IN THE SUPREME COURT OF FLORIDA

ERNEST SUGGS,

Appellant,

v. CASE NO. 80,340

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR WALTON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i-ii
TABLE OF CITATIONS	iii-
STATEMENT OF THE CASE AND FACTS	1-13
SUMMARY OF ARGUMENT	14
ARGUMENT	
POINT I	
THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS "RICHARDSON" CLAIM	15-19
POINT II	
THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS	19-24
POINT III	
THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL	24-27
POINT IV	
THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS CUMULATIVE ERROR CLAIM	27-35
POINT V	
THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION FOR KID-NAPPING	36-37
POINT VI	
THE TRIAL COURT DID NOT ERR IN ADMITTING THE IDENTIFICATION TESTIMONY OF RAY HAMILTON	37-39

TABLE OF CONTENTS
(Continued)

	PAGE(S)
POINT VII	
THE TRIAL COURT DID NOT ERR, DURING THE PENALTY PHASE, IN ADMITTING INTO EVIDENCE A BOOK ENTITLED DEAL THE FIRST DEADLY BLOW	39-42
POINT VIII	
THE TRIAL COURT DID NOT ERR IN ALLOWING STATUTORY AGGRAVATING FACTORS TO BE CONSIDERED BY THE JURY	42-48
CONCLUSION	48
CERTIFICATE OF SERVICE	49

TABLE OF AUTHORITIES

CASES	PAGE(S)
Adams v. State, 192 So.2d 762 (Fla. 1966)	30
Alvord v. State, 322 So.2d 533 (Fla. 1975)	44
Ansley v. State, 302 So.2d 797 (Fla. 1st DCA 1979)	18
Baker v. State, 438 So.2d 905 (Fla. 2nd DCA 1983)	18
Bedford v. State, 589 So.2d 245 (Fla. 1991)	37
Bew v. Williams, 373 So.2d 446 (Fla. 2nd DCA 1976)	29
Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982)	26
Bryan v. State, 533 So.2d 744 (Fla. 1988)	46
Buckrem v. State, 355 So.2d 111 (Fla. 1978)	32
Bullard v. State, 436 So.2d 962 (Fla. 3rd DCA 1983)	31
Card v. State, 453 So.2d 17 (Fla. 1984)	44
Clark v. State, 363 So.2d 331 (Fla. 1978)	17,28,31
Cochran v. State, 547 So.2d 928 (Fla. 1989)	37
Cotton v. State, 395 So.2d 1287 (Fla. 1st DCA 1981)	37
Craig v. State, 510 So.2d 857 (Fla. 1987)	33
Czubak v. State, 570 So.2d 925 (Fla. 1990)	26

TABLE OF AUTHORITIES
(Continued)

CASES	PAGE(S)
Dobbert v. State, 409 So.2d 1053 (Fla. 1982)	44
DuBoise v. State, 520 So.2d 260 (Fla. 1988)	37
Dunaway v. New York, 442 U.S. 200 (1979)	21
Edwards v. State, 538 So.2d 440 (Fla. 1989)	38
Elledge v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S70	17
Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)	45
Florida v. Bostick, 501 U.S. ___, 115 L.Ed.2d 389 (1991)	21,23
Florida v. Jimeno, 500 U.S. ___, 114 L.Ed.2d 297 (1991)	21
Florida v. Royer, 460 U.S. 491 (1983)	21,23
Gilvin v. State, 418 So.2d 996 (Fla. 1982)	22
Grant v. State, 390 So.2d 341 (Fla. 1980)	39
Gunsby v. State, 574 So.2d 1085 (Fla. 1991)	28
Hansbrough v. State, 509 So.2d 1081 (Fla. 1987)	20
Harmon v. State, 527 So.2d 182 (Fla. 1989)	45

TABLE OF AUTHORITIES
(Continued)

CASES	PAGE(S)
Henry v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S33	22
Hildwin v. State, 531 So.2d 124 (Fla. 1988)	46
Hitchcock v. State, 578 So.2d 685 (Fla. 1990)	41
Holton v. State, 573 So.2d 284 (Fla. 1990)	20,22
Jackson v. State, 522 So.2d 802 (Fla. 1988)	31
Jackson v. State, 575 So.2d 181 (Fla. 1991)	32
Johnson v. State, 442 So.2d 185 (Fla. 1983)	28,45
Johnson v. State, 465 So.2d 499 (Fla. 1985)	46
Justus v. State, 438 So.2d 358 (Fla. 1983)	37
Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992)	45
Koon v. Dugger, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S201	45
Kramer v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S266	27,32
Lewis v. State, 377 So.2d 640 (Fla. 1980)	29

TABLE OF AUTHORITIES
(Continued)

CASES	PAGE(S)
Lucas v. State, 335 So.2d 566 (Fla. 1st DCA 1976)	31
McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971)	17
Mann v. State, 603 So.2d 1141 (Fla. 1992)	33
Manson v. Brathwaite, 432 U.S. 98 (1977)	39
Marshall v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S459	28
Medina v. State, 466 So.2d 1046 (Fla. 1985)	22
Mendyk v. State, 545 So.2d 846 (Fla. 1989)	40
Messer v. State, 330 So.2d 137 (Fla. 1976)	41
Mitchell v. State, 527 So.2d 179 (Fla. 1988)	28
Neil v. Biggers, 409 U.S. 188 (1972)	38
Nowitzke v. State, 572 So.2d 1346 (Fla. 1990)	33
Occhicone v. State, 570 So.2d 902 (Fla. 1990)	26
Parker v. State, 476 So.2d 134 (Fla. 1985)	46
Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979)	30
Provenzano v. State, 497 So.2d 1177 (Fla. 1986)	47

TABLE OF AUTHORITIES
(Continued)

CASES	PAGE(S)
Randolph v. State, 562 So.2d 331 (Fla. 1990)	26
Remeta v. State, 522 So.2d 825 (Fla. 1988)	45
Rhodes v. State, 547 So.2d 1201 (Fla. 1989)	41
Richardson v. State, 246 So.2d 771 (Fla. 1971)	15
Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984)	37
Rogers v. State, 511 So.2d 526 (Fla. 1987)	47
Shapiro v. State, 390 So.2d 344 (Fla. 1980)	22
Simpson v. State, 418 So.2d 984 (Fla. 1982)	31
Slawson v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S209	45
Smith v. State, 424 So.2d 726 (Fla. 1982)	45
Smith v. State, 500 So.2d 125 (Fla. 1986)	17
Sochor v. State, 580 So.2d 595 (Fla. 1991)	35
Sochor v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S273	46
Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992)	45

TABLE OF AUTHORITIES
(Continued)

CASES	PAGE(S)
Spinkellink v. State, 313 So.2d 666 (Fla. 1975)	22
State v. Cumbie, 380 So.2d 1031 (Fla. 1980)	17,28
State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)	43
State v. Murray, 443 So.2d 955 (Fla. 1984)	30
Steinhorst v. State, 412 So.2d 332 (Fla. 1982)	20,46
Stewart v. Cook, 218 So.2d 491 (Fla. 4th DCA 1969)	29
Swafford v. State, 533 So.2d 270 (Fla. 1988)	47
Taylor v. State, 583 So.2d 323 (Fla. 1991)	31
Thompson v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S212	45
Tibbs v. State, 397 So.2d 1120 (Fla. 1981)	21
Tompkins v. State, 502 So.2d 415 (Fla. 1986)	46
Trepal v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S327	47
Turner v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S20	45
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	21
Ward v. State, 559 So.2d 450 (Fla. 1st DCA 1990)	26

TABLE OF AUTHORITIES
(Continued)

CASES	PAGE(S)
Washington v. State, 362 So.2d 658 (Fla. 1978)	45
Waterhouse v. State, 596 So.2d 1008 (Fla. 1992)	41
Wheeler v. State, 468 So.2d 978 (Fla. 1985)	31
Whitted v. State, 362 So.2d 668 (Fla. 1978)	26
Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985)	18
Williams v. State, ___ So.2d ___ (Fla. 1st DCA 1993), 18 Fla.L.Weekly D1036	37
Worden v. State, 603 So.2d 581 (Fla. 2nd DCA 1992)	30

OTHER AUTHORITIES

Canon 4-3.3, Code of Professional Responsibility	16
§787.01, Fla.Stat.	36
§90.607, Fla.Stat.	19

STATEMENT OF THE CASE AND FACTS

On the evening of August 6-7, 1990, Ernest Suggs robbed, kidnapped and brutally murdered Pauline Casey. Suggs was ultimately convicted of first degree murder, kidnapping and robbery and received a sentence of death for the murder conviction, thus prompting this appeal.

Mr. Suggs' brief sets forth the facts in what can best be described as a jury argument. As such, his statement is not appropriate under Florida appellate practice and will not be accepted by the State. Instead, the Appellee will rely upon its own statement, offered as a general overview of the case followed by particularized statements relevant to each point on appeal.

Generally, Pauline Casey was an employee of the Teddy Bear Bar (R 2242). On the evening of August 6, 1990, the bar was found "abandoned" with the door ajar and the cash missing (R 2220-2223). Pauline's car, purse and keys were found at the bar (R 2225-2226).

Ray Hamilton, Pauline's neighbor, told the police that he saw her shooting pool with a customer when he left the bar that night. Hamilton described that customer and the customer's green jeep, prompting the issuance of a "BOLO" (R 2685).

A patrol officer happened upon Mr. Suggs (who was speeding) and ultimately recognized the defendant's vehicle as the BOLO vehicle and stopped Mr. Suggs (R 2324-2325).

Officers Sunday, Mann and Sutton came to the scene and sought to question Suggs (R 2336). At the time, no one knew Ms. Casey was dead. Suggs agreed to cooperate and even showed

Officer Mann how to drive the jeep (R 2737). Suggs agreed to a search of his jeep and his home (R 2737-2739), see also (R 876-877). When Ray Hamilton was brought to the station he identified Suggs' jeep (R 2804), and a photograph of Mr. Suggs as the last known customer in the bar (R 2807). Still, at this point, no one knew Pauline had been kidnapped or murdered and no one was under arrest.

That situation changed swiftly. First, police searching Suggs' home found a sink full of cash, mostly small bills, totaling one hundred and seventy-six ($176.00) dollars (R 2739, 2740). Next, word came that Officer Lyle Haney, using a photo-tire print from Suggs' jeep, had found a set of similar tracks on a dirt road that led to the body of Ms. Casey (R 2335, 2343). The cumulative evidence led to Suggs' arrest (R 2740), and a more intense investigation (R 2746).

Divers found a Pilsner beer glass like the ones used in the bar and one of the three known (side-door) keys to the bar in the bay behind Suggs' home (R 2742). The victim's palm and finger prints were found in Suggs' jeep (R 3027). A serologist found a bloodstain on Suggs' shirt with an enzyme ("Type-1") that matched the victim's blood but not Mr. Suggs' blood (R 3159-3160).

Jail trustee Wallace Byars, Jr., meanwhile was told by Suggs that he (Suggs) had in fact killed Pauline Casey (R 3399). Suggs described (correctly) how she was killed and how he "Damn near cut her head off." (R 3400). Suggs explained that he took Pauline out of the bar at knife-point and boasted that he could beat the case because the police would not be able to place him with Pauline at the time she was killed (R 3400).

Suggs also made incriminating statements to James Taylor, his other cellmate. Suggs stated that he threw the murder weapon into a canal (R 3537). Suggs also claimed that the police were "bluffing" about finding the glass and key behind his home (R 3537). Suggs specifically stated he killed Ms. Casey to eliminate her as a witness (R 3538).

In addition to this direct evidence, other evidence surfaced which negated any defense; to-wit:

(1) Suggs alleged the money (etc.), got wet because he fell off his dock while replacing some boards. No new boards were found in or on the dock, and no tools were found (R 3623-3624).

(2) Suggs alleged that the money came from his parents, but the denominations (five "20's", one "10", three "5's" and fifty-one "1's") were in keeping with the cash till at a bar that sold dollar drinks, see (R 3627).

(3) Steven Casey and Ray Hamilton's alibi's were confirmed by phone records and a pizza-box stub, see (R 2719, 2759, 3067-3076).

At trial, the defense strategy was to portray Steven Casey, the victim's husband, as a possible suspect and to accuse the State of selectively investigating and prosecuting an "outsider". The State's experts were challenged by other experts retained by the defense (R 4417-4481).

When bar owner Ted Valencia explained there were only three side door keys to the bar, the defense tried to confuse the issue of "how many keys" existed and who had them (R 2256-2257). This

smokescreen was ultimately removed by the State's witnesses (R 2744-2745). Attempts to misrepresent that a key photographed on the cash register was Pauline's key were defeated when the key in the photograph was identified as a cash register key, not a side-door key (R 2300-2301). Also, the door key Pauline laid on the register was identified as a back door key, not the side door key in dispute (R 2301).

Defense counsel attempted to put words in the mouth of Officer Sunday by asking, on cross, if the investigation was "biased" against Suggs (R 2699). Officer Sunday clarified the issue by stating that any "bias" developed as more and more evidence came in which led to Suggs' arrest at 8:56 a.m., on August 7th, see (R 2718-2726).

The expert testimony regarding tire tracks by Laura Rousseau (R 3270, et. seq.), was ponderously questioned by defense expert Dale Nute, who primarily disputed minor technical procedures and created a jury question of whether he or Ms. Rousseau was more credible (R 4089, et. seq.). Nute admitted that Rousseau did correct tests (R 4171), and confessed that he did his tests on a different part of the road, after that road had been cleared and graded (R 4173). Nute incorrectly accused Rousseau of not using "side lighting" when photographing tire tracks, a point refuted later (R 4248). Even Nute found two "matching" tires (Rousseau found three), see (R 4191), and Nute could not overcome the "coincidence" that Officer Haney, using

photographs of Suggs' jeep's tracks, found the one dirt road that led right to the body of the victim.[1]

An attempt was also made to challenge the bloodstain expert, Lonnie Ginsberg. Mr. Ginsberg tested a human bloodstain found on Suggs' shirt. Mr. Ginsberg testified that Suggs and Ms. Casey had the same ABO blood type and that three of five other enzymes matched (R 3159-3160). The "ADA" enzyme, however, differed in that Mr. Suggs was ADA 2-1, while Ms. Casey was ADA 1 (R 3159-3160).

The human bloodstain on Suggs' shirt did not conclusively match (to Mr. Ginsberg's very conservative standards), see (R 3231-3232), the victim's ABO blood type or (4) out of (5) enzymes (R 3166-3167). The last enzyme, however, was ADA 1 - a match (R 3166-3167).

Ginsberg also found scant traces of sperm on Pauline's jeans but lacked a sufficient sample to test for DNA (R 3226).

The defense countered with its own expert, Mr. Kopeck, who was so evasive as to his "qualifications" that at one point the defense withdrew its proffer of the witness after a withering voir dire (R 3976-3984).

Kopeck claimed that Mr. Ginsberg could have run DNA tests on Pauline's clothes by using a test called "PCR" to increase the available DNA standards. The "expert", however, forgot that the "PCR" test was not available in 1990 when Ginsberg tested the evidence (R 4317). Kopeck misrepresented that ADA 2-1, over

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[1] The State had collected some tree branches with blue paint on them. Suggs' jeep was green but the FDLE van that drove up the road, before the branches were cut, was blue (R 4170).

time, "deteriorates into" ADA 1 (R 4302), and made other misstatements easily refuted by Mr. Ginsberg on rebuttal (R 4290-4327).

Finally, the defense tried to portray the two inmate witnesses as "incompetent" (Byars), or dishonest (Taylor), but again fell flat when the full panoply of evidence came in (see below).

Turning to the points on appeal, the following additional facts are noted:

Facts: Point I
("Richardson Hearing")

Pretrial motions to prevent the introduction of testimony from inmate Wallace Byars focused upon his mental health during the summer of 1990 (R 1155, et seq.). During the pretrial hearing, Mr. Byars' attorney, Mr. Mooneyham, told counsel and the court that Judge Lindsey had sent Byars to the Florida State Hospital (Chattahoochee) (R 1214), thus providing notice of Judge Lindsey's involvement.

On May 26, 1991, on the first day of trial, the defense lawyers ambushed the State with a packet of untimely "reciprocal discovery" intended to impeach Mr. Byars (R 2108). The prosecutor was not able to respond until the conclusion of jury selection on May 28, 1991, at which time he moved in limine to exclude this evidence as false and misleading (R 2108). Basically, the defense wanted to introduce limited evidence to support the false charge that the Sheriff of Walton County was granting special privileges to Byars, including unsupervised vacations from jail.

Defense counsel were fully aware that Byars was released for emergency medical care by Judge Lindsey - not the sheriff - and while on medical release, Mr. Byars was subpoenaed as a witness to Crestview (see R 3500, et seq.), since they had Byars' records.

When, however, it appeared that the court was going to allow this line of "impeachment", the prosecutor replied:

> Judge, if that's the case, I would like to put defense counsel on notice that Judge Lewis R. Lindsey will be a witness in this trial.

(R 2121).

The defense replied that it wanted a Richardson hearing (R 2121), and the court (Judge Melvin) agreed to hold one before Judge Lindsey testified (R 2122).

The issue was not argued again until June 2, 1991, giving defense counsel six days to prepare. At this hearing, defense counsel protested that they just did not want "a judge" to testify, period, and that "a Richardson hearing would not cure it" (R 3459).

Thus, the defense changed its argument from a Richardson objection to Judge Lindsey to a general objection to having judges testify at all. Thus, the Richardson issue was waived.

By this time, however, the defense had already cross-examined Wallace Byars and defense counsel, before the jury and with full knowledge that his assertion was false, openly accused Byars of obtaining releases from the sheriff rather than Judge Lindsey (R 3418).

Defense counsel argued that Mr. Byars' denial of this accusation was all the "proof" the State could be allowed to present (R 3459). Extensive argument on the issue led the State to offer, as a compromise, a stipulation that Judge Lindsey (rather than the sheriff), granted the furlough (R 3469). Defense counsel refused to stipulate, thus creating an issue of fact which forced the trial judge to allow Judge Lindsey to testify (R 3472). The testimony was delayed until the next day, giving defense counsel more time to prepare (R 3499, 3500).

Facts: Point II
(Motion to Suppress)

On August 7, 1990, Officer Russ Townsend spotted a vehicle speeding on 331 South (R 852). The speed limit was 55 mph and Officer Townsend, pursing the vehicle at 65 mph, was losing ground (R 863). The vehicle sped through a construction zone where the posted speed was only 35 mph (R 864).

The vehicle turned into a FINA station and made a U-turn, driving straight towards Officer Townsend (R 854). Only then did Officer Townsend realize that the vehicle was a green jeep similar to the vehicle in the BOLO report (R 854-855). The jeep had Alabama tags (R 855).

Townsend spoke to his sergeant on the radio and pulled the jeep over in or near a convenience store lot, at "the end of the driveway" (R 856). Townsend walked to Suggs' vehicle and told Suggs that the police were looking for a car like his (R 856). Townsend asked Suggs if he would wait to speak to some other officers and Suggs replied, "Sure" (R 856).

At the time, no one knew that Pauline Casey was dead or even kidnapped. The only interest anyone had in Suggs was the possibility he saw something that could help. Suggs was not under arrest and could have left (R 862, 873, 874-875).

While Officer Townsend was radioing his superiors, Mr. Suggs walked up to the police car (R 857). Townsend prudently dropped the "mike", exited his vehicle with his hand on his revolver,[2] and ordered Suggs to halt (R 857, 862). Suggs put both hands out and told Officer Townsend that he was on "probation" for murder (R 857). Townsend told Suggs to return to his jeep and to place both hands on the steering wheel (R 857).

Eddie Ferris, the shift sergeant, arrived and told Townsend to get the registration for the out-of-state jeep. Suggs had originally not been able to locate his registration (R 856), but now located his title (R 857).

Investigator Steven Sunday arrived at the scene and asked Suggs if he would go to the substation to talk with the police about an incident in Walton County (R 872). Suggs agreed, and even showed the police how to drive his vehicle (R 872). Suggs was not under arrest (R 873). Again, Suggs merely fit the description (including clothes), of the last known customer (R 874). No one knew Pauline was dead or even the victim of a crime at this point (R 874).

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[2] Townsend's testimony was consistent with the report he wrote on August 7, 1990, but differed with a pretrial deposition (R 868), where he is reported to have said he drew the gun. Townsend said the gun was not drawn (R 869).

At the station Suggs was told that the police were looking for a missing bartender (R 876), and consented to a search of his home (R 876). He later signed consents to search his home and car (R 876). The reason why Mr. Suggs was "nervous" was that he was illegally in the possession of firearms (as a "probationer") (R 879), and did not want a "violation" (R 879-880). Suggs was told that the police were not interested in the guns but merely wanted to "eliminate him" from the Teddy Bear Bar incident (R 880).

Mr. Suggs' home was searched with his consent as noted above. After money was found in the sink and Pauline Casey's body was discovered, a warrant was obtained (R 882).

The Appellant gave crucial testimony at the suppression hearing. Of particular importance was Mr. Suggs' testimony that he knew his rights and that he refused to consent to any searches until he won a statement from the police that they were not interested in any guns that were in the house (R 937).

At the conclusion of Suggs' testimony the court asked defense counsel about the scope of the motion to suppress (R 942). Counsel said that Suggs was not attacking the initial stop (R 942), because the defense felt it was a valid investigatory stop (R 942-943). The defense argued that it was challenging "everything after the defendant was placed in the police car" (R 944).

Facts: Point III
(Prosecutor's Opening Statement)

The prosecutor, during opening argument, made reference to the Appellant and a witness, Taylor, both knowing people from

Alabama (R 2166). The comment was made after the State mentioned that Taylor was in jail in Alabama (R 2166).

The defense objected, claiming that the two comments "ran together" to leave the impression that Suggs was in prison in Alabama with Taylor (R 2169, 2192). The judge had the court reporter read the transcript (R 2193). The court found the tape to be of greater value than the transcript because the transcript did not reflect pauses, stops, starts, etc. (R 2194-2195). The court found no misrepresentation by the State (R 2198), but offered a curative instruction.

Mr. Suggs' attorney did not want a curative instruction because it would "highlight" the comment (R 2199-2200). Instead, he said he would "cover the issue on cross" (R 2199-2200). After a recess, the lawyers again said they did not want an instruction (R 2200).

Later (R 2639), defense counsel requested that the prosecutor withdraw the comment before the jury, telling the court that that would "cure" the problem (R 2639). The defense refused, however, to withdraw the motion for mistrial (R 2639). The prosecutor agreed to give a curative statement and, based upon this compromise, the statement was approved and mistrial was denied (R 2673).

Facts: Point IV
("Cumulative Errors")

In Point IV, Mr. Suggs argues several "errors" which were not preserved for appellate review by proper objection. These alleged errors will be addressed in the "argument" section of the brief.

Facts: Point V
(Sufficiency of Evidence: Kidnapping)

The evidence clearly supported the charge that Pauline Casey could not have left the Teddy Bear Bar "voluntarily" and was, in fact, kidnapped.

First, Pauline would not have abandoned the bar, leaving the front door open (R 2221-2222, 2242).

Second, even if she left work, she would not have abandoned her purse and keys, yet both were left at the bar (R 2225-2226).

Third, there was no evidence to explain why Pauline would drive off into the woods with Mr. Suggs.

Fourth, Suggs told Mr. Byars that he took Pauline out of the bar at knife-point (R 3400).

Suggs' confession, supported by the physical evidence, was sufficient to convict.

Facts: Point VI
(Suppression of In-Court Identification)

Ray Hamilton described the last customer (Mr. Suggs) to the police, as well as that customer's vehicle. The description included the clothes worn by Mr. Suggs (R 2805, 1364-1368).

As noted before, Hamilton readily identified Suggs' jeep even as the police were pulling into the substation parking lot (R 1368).

Facts: Point VII
(Admission of Book During Penalty Phase)

The consent and warrant based searches of Mr. Suggs' home led the police to a book entitled Deal the First Deadly Blow,

which was linked to Mr. Suggs by a nearby notebook containing paramilitary articles and notes written with references to "Ernie" and later to "I" (R 4602-4604). A comparison of the autopsy photos to the pictures in the book also linked the book to the crime (R 4629).

Facts: Point VIII
("Aggravating Factors")

This issue will be convered in the "argument" portion of this brief.

SUMMARY OF ARGUMENT

Mr. Suggs offers six general challenges to his conviction and two challenges to his sentence of death.

The Appellant's guilt phase claims combine preserved and unpreserved "issues" with an incomplete view of the transcripts in an effort to create the illusion of error. None of his claims enjoy factual or legal support.

The Appellant only challenges three of the seven (applied) statutory aggravating factors, and concedes that two of those three claims were not preserved below. In point of fact, the trial court correctly applied seven distinct aggravating factors in sentencing the Appellant.

Mr. Suggs is not entitled to relief.

ARGUMENT

POINT I

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS "RICHARDSON" CLAIM

The Appellant, Mr. Suggs, contends that the trial court reversibly erred by allowing, as a state rebuttal witness, Judge Lindsey to testify without first conducting a proper inquiry pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971). The State rejects this argument as both inconsistent with Mr. Suggs' position at trial and as meritless.

(A) The Appellant's Position Is Inconsistent With His Arguments At Trial

The facts surrounding this issue need not be repeated. It is obvious from the record that Mr. Suggs had a plan of battle which backfired and now he wishes to retry his case using a different plan.

Mr. Suggs confessed to Wallace Byars. When Byars became a witness, Suggs needed a way to discredit him. After investigating Byars' own criminal files, Suggs learned that Byars suffered from a life-threatening medical condition which was brought to the attention of Judge Lindsey, who furloughed Byars to Shands Hospital. Although Byars was unguarded, he was required to maintain contact with the authorities. While on this furlough Byars was subpoenaed by the State to testify in Okaloosa County. Byars stayed at a hotel, where he ultimately was rearrested after a fight with his wife.

Suggs decided to manipulate portions of this file into an attack upon Byars' credibility. After carefully deleting Judge

Lindsey's orders from his "packet of evidence", Suggs concocted the falsehood that Byars was a jailhouse snitch who was rewarded for his work, by the sheriff, with unsupervised vacations to beachfront Hilton hotels. This story was highly improper (Canon 4-3.3, Code of Professional Responsibility), but Suggs did not care.

In an apparent effort to prevent the State from refuting this story, Suggs withheld his "evidence" until the first day of trial (R 2108).[3] The State protested the ambush to no avail, causing the prosecutor to declare that he had to call Judge Lindsey as a witness (R 2121). The court, at the request of Mr. Suggs, agreed to conduct a Richardson hearing (R 2122).

This issue did not resurface for five days. In that time, the defense proceeded with its charges of "favoritism" even though Suggs knew it was not the truth. The defense hoped to limit the State's rebuttal of its "evidence" to the mere denial of Mr. Byars, whose credibility was in dispute.

While Mr. Suggs could exploit this tactic by impeaching Byars, he could not impeach Judge Lindsey. Thus, when the time came for the Richardson hearing, Suggs confessed that Judge Lindsey's testimony would destroy his "defense" and noted "a Richardson hearing would not cure it." (R 3459).

Suggs was correct. Richardson deals with procedural prejudice, i.e., a surprise witness and its impact upon the

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[3] The defense had an obligation to timely serve any reciprocal discovery. Fla.R.Crim.P. 3.220(d). The rules apply to the defense as well as the State. State v. Meyer, 430 So.2d 440 (Fla. 1983).

opposing party's ability to prepare for said witness, not with "substantive" prejudice, i.e., the ultimate value of the witness' testimony. Smith v. State, 500 So.2d 125 (Fla. 1986); Elledge v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S70. Thus, the issue, to Suggs, was not one of "notice" (he even had five days warning to prepare for the witness), nor was it one of "surprise" (Suggs already knew the truth). The issue, to Suggs, was one of substantive prejudice ("should a judge ever be allowed to testify as a witness"), and that substantive issue was beyond the scope of Richardson. That is why, on June 2, Suggs told the court that a Richardson hearing no longer made any different.

Now, on appeal, Suggs tailors his facts as he did below, then Suggs complains that he did not receive a technically perfect Richardson hearing. Suggs is clearly trying to sandbag the lower court with a technical "error" which, if anything, was Suggs' own fault and to which Suggs never objected.

Mr. Suggs is estopped from assuming an inconsistent position on appeal. McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971). If Suggs had wanted a more extensive hearing, he could have had it (after all, the court had already agreed). Suggs not only eschewed any formal hearing, he did not object to the "lack" of a hearing when the court ruled. His only objection was to Judge Lindsey being allowed to testify. By not objecting, Suggs waived his appellate remedies. Clark v. State, 363 So.2d 331 (Fla. 1978); State v. Cumbie, 380 So.2d 1031 (Fla. 1980).

(B) The Trial Court Held An Adequate Richardson Hearing

Richardson states that it is not necessary for a trial court to formally declare the opening and closing of a "Richardson Hearing" in order to satisfy the requirements of the decision. All that is required is a sufficient inquiry to determine the existence of any procedural prejudice and the steps necessary to cure the same. Furthermore, a detailed "order" is not required. Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985); Baker v. State, 438 So.2d 905 (Fla. 2nd DCA 1983); Ansley v. State, 302 So.2d 797 (Fla. 1st DCA 1979).

The record at bar shows the existence of two separate hearings on the issue of Judge Lindsey's testimony. Furthermore, the record contains Judge Melvin's express statement that a Richardson hearing would be held (and in fact one was). The hearings, though composed of argument by counsel, were clearly adequate to reveal the total absence of procedural prejudice as well as Suggs' preoccupation with "substantive prejudice". In fact, even Suggs confessed that since his concern was substantive, a Richardson hearing was "useless".

(C) Prejudice

Mr. Suggs makes the same substantive prejudice argument on appeal that he made below. Although substantive prejudice is irrelevant to Richardson, and although Suggs has neither alleged nor shown any procedural prejudice, we will briefly respond to his claim of substantive prejudice.

Mr. Suggs misstates the teachings of Professor Erhardt and, incredibly, tries to tell us that a judge can never be a witness in any proceeding, no matter the issue. This argument is almost unworthy of response, but, for the record, Erhardt's actual teaching is that a judge "should not" be a witness in a case in which said judge is the presiding judge. See §90.607, Fla.Stat. All of Suggs' cited authorities speak to the conduct of a presiding judge coming down from the bench to testify - not to a third party witness who happens to be a judge.

(D) Conclusion

The bottom line is that Suggs tried to hoodwink the jury with a phony and malicious story and he got caught. Now Suggs wants a new trial so he can try a different approach, and to get that trial he has fabricated a Richardson claim.

Richardson says one more thing which effectively resolves this case. It says that our rules of procedure were not created to provide a system of "procedural escape hatches" for criminal defendants. Mr. Suggs should not be allowed to win a new trial by means of his self-constructed escape hatch.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS

The second issue on appeal is an allegation that Mr. Suggs did not give valid consents to the search of his car or his home, thus compelling suppression of the physical evidence in this case. It is submitted that Mr. Suggs gave an informed and valid consent which led to the legal discovery and seizure of admissible evidence.

(A) The Initial Stop Was Legal

Mr. Suggs stipulated, on the record, that Officer Townsend properly stopped him and detained him on the morning of August 7, 1990 (R 942-943). To the extent Suggs would now abandon that position, we note that Suggs is estopped from challenging Officer Townsend's action, on appeal, given his stipulation sub judice. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Holton v. State, 573 So.2d 284 (Fla. 1990).

For the record, however, we note: (1) When Officer Townsend first detected a vehicle speeding across the Bay Bridge, he did not know it was the BOLO vehicle (R 854-855); (2) the "tail lights" Officer Townsend pursued were pulling farther away even though Townsend sped his cruiser to 65 mph. In fact, Suggs sped through a 35 mph zone at this speed (R 863-864); (3) Townsend only recognized the car as the BOLO vehicle when it made a U-turn and passed alongside, an event similar to Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (R 854-855); (4) when Suggs was stopped, he was unable to provide a registration (R 855, 914), to his out-of-state vehicle; (5) events escalated when Suggs revealed that he was "on probation for murder" (R 857), and (6) Suggs himself told Judge Melton that he was also driving "under the influence" (R 915, 933).

It is submitted that if Officer Townsend had chosen to do so he could have arrested Suggs for the apparent and obvious traffic infractions and detained him for probable violation of parole. (It being logical to assume a violation of the terms of parole from the other infractions).

Suggs, however, was not placed under arrest and was simply asked to await the arrival of some other officers who wished to talk to him. Again, at the time this request was made, no one knew there had been a murder, a kidnapping or a robbery. All the police "knew" was that a barmaid was missing along with the day's cash, and that Suggs might have seen something useful.

Although Suggs waived this issue below, we would, for the sake of completeness, note that this initial stop and "seizure" does not provide a basis for suppression under the caselaw.

Mr. Suggs compares this case to Dunaway v. New York, 442 U.S. 200 (1979), but the cases are not similar. In Dunaway, the police knew they were investigating on a tip. The police also conceded that Dunaway would not have been allowed to leave despite their lack of sufficient cause and an improper "stop". In our case, the unrebutted testimony of the police was that Suggs could have left if he wanted (R 862, 873, 900). The credibility of that testimony was for Judge Melton to decide. Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

Mr. Suggs also cites to Florida v. Royer, 460 U.S. 491 (1983), but on the issue of initial detention, either to detain a suspect or merely to obtain information, Royer clearly holds that the police have the right to approach, detain and question a civilian to a limited extent, citing United States v. Brignoni-Ponce, 422 U.S. 873 (1975). That position was affirmed in Florida v. Jimeno, 500 U.S. ___, 114 L.Ed.2d 297 (1991), and in Florida v. Bostick, 501 U.S. ___, 115 L.Ed.2d 389 (1991).

Thus, as Suggs agreed below, his initial detention was appropriate, and his consent to await the other officers was not coerced or tainted by some illegality.[4]

That brings us to the issue of whether Suggs' various "consents" were valid.

(B) The Trial Court Did Not Err In Finding Valid Consents

At the outset we would note that the trial court's order carries a presumption of correctness on appeal. Henry v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S33; Medina v. State, 466 So.2d 1046 (Fla. 1985). In reviewing that order, all disputed facts and all inferences from those facts must be taken and resolved in favor of the judgment. Holton v. State, 573 So.2d 284 (Fla. 1990); Gilvin v. State, 418 So.2d 996 (Fla. 1982); Shapiro v. State, 390 So.2d 344 (Fla. 1980); Spinkellink v. State, 313 So.2d 666 (Fla. 1975).

Judge Melvin had virtually unanimous testimony from all of the witnesses, including Mr. Suggs, that his consent, as indicated in the signed forms, was validly given.

When Townsend turned Suggs over to the investigators, these officers told Suggs that they were seeking a car like his and would like to question him (at the station) (R 856). Suggs not

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[4] Although Suggs was not detained or questioned on the pretense of a violation of parole, which might have been improper under Braxton v. State, 524 So.2d 1141 (Fla. 2nd DCA 1988), but see Griffin v. Wisconsin, 483 U.S. 868 (1987), Suggs was clearly concerned about his own parole status, which he volunteered to the police. The mere fact that Suggs may have felt "limited", however, is not dispositive. Bostick, supra, at 399, to the issue of alleged "coercion", a point we will revisit below.

only consented, he showed Officer Mann how to drive his jeep (R 872, 908).

The testimony of Mr. Suggs actually supported the court's decision. Mr. Suggs was "nervous" because of his parole status (R 937). Suggs (who was the son of a police commissioner and a convicted murderer), surely was no stranger to the criminal justice system and, clearly, told the truth when he said that he was fully aware that he did not have to consent to anything (R 937). Suggs did not acquiesce to authority. Rather, he "held out" or negotiated his consent to guarantee that his parole would not be violated (R 937). An admitted strategy of negotiation clearly defeats any appellate claim of coercion.

Since, on appeal, the entire record is reviewed, we would go on to note other evidence, from trial, which explained Mr. Suggs' decision. Mr. Suggs carefully planned his crime and the destruction of any evidence. Thus, when the police found the glass and key from the Teddy Bear Bar, Suggs declared that they were "bluffing" (R 3537). In fact, Suggs was certain there was no discoverable evidence linking him to the crime (R 3537, 3538, 3400). Thus, Suggs executed the negotiated consents to protect himself from the Alabama case, while secure in the knowledge he would not be linked to the killing at bar.

There is no evidence of coercion or mere acquiesceance in this case, thus making this case more akin to Florida v. Bostick, 501 U.S. ___, 115 L.Ed.2d 389 (1991),[5] than to Florida v. Royer,

[5] We would also note the decisions in State v. Hester, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S308, and State v. Jenkins, ___ So.2d ___ (Fla. 2nd DCA 1993), 18 Fla.L.Weekly D878, relating to

460 U.S. 491 (1983) (in which the defendant was actually held in a room and was not free to go, and silently allowed the police to open his luggage). Furthermore, the touchstone issue of "what a reasonable pereson might believe" is answered by Mr. Suggs' own statements. See Florida v. Jimeno, supra, so that no speculation is necessary; Suggs had tactical grounds for his decision.

In sum, therefore, Suggs has retreated from his position that his original stop and detention were legal and has tried to construct a facade of illegal restraint followed by some submission to authority. To the extent his claim is available for review, neither illegal police conduct nor acquiesceance has been shown. That, in turn, means that however debateable Mr. Suggs' views, no record basis for reversing the presumptively valid judgment of the lower court exists.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL

The Appellant's third point on appeal is without foundation in either fact or law. Here, as at trial, Mr. Suggs has taken a single sentence from the prosecutor's opening argument, twisted it out of context and manufactured a theory of the facts which no one shared (below) or can reasonably accept at this level.

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police encounters, consents, and the gradual escalation of information leading to an ultimate arrest. We also note California v. Hodari, ___ U.S. ___, 115 L.Ed.2d 389 (1991), requiring a showing of physical restraint or submission to authority to show a "seizure". Here, Suggs was, as noted before, was free to refuse (or to leave) and, by his own admission, aware of his rights.

The single most important omission from Mr. Suggs' brief is the fact that the trial judge reviewed not only the "transcript" (as read by the court reporter) but listened to an audio-cassette of the prosecutor's opening (R 2195). After doing so, the judge took pains to place on the record the "pauses, stops and starts" from the tape which clearly showed that the state's attorney did not say that Suggs was in prison in Alabama (R 2195, 2198).

This was not the only "fact" omitted from Mr. Suggs' brief. The Appellant failed to report that the prosecutor also told the jury that his argument was not evidence (R 2148). Of course, (as Suggs does admit) pursuant to a defense request for a corrective statement which would "cure" the problem, (R 2639), the prosecutor made a statement correcting any misimpression which the defense approved despite retaining its objection (R 2639). The defense assured the court it was not "sandbagging" (R 2650) the issue for appeal.

Mr. Suggs is apparently of the opinion that juries suffer from selective hearing. Thus, according to Appellant, the jury twisted the prosecutor's comment in the same manner he has, yet the jury ignored or did not hear the "arguments are not evidence" admonitions or the corrective statement. This is pure nonsense.

The Appellant is, again, reminded that this is an appeal, thus compelling all disputed facts to be taken in favor of Judge Melton's decision. Spinkellink, supra; Gilvin, supra. Mr. Suggs' theory regarding what the prosecutor said or how it might have been interpreted is flatly irrelevant.

In the same vein, we would refer the Court to Randolph v. State, 562 So.2d 331 (Fla. 1990). There, this Court recognized anew that a trial judge who sees and hears the proceedings before her is in a vastly superior position to assess error and prejudice and her decision is entitled to deference.

In Occhicone v. State, 570 So.2d 902 (Fla. 1990), the Appellant complained that the prosecutor engaged in improper opening argument. This Court noted that, indeed, opening arguments are not evidence, see, Whitted v. State, 362 So.2d 668 (Fla. 1978) and that the control of opening statements is purely a matter of judicial discretion. Breedlove v. State, 413 So.2d 1 (Fla.) cert. denied, 459 U.S. 882 (1982).

Mr. Suggs' error, clearly, stems from his incorrect equation of "arguments" with "evidence." This is demonstrated by his cited cases, including Czubak v. State, 570 So.2d 925 (Fla. 1990) and Ward v. State, 559 So.2d 450 (Fla. 1st DCA 1990). Those cases both involved evidence or testimony elicited during trial, not mere argument. Thus, the citations are irrelevant.

In an effort to salvage the point, Mr. Suggs lifts two unrelated events from the trial and gamely attempts to link them to the prosecutor's alleged argument.

The first event was the state's cross examination of Mrs. Suggs after the Appellant's mother misrepresented that Suggs had worked (for a Mr. Mayne) for "several years" prior to 1990 (R 3920-21). The defense conceded that cross examination regarding employment with Mr. Mayne was proper (R 3922) as long as no reference was made to prison (R 3926-27). The court limited the

scope of cross examination and the state concluded its questions on point without objection (R 3943)[6]

The second event was the prosecutor's rebuttal argument, wherein he responded to defense portrayals of Suggs as honest and hardworking (R 4420) by simply citing to the lack of evidence, a proper response, Kramer v. State, 18 Fla. L. Weekly S. 266 (Fla. 1993) to which no objection was made.

The issues cited by Mr. Suggs as "support" for his claim regarding opening argument, are simply not preserved and not available for review, and Suggs cannot save unpreserved claims by linking them to the oral argument.

The Appellant has no legal or factual basis for relief on point three, and in particular has failed to show any abuse of discretion by the trial court. Breedlove, supra.

POINT IV

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS CUMULATIVE ERROR CLAIM

The fourth point on appeal is an ad hominem assault on the trial prosecutor on the basis of alleged "improper" arguments which, in truth, were so innocuous that they did not draw any objections at trial. The so-called improprieties consisted of: (1) an alleged "Golden Rule" argument; (2) a reference to the vicitm's inability to testify; (3) references to gaps in the affirmative defenses set forth by Mr. Suggs; (4) reference to the

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[6] The "objectionable testimony" at (R 3928-31) cited in Suggs' brief was, in fact, a proffer outside the jury's presence.

putative defenses as a "smokescreen", and (5) reference to the defendant's experts as "hired guns".

Defense counsel also criticized questions asked by the prosecutor which related to "probable cause", yet, again, no objections were raised at trial.

To circumvent the procedural obstacle, the Appellant once again labels one error "fundamental" and then tries to bootstrap all of his unpreserved issues into the "fundamental" issue.

Trial courts cannot be sandbagged on appeal with claims that were not fairly presented at trial. This includes claims of improper prosecutorial conduct. Clark v. State, 363 So.2d 331 (Fla. 1978); State v. Cumbie, 380 So.2d 1081 (Fla. 1980); Johnson v. State, 442 So.2d 185 (Fla. 1983); Tillman v. State, 471 So.2d 32 (Fla. 1985); Mitchell v. State, 527 So.2d 179 (Fla. 1988); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); Marshall v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S459. Thus, none of Mr. Suggs' "claims" are properly before the court. Without waiving this point, however, the State would note:

(A) "Golden Rule"

The defense proposed that Pauline Casey was murdered by her husband, to collect her life insurance. This unfair attack upon the surviving spouse was not supported by evidence beyond the mere collection of a death benefit by Mr. Casey. To prop up this "defense", Mr. Suggs called Mr. Casey as a straw man witness (R 3667, et seq.), and then argued Mr. Casey's bad memory for precise events in the days following his wife's murder as "proof" he murdered Pauline Casey. In rebuttal to this incredible attack

upon the family of the victim, the prosecutor replied to the "memory" issue in the manner quoted in Suggs' brief.

The context of the argument is clear. The prosecutor was explaining in common sense terms why someone's memory might lapse. He was not asking the jury to rule against Suggs by pretending it was the victim. Thus, as a "Golden Rule" argument this argument was borderline at best.

In Bew v. Williams, 373 So.2d 446 (Fla. 2nd DCA 1976), the second district, citing to Stewart v. Cook, 218 So.2d 491 (Fla. 4th DCA 1969), held that there were cases in which an "abstract" use of the pronoun "you" in an argument would not render the argument violative of the Golden Rule.[7]

We submit that the use of the pronoun "you" in the context of this case was abstract usage geared to the credibility of Mr. Casey as challenged by the defense. In this context, we would cite to Lewis v. State, 377 So.2d 640 (Fla. 1980).

In Lewis, the prosecutor argued:

> Now, if you just shot a man in self-defense, wouldn't you tell that to the deputy? Instead of, 'He's been bugging me a long time and I'm tired of it and I shot him.'"

Id. at 645.

This Court, while noting the reference to "you" to the jury, looked at the statement in context and ruled that the argument was, in fact, a comment on the credibility of the proposed defense rather than a Golden Rule violation. Thus, Lewis is

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[7] Factually, the attorney in that case used "you" in actual reference to a party at trial, not to the jury. The Appellant felt the pronoun could have been misunderstood.

precisely on point. Here, the "you" reference addressed the defense that Steve Casey killed Pauline and lied about his conduct in the days following her death by feigning a bad memory. The prosecutor's response, that a memory loss after the death of a spouse was reasonable, was essentially identical to the context of Lewis. In Worden v. State, 603 So.2d 581 (Fla. 2nd DCA 1992), the court, again, refused to call an argument a "Golden Rule" argument when it did not seek to place the jury in the "shoes of the victim".

Interpreting and resolving this record in favor of the judgment, it simply cannot be accepted that the argument at bar was a "Golden Rule" argument.

Mr. Suggs goes on, however, to allege that the presence of a "Golden Rule" argument is per se reversible error which compels relief even in the absence of an objection. He is wrong. Prosecutorial errors, standing alone, will not compel reversal unless they are "fundamental" as described in State v. Murray, 443 So.2d 955 (Fla. 1984), and the "mailorder catalog" case of Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979). The argument at bar does not remotely approach these examples.

The cases cited by Mr. Suggs do not support his position.

Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), addressed fundamental error from the context of a veritable "catalog" of improper and inflammatory arguments, not just a "Golden Rule" argument.

Adams v. State, 192 So.2d 762 (Fla. 1966), makes no reference to the presence or absence of an objection.

Lucas v. State, 335 So.2d 566 (Fla. 1st DCA 1976), again makes no reference to objections.

In Bullard v. State, 436 So.2d 962 (Fla. 3rd DCA 1983), the court specifically ruled that the "Golden Rule" argument was preserved for appellate review by timely objection as required by Clark v. State, 363 So.2d 331 (Fla. 1978), and Simpson v. State, 418 So.2d 984 (Fla. 1982). The defense also objected in Wheeler v. State, 468 So.2d 978 (Fla. 1985).

Mr. Suggs' reliance upon Taylor v. State, 583 So.2d 323 (Fla. 1991), would seem to be misplaced. Taylor involved a preserved claim relating to the victim's inability to enjoy life. The jury was not told to put itself in the victim's shoes, but rather that the victim could no longer enjoy life (as opposed to a person who, although in prison, was still alive). This was the same argument used in Jackson v. State, 522 So.2d 802 (Fla. 1988), and was not a Golden Rule argument as much as it was a "victim impact" argument.

It is submitted that the failure to object to the alleged "Golden Rule" argument at bar is dispositive of the issue.

(B) Other "Errors"

Apparently, in reaction to his procedural dilemma, Mr. Suggs offers other unpreserved "errors" in the faint hope he can equate this case with Peterson, supra. These other "errors" are easily disposed of:

(2) "Victim unable to testify" - Typically lifted out of context (R 4380), the comment was couched in terms of "additional evidence" provided by the victim even though she obviously could

not testify.[8] This was not an appeal for sympathy or an effort to inflame the jury. The equally non-contextual reference to "ants" on the victim was in reference to the photographic evidence and the loss of fiber samples due to dragging the victim into the bushes (R 4500).[9]

(3) "Fifth Amendment" - Mr. Suggs called witnesses to support his theory of defense. The prosecutor had every right to point out gaps in the defense. Kramer v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S266. Suggs' cited case of Jackson v. State, 575 So.2d 181 (Fla. 1991), involved a defendant who called no witnesses, and distinguished its holding from that in Buckrem v. State, 355 So.2d 111 (Fla. 1978), wherein the defendant did call witnesses and thus could be challenged for not calling other witnesses. Jackson, supra, at 188. Trial counsel did not and could not object in our case because the prosecutor's argument was appropriate.

(4) "Smokescreen" - Mr. Suggs argued that the State and its experts all conspired to frame an "outsider" with "long hair" for a murder that, in fact, was committed by some local good-old-boy. Mr. Suggs engaged in improper accusations against Mr. Casey despite having no evidence at all that Mr. Casey killed his wife. See State v. Castillo, 486 So.2d 565 (Fla. 1986) (improper for attorney to accuse witness of committing a crime without actual

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[8] i.e., bloodstains, fingerprints and items left on the bar (R 4380).

[9] Suggs' reference to Garron v. State, 528 So.2d 353 (Fla. 1988), is not only inapt, it fails to admit that the cited comment was only one of many improper arguments which were preserved by timely objection throughout that case.

proof). Thus, it was defense counsel, not the State, who engaged in improper tactics[10] and the prosecutor had every right to respond. That is why Mr. Suggs did not object or, by doing so, "preserve" the issue for review.

(5) "Attacks Upon Defense Experts" - Mr. Suggs did not object to the State's arguments regarding the experts hired by the defense (regardless of the source of any funds). Although use of the descriptive phrases "hired guns" and "Monday morning quarterback" are now suddenly of reversible magnitude to Mr. Suggs, they were clearly not as objectionable at trial.

The phrase "hired gun" was, at worst, an intemperate characterization of the evidence going to the potential bias of the witness. The comment did not constitute reversible error. Mann v. State, 603 So.2d 1141 (Fla. 1992) (denigration of expert not reversible error); Craig v. State, 510 So.2d 857 (Fla. 1987) (reference to witness as "liar" not reversible error).

Mr. Suggs' cited case of Nowitzke v. State, 572 So.2d 1346 (Fla. 1990), is irrelevant. In that case, the prosecutor asked a defense psychiatrist (Dr. Tanay) if another psychiatrist who was not a witness (Dr. Szasz) ever called Dr. Tanay a "hired gun".

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[10] In point of fact, if the prosecutor and the police had conspired to frame an "outsider" for a crime committed by a "local" such conduct would itself be criminal. Reckless accusations of misconduct against the prosecution, without proof, are not only improper, but arguably sanctionable, as in Thomas v. State, 210 So.2d 488 (Fla. 2nd DCA 1968); Bogan v. State, 211 So.2d 74 (Fla. 2nd DCA 1968); Giles v. State, 363 So.2d 164 (Fla. 3rd DCA 1974); Bumgarner v. State, 245 So.2d 635 (Fla. 4th DCA 1971). It should also be noted that the duty of counsel to his client does not include setting up false defenses, McNealy v. State, 183 So.2d 738 (Fla. 1st DCA 1966); Wilder v. State, 156 So.2d 395 (Fla. 1st DCA 1963). So the "right to counsel" was not violated.

Thus, the issue was whether one could impeach an expert through an opinion (of that expert) held by a third person. We are not dealing with "impeachment" evidence. We are dealing with closing argument and the proper inferences which the parties are permitted to draw from the evidence that was presented to the jury.

The State submits evidence (for testing) to an appropriate agency and then relies upon those findings at trial. The defense is awarded investigative funds and can go from expert to expert to obtain the opinion it wants. It is fair commentary, therefore, to note that defense experts are "selected" and not neutral when, in fact, that can be inferred from the evidence. That is particularly true when, as here, the theory of the defense was that the State was "biased" against Suggs as an "outsider" and, therefore, manufactured a case against him.

Mr. Suggs also complains that the prosecutor "shouted" while questioning witnesses. That "fact" is not evident from the record. On page (R 3834), defense counsel alleged that the prosecutor was shouting, but also noted that the prosecutor was afflicted by a hearing loss which caused him to raise his voice. The claim that the prosecutor somehow selectively raised his voice is an unfair ad hominem attack upon a physically disadvantaged attorney and will not be dignified further.

Finally, in addition to the failure of Mr. Suggs to preserve these assorted issues by objection, the State would note that the freewheeling nature of the closing arguments by both sides clearly rendered any "error" harmless. Defense counsel claimed

that they took notes during the trial which correctly recorded testimony and that the prosecutor "could have" examined (and corrected, by inspection) their notes but did not (R 4422). Counsel referred to secret, non-record evidence (R 4428). Counsel characterized the State's experts' testimony as "hogwash" (R 4435), and misrepresented that the State's experts were also specially hired ("everyone's being paid") (R 4438). It cannot be said that the State's arguments outshone this catalog of improper defense argument. Thus, any "error" was, if existent, harmless.

(6) "Diminishing Burden of Proof" - The last sub-point is an interpretation of a question and answer (regarding probable cause to arrest) drawn by appellate counsel, alone. The jury was repeatedly instructed and reminded that it was required to find proof "beyond a reasonable doubt" and it cannot fairly be argued that this unpreserved error in any way overshadowed the rest of the case.

Since the "error" was not preserved, Suggs is not entitled to review or relief.

(C) "Cumulative Error"

Again, we note that the defense has infused this appeal with as many illusory and unpreserved "errors" as possible in a vain effort to create the illusion of "cumulative error". None of the complained-of "error" was, in fact, error at all or it was clearly offset by other events at trial. Since the total cannot be greater than the sum of its parts, adding together all of Mr. Suggs' illusory errors does not create reversible error. See Sochor v. State, 580 So.2d 595 (Fla. 1991).

POINT V

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION FOR KIDNAPPING

The Appellant, was charged by Indictment with "kidnapping," in violation of §787.01, Fla.Stat. (R 11). The record does not reflect any inability to prepare a defense or any "failure to comprehend the charges" by Mr. Suggs.

The evidence supporting the charge of kidnapping included:

(1) The victim worked for a bar called "Teddy Bear's." (R 2241).

(2) Pauline Casey (the victim) was dependable and would not leave the bar unattended (R 2242).

(3) Pauline Casey was missing, yet her purse and keys were left in the bar, her car was left in the lot, and the front door to the bar was left open." (R 2221-2226).

(4) Suggs confessed to Wallace Byars that he took Pauline from the bar at knife-point (R 3400).

(5) Pauline's finger and handprints were found in Suggs' jeep (R 3359-60).

No defense to this line of evidence was offered.

On appeal, Suggs offers de novo argument that the Indictment (R 11) failed to include the alternative term "secretly", thus negating the entire trial because "secretly" applied to the evidence of abduction. This theory is clearly frivolous even if preserved.

First, notwithstanding the applicability of the term "secretly" in describing the abduction of Pauline Casey, the unrebutted evidence from the trial was that Pauline was taken out of the bar "by force" (knifepoint). Thus, the "secretly" issue is moot.

Second, the theory that a valid Indictment, which refers the accused to the statute (§§787.01), can be challenged by a post-trial assault on the evidence has been repeatedly rejected. DuBoise v. State, 520 So.2d 260 (Fla. 1988); Justus v. State, 438 So.2d 358 (Fla. 1983); Williams v. State, ___ So.2d ___, 18 Fla.L.Weekly D 1036 (Fla. 1st DCA 1993); Cotton v. State, 395 So.2d 1287 (Fla. 1st DCA 1981).

Third, if the claim goes merely to the weight of the state's evidence, it is clearly improper. Tibbs v. State, supra.

Fourth, the task of deciding whether an "alternative theory" is reasonable is a jury question - not one for an appellate court. Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984). The jury was not required to believe any alternative view of the evidence offered by Mr. Suggs. Bedford v. State, 589 So.2d 245 (Fla. 1991); Cochran v. State, 547 So.2d 928 (Fla. 1989). Thus, Suggs' secondary challenge to the "circumstantial" nature of the evidence (excluding, of course, his confession) is equally devoid of merit.

POINT VI

THE TRIAL COURT DID NOT ERR IN ADMITTING THE IDENTIFICATION TESTIMONY OF RAY HAMILTON

The Appellant's sixth point on appeal is a claim that Ray Hamilton's identification of Mr. Suggs was "tainted" because of an unduly suggestive photo - ID procedure employed by the police. This theory is supported by a claim that Mr. Hamilton "had never saw or even looked at the person in the bar." (Brief at 82).

The record disproves this theory and clearly supports the presumptively correct ruling by the trial judge.

First, Mr. Hamilton did see Mr. Suggs in the bar and gave the police a description of Suggs, Suggs' clothing and Suggs' green jeep station wagon. (R 871, 874, 2685, 2735-36, 2805-7). There can be no coincidence that Ray Hamilton would just happen to randomly describe a green jeep station wagon, a stocky driver "no more than 5'11 "tall" (R 2811) with shorts, a pullover shirt and long hair, only to have the police find such a person within hours of the "random guess" by Mr. Hamilton. The truth is that Hamilton saw Mr. Suggs, saw the green jeep, recognized the cooler sitting behind the driver's sear and identified a photo of a person he saw just hours before.

Not one shred of evidence was offered to show that Hamilton did not see Mr. Suggs or that his description - even if not "exact" as to weight or height - was fabricated or otherwise unreliable.

As noted in Edwards v.State, 538 So.2d 440 (Fla. 1989), a pre-trial show up, even if unnecessarily "suggestive", does not compel the suppression of any in-court identification testimony when the witness can base the identification on his own independent recollection. accord: Neil v. Biggers, 409 U.S. 188 (1972). In assessing reliability, the Edwards decision states that the following factors are relevant:

> (1) The opportunity the witness had to observe the "criminal act."
>
> (2) The discrepancies between any description and the defendant's actual appearance.
>
> (3) Any prior identifications, such as by photo, or

(4) Any prior failure to identify the defendant.

Suggs contends that Hamilton's estimates of exact height and weight void any subsequent identification. This is clearly nonsense. There can be no dispute from this record that:

(1) Hamilton watched Suggs shooting pool at the bar for a substantial period of time.

(2) Hamilton gave the police a useful description of Suggs and his jeep.

(3) Hamilton "reacted" when he saw the jeep again at the police station, without prompting.

(4) Hamilton readily identified the person in the photograph.

As noted in Grant v. State, 390 So.2d 341 (Fla. 1980) and Manson v. Brathwaite, 432 U.S. 98 (1977), even an unduly "suggestive" show-up will not not compel suppression when the identification, by the witness carries other indicia of reliability.

Here, the identification was reliable and the trial court did not err in denying suppression.

POINT VII

THE TRIAL COURT DID NOT ERR, DURING THE PENALTY PHASE, IN ADMITTING INTO EVIDENCE A BOOK ENTITLED DEAL THE FIRST DEADLY BLOW

Prior to the penalty phase the trial court considered the admissibility of a book called Deal The First Deadly Blow (R 4588 et seq.). The book was found in Mr. Suggs' home, as conceded.

During the hearing, the State proffered testimony from Officers Sunday and Trusty regarding a notebook that was found on

the same shelf as the book in question. While Deal The First Deadly Blow was an instruction manual on killing people (with a knife), the notebook contained diagrams of knives and notes on topics such as "how" to commit a robbery (R 4604). The notebook listed "things to get", etc., and in one key section, begins by referring to "Ernie" but switches to the first-person "I" (R 4604).

The primary relevance of Deal The First Deadly Blow was its illustrations, particularly on page 99, of where (on the body) to stab someone. The illustration was a nearly perfect match for the stab wounds inflicted on Pauline Casey by Mr. Suggs (R 4629-4630) (The comparison was left to the jury, id).

The defense fully cross-examined Officer Sunday on the issue of whether the book actually belonged to Mr. Suggs (R 4631), bringing out the existence of the notebook in the process (R 4631). This opened the door for the State (without objection) to elicit testimony regarding the contents of the notebook (R 4635).

On appeal, Mr. Suggs once again cites to Mendyk v. State, 545 So.2d 846 (Fla. 1989), as authority for the rejection of this evidence supporting the "cold, calculated and premeditated" factor. Finding nothing more in common between Mendyk and this case than the noun "books", Suggs cites Mendyk for the proposition that written materials are not admissible during a penalty phase proceeding. Naturally, he is wrong again.

In Mendyk, the State read to the jury a list of titles to pornographic books found in the defendant's home. The titles had no connection whatsoever to any statutory aggravating factor or any mitigating factor.

Mendyk stands in stark contrast to the case at bar. The evidence clearly showed that Deal The First Deadly Blow served as a virtual blueprint for the stabbing of Pauline Casey. As a blueprint for murder, it was as relevant as a blueprint of a (robbed) bank in a robbery case or an explosive/incendiary device in an arson case. This blueprint for murder, linked to Suggs by virtue of possession and the nearby notebook, was relevant to the "cold, calculated and premeditated" aggravating factor.

This was, of course, a penalty phase hearing and, as such, was conducted under less stringent rules of evidence. Messer v. State, 330 So.2d 137 (Fla. 1976). In dealing with the issue of admissible hearsay, the court had to consider the defendant's opportunity to rebut any such evidence. Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). Mr. Suggs had as much (or more) opportunity to rebut this evidence as the defendant in Hitchcock v. State, 578 So.2d 685 (Fla. 1990) had to counter the admission of a letter, written to his mother, confessing the crime.

Mr. Suggs had the opportunity to deny ownership of the book, knowledge of its contends of authorship of the notebook. He also had the opportunity to allow his father (who was suggested as being the owner of the book) to testify, or his mother to testify if needed. Since Mr. Suggs did not exercise this opportunity, the State cannot be faulted.

For the same reason, this case is totally unlike Rhodes v. State, 547 So.2d 1201 (Fla. 1989) (tape of "victim" from unrelated case who could not be cross-examined).

Finally, Mr. Suggs contends that the trial court erred in allowing the jury to compare the autopsy photographs with the handbook to see if the wounds were similar. The jury drew the comparison at the suggestion of defense counsel, "Your Honor, this is a comparison that the jury should make." (R 4629-4630). Thus, Suggs not only failed to preserve any error for appellate review, he specifically invited any error by proposing that the jury should perform the comparison. Suggs cannot appeal this subclaim.

POINT VIII

THE TRIAL COURT DID NOT ERR IN ALLOWING STATUTORY AGGRAVATING FACTORS TO BE CONSIDERED BY THE JURY

The final section of Mr. Suggs' brief alleges two separate "errors". First, Suggs alleges that the State elicited evidence of uncharged crimes. Second, he requests appellate reweighing of the evidence supporting the aggravating factors found by the trial judge, as actual sentencer.

(A) "Uncharged" Crimes

As Mr. Suggs is well aware, this so-called issue was not preserved by objection and is not properly raised on appeal. Clark, supra; Cumbie, supra. Of course, the issue is also facially frivolous.

The fact that a book discussed "how to rob someone" is not proof of another crime. It is proof of the mere contents of a book. The relevance of the book is its value in establishing the planning behind this murder as part of the "cold, calculated and

premeditated" aggravating factor. (See below). The half-sentence underscored by Mr. Suggs is taken grossly out of context.

The next alleged "error" was the following question asked of Officer Sunday on redirect:

> Q: Now, he asked you about what else you saw in the house there and this book being in regards to firearms. Did you find . . .
>
> (Objection).

(R 4635).

Before this allegedly improper question was asked, defense counsel elicited responses from Officer Sunday that assorted "army gear" was in the house (R 4631), and that there was no evidence of crimes (R 4632), in the house. Also on cross, defense counsel brought out the fact that the "book" discussed rifles and their use (R 4633).

The prosecutor's phrase "this book being in regards to firearms" clearly stated no more than that elicited by defense counsel regarding the contents of the book.

The State never uttered the key "question" now protested on appeal. Defense counsel's swift objection led to a bench conference and the withdrawal of the question by the State (R 4436).

The Appellant is respectfully reminded that half of a question is not "evidence", especially in the absence of an answer. Thus, the record does not reflect the "error" complained of on appeal. Given the absence of any answer to the unasked question, any "error" was also harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

(B) Aggravating Factors

The remainder of Mr. Suggs' brief argues the weight of the evidence supporting various statutory aggravating factors. Evidentiary sufficiency may be appealed, but not evidentiary weight. Tibbs v. State, supra. In capital appeals, the Supreme Court of Florida does not engage in "resentencing". Dobbert v. State, 409 So.2d 1053 (Fla. 1982); Alvord v. State, 322 So.2d 533 (Fla. 1975). Therefore, the issue as to each aggravating factor is the existence of supporting evidence rather than its weight. (Since this is an appeal, the "weight" of the evidence presumptively favors the judgment in any event, Spinkellink, supra).

(i) Witness Elimination

Ernest Suggs flatly confessed to this factor. Contrary to Suggs' brief (Initial Brief at 89), the supporting evidence included the penalty phase testimony of James Taylor, the other inmate with whom Suggs discussed the murder. Taylor reported that Suggs said he was captured in Alabama because he left a living witness (R 4625), but that in this case he did not leave a witness behind (R 4625). Taylor was not cross-examined and was not challenged by rebuttal evidence (R 4626).

Thus, in addition to the facts of the crime (reflecting the needless removal and slaying of a lone bar employee), this unrebutted testimony established "witness elimination" beyond any reasonable doubt. The witness elimination factor was as well established as it was in Card v. State, 453 So.2d 17 (Fla. 1984);

Smith v. State, 424 So.2d 726 (Fla. 1982) (victim not a threat but killed); Harmon v. State, 527 So.2d 182 (Fla. 1989) (victim knew defendant); Washington v. State, 362 So.2d 658 (Fla. 1978) (victim knew defendant and was kidnapped, taken to secluded spot, killed); Remeta v. State, 522 So.2d 825 (Fla. 1988) (defendant plans robbery including elimination of witnesses); Johnson v. State, 442 So.2d 185 (Fla. 1983) ("dead men don't testify").

(ii) Heinous, Atrocious or Cruel

The Appellant's actual issue is the propriety of the jury instruction given in this case, which is correctly quoted on page 92 of his brief. This instruction is not the "short" instruction condemned in Espinosa v. Florida, ___ U.S.___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

Nevertheless, as Suggs confesses, he did not preserve the jury instruction issue for review. Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992); Turner v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S20; Koon v. Dugger, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S201. A mere objection to the "HAC" factor does not preserve an objection to the wording of a jury instruction. Koon, supra.

Although the issue is not squarely presented, it is clear that the murder at bar was so heinous, atrocious and cruel that any error in the instruction was harmless. Slawson v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S209; Thompson v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S212.

Dr. Kielman's unrebutted testimony revealed that Pauline Casey endured nonfatal stab wounds (R 3375, 3377), as well as a lethal stab wound that severed her "breathing muscle" (R 3377), which kept her from breathing. Pauline could feel her wounds (R 3382), and took anywhere from five to ten minutes to slowly choke and bleed to death (R 3378), while in pain. Of course, it is undisputed that Suggs took Pauline out of the bar at knifepoint and drove her to the woods. Thus, she had time to contemplate her demise before she was stabbed. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). There is no doubt that fear and emotional strain can support an "HAC" finding. Sochor v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S273. Similarly, strangulation presumptively gives rise to proof of requisite suffering and contemplation. Sochor, supra; Tompkins v. State, 502 So.2d 415 (Fla. 1986); Johnson v. State, 465 So.2d 499 (Fla. 1985). There is no practical difference between suffocation by strangulation and suffocation by slicing the diaphragm.

This crime can also be compared to abduction-murder cases such as Bryan v. State, 533 So.2d 744 (Fla. 1988); Hildwin v. State, 531 So.2d 124 (Fla. 1988), and Parker v. State, 476 So.2d 134 (Fla. 1985).

(3) Cold, Calcuated and Premeditated

This issue is also barred under Sochor, as to the jury instructions. The evidence, viewed in favor of the judgment, shows:

(1) Suggs was determined not to get caught for his next crime by leaving a witness behind.

(2) Suggs studied and kept a notebook containing everything from diagrams of knives to notes on "how to" commit robbery.

(3) Suggs studied Deal The First Deadly Blow and murdered Pauline "by the book".

(4) Suggs waited until he was the last person in the bar, abducted Pauline, took her into the woods, killed her and hid her body in the bushes.

This crime reflected a careful and prearranged plan. Rogers v. State, 511 So.2d 526 (Fla. 1987). In fact, the evidence of study and preparation combine with Suggs' statements to the extent that this case can be compared to Trepal v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S327 (defendant shown to be familiar with chemistry and "voodoo" tactics). Trepal cites to Swafford v. State, 533 So.2d 270 (Fla. 1988), in finding that "cold, calculated and premeditated" ("CCP") can be shown through (1) advance procurement of a weapon, (2) lack of resistance or provocation, and (3) killing "as a matter of course". The CCP factor also applies when the manner of killing was premeditated. Provenzano v. State, 497 So.2d 1177 (Fla. 1986). Few murders, we submit, are shown to be carried out pursuant to a textbook. This case, however, reflects that very significant factor.

(4) Other Factors

Without waiving any procedural defense to this appeal, we note that Mr. Suggs does not challenge his other aggravating factors or the proportionality of his sentence. (Thus, those issues are waived). This means that the following aggravating factors are uncontested: (1) Suggs was under sentence; (2)

Suggs was previously convicted (of murder); (3) Suggs committed this murder in the course of a kidnapping; (4) Suggs committed the murder for pecuniary gain.

These undisputed factors, combined with the challenged factors or standing alone, clearly outweighed the minimal mitigation at bar: (1) Somewhat diminished capacity due to drinking; (2) The defendant had a good family; (3) The defendant was a good worker.

The death sentence was clearly proportional to those upheld in the above-referenced cases.

CONCLUSION

The Appellant is not entitled to relief.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Larry D. Simpson, Esq., KITCHEN, JUDKINS, SIMPSON & HIGH, Post Office Box 10368, Tallahassee, Florida 32302, this 12th day of July, 1993.

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