the trial court erred by imposing departure sentences without written reasons and without guideline scoresheets being prepared.

POINT I

THE TRIAL JUDGE ERRED BY FAILING TO RECUSE HIMSELF FROM THE APPELLANT'S TRIAL.

On October 19, 1989, less than two months after the mandate of this court reversing the conviction after the Appellant's third trial, Jackson filed a Motion for Disqualification of the Trial Judge. (Tr. vol. VIII, pg. 1205). The Motion for Disqualification of the Trial Judge alleges the belief by the Appellant that the trial court is prejudiced against the Appellant due to the circumstances and history of the case (specifically the three previous trials) and the Motion is supported by affidavits of the Appellant's trial attorney and the Appellant (Tr. vol. VIII, pg. 1207-1208).

On October 19, 1989, a hearing was held on the Motion for Disqualification and the trial court denied the Motion (Supp. R., pg. 4; Tr. vol. VIII, pg. 1211). A Renewed Motion for Disqualification of the Trial Judge, supported by affidavit, was filed on February 27, 1990, with the Renewed Motion relying upon comments made by the trial court at the hearing of October 19, 1989. A hearing on the Renewed Motion for Disqualification of the Trial Judge was conducted on March 1, 1990, with this Motion being denied by written order dated March 2, 1990 (Tr. vol. VIII, pg. 1254).

A third Motion for Disqualification/Recusal of the Sentencing Judge was filed after conviction in the instant matter, but before sentencing on April 3, 1990 (Tr. vol. VIII, pg. 1328) and this third Motion was denied by the trial Court (Tr. vol. VIII, pg. 1339).

It is absolutely clear that the comments made by the trial judge in response to the Motions for Disqualification require that the trial judge be recused from the case and the trial judge's failure to so act is reversible error.

For a Motion to Disqualify or Recuse a Trial Judge to be sufficient, the facts alleged in the Motion need only show a well-grounded fear that the movant will not receive a fair trial at the hands of the judge:

> The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially. Livingston v. State, 441 So.2d 1083 (Fla. 1983), pg. 1086; McKenzie v. Superkids Bargain Store, Inc., 565 So.2d 1332 (Fla. 1990), pg. 1334.

In deciding the legal sufficiency of a Motion to Disqualify the Trial Court, the judge must make a determination as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial - purely a question of law. McKenzie, supra, pg. 1335. The facts

set forth in the Appellant's initial Motion to Disqualify are unique to this case, as the Motion correctly alleged that the same trial judge had already presided over the same trial of the Appellant on three different occasions, imposing the death sentence twice (with the third a mistrial) (Tr. vol. VIII, pg. 1205).

In the renewed Motion for Disqualification, it is additionally noted that the trial court heard the trial of the instant case on five separate occasions, including two trials of the co-defendant. It is also alleged in the renewed Motion that the court made comments to the effect that it was the facts of the case that convicted the Appellant and not the court itself and it will be the facts that convict the Appellant again (Tr. vol. VIII, pg. 1247).

Based upon the court's extensive exposure to the case, the repeated death sentences being imposed, and the comments of the court which were reflected in the second Motion, it cannot be seriously disputed that the Appellant, as a reasonably prudent person, would have a well-grounded fear that he would not receive a fair trial and that therefore the Motions were sufficient to require the recusal of the trial judge. See McKenzie, supra, pg. 1334-1335).

Unlike Walton v. State, 481 So.2d 1197 (Fla.), cert. denied 110 S.Ct. 759, where this court found the Motion to Disqualify to be insufficient when it was based upon the fact that

the judge had recently presided over the trial of the co-defendant which might cause the trial judge to be "psychologically predisposed" to reject Walton's defense, the Appellant Jackson's fears in the instant case are certainly well grounded, as the same trial judge had already sentenced him to death on two separate occasions, as well as sentencing his co-defendant to death on the same facts. (Tr. vol. IV, pg. 707). The Motions to Disqualify the Court were sufficient to require the trial judge to remove himself from further action on the Appellant's case.

Separate and distinct from the trial court's error in failing to recognize the Motions to Disqualify as sufficient for failing to disqualify himself from further proceedings on the Appellant's case, this court must recall that regardless of whether the trial judge ruled correctly in denying the Motion for Disqualification as legally insufficient, it has been repeatedly held that a judge who is presented with a motion for his disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification". McKenzie, supra, pg. 1339; Bundy v. Rudd, 366 So.2d 440 (Fla. 1978), pg. 442.

> When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry, and on that basis alone, establish grounds for his disqualification. McKenzie, supra, pg. 1339.

This court has consistently and repeatedly explained that the limitation on the trial judge to a mere determination of legal sufficiency is expressly designed to prevent the creation of "an intolerable adversary atmosphere" between the trial judge and the litigant. McKenzie, Id., pg. 1339. In the instant case, the judge went well beyond a mere determination of the legal sufficiency of the Motions to Disqualify and passed on the truth of the facts alleged, and reversal is required.

At the hearing of October 19, 1989 on the initial Motion for Disqualification, the trial court read the Motion and immediately commented on the allegations made in the Motion dealing with the court's following of the jury recommendation and imposing the death sentence on two separate occasions: "that's what the jury recommended ... I'm not supposed to follow the advice of the jury?" (Supp. R., pg. 2-3).

While this attempt by the trial court to refute the allegations is sufficient by itself to require recusal and to mandate reversal in this case, the court entered into a dialogue directly with the Appellant Jackson and again defended his actions and attempted to refute the allegations of prejudice made by the Appellant:

> **The Defendant:** "I think you're prejudiced."
>
> **The Court:** "How can you think I'm prejudiced when you send me Christmas cards every year?"

The Defendant: "You sat in this trial five different times."

The Court: "That doesn't make me prejudiced." (Supp. R., pg. 4)

At the subsequent hearing of March 1, 1990, upon the Amended Motion for Disqualification, the trial judge was confronted with the allegations as reported in the press that the court stated, "It was the facts that condemned him, not me", as well as the comments regarding the Christmas cards as quoted earlier in this brief. (Tr. vol. I, pg. 7). The court then answered the allegations by noting that the court and Appellant Jackson were not strangers and had conversed in the courtroom before. The court also agreed that he had heard the case before and was not anxious to go through the trial again, and that it would be very easy for the court to relieve himself of a week or two of the trial with a stroke or two of the pen (Tr. vol. I, pg. 12). The trial judge then personally engaged the Appellant in a dialogue in which the Appellant informed the court of his personal belief that the court is prejudiced, that the Appellant could not get a fair trial, based upon the three preceding trials and the bias, prejudice and favoritism which was exhibited toward the State, with the court acting "as a prosecutor from the bench". (Tr. vol. I, pg. 13). The trial judge then inquired of the Appellant: "Why didn't you bring this up at the second or third

trial ... if you felt that way after the first trial, why didn't you?", leading to the Appellant's extremely reasonable and logical response that the Appellant was not aggressively involved in the previous trial and was not fully aware and knowledgable of the law and procedures of the law (Tr. vol. I, pg. 13).

In this regard, this court is requested to take notice of the fact that in the appeal of the Appellant Jackson's second conviction and sentence of death, the trial judge's comments during the course of that trial were the subject of an issue on appeal, indicating bias on behalf of the prosecution. While this issue was unsuccessful, the matter was briefed in great detail and addressed by this court in the written opinion of the court filed on June 8, 1989 (Tr. vol. VIII, pg. 1195). The trial judge goes on to find the second Motion for Disqualification legally insufficient, but then once again, the judge addresses and refutes the claims alleged in the Motion:

> I would also point out that I have signed practically every order your lawyer has put in front of me, including transportation of a bunch of witnesses I have never heard of before. So I assume this is going to be a different trial anyway than the other ones I have heard. This is not going to be the same trial. It is going to be a different trial. (Tr. vol. I, pg. 15).

The trial judge clearly went beyond the very narrow constraints of ruling on the legal sufficiency of the evidence and not only passed on the truth of the facts alleged, but also adjudicated the question of disqualification - both of which were prohibited by this court in McKenzie, supra, pg. 1339.

As in Townsend v. State, 564 So.2d 594 (Fla. 2d DCA 1990), the trial judge specifically addressed the question of his alleged prejudice and commented on the allegations contained in the Motion. The trial judge created the intolerable adversary atmosphere and the conviction and sentence of the Appellant Jackson must be reversed and remanded for a new trial before a different Circuit Court Judge.

POINT II

THE TRIAL COURT ERRED BY ADMITTING A PRIOR CORROBORATING STATEMENT BY STATE WITNESS LIVINGSTON TO BE PLAYED BEFORE THE JURY.

At the Appellant's trial, co-defendant Aubrey Livingston was called as a State witness in the State's case in chief. (Tr. vol. IV. pg. 691). Livingston testified about basic elements of the incident, including the fact that he was with the Appellant when they went to the Washington home (Tr. vol. IV, pg. 694), that the Appellant had a gun, but that Livingston never did (Tr. vol. IV, pg. 696), that the victims were put into the back of the Appellant's truck along with Livingston, but that there were no conversations or questions by any of the victims (Tr. vol. IV, pg. 699-702), the fact that Livingston was in the truck at the time of the actual incident and only heard shots and heard sounds of gas igniting (Tr. vol. IV, pg. 703) and that the Appellant stopped at a store and then took Livingston home (Tr. vol. IV, pg. 704). The prosecutor elicited from Livingston that he was arrested for these murders and that he gave a statement to the police at the time of his arrest (Tr. vol. IV, pg. 692). The entire direct examination of State witness Livingston took less than fourteen pages of the trial transcript (Tr. vol. IV, pg. 691-704).

Livingston was cross examined by the Appellant's trial attorney regarding the fact that Livingston refused to testify until his attorney told him to "just go ahead and cooperate"

(Tr. vol. IV, pg. 706), and also it was brought out that Livingston was initially convicted of the six counts of kidnapping and five counts of murder and was sentenced to death at one time, went to trial a second time and while he was awaiting sentence, entered into an agreement with the State to cooperate in exchange for a recommendation of a life sentence, although Livingston denied ever being told that the State threatened to seek a resentence of death if he failed to cooperate (Tr. vol. IV, pg. 706-707).

After these few questions clarifying the information elicited on direct examination by the State Attorney's Office (regarding the arrest for these murders and the statement given by Livingston), the cross examination continued with a string of questions and attempts to impeach Livingston with prior inconsistent statements, with the specific intention of the cross examination stated to the court and to the jury (Tr. vol. IV, pg. 713): "I am going to cross examine him about prior inconsistent statements ... trying to impeach also". Specifically, the trial attorney impeached Livingston one time regarding whether or not the Appellant was at his mother's house before or after the initial phone call to Livingston, using the 1985 deposition for this impeachment (Tr. vol. IV, pg. 709-710). The balance of the attempts at impeachment, sixteen separate times, were done, apparently, using trial transcripts and <u>each</u>

of these impeachment attempts dealt with factual matters, testing the recall of the witness Livingston: whether or not the Appellant was worried about the children; whether the truck was driven for fifteen or thirty minutes (Tr. vol. IV, pg. 711); if Livingston knew Karen Jackson for five or six years or six or seven years (Tr. vol. IV, pg. 713); if Larry Finney was present at the home or came in later (Tr. vol. IV, pg. 715); if Livingston would have stopped the people from leaving or would have called the Appellant (Tr. vol. IV, pg. 717); whether or not they returned to the Washington home for clothes or a coat (Tr. vol. IV, pg. 719); whether or not the Appellant was wearing a jacket (Tr. vol. IV, pg. 720); whether or not the jacket was buttoned up (Tr. vol. IV, pg. 721); if they stayed at the Washington home for one to two hours or four to five hours (Tr. vol. IV, pg. 725); if the fire started on the passenger or driver's side (Tr. vol. IV, pg. 728); if the Appellant was wearing gloves in the house (Tr. vol. IV, pg. 729); if the Appellant brought anything out of the house (Tr. vol. IV, pg. 732); if Livingston was absolutely certain that Karen never went into the house (Tr. vol. IV, p. 733), whether or not the Appellant had anything in his hand (Tr. vol. IV, pg. 734; and whether or not the Appellant went into the store afterwards with Livingston (Tr. vol. IV, pg. 736).

As a predicate for nearly every answer of Livingston's, when asked if he might have testified differently at a different

time, Livingston generally said that "he might have" and he pointed out that "it's been quite a while", or "it's been a long time" (Tr. vol. IV, pg. 709-711), etc. The cross examination was absolutely consistent in its tone and content: testing the memory and credibility of the co-defendant Livingston. It was never questioned, either implied nor expressly, that Livingston had fabricated his story nor was there cross examination regarding improper influence or motive to testify, with the only questions arguably in this area of motive to testify dealing with the clarfification of the State Attorney's questions to Livingston regarding being arrested for the murders and giving statements (Tr. vol. IV, pg. 692). This is further clarified by Livingston' s explanation that he refused to testify until his attorney told him to cooperate and that Livingston specifically and repeatedly denied any fear or possibility of being resentenced to death if he didn't cooperate (Tr. vol. IV, pg. 706, lines 8-15, lines 24-25; at page 707, lines 1-3).

Despite the rather uneventful cross examination, the State called Officer Mark Schlein as a witness and proffered the tape recorded statement made by co-defendant Livingston as a prior consistent statement, which was admitted over defense objection (Tr. vol. IV, pg 774-775). The tape recorded statement of co-defendant Livingston, which was played to the jury in an unedited form, took thirty pages of transcript (Tr. vol. IV, pg. 775-800; vol. V, pg. 803-806).

Admitting this tape recorded statement before the jury constituted reversible error.

It is well settled that a witness's prior consistent statements are generally inadmissible to corroborate that witness's testimony. Jackson v. State, 498 So.2d 906 (Fla. 1986) p. 909. An exception to this general rule is recognized, however, when such statements are introduced to rebut an express or implied charge against a witness of improper influence, motive, or recent fabrication. Jackson, Id., pg. 910. Under §90.801(2)(b), a prior consistent statement is not hearsay and can be used as substantive evidence if: 1) the witness testifies at trial; 2) the witness is subject to cross examination regarding the prior statement; 3) the statement is offered to rebut an express or implied charge of improper influence, motive or recent fabrication; and 4) the prior consistent statement must have been made prior to the existence of the fact said to indicate bias, interest, corruption or other motive to falsify. Jenkins v. State, 547 So.2d 1017 (Fla. 1st DCA 1989), pg. 1020. Admissibility of such prior statements is addressed to the sound discretion of the trial court. Jenkins, Id., pg. 1020.

However, in order for a prior consistent statement to be admissible, an initial threshold must be crossed:

> There must be an initial attempt on cross examination to demonstrate the improper influence, motive or recent fabrication, and once such an attempt has successfully occurred, then prior consistent statements are admissible ... to show the consistency of the witness's trial testimony. (emphasis added)
> Jenkins, supra, pg. 1020.

In the instant case, there was no successful attempt to demonstrate improper influence, motive or recent fabrication. As was mentioned earlier, the State Attorney brought up on direct examination that co-defendant Livingston was arrested for the same murders and that he had given a statement, and Livingston specifically denied being again threatened with the death penalty in exchange for this testimony. A witness's credibility is always an issue at trial and a general attack on that credibility does not satisfy the hearsay exception rule. Jenkins, supra, pg. 1021. In Jenkins, the trial attorney attempted to impeach the victim's testimony through use of deposition and generally attacked the victim's credibility, as occurred in the case at bar. Specifically, in Jenkins, the victim was impeached regarding the date of the occurrence, regarding whether her son was awake at the time of the incident and saw Jenkins, and questions regarding why the victim did not go the police and the fear that she had of Jenkins. Id., pg. 1020-1021. The court in Jenkins found an abuse of discretion by the trial court for allowing the victim's mother and a police officer to testify regarding earlier renditions of the incident. The court noted that:

> A reasonable interpretation of the victim's cross examination does not indicate either expressly or implicitly a charge of recent fabrication, improper influence or motive to falsify. Her testimony did not indicate that she was changing her story at trial; nor did the impeachment attempts establish any fact which indicated that her trial testimony was improperly influenced or that she had a motive to falsify. Id., pg. 1021.

Jenkins' conviction was reversed, with the court finding that the prior statements of the victim were consistent with her trial testimony and served only to impermissibly bolster the victim's credibility.

In the case at bar, the cross examination was even more benign than in Jenkins and there can be no justification in the admission of the prior statement to improperly bolster the testimony of Livingston.

Notwithstanding the insufficient predicate which led to the improper admission of Livingston's prior recorded statement, the nature and content of the statement itself was improper and so prejudicial that reversal of the Appellant's conviction and sentence are required.

This court recently dealt with an improper admission of prior statements in a death sentence case in Alvin v. State, 548 So.2d 1112 (Fla. 1989). A tape recorded statement was admitted and played before the jury to rebut the inference that the witness had fabricated his story because of a grant of immunity in exchange for testimony. Citing §90.801(2)(b) Florida Statutes (1985), this court held that such statement was admissible, but only "to the extent that the tape was consistent with his trial testimony". Id., pg. 1114. However, this court went on to find that the tape recorded statement contained information which was not elicited from the witness in court, finding that the admission of the portion of the tape containing the matters

about which the witness did not testify in court was error. Id., pg. 1114. As in the case at bar, the trial court in Alvin did not listen to the tape recording beforehand and did not edit out those statements which went beyond the witness's testimony. The only aspect in the tape recorded statement which was not contained in the trial testimony was the apparent motive for the shooting, with the witness testifying in court that he did not know why Alvin started to shoot, but on the tape he indicated that the shooting was drug related, involving a robbery. Id., pg. 1114.

In the case at bar, the prior consistent statement of Livingston was clearly used by the prosecutor to improperly bolster Livingston's testimony, but also, such statement was used to bring new information before the jury as substantive evidence in the State's case in chief. Not only was the tape recorded statement nearly triple the length of the direct testimony of the witness Jenkins (with no redirect testimony given), but the prior recorded statement contained several critical aspects of the case which were not brought out in Livingston's trial testimony and which were extremely prejudicial to the Appellant.

Parenthetically it must also be noted that thoroughout the course of the prerecorded statement, the police officers taking the statement used extensive and prejudicial leading questions, giving the police officers' theory of the case, which

would be inadmissible under any theory of evidence. As an example, the tape recording of Livingston's statement began with nearly two pages of testimony regarding the fact that Livingston liked children, that he worked with children, that he had alot of patience with children, etc. (Tr. vol. IV, pg. 781, 782). Not only is this information irrelevant, it improperly attempts to eliminate Livingston's motive or ability to have participated in the murders of the two children involved.

In a similar matter, the police elicited information regarding the Appellant being upset at his wife and with the people in the house (the victims) for "messing up on him", which was basically dealing with the wife seeing another man and the victims' helping her to do so (Tr. vol. IV, pg. 785). Of course, none of this information was in Livingston's trial testimony.

The tape recorded statement also had the Appellant coming back to the truck for a gas can for the first time (Tr. vol. IV, pg. 794) and actually has the Appellant pouring the gas on the people and lighting it, which was never the testimony of Livingston at the trial. (Tr. vol. IV, pg. 795). See trial testimony, vol. IV, pg. 703, where Livingston testified that he was in the truck, could see nothing, does not know exactly what happened.

This was also aggravated by the volunteered statements by the police officers, on the tape, regarding the gas being thrown on the victims (Tr. vol. IV, pg. 797) and the police volunteering "after the people were shot to death and the car lit on fire ..." (Tr. vol. IV, pg. 798).

The tape recorded statement also contained the first mention by Livingston of converstions with the victims, questioning of the victims (Tr. vol. IV, pg. 796) and brought up, for the first time, the fact that Edna Washington was in pain because of the pregnancy, because she was frightened and because of the ride in the truck (Tr. vol. IV, pg. 799).

Probably the most prejudicial information which was brought up in the recorded statement for the first time was the volunteered information, prompted by the police officers, that the victims knew and felt that the Appellant was going to kill them. This information was brought out through the improper opnions of Livingston that he imagined that the victims knew what was going to happen, and that he felt that the victims knew that the Appellant was going to kill them (Tr. vol. IV, pg. 796):

Question by Officer: "They knew what was going to happen, you think? Sort of felt he was going to kill them?"

"Yeah, yeah ... probably after coming in their house like that, I think they probably thought so".

Livingston also claimed the victims asked him if he wanted to be involved in what the Appellant was doing (Tr. vol. V, pg. 805). There was also questioning by the police officers, for the first time, regarding how the young children got into the car since they couldn't walk, and information regarding the mother carrying the children into the car. (Tr. vol. IV, pg. 799).

Finally, the tape recorded statement brought before the jury, for the first time, Livingston's volunteered opinions, prompted by the police officers, regarding how the Appellant reacted after the killings, that it seemed not to bother him (Tr. vol. V, pg. 800) and that Livingston didn't go to the police because the Appellant would have killed him also and Livingston wasn't about to get in his way (Tr. vol. IV, pg. 799; vol. V, pg. 804). All of this information and other smaller details were brought to the jury's attention for the first time in the supposed prior consistent statement of Aubrey Livingston, despite the fact that this information was not brought out on the direct examination of Livingston and could not have been brought out as improper and prejudicial opinion testimony, assumptions, etc.

Although the single detail in Alvin, supra, was found to be harmless error, the overwhelming prejudice caused by the improper evidence in the instant matter, coupled with the disproportionate length of the recorded statement as compared to the trial testimony, requires reversal in the instant case.

POINT III

COMMENTS BY THE TRIAL COURT PREVENTED APPELLANT FROM RECEIVING A FAIR TRIAL.

During the course of the trial, the trial court improperly interjected himself into the proceedings on several occasions, several times in a manner which reflected negatively upon the defense, the Appellant or the Appellant's trial counsel, and the cumulative effect of the trial court's actions resulted in a due process violation and prevented the Appellant from receiving a fair trial in the instant matter.

Although there were no objections or exceptions taken to many of the court's comments, this court has repeatedly stated that a lawyer is not required to pursue a completely useless course where the judge has announced in advance that it will be fruitless. As a practical matter, there can be nothing more fruitless than objecting to the judge about a comment that the judge has just made. This court has held that such comments would be reviewed in a capital case. Bennett v. State, 173 So. 817 (Fla. 1937).

Parenthetically, this court is respectfully reminded to consider the following several examples of the trial court's indication of his displeasure with the defense, the Appellant and the defense counsel, as it relates to the previously filed motions for disqualification of the trial court, as was raised in Point I.

Initially, the trial court instructed the jury on the charges against the Appellant and included in those instructions the count charging the kidnapping of Karen Jackson, a count of which the Appellant was earlier acquitted. (Tr. vol. I, pg. 72). The trial court denied a Motion for Mistrial and instructed the jury to disregard Count 11, but the effect of making the jury aware of an earlier trial was unmistakable (Tr. vol. I, pg. 73).

Later, during the continued jury selection, the court interrupted the defense counsel during questioning regarding the Appellant testifying. The court stated, in front of the jury, that the statements of the defense counsel were not fair. (Tr. vol. I, pg. 194-195). The court later admonished the defense counsel to stop backstriking jurors (Tr. vol. II, pg. 254), despite this court's specific pronouncements in the earlier opinion reversing Appellant Jackson's first conviction. Jackson v. State, 464 So.2d 1181 (Fla. 1985), pg. 1183.

During the defense cross examination of Officer Walkup, the court intervened during cross examination to protect the witness, without objection by the State, stating that the defense attorney was arguing with the witness and "he didn't say that", which had the definite effect of disparaging the defense attorney and the cross examination of the State's witness (Tr. vol. II, pg. 382). When the court overruled the Motion in Limine regarding the autopsy pictures, the court took the opportunity to explain relevance and corroboration to the jury, unduly emphasizing that aspect of the State's case and State's evidence (Tr. vol.

III, pg. 404). When sustaining the State's objection regarding a question to Officer Schooley regarding victim Finney's prior arrest record, the court volunteered, before the jury, that the question was totally improper and admonished the jury (Tr. vol. III, pg. 540).

During the cross examination of State witness Karen Jackson, the court took an active role in restricting the cross examination of Jackson and in actually protecting the witness. When Karen Jackson was asked to refresh her recollection, the court informed the jury that that proposition was ridiculous (Tr. vol. IV, pg. 607) and then went on to attempt to terminate the questioning or at least intimidate the defense counsel by asking, "Any more questions? Come on, ask 'em". (Tr. vol. IV, pg. 610. After the next question, the court again took the opportunity to protect Karen Jackson and to bolster her testimony by actually answering a question for her: "She was picked up and driven to the police department, okay? Next question." (Tr. vol. IV, pg. 611). The court then recessed the trial in the middle of the next question and, out of the presence of the jury, again attempted to intimidate the defense counsel by admonishing him regarding advancing on the witness and by speaking too loud, instructing the attorney to stay at the podium while asking questions (Tr. vol. IV, pg. 612, 615).

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Later during the cross examination, the court volunteered that he sustained an objection for the smartness of the

question and instructed the defense attorney to ask the question properly (Tr. vol. IV, pg. 631) and later again told the attorney to tone down the questions, as they were hurting the court's ears (Tr. vol. IV, pg. 636).

Finally, regarding Karen Jackson, the court again actively assisted the witness by stating that the witness had answered the last question three or four times and that the court could remember (Tr. vol. IV, pg. 648).

During the cross examination of co-defendant Livingston, the court interrupted the cross examination by telling the attorney that he was not going to go through the whole transcript as that would take all week, and that the attorney should do any impeachment the way he was supposed to (Tr. vol. IV, pg. 713).

Finally, during the cross examination of Officer Schlein, the court interrupted the cross examination to tell the witness to answer the question one more time, although he already answered it three times, because the defense attorney wanted it one more time (Tr. vol. IV, pg. 812). The court went on to berate the defense attorney while sustaining an objection: "Don't you learn? I sustained the objection three times. That should be sufficient, counsel." (Tr. vol. V, pg. 814).

The total effect of the court's constant harrassment of the defense attorney before the jury certainly inhibited counsel from giving full representation to the Appellant, as well as bringing counsel into disfavor before the jury, at the expense

of the Appellant Jackson. See Hunter v. State, 314 So.2d 174 (Fla. 4th DCA 1975), pg. 174. As was pointed out in the successive motions for disqualification of the trial court, the court had heard the case on at least five occasions, and the court himself commented that he was not anxious to hear the case again (Tr. vol. I, pg. 12). Unfortunately, the strain of this case was shown before the jury, and required reversal in this case.

In a similar situation, the court in Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980) acknowledged the strain under which trial judges work, but reversed conviction when the effects of that strain became known to the jury:

> We cannot condone his manifestation of that strain in the presence of the jury. Our review of the complete record in this case indicates anything but an impartial atmosphere in which the defendant received a fair trial. As was indicated in Hunter (v. State, 314 So.2d 174 (Fla. 4th DCA 1975), defense counsel's conduct should not be visited upon the defendant to the extent that his fundamental right to a fair trial is abridged. Page 134.

The cumulative effect of the trial court's actions prevented the Appellant from receiving a fair trial. As was held by this court in Williams v. State, 143 So.2d 484 (Fla. 1962):

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

POINT IV

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

It is clearly established in the State of Florida that a party is entitled to present evidence upon the facts that are relevant to his theory of the case, so long as that theory has support in the law. Steiger v. Massachusetts Casualty Insurance Company, 273 So.2d 4 (Fla. 3d DCA 1973); Zamora v. State, 361 So. 2d 776 (Fla. 3d DCA 1978), pg. 779. Where a defendant offers evidence which is of substantial probative value, and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982), pg. 1225.

This court has recently revisited and followed Moreno, supra, and has reiterated the law in the State of Florida:

> Where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. §90.404(2)(a) Florida Statutes (1985). Rivera v. State, 561 So.2d 536 (Fla. 1990), pg. 539.

In the case at bar, 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.

After the State presented the testimony of Karen Jackson, the Appellant's wife, on their case in chief, the defense recalled Karen Jackson for the purpose of identifying various letters which were sent by Karen Jackson to the Appellant, and more importantly, for the purpose of publishing those letters to the jury by having Karen Jackson read them (Tr. vol. V, pg. 850-859). These emphasized to the jury that Karen Jackson still claimed to love the Appellant (Tr. vol. V, pg. 851) and that she wanted to help the Appellant (Tr. vol. V, pg. 854). Karen Jackson also stated, through these letters, that she was afraid of the environment in Florida, but not the Appellant Jackson (Tr. vol. V, pg. 858). As Karen Jackson was asked to publish more of the excerpts of the letters to the jury, the trial court, without objection by the prosecutor, took it upon himself to prevent any further reading and to prevent the further publishing of the letters on behalf of the Appellant. When Karen Jackson asked Appellant's trial attorney if the attorney wanted her to read all of the letters, the trial court interjected himself into the proceedings:

> No, I do not want you to. Any of you people cannot read? Any of you cannot read? You can all read, I assume. I think that they are able to read what is in evidence without her reading it for them. (Tr. vol. V, pg. 860-861).

When the trial attorney inquired whether or not the prosecutor was objecting, the trial court again interjected, "I am objecting to her reading them all, yes." (Tr. vol. V, pg. 861). When the trial attorney continued to try to have Karen Jackson read portions of the letters in question, the trial court told the witness: "If you do not want to read it, Mrs. Jackson, you do not have to." (Tr. vol. V, pg. 861). After the court again advised the trial attorney that Mrs. Jackson did not have to read the excerpts and that the jury could read them themselves, he further instructed that he was not going to force her to read. When the trial attorney clarified his intention to publish the letters to the jury, the court stated: "I know what you would like to do, but I have ruled. Do you understand what I am saying? ..... Well, then listen to me, okay? If you have any more questions of this lady, you ask her." (Tr. vol. V, pg. 862).

When the trial attorney made one last effort to get Karen Jackson to agree to publish contents of the letters to the jury, the court again sustained an objection and then, of the court's own accord, chastised Appellant's trial attorney: "You know, you really should refer to the lady as Mrs. Jackson." (Tr. vol. V, pg. 863). The trial attorney finally accepted the court's limitation on the presentation of evidence and acknowledged: "I guess I can't have anything further with this witness." (Tr. vol. V, pg. 863).

This restriction in the presentation of evidence in support of the defense is further aggravated when this court recalls that the trial court allowed the playing of the entire statement by co-defendant Livingston, which was nearly three times as long as the direct testimony by Livingston (Tr. vol. IV, pg. 776 - Vol. v, pg. 805).

Later in the presentation of the defense side of the case, the trial attorney again objected to the court preventing the publishing of the letters in question, and a motion to recall Karen Jackson was made, but denied by the trial court, effectively completing the restriction of the presentation of that particular segment of the defense case (Tr. vol. V, pg. 869-870).

The trial court also prevented the presentation of evidence in support of the defense by effectively eliminating the defense witness, Amos King. The Appellant Jackson initially made a Motion in Limine to prevent the prosecutor from eliciting, on cross examination, that defense witness Amos King met and got to know Appellant Jackson while in State prison, specifically on death row. (Tr. vol. I, pg. 19-20). The Motion in Limine was renewed during the defense side of the case, and the trial court ruled that he would allow cross examination regarding how witness King knew the Appellant regarding prison, although there would be no mention of death row (Tr. vol. V, pg. 871-873). The defense then announced that based on the court's ruling, King would not be used as a defense witness (Tr. vol. V, pg. 874).

The trial court also prevented inquiry into whether or not a testifying police officer knew of the previous arrest of Finney (Tr. vol. III, pg. 540), and prevented the Appellant's counsel from impeaching State witness Officer Schlein regarding previous disciplinary proceedings (Tr. vol. IV, pg. 740).

The trial court refused to declare Karen Jackson as a hostile witness, as was requested by the defense, further restricting the defense and the ability to put forth evidence (Tr. vol. IV, pg. 738).

Finally, during the cross examination of the State's critical witness, co-defendant Aubrey Livingston, the court prevented the defense from eliciting before the jury the fact that Livingston was on probation for a drug charge, despite the emphasis to the trial court that a theory of the defense was that the killings were drug related (Tr. vol. IV, pg. 705).

Finally, as the defense was attempting to impeach co-defendant Livingston, the trial court interrupted the defense attorney, informing the attorney that he was not going to go through the whole transcript, as that would take all week (Tr. vol. IV, pg. 713).

The cumulative effect of the court's restrictions of the presentation of the defense prevented the Appellant from receiving a fair trial by preventing the Defendant from effectively establishing a reasonable doubt in the minds of the jury. Reversal of the conviction is required.

POINT V

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

When reviewing the sentence of death imposed on the Appellant Jackson, this court must determine that the jury and judge acted with procedural rectitude and must also examine the appropriateness of the death sentence imposed, as compared with other such sentences that have been approved statewide. Adams v. State, 412 So.2d 815 (Fla. 1982).

In this instant case, there are several procedural errors which are fatal to the sentencing of death and also, the death sentence is not appropriate due to an invalid override of the jury recommendation of life, and due to the disparity in treatment between the Appellant and co-defendant Aubrey Livingston, who received a life sentence.

In deciding to overrule the jury recommendation of life imprisonment, the trial court found that there were "at least three and perhaps as many as five" aggravating circumstances applicable in the case. (Tr. vol. VIII, pg. 1378). The court also found at least three mitigating circumstances, including no prior significant criminal history, good character and upbringing, and the fact that the Appellant led an rather exemplary life, was a good son and helpful to the Bentleys (friends) (Tr. vol. VIII, pg. 1377-1378).

Statutory aggravating circumstances must be proved and shown to exist beyond a reasonable doubt before they can be considered as support for the imposition of death penalty.

See State v. Dixon, 283 So.2d 1 (Fla. 1973). When the trial court found that the aggravating circumstance of a murder done to avoid or prevent lawful arrest and murder causing great risk of death to many "may well apply" (Tr. vol. VIII, pg. 1374-1375), the court was, in essence, finding that these aggravating circumstances were not proved beyond a reasonable doubt, and therefore cannot be considered by this court.

Additionally, neither of these aggravating circumstances was supported by the record and neither may be appropriately considered by this court. Regarding the claim of murder done to avoid or prevent the lawful arrest, this court must recall that the death sentence was imposed for the murder of the two infant children, ages 4 and 1½ years (Tr. vol. III, pg. 458) and these victims could not have been witnesses to convict the Appellant of kidnapping, as the trial court suggested.

When applying this aggravating circumstance, this court has required that there be strong proof of the motive and that it be clearly shown that the dominant or only motive for the murder was the elimination of witnesses, with the mere fact that the victims may have known the assailant being insufficient to prove intent to kill to avoid lawful arrest. Jackson v. State, __So.2d__; 16 F.L.W. S151 (Fla. 1991), p. S154.

Regarding the aggravating circumstance of creating a risk of death to many people, the trial court could only look to speculation or possibilities to support this circumstance: possible police, rescue workers, firemen, to the scene and possible gas tank explosion (Tr. vol. VIII, pg. 1374).

It must be recalled that the car in question was abandoned in a rural area of Broward County, U.S. 27 & Hollywood Boulevard (Tr. vol. I, pg. 318; vol. IV, pg. 586) and that the area was so deserted that the Appellant and co-defendant were able to park next to the abandoned car for two hours, with nothing happening and no persons going by (Tr. vol. IV, pg. 701). Also, the incident involved occurred at approximately 4:00 AM (Tr. vol. II, pg. 323). The nearest witness lived about ¼ mile from the area (Tr. vol. II, pg. 323).

This court has held that a great risk of death to many persons means not a mere possibility, but a likelihood or high probability. Bello v. State, 547 So.2d 914 (Fla. 1989), pg. 917. Specifically dealing with fires, this court, citing King v. State, 514 So.2d 354 (Fla. 1987), found this aggravating circumstance to be invalid, although the fire involved was actually set in a house. This court noted that there were no facts to point to any persons inside or outside the house who were at risk of death and that the fire was confined to one room of a concrete block house. Scull v. State, 533 So.2d 1137 (Fla. 1988), pg. 1141. Certainly this aggravating circumstance is not supported and cannot be considered in the instant case.

The trial court also improperly found and considered the aggravating circumstance of murder done in a cold, calculated manner. The singular facts surrounding the jury's verdict in

this case makes it clear that this aggravating circumstance was improperly considered. During deliberation, the jury had questions, including whether or not a verdict of guilty as charged included felony murder and whether or not the jury had to be unanimous for premeditated murder as opposed to felony murder (Tr. vol. VI, pg. 1097-1098). Ultimately, the jury made their decision very clear when they returned a verdict of guilty of felony murder in the first degree and the jury specifically hand-wrote the notation "felony murder" on the verdict form for each guilty verdict (Tr. vol. VI, pg. 1199, 1105). The jury obviously specifically considered and rejected the claim of premeditated murder and designated their verdict specifically as felony murder.

In attempting to justify the finding of the aggravating circumstance of cold and calculated, the court had no justification for the finding, and more importantly, improperly considered that the bodies were disposed of in a most heinous way and that the Appellant showed no feelings of remorse (Tr. vol. VIII, pg. 1376).

To justify a finding that a murder was done in a cold, calculated and premeditated manner, the premeditation must exceed that level of premeditation required for a conviction of first degree premeditated murder. Dolinsky v. State, __So.2d__; 16 F.L.W. S145 (Fla. 1991), p. S146. Clearly, this finding is impossible, based upon the jury's specific rejection of premeditation in this case. Also, the factor of cold and calculated has

generally been reserved for cases showing a careful plan or pre-arranged design, Campbell v. State, __So.2d__; 16 F.L.W. S1 (Fla. 1991), pg. S2, and in fact, this circumstance ordinarily applies to those murders that are characterized as executions or contract murders. McCrae v. State, 416 So.2d 804 (Fla. 1982). The State's evidence showed only that the Appellant expressed his desire to hold the victims hostage, like the victims held the Appellant's wife hostage (Tr. vol. III, pg. 582, 584). The evidence also showed that the Appellant drove around aimlessly until he found the parked car in the rural area and then sat for two hours telling everyone that he didn't know what he was going to do (Tr. vol. III, pg 586; vol. IV, pg. 796). Finally, the Appellant told Karen Jackson that he was simply going to leave the victims in the car at the side of the road (Tr. vol. III, pg. 587).

Further, the court improperly and specifically relied upon the Appellant's lack of remorse to substantiate the finding of the aggravating circumstance of cold and calculated. Lack of remorse should have no place in the consideration of aggravating factors and it is error to consider lack of remorse for any purpose in capital sentencing. Pope v. State, 441 So.2d 1073 (Fla. 1983), pg. 1078; Colina v. State, __So.2d__; 15 F.L.W. S600 (Fla. 1990), pg. S602. Similarly, the method of disposal of the bodies is not sufficient to support this aggravating circumstance. Herzog v. State, 439 So.2d 1372 (Fla. 1983).

Although the aggravating circumstance of a murder committed during the commission of a felony, that being the

kidnapping, is arguably appropriate and supported by the record, the Appellant would call this court's attention to the following cases regarding the finding of heinous, atrocious and cruel, the discussion of which invariably melds with a statewide review of the proportionality and appropriateness of the death sentence in light of other decisions of this court: Mendez v. State, 419 So. 2d 312 (Fla. 1982), pg. 315.

In Penn v. State, __So.2d__; 16 F.L.W. S117 (Fla. 1991), Penn was estranged from his wife and two-year old child and was living with his mother. Penn eventually stole liquor and jewelry and beat his mother to death with a hammer. Despite the jury recommendation of death, the court considered the lack of prior criminal history, his drug use, and "his wife's telling him that his mother stood in the way of their reconciliation", and reversed the sentence of death. In Wilson v. State, __So.2d__; 11 F.L.W. 471 (Fla. 1976), the death sentnce was reversed by this court despite a jury recommendation of death and despite Wilson's beating his mother and father to death with a hammer and finally shooting his father and stalking and discovering his mother hiding in a closet and shooting her many times. Wilson also stabbed his five-year old cousin with a pair of scissors during the episode. The court reversed the death sentence, finding that the incident was the result of a heated domestic confrontation and that the death was not proportionally warranted, despite the jury recommendation of death. In Irizarry v. State, 496 So.2d 822

(Fla. 1986), this court reversed a death sentence, although Irizarry murdered his wife with five chops with a machete, almost decapitating her, and at the same time attempted to kill her boyfriend in the same manner.

Finally, in Herzog v. State, 439 So.2d 1372 (Fla. 1983), the death sentence was reversed, despite the fact that the victim, Herzog's girlfriend, was forced to take pills, was beaten and suffocated, and eventually when she refused to die, was strangled with a phone wire with each end of the wire being pulled by a separate perpetrator, with the body eventually being burned after being stuffed into a garbage can.

Based upon the improper finding and consideration of the aggravating circumstances in this case, and the fact that the legitimate mitigating circumstances as were presented and found by the trial court override the remaining aggravating circumstance(s), this heated domestic situation which resulted in killings, does not appropriately and proportionally merit the death sentence and the death sentence must be reversed.

After hearing argument by counsel, the jury recommended that a life sentence be imposed instead of the death sentence (Tr. vol. VI, pg. 1157). Separate and apart from the improper consideration of at least three aggravating circumstances and the inappropriateness of the death sentence as discussed previously, the death sentence must also be reversed as an improper override of the jury's recommendation. "In order to sustain a sentence of

death following a jury recommendation of life, the facts suggesting the sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908 (Fla. 1975), pg. 910; Hegwood v. State, __So.2d__; 16 F.L.W. S120 (Fla. 1991), pg. S121. This court has recently reiterated the long-standing rule in the State of Florida regarding an override of a jury's recommendation of life in prisonment in Downs v. State, __So.2d__; 16 F.L.W. S106 (Fla. 1991):

> A jury's recommendation of life imprisonment is entitled to great weight (citing Tedder v. State. Under Tedder, a trial court errs in overriding a jury's recommendation if facts are evident from the record upon which a reasonable juror could rely in recommending life imprisonment. Page S107.

Of course, the process of weighing aggravating and mitigating circumstances is not a mere tabulation. The record must be void of any valid mitigating circumstances before the trial court is justified in overriding the jury's recommendation. Brown v. State, 473 So.2d 1260 (Fla. 1985). Page 1270.

In the case at bar, it is evident that there were several mitigating factors which form a reasonable basis for the jury's recommendation and, in fact, the trial court acknowledged several of these mitigating factors, including no prior criminal history, good character, good upbringing, the fact that the Appellant led a "rather exemplary life", the Appellant was a good son and was helpful to his elderly friends, the Bentleys. (Tr. vol. VIII, pg. 1377-1378. The trial court also addressed and acknowledged the

disparate treatment of the co-defendant Livingston, who received a light sentence (Tr. vol. VIII, pg. 1378-1379).

Finally, the court went on to acknowledge the domestic nature of the incident, noting that one of the victims, Larry Finney, was the alleged lover of the Appellant's estranged wife, Karen Jackson, while Karen Jackson was living at the Washington home with her children (Tr. vol. VII, pg. 1379).

In addition to the several mitigating factors found by the trial court, each of which is sufficient, standing alone, to justify the jury's recommendation of life in prisonment, and therefore sufficient to require reversal of the death sentence, there were several other mitigating factors found in the record which the court did not acknowledge, but which, similarly, would sustain the jury's recommendation of life. This court has recently held that a defendant's potential for rehabilitation is unquestionably a significant factor in mitigation and is clearly mitigating in the sense that it might serve as a basis for a sentence less than death. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988), pg. 902. Similarly, this court has acknowledged and followed the United States Supreme Court in Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986), finding that evidence relating to the defendant's conduct while in prison would be mitigating in the sense that it might serve as a basis for a sentence less than death. Cooper v. Dugger, supra, pg. 902. In this regard, this court's attention is brought to the fact that the court denied a presentence investigation update, since the Appellant had been

incarcerated, uneventfully, over the last eight years (Tr. vol. VI, pg. 1164). Also, uncontradicted testimony by virtue of letters brought before the court showed that the Appellant adapted to prison life, and in fact had tremendous potential for rehabilitation. Specifically, the letter from attorney Weiner verified that the Appellant is very intelligent and uses his time while on death row using his intelligence to help others, counseling other inmates, and that the Appellant is a model prisoner of great integrity and character (Tr. vol. VI, pg. 1170-1171). The Appellant's excellent employment history has also been found relevant by this court as it relates to the Appellant's potential for rehabilitation and productivity within the prison system. Fead v. State, 512 So.2d 176 (Fla. 1987); Cooper, supra, pg. 902. The testimony of the Appellant's father showed that the Appellant worked in grocery stores and at various jobs since his early childhood and that the Appellant actually paid rent, mortgage and bought food for his wife's aunt (Tr. vol. VI, pg. 1112, 1115).

Mitigating circumstances have long been broadly defined as any aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978); Campbell v. State, __So.2d__; 16 F.L.W. S1 (Fla. 1991), pg. S2. Valid non-statutory circumstances have been found to include, but are not limited to: good prison record, charitable or humanitarian deeds, potential for rehabilitation, contribution to community or society as evidenced by an exemplary work,

military, family or other record. Even in the State's case in chief, various important mitigating factors were brought to light to the jury, including the testimony of Officer John Pace regarding his work with the Appellant as the Appellant tried to overcome his marital problems and tried to get his family back together, asking the officer for help in this regard (Tr. vol. III, pg. 429). It was the testimony of Officer Pace that the Appellant seemed sincere regarding his concern for his family and his attempts to reunify the family (Tr. vol. III, pg. 435). Even State witness and ex-wife Karen Jackson testified that the Appellant was concerned regarding seeing his children during this period of time (Tr. vol. III, pg. 597). Witness Lucille Bentley, a high school administrator, testified regarding the Appellant installing boat parts and developing a father-son relationship with her husband (Tr. vol. V, pg. 964). Mrs. Bentley also testified about the Appellant's relationship with his family and children, as did Mr. Roy Bentley, a special education teacher. Mrs. Bentley further testified regarding the fact that the Appellant had no record, did not use drugs nor alcohol, was a good citizen and family man and cared for his family (Tr. vol. VI, pg. 123-124). Roy Bentley talked about the fact that the Appellant spoke often of the need to keep his family together, as his children needed him, and the fact that the Appellant could not be a better father and provider for his children (Tr. vol. VI, pg. 1119). Mr. Bentley also testified about the Appellant's excellent character and reputation in the community, the fact that the Appellant was well-liked by his

family, friends and co-workers and that the Appellant was practically running the company that he was working for at the time (Tr. vol. VI, pg. 1121-1122). This testimony was echoed by the Appellant's father who described the Appellant as a wonderful student and a church-goer, was also a hard worker and active in the community working for neighbors (Tr. vol. VI, pg. 114-116).

It is beyond dispute that these non-statutory, mitigating circumstances were uncontradicted in the record and were clearly established through the testimony and documentation presented by the Appellant. A mitigating circumstance need not be proved beyond a reasonable doubt, but must simply be shown to exist by reasonably convincing evidence. Campbell v. State, supra, pg. S2.

In setting forth some guidelines for the uniform application of mitigating circumstances in death sentence cases, this court in Campbell v. State, supra, specifically held that "although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor, once found, cannot be dismissed as having no weight." Page S2. While these factors are applicable to the weighing process, aggravating versus mitigating circumstances (as discussed previously), the guidelines are also applicable to the review of mitigating circumstances as a reasonable basis for a jury recommendation of life.

Finally, regarding the reasonableness of the jury's recommendation, this court has consistently held that a jury may

reasonably base its recommendation of life imprisonment on disparate treatment accorded a co-perpetrator. McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Fuente v. State, 549 So.2d 652 (Fla. 1989), pg. 658. In the instant case, three of the five victims were killed with gunshot wounds (Tr. vol. IV, pg. 665, 669, 672) and Karen Jackson admitted that it was the co-defendant Livingston who had the gun at all times and who put the victims into the back of the truck and it was the co-defendant who was in the back of the truck at the time of the gunshots, along with the Appellant (Tr. vol. III, pg. 583, 587). Most importantly, Karen Jackson admitted that the Appellant never had a gun, but it was in the possession of the co-defendant Livingston (Tr. vol. IV, pg. 627). Livingston himself admitted guarding the door to make sure that the victims didn't leave the house, as well as sitting in the back of the truck to make sure the victims didn't get out (Tr. vol. IV, pg. 696, 699). The trial court himself acknowledged that the co-defendant Livingston assisted and enabled the crimes to be accomplished (Tr. vol. VIII, pg. 1379).

In Fuente v. State, supra, this court reversed a jury override, despite three aggravating factors, as the jury could reasonably have based its recommendation on the disparate treatment between Fuentes and the co-perpetrators. In Brookings v. State, 495 So.2d 135 (Fla. 1986), this court again reversed a jury override, finding that the disparate treatment accorded to co-perpetrators could serve as a reasonable basis for a life recommendation. In Brookings, supra, the woman who hired Brookings

to kill the victim, pled to second degree murder and the active participant in the killing received immunity. Despite four valid aggravating circumstances, there were three non-statutory mitigating circumstances, two of which dealt with the differing treatment. Although Brookings actually pulled the trigger, the differing treatment between the three parties were facts that reasonably could be considered by the jury, and therefore, under Tedder, the override was improper. Page 142-143. In Cailler v. State, 523 So.2d 158 (Fla. 1988), the death sentence was reversed on a jury override, with this court finding that disparate treatment could have served as a basis for the jury's recommendation of life, despite the fact that the trial judge specifically rejected such treatment as mitigating factor as was the case with Appellant Jackson. See also Dolinsky v. State, supra, in which a jury override was reversed, with this court finding that the jury might well have had a reasonable basis for a life recommendation by considering what happened to co-defendants, as well as considering the testimony regarding Dolinsky's qualities as a hard-working man: "we find that reasonable persons could differ as to the propriety of the death sentence here." Page S146.

Finally, the emotional and domestic nature of the incident and surrounding factors (as was reflected previously) must be considered by this court, and almost certainly were considered by the jury as yet another reasonable basis for their recommendation of life. In Downs v. State, __So.2d__; 16 F.L.W. S106 (Fla. 1991), Downs murdered his estranged wife and attempted to kill a witness

to the incident. As in the instant case, the testimony indicated that Downs was distraught over his failing marriage and his belief that he was losing his wife and children to another man. Page S107. In reversing the override of the jury's recommendation of life, this court specifically held that such recommendation "is consistent with other cases involving domestic confrontations or lovers' quarrels in which this court has found the death penalty unwarranted." Page S107.

Wherefore, because of the improper consideration of aggravating circumstances and an improper weighing of the mitigating circumstances against the remaining circumstances, the death sentence must be reversed.

Also, the death sentence must be reversed due to the improper override of the jury's recommendation of life.

POINT VI

THE TRIAL COURT ERRED IN IMPOSING IMPROPER SENTENCES ON THE NON-CAPITAL FELONIES.

The trial court sentenced the Appellant to life imprisonment on the various kidnapping charges reflected in counts six through ten of the Indictment, with such kidnapping sentences to run consecutively (Tr. vol. VII, pg. 1381). The court did not prepare guideline scoresheets, nor did the court set forth the written justification for the departure sentences on these non-capital felonies. Rule 3.701(d)(1) mandates that the sentences be imposed on a sentencing guideline scoresheet that has been reviewed by the trial judge, Holton v. State, __So.2d__; 16 F.L.W. S136 (Fla. 1991). Without guideline scoresheets and without contemporaneous written reasons justifying a departure sentence, the non-capital sentences must be remanded for resentencing within the recommended guideline range.

POINT VII

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

Throughout the course of the trial, various rulings by the trial court resulted in prejudice to the Appellant, which cumulative effect requires a new trial.

The trial court erred by failing to grant a continuance of the trial in the instant matter. The Appellant requested more time to prepare the defense, specifically to review voluminous transcripts of past trials, to present witnesses who were unavailable and to redepose various key witnesses, including Karen Jackson and newly discovered witness Lambrix. This motion was denied by the trial court (Tr. vol. I, pg. 31, 35). Adequate time to prepare a defense is inherent in the right to counsel under the VI Amendment and is founded on constitutional principles of due process and cast in the light of notions of a right to a fair trial. Harley v. State, 407 So.2d 382 (Fla. 1st DCA 1981), pg. 383. This denial of a continuance constituted an abuse of discretion and a new trial is required. See Palmer v. State, 380 So.2d 476 (Fla. 2d DCA 1980).

The trial court erred by restricting the impeachment of Officer Schlein regarding disciplinary proceedings within the deparment (Tr. vol. IV, pg. 740). This preclusion of the cross examination of a critical State witness requires reversal as the court improperly disregarded the absolute right to elicit facts, showing

a State's witness bias, motive and self interest. Cherry v. State, __So.2d__; 15 F.L.W. D2804 (Fla. 1st DCA 1990), pg. D2804.

The trial court erred by refusing to allow the Appellant Jackson to act as co-counsel. The Appellant Jackson had the highest possible interest in the matter and, as he informed the court through motions for library privileges and through his direct comments at the hearing of March 1, 1990, the Appellant Jackson was now aggressively, actively involved in his defense and was becoming aware of the laws and procedures applicable (Tr. vol. I, pg. 13). The Appellant should have been allowed to act as co-counsel at the trial of his case.

As was mentioned previously, the trial court aggressively attempted to intimidate and hinder the defense and the defense counsel throughout the course of the trial, including an admonition to stop backstriking during the jury selection (Tr. vol. I, pg. 254), despite this court's holding in an earlier opinion on this case that backstriking was proper, Jackson v. State, 464 So.2d 1181 (Fla. 1985), pg. 1183.

The trial court also read Count 11, charging the kidnapping of Karen Jackson to the jury, a charge of which the Appellant had been previously acquitted. A Motion for Mistrial was denied and the court instructed the jury to disregard. (Tr. vol. I, pg. 72-73). This activity by the court made it clear to the jury that there had been at least one previous trial, at which the Appellant was acquitted of the kidnapping charge. Inversely, the unmistakeable conclusion by the same jury would be that the Appellant was

not acquitted of the remaining charges, that he was previously convicted by a separate jury. This was the very rationale which led to the reversal of the conviction and sentence after Jackson's second trial. Jackson v. State, 545 So.2d 260 (Fla. 1989).

The trial court erred by allowing the extremely gruesome and inflammatory photographs of the victims to be presented to the jury. These photographs were certainly so inflammatory as to create an undue prejudice in the minds of the jury and to detract from a fair and unimpassioned consideration of the evidence in the case. Young v. State, 234 So.2d 341 (Fla. 1970), pg. 348. This court previously found the photographs admissible to prove identity and to corroborate the Medical Examiner's testimony [Jackson v. State, 545 So.2d 260 (Fla. 1989)], but in the instant case, the Medical Examiner, Larry Tate, testified that not only were the photos gruesome, but they did not assist him regarding his testimony on the cause of death - despite specific coaching by the trial court to use the photographs for such purpose (Tr. vol. IV, pg. 676, 681).

The trial court erred by allowing testimony regarding numerous problems between the Appellant and his wife in the past (Tr. vol. IV, pg. 659) and the allegations that the Appellant had handcuffed his wife to the bed (Tr. vol. III, pg. 429). These matters had the effect of simply inflaming the jury by showing bad character, and any arguable probative value would certainly be outweighed by this improper prejudicial effect and the speculation which would necessarily occur. See Washington v. State, 432 So.2d 484 (Fla. 1983).

Various comments made by the Assistant State Attorney during closing argument resulted in prejudice to the Appellant, and this misconduct prevented the Appellant from receiving a fair trial. Specifically, the court allowed testimony, over objection, of the fact that one of the victims was pregnant at the time of the incident, which again was improper and was brought in before only for the inflammatory and prejudicial effect (Tr. vol. IV, pg. 672). The prosecutor then emphasized this fact during the closing argument (Tr. vol. VI, pg. 1043). Also, after the trial court improperly admitted the inflammatory photographs as mentioned previously, the prosecutor not only emphasized those photographs but indicated to the jury that the photographs the jury saw were very mild (Tr. vol. VI, pg. 1044), which improperly implied to the jury that the State had more evidence upon which it could have relied.

Finally, the prosecutor repeatedly made improper argument to the jury, again indicating additional evidence which was not brought forward and personal beliefs and improper attempts to bolster the State's case by stating that "the judge knows and everyone knows that the Appellant is guilty" (Tr. vol. VI, pg. 1044-1045, 1051).

Prosecutorial misconduct occurred when the prosecutor improperly mentioned a second holster which he knew, from his prior experience with this case, had been lost and could not be produced by the State. A Motion for Mistrial was denied (Tr. vol. V, pg. 957).

The trial court erred by failing to admonish the jury or grant a mistrial after repeated outbursts by State witness Shirley Jackson regarding the fact that she was sick of coming to court, sick of testifying at the trial, and that she'd been doing it for ten years (Tr. vol. III, pg. 492, 494-495, 497-498, 502). Again, this indicated to the jury that there had been previous trials and, taken in conjunction with the trial court's reading of a count of kidnapping of which the Appellant had been acquitted, clearly indicated in support of the conclusion that there were previous convictions by earlier juries.

The trial court erred by failing to declare Karen Jackson a hostile witness, thereby enabling the Appellant to effectively cross examine the witness, and erred by preventing the Appellant from calling and presenting witness Lambrix. There was a letter which was allegedly from Lambrix's attorney which supposedly stated that Lambrix would not be allowed to testify (Tr. vol. I, pg. 28-30). The trial court took no testimony and did not verify the content or the allegations of the supposed attorney letter, and therefore denied the Appellant access to a potential critical defense witness.

The trial court erred by refusing to deny the instant case on double jeopardy grounds and the resultant extreme delay which caused prejudice to the Appellant. As was noted in the hearing on March 12, 1990, and as was previously discussed, the current conviction is the result of the fourth trial to which the

Appellant Jackson was subjected, with one ending in a mistrial with a document on an evidence box indicating a prior conviction (Tr. vol. I, pg. 36). Of course, the Appellant Jackson's last conviction was reversed by this court when during the State's cross examination of the Appellant regarding letters that the Appellant received from his wife while "awaiting trial", the prosecutor specifically stated to Jackson, and the jury, "you had already been to trial, hadn't you?" "And you had been convicted when you were in prison, right?" "Your status was as being convicted, correct?" (Tr. vol. VIII, pg. 1192-1193).

This court specifically held that the evidence of the Appellant's prior conviction was not inadvertantly presented to the jury, but was intentional. (Tr. vol. VIII, pg. 1193). The retrial of the Appellant in the instant matter and the imposition of the death sentence violate the Appellant Jackson's constitutional right against double jeopardy, specifically the bar against successive prosecutions for the same offense. U.S. Constitution, Amendment V; Art. I, §9, Florida Constitution.

Although Appellant Jackson acknowledges that double jeopardy is generally no bar to reprosecution where a mistrial is granted following a defense motion, a specific exception exists regarding a situation where the State deliberately provokes the defendant into moving for a mistrial, or in this case, deliberate action requires reversal. See Oregon v. Kennedy, 456 U.S. 667 (1982), pg. 669; Robinson v. State, __So.2d__; 16 F.L.W. S107

(Fla. 1991), pg. S109. In Robinson, this court acknowledged the earlier reversal of conviction and death sentence, based upon the prosecutor's deliberate attempt and appeal to bias prejudice. Pg. S109. Unlike Keen v. State, 504 So.2d 396 (Fla. 1987), the prosecutor in the instant matter intentionally and with prior calculation elicited from the Appellant Jackson the fact that Jackson had been previously convicted for the crimes with which he is again accused, and it was not a situation where the prosecutor, in the heat of the trial, acted improperly. Nor was this situation bringing the Appellant Jackson's prior conviction to the jury's attention similar to that reviewed by this court in Rutherford v. State, 545 So.2d 853 (Fla.), cert. denied 110 S.Ct. 353 (1989) where this court felt that the prosecutor's motive was to introduce evidence intended to convict the defendant, not to create error that would force a new trial. By any imagination, the prosecutor's actions in bringing the prior conviction of the Appellant before the jury cannot be seen as introducing evidence intended to convict. Based upon the intentional acts of the prosecutor, which showed blatant bad faith on their face, retrial of the Appellant Jackson was improper, and the Motion to Dismiss should have been granted by the trial court.

The cumulative effect of these aforementioned errors requires new trial.

CONCLUSION

Based upon the errors of fact and law made by the trial court, as well as the trial court's comments and attitudes exhibited toward the Appellant and the Appellant's trial attorney in defense, the Appellant was prevented from receiving a fair trial and a new trial is required.

Specifically, such new trial must be conducted by a new Circuit Court Judge, as the trial judge in this matter should have and must now recuse himself from further proceedings in this case.

Also, the death sentence in the instant matter was inappropriate and was improperly imposed, based upon invalid aggravating circumstances and based upon an improper weighing procedure in which the court did not consider the mitigating circumstances and the appropriateness of the death sentence.

Further, the death sentence must be vacated due to the improper override of a jury recommendation of life, which was well supported by mitigating factors, including the disparate treatment of the co-defendant Livingston.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was mailed to the Attorney General's Office, 111 Georgia Avenue, Suite 204, West Palm Beach, FL 33401 this 13 day of March, 1991.

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