IN THE SUPREME COURT OF FLORIDA

DONALD VOORHEES,

Appellant,

vs.

STATE OF **FLORIDA,**

Appellee,

CASE NO. 83,380

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEYGENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar **I.D.** No. **0134101**
2002 North Lois **Avenue, Suite 700**
Tampa, Florida 33607
(813)873-4739

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE:

TABLE OF CITATIONS

PAGE :

STATEMENT OF THE CASE AND FACTS

(1) The Pre-Trial Motion to Suppress --

Mississippi deputy sheriff Walker had contact with Voorhees and Sager on January 8, 1992 when two men in the rain were asking for food from Mr. Sanderson. They provided as names William Stephen O'Donnel and David Alan Scott (R 387 - 389). They claimed their vehicle was bogged down, they had gotten lost and were unable to find camp. Walker offered them lodging at the jail with a hot meal and a change of clothes and they said, "they'd love to go" (R 390). They voluntarily got in his car, were not handcuffed (R 392), they were not fingerprinted at the jail (R 394) and they were not arrested (R 415). Walker testified that it was not unusual to offer this type of assistance and they had done it on numerous occasions (R 394). A subsequent review on NCIC showed no record on the information provided and Walker went home at 10:00 p.m. (R 397). Walker returned to work at 12:30 p.m. the next day, learned that Scott had given his real name as Robert John Sager (Voorhees' codefendant) and that O'Donnell had given deputies another name, James Earl Densmore. Walker told Densmore (Voorhees) all he needed was a positive name (R 399). Voorhees told him he had a friend in Jacksonville who could verify who he was and dialed the phone; the man on the other end identified himself as Tony Watson who said he knew the caller as Donald Voorhees. Watson asked if Sager were with Voorhees and told Walker that Pasco County deputies wanted to talk to them about a murder. Walker then asked Voorhees to confirm that he was Voorhees

(R 401), told Voorhees what Watson had said and allowed Voorhees to speak to Sager. Voorhees told Sager at about 2:00 or 2:30 that everything would be all right, he would take care of it (R 402 - 404). At about 7:00 p.m. Sager told Walker he wanted to talk to him and after Miranda warnings gave a taped statement to Sheriff Farrior (R 404 - 406).

Wayne County Mississippi Sheriff Marvin Farrior testified that at about 8:00 p.m. on January 9th, Sager indicated that he wanted to talk to him about the murder-incident in Florida and after Miranda warnings gave a taped statement (R 465 - 468). He was not present when Pasco detectives subsequently arrived (R 469).

Jail trustee Benny Humphrey testified that on January 9th, Voorhees asked him to relay a message to Sager that everything was going to be all right, that he would take the blame for all of it. Voorhees admitted to Humphrey that he had cut the victim's throat (R 499 - 500). He was not instructed by law enforcement to get incriminating statements, was not paid and was not an informant (R 501).

Pasco County sheriff's detective William Lawless testified that he had been informed by Detective Spears on January 9th, that both defendants were arrested in Mississippi (R 5 16). He had been the case officer for five days and had spoken to Tony Watson and others in Jacksonville (R 517). Watson told him he met Voorhees whom he knew as James Densmore in Jacksonville and that he had seen Voorhees and Sager on January 4th (R 5 18). Voorhees and Sager, according to Watson, were driving a burgundy, two door sedan from Pasco County (and Lawless knew the victim's car was a maroon two

door Pontiac Grand Prix) (R 519). Lawless knew Voorhees' identity prior to going to Jacksonville. William Slaughter told Lawless that Sager told him that he and James had beaten a guy and stolen the burgundy Grand Prix on January 8th (R 520). Lawless knew the victim's injuries included a broken nose (R 521). Melanie Cooper told Lawless that she received phone calls from Voorhees saying he was in Alabama a few days after the murder (R 521). Lawless would have gotten grand theft auto arrest warrant upon his return to Pasco County when he received the call that the defendants were in Mississippi (R 523). BOLOS had been put out for the vehicle and Voorhees and Sager on January 5th, 6th and 7th (R 524 - 525). Lawless had learned on January 5th that both defendants were seen with the victim at Room 4 of the Chasco Inn which was registered to Robert Sager and James Densmore (R 525) and that there was an argument overheard by neighbors there (R 526). The victim's body was discovered the morning of January 4th (R 527). The fact that the victim was hogtied led the investigator to believe that more than one perpetrator was involved. The news media was not informed of the condition of the body (R 529). All of this was learned prior to his visit to Mississippi (R 531). Lawless did not tell Spears to ask Mississippi authorities to question the suspects because he didn't want anyone messing up his interview; he was told they were under arrest in Mississippi (R 53 1). Lawless had been told by Brenda King that James Densmore was Donald Voorhees (R 532 - 533). Phifer told him that Densmore had not shown up for work. King also gave the name and home number of Tony Watson in Jacksonville (R 534 - 35).

He learned that Densmore had picked up his paycheck in Madison, Mississippi on January 6th (R 537). He learned that Room 4 of the Chasco Inn was registered to Densmore and Sager. The landlady, Mrs. Weiskopf, indicated they had rented the room at fifty dollars a week -- the receipt showed December 29th, indicating that the rental period would be up on January 6th. Mrs. Weiskopf consented to a search of the room (R 539). There was no evidence discovered that led to other witnesses or tangible evidence (R 541).

Lawless flew to Mississippi, arrived at Wayne County jail after midnight. He spoke to Sager who after Miranda warnings admitted his involvement in the victim's murder (Lawless was unaware Sager had given a prior statement) (R 543 - 544). Lawless also spoke to Voorhees who also confessed (R 545). Lawless also testified that Watson told him that Voorhees said that if cops came looking for him they were drug dealers from whom the defendants stole money. Lawless also learned there had been a withdrawal from the victim's ATM account (R 595 - 596). One of the reasons for not seeking an arrest warrant was that he was told Mississippi was holding them on their charges (R 604 - 605).

Margaret Weiskopf talked to Detective Lawless and gave the key to police to search the room. She told the detective she thought the room was abandoned (R 622 - 625). When she talked to detectives she was unaware the renters had paid for two weeks (R 625).

Voorhees testified at the suppression hearing and admitted telling Humphrey to tell Sager to keep his mouth shut and that he'd take the rap (R 634 - 635).

The trial court denied the motion to suppress in a lengthy and comprehensive order (R 107 - 113).

(2) Guilt Phase --

Heinz Haase was contacted by a tenant regarding flooding in one of the triplexes he owned (Tr 388).; He entered one of the apartments and saw a body laying on the floor. He notified the Sheriffs Office (Tr 389 - 390). Deputy Sheriff Roy Haynes arrived at the scene at 9:46 a.m., on January 4, 1992 (Tr 392 - 393). In the bedroom he discovered a deceased white male laying on the floor; he was hog tied with his feet and arms tied up behind his back. The living room and bedroom area had been ransacked (Tr 393 - 394). He put out a BOLO for the deceased's vehicle, a red Monte Carlo with a black roof (Tr 395). The victim had been tied with speaker wire or telephone cords. There was flooding in the bathroom and kitchen area (Tr 936). A brown-handled knife was lying on the top of the neck (Tr 396).

Crime scene technician Jeffrey Boekelou noticed a strong, bitter odor caused by the oven containing pots and pans with the heat turned on to 500 degrees (Tr 399). He described the victim whose hands and feet were bound with phone wire. There was a knife underneath his neck, a large amount of blood from the head area, He had an abrasion on one arm and a puncture wound on the other arm (Tr 400).

The bedroom had been ransacked (Tr 400). It appeared that a wound was inflicted in the living room first, with a large amount of blood from a gaping neck wound in the

bedroom where the blood had flowed from; there were cut telephone wires on the premises. A burnt shirt lay in front of the toilet and a blue nightgown was in the bathroom sink, the apparent source of the flooding (Tr 401). . Three knives were found, one underneath the victim, a second in the closet, and a third between the bed and wall (Tr 402 - 403).

Carrie DeMichele was an acquaintance of victim Stephen Bostic and was at the Chasco Inn on Friday, January 3rd with him and two white males (Tr 432). Bostic allowed one of the men the use of the telephone calling card and the three men left Room 4 at 3:30 p.m. (Tr 434). She identified the two men with Bostic in a photopack shown to her by Detective Lawless and appellant was one of the two men (Tr 435 - 537). Appellant was going to be the driver of the car, the designated driver of Bostic's vehicle (Tr 442).

Margaret Weiskopf, owner of the Chasco Inn, identified records indicating that Room 4 was rented on December 29, 1991, to a Robert John Sager and one James E. Densmore. They rented for two weeks, to January 11, 1992. (Tr 445 - 446).

Thomas Novici, an employee of Ingram Construction Company, met an individual who identified himself as James Densmore (Tr 45 1). Densmore walked to work. Novici identified appellant as Densmore (Tr 452 - 453).

John Fifer was a supervisor with Ingram Construction who hired "Densmore" and lived with him for three or four weeks. Densmore brought down another guy -- he said

it was his brother -- and Densmore moved out. Fifer identified appellant Voorhees as Densmore (Tr 455 - 457). Appellant failed to show up for work on Wednesday and when he arrived on Thursday, Fifer advised him that he didn't' need him if he couldn't show up on time(Tr 457). Voorhees did not show up for work on the following Monday (Tr 458).

Jean Womack, a receptionist for Ingram Construction in Madison, Mississippi, testified that a man identifying himself as James Densmore asked for his paycheck. A shorter man was with him. She gave Densmore the check and they left in a two door maroon Monte Carlo Grand Prix type of car (Tr 463). She mentioned to Densmore he could cash the check at the Trustmart National Bank a mile away (Tr 466).

Mississippi deputy sheriff Bilmer Ray Walker testified that on January 8, 1992, it was raining and the temperature was dropping; cold weather was predicted (Tr 473). He came into contact with two men who provided names but had no identification; one gave the name of David Adam Scott and the other William Stephen O'Donnell. They were dressed in camouflage clothing and were soaking wet, The indicated they were going to California from Florida but they had no mode of transportation other than walking. They had no personal belongings or luggage (Tr 474 - 476). Walker offered to provide dry clothes and a hot supper at the jail and they said they'd be glad to go. He did not arrest them (Tr 478). He has done the same previously for other individuals (Tr 478). The next morning Walker learned that O'Donnell had given a different name, James Earl Densmore (Tr 479). Densmore made a phone call to a friend of his in Jacksonville and Walker

talked to that friend (Tr 480 - 481). The witness then called the Pasco County Sheriff's Office (Tr 482). Densmore told Walker the car they were in was bogged down and described the area (Tr 482); it was discovered off the road (Tr 483). Walker gave to Detective Lawless a knife that "Densmore" had in his shirt pocket (Tr 487). After talking to his friend on the phone appellant admitted his real name was Voorhees (Tr 489)

Benny Humphrey, a jail trustee in Mississippi, testified that appellant Voorhees, a/k/a, O'Donnell told him on January, 1992, that he needed to get word to his buddy that everything would be all right, that he would take the rap for everything (Tr 528). Voorhees admitted they had tied the victim up and that Voorhees caught him by the hair and cut his throat; appellant said he stabbed him a second time in the neck (Tr 529). Investigator William Dodd retrieved certain papers and clothing on Highway 18 and shipped them to the Pasco County Sheriffs Office (Tr 540).

The parties stipulated to the identify of victim Audrey Stephen Bostic (Tr 544).

Detective William Lawless testified that he found no evidence of forced entry at the victim's residence (Tr 556). The victim's pants pockets were pulled inside out (Tr 558). No money was found on Bostic (Tr 559). The vehicle recovered in **Mississippi** belonged to the victim Mr. Bostic (Tr 560). While on his way back to Pasco County from Jacksonville on January 9th, he learned that two individuals were in Wayne County, Mississippi, and he flew there the same day (Tr 562). He arrived shortly after midnight on January 10; he read Voorhees his constitutional rights (Tr 563 - 564). Voorhees gave

a taped statement (Tr 566) and the tape was played to the jury (Tr 573).

In that interview, Voorhees demonstrated how he cut the victim's throat (Tr 573). Voorhees provided new information to him, e.g., that he had used the victim's bank card at numerous locations between Pasco County and Jacksonville and the telephone calling card was used from several locations, as well as clothes left on the highway (Tr 578). Lawless arrested appellant for murder after January 10 and on the plane ride to Pasco County Voorhees asked if Florida had the death penalty. When told that it did, Voorhees volunteered that the and Johnny "were going to cook" (Tr 589). DiMichele selected Voorhees' picture out of a photpack and was a hundred percent positive (Tr 594). She also selected Sager's photo (Tr 595).

Ron Rager, a Nations Bank employee, testified to ATM transactions on Bostic's account on January 3rd and 4th. The last time the correct PIN was used there was a hundred dollar withdrawal (Tr 622 - 623). Afterwards, there were about fifteen unsuccessful attempts using an incorrect PIN (Tr 623).

GTE special agent James Kebel testified that calls were made on January 4th on Bostic's account to California and Jacksonville (Tr 633 - 638). The point of origin had a 601 area code.

Technician Boekeloo brought the victim's car back to Florida (Tr 641).

Crime scene technician Sean Fagan video recorded the crime scene on January 4th (Tr 649 - 650) and retrieved the phone cords from the medical examiner following the

autopsy (Tr 65 1).

Appellant's fingerprints were on a road atlas in the victim's' car (Tr 670). The court took judicial notice that area code 601 referred to all locations within the state of Mississippi (Tr 679).

Associate Medical Examiner Dr. Marie Hansen described the injuries she observed on the victim at the scene (hogtied with three different colored wires, a slash or cut which went almost entirely through his throat, several other cuts to the side of the neck, bruising along the side of the face and around the eyes) (Tr 681). The autopsy revealed that Bostic died from a combination of homicidal violence including blunt trauma to the head and chest, choking, binding and incisions to the neck (Tr 682). There were two incised wounds on the left arm (Tr 683). Bostic did not have defensive wounds (Tr 685). There was an incised wound to the neck and stab wounds (Tr 686). Teeth laceration on the inside of the face was consistent with the victim being pushed or kicked (Tr 690). If the victim was yelling and screaming and his neck or windpipe severed to shut him up, the witness would expect the victim to be conscious (Tr 700).

(B) Penalty Phase --

The defendant's first witness Detective Lawless identified the tape of his interview with Robert Sager on January 10, 1992, and it was played to the jury (Tr 982 - 983). On cross examination the witness revealed that Voorhees and Sager had the opportunity to discuss the case together prior to his interview (Tr 999) and that Voorhees had a better

recollection of events than did Sager. Voorhees was able to recall that each defendant did certain things (Tr 1003). Voorhees was older (Tr 1006) and said he was the leader of the two (Tr 1010).

Miklos Flinn met Sager in the county jail in January of 1992, and said that he had killed some guy and cut his throat (Tr 1016 - 17). On cross examination the witness added that Sager said he was going to try and get off by claiming insanity (Tr 1018). The first person he told about Sager's statement was Voorhees' lawyer after he met Voorhees (Tr 1027 -28).

Appellant's sister, Tina Voorhees, described their poverty growing up. Their father beat them for eating his salami and they lived on welfare (Tr 1038 -42). She claimed their father sexually abused the children and other kids teased them because of their dark skin and clothing (Tr 1047, 1056).

On cross examination the witness conceded that appellant was questioned about signing a check at age nine, that he was arrested at age thirteen for a burglary, that he was in a California Youth Authority for a number of years (Tr 1066 - 68). Voorhees had above-average intelligence, no history of psychological problems (Tr 1070). Her father was investigated for welfare fraud in 1981 and her mother was convicted of this offense (Tr 1074). Having endured a similar upbringing as appellant, she only had a ticket (Tr 1075). The witness admitted that appellant was admitted to the C.A. four or five times for theft-related crimes (Tr 1079). Her father was not prosecuted for physical or sexual

abuse (Tr 1081 - 82). In 1986, she gave a court statement for appellant's benefit and did not mention the abuse; she referred to him as a punk who was bitter (Tr 1085).

Defense mental health expert Dr. Michael Maher opined that Voorhees suffered from post-traumatic stress disorder and opined that the two statutory mental mitigators were present (Tr 1125, 1133 - 1134). On cross examination the witness admitted having testified for defendants in other first degree murder cases (Tr 1140). Voorhees told Maher that he wasn't responsible for any of the cutting of the victim (Tr 1154). Appellant had lived in society for about seven months between the ages of fifteen and twenty-one and appellant had been in trouble in the school system and had trouble complying with rules and doing as he was told (Tr 1160 - 68). He blamed others for his predicament and did not mention any sexual abuse to him by his father; no reports, other than Tina's statement corroborated that appellant was sexually abused (Tr 1172). Voorhees blames people in an inappropriate and irrational way (Tr 1174); he was described as flippant in almost every interview (Tr 1175). Maher conceded that appellant lied at least in regard to some of the facts of his confession (Tr 1178). Maher's opinion regarding Voorhees ' alcohol intoxication was based on what Voorhees told him about the crime (Tr 1193). Appellant's taped statement did not mention being confused or unable to recollect events (Tr 1200). Of the murderers Maher has interviewed in the last ten years, more than one-half claimed to have consumed alcohol and 75-90% claimed to have been abused as a child (Tr 1205). Voorhees' sisters may have been more traumatized as children than appellant (Tr 1207).

State rebuttal witness Dr. Sidney Merin opined that Voorhees did not suffer from alcoholic intoxication at the time of the murder; he recalled details in his confession and engaged in goal-directed behavior at the time, such as turning on the oven, washing his hands and wiping off fingerprints. He opined that there was no evidence of post-traumatic stress disorder -- ne evidence that he had tried to avoid traumatic event (Tr 1240 - 1245). No evidence suggested sexual abuse by the father in any prior psychological evaluation (Tr 1252). Appellant opined that neither of the two statutory mental mitigators was present, nor was Voorhees under the domination of Sager (Tr 1254 - 1255).

The jury recommended death by a nine to three (9 - 3) vote. The trial court found that two aggravating factors (homicide during a robbery and HAC) outweighed the mitigating factors and unposed a sentence of death (R 358 - 364).

SUMMARY OF THE ARGUMENT

I. The lower court correctly denied appellant's motion to suppress and its findings following the suppression hearing are presumed correct. Voorhees and his companion accepted the officer's invitations to stay overnight in jail -- with hot food and a change of clothing in the inclement weather and were not placed under arrest. While they may have been briefly and impermissibly detained the next morning, the reason for that was unrelated to the Pasco County homicide invesitigation. Appellant subsequently and voluntarily admitted his involvement and intervening factors rendered the statements admissible.

II. Appellant was not absent during jury selection; he is not entitled to relief under Coney v. State, 653 So. 2d 1009 (Fla. 1995), which was decided after the instant trial and held to be prospective only. Appellant did not complain below and it is procedurally barred. Other alleged absences are either unsupported by the record or did not occur at a criticial stage when his presence would be meaningful.

III. The lower court did not abuse its discretion in ruling on the admissibility of the knife found on Voorhees' person. It was relevant as Voorhees had described such a knife in his confession and was also evidence of the property taken in the felony murder. Even if its admission into evidence were error, it would be harmless in light of the totality of the evidence in this case,

IV. The lower court correctly ruled that the hearsay statements made by

appellant's co-defendant were inadmisible because they did not exculpate the defendant. Error, if any, is harmless.

V. The lower court properly denied a motion for judgment of acquittal since there was sufficient evidence of premeditation, In any event, such error would be harmless since the record also demonstrates the commission of a robbery for felony murder.

VI. The lower court did not abuse its discretion in denying a mistrial request for the prosecutor's guilt phase closing argument; it was not inflammatory and were valid inferences from the evidence.

VII. The lower correctly denied mistrial requests for the prosecutor's penalty phase closing arguments and appellant has failed to demonstrate an abuse of discretion.

VIII. The trial court correctly gave the jury an instruction on CCP since there was some evidence to support it. The instruction given was one modified from one proposed by the defense so appellant should not be heard to complain on appeal, Appellant did not complain below that the CCP instruction was unconstitutinoally vague but appears only to have argued the evidentiary sufficiency of it. In this pre-Jackson trial, the lower court provided an adequate instruction which was more detailed than that condemned in Jackson v. State, 648 So. 2d 85 (Fla. 1995). The trial court declined to find CCP and if it was insufficient from an evidentiary perspective, the jury could disregard it.

IX. The lower court properly found homicide during a robbery as an aggravator because the evidence established Voorhees' desire to rob prior to and during the killing

as well as the taking of the victim's property.

X. The lower court did not err. The trial court gave the post-Espinosa instruction approved in Hall v. State, 614 So. 2d 473 (Fla. 1993) with an additional sentnece from defense prooposed instruction. The evidence supports a finding of this factor in this beating, stabbing, strangulation of a helpless, bound victim.

XI. The lower court did not use an incorrect standard; it properly considered and weighed proffered mitigation. The failure to accord it greater weight is not error.

XII - XV, Appellant's failure to brief these points constitutes an abandonment of the claims. Duest v. State, 555 So. 2d 849 (Fla. 1991).

ISSUE I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Appellant initially acknowledges at page 45 of his brief that "it does not appear from the record that law enforcement authorities obtained any incriminating evidence against appellant when they searched the room" at the Chasco Inn. This is in conformity to the testimony of Detective Lawless who testified at the suppression hearing that there was nothing discovered in the room that led to any other witnesses or other tangible evidence and it played no role in the investigation of this case (Tr 541).

Appellant contends that he was illegally detained from the outset of his encounter with the Wayne County deputies. With respect to this detention the trial court found as follows:

> Switching to Wayne County, Mississippi, the defendants first came to light on January 8, 1992 when Mississippi authorities received a call regarding suspicious strangers in the vicinity. After another call was received and the Wayne County authorities had determined that the individuals were apparently dressed in camouflage outfits and were soaked from rain, Deputy Walker was dispatched to the area of the sightings to investigate. There was absolutely no indication that the individuals either were committing, had committed or were about to commit any crime. Wayne County, Mississippi is an extremely small area in which strangers are apparently immediately considered to be suspicious. After making one fruitless attempt, Deputy Walker found the defendants at approximately 4:30 p.m. on January 8, 1992. In addition to the fact that it had been raining, Deputy Walker testified that it gets dark at approximately 5:00 p.m. at that time of year and it was turning much colder. Defendant Sager identified himself as Mr. Scott and defendant Voorhees identified himself as Mr. O'Donnell. Basically the defendants stated that they had been camping in the nearby DeSoto National Forest, that their car had been thoroughly

bogged down and that they had somehow wandered away from their campsite and become lost, Although Deputy Walker was somewhat dubious about the defendants' story, he followed what appears to be a long standing procedure in Wayne County, Mississippi. He offered to put the defendants up for the evening at the county Jail, wash and their clothes, give them a hot meal and give them some dry clothes to wear. Deputy Walker was of the opinion that the defendants were broke and, indeed a subsequent inventory of their belongings revealed that they had a total of $5.01 between them. It was for this reason that Deputy Walker did not offer to take them to one of the county's four motels, however, he made it plain that he would have done so if they had asked. At this point there is no objective evidence the defendants were not free to leave and the Court finds that a reasonable individual would have understood that he was free to leave and was simply receiving an offer. The Court further finds that the offer extended by Deputy Walker and authorized by long standing policy not only has some beneficial effects for individuals in Wayne County, Mississippi who have suffered some misfortune, but also has the benefit of not requiring Deputy Sheriffs to run all over the county answering calls about "strangers" in the community. Unfortunately, the defendants were not told that this policy also requires defendants provide truthful information about their names and that they will not be released from the county's "hospitality" until their true names can be determined. In any event, the defendants voluntarily agreed to spend the night in the jail and were transported to the jail in the rear seat of Deputy Walker's marked police cruiser. The defendants were not handcuffed or restrained in any way and, although Deputy Walker could not recall whether or not he locked the back door to the cruiser, he indicates that he would have stopped at any time and allowed them to leave the cruiser if they had asked. Neither asked. The only precaution Deputy Walker took was to remove a white handled kitchen knife which was observed in Mr. Voorhees' (O'Donnell) breast pocket. Upon arrival at the jail, Deputy Walker filled out an arrest card as a means of accounting for the defendants' presence in the jail, however, the individuals were not finger printed or photographed. During the ride to the jail, Sager (Scott) indicated, without any questioning on the part of Deputy Walker, that the car that they had gotten stuck was a maroon Pontiac that belonged to his (Sager's) girlfriend. At the jail, the

defendants were, as promised, fed and given dry clothing and placed in a holding cell which was separated by a short distance from the main jail. Initially, they were kept together. A subsequent NCIC computer check requested by Deputy Walker showed absolutely nothing concerning the names provided to him by the defendants. To Deputy Walker, this indicated that the names were undoubtedly fictitious. When Deputy Walker returned to work the following morning at approximately 10:30 or 11 :00 a.m., he found a note, the source of which was really never determined, that Scott was actually Sager and that O'Donnell was actually Densmore (Voorhees). At approximately 7:00 a.m. the following morning, a time at which it is reasonable to believe that the defendants anticipated that they would be allowed to proceed on their way, the Sheriff of Wayne County, Mississippi arrived at work and, apparently being aware of the fact that there was some suspicion concerning improper names, broke the bad news to the defendants that they would not be permitted to leave until the name situation was cleared up. At this point there was still absolutely no probable cause for arrest and, quite frankly, no reasonable suspicion regarding the defendants. At approximately 1: 15 p.m. on January 9, 1992, Deputy Walker got O'Donnell (Voorhees) out of his cell and again talked about obtaining a true name. Voorhees was permitted to telephone Tony Watson in Jacksonville. Deputy Walker spoke with Watson and Watson indicated that O'Donnell/Densmore was known to him as Voorhees. Unfortunately for the defendants, Watson also advised Deputy Walker that he had recently been contacted by Detective Lawless of the Pasco County Sheriffs Office and that Pasco County authorities were looking for Sager and Voorhees in connection with a murder in Pasco County. Deputy Walker immediately advised Voorhees that Pasco County authorities were looking for he and Sager regarding a murder and he advised Voorhees that he and Sager would be held until Wayne County officials got more information from Pasco County. Deputy Walker also called Pasco County and spoke with Detective Spears who was the individual who ultimately activated Detective Lawless' beeper, as previously set forth in these findings. Somewhere between 2:00 p.m. and 3:00 p.m. on January 9, 1992, Voorhees indicated that he wanted to tell Sager about the desire of Pasco County authorities to talk to them concerning a murder in Pasco County. Deputy Walker honored this request and

stood by while Voorhees told Sager what he had learned. Sager reacted by slumping down the wall he had been leaning against, but no further statements were made. Neither Deputy Walker nor any other officer made any effort to question either defendant about the Pasco County murder and there is no evidence that Pasco County authorities requested them to do so. The defendants were thereafter separated and simply left alone. Upon Deputy Walker's return from his supper break, he was advised that defendant Sager wanted to talk to him, Walker either brought Sager to Sheriff Farrior's office or had him brought to Sheriff Farrior's office at approximately 8:00 p.m. in the evening on January 9, 1992. This was totally in response to Sager's request. At that point, Sheriff Farrior produced a tape recorder, advised Sager of his rights on tape, and Sager proceeded to make incriminating statements. The statement lasted from approximately 8:00 p.m. to approximately 8:25 p.m. Thereafter, Sager was returned to his cell. Also during the evening of January 9, 1992, defendant Voorhees attempted to get a message to defendant Sager by means of trustee Benny Humphrey. Humphrey is an individual who has technically been sentenced to State Prison, however, under Mississippi practice, is permitted to serve his time in the county jail. Humphrey not only has considerable amounts of freedom within the jail and is sometimes used as the dispatcher when illness or other matters prevent other employees from handling these duties, Humphrey is also permitted considerable latitude in leaving the jail to assist other branches of government or, for that matter, to simply run errands. Given the fact that Humphrey has been convicted of manslaughter and is serving a twenty-year sentence, the Court can only observe that this situation is highly unusual. In any event, there is absolutely no evidence that Humphrey was given the task of extracting statements from Voorhees or anyone else, There is also absolutely no indication that Humphrey received any kind of reward in return for information that he received from Voorhees or 'that he expected any such reward. The evidence indicates that Voorhees initiated the conversation with Humphrey and voluntarily made incriminating statements to him. Although Humphrey did ask questions during the course of the conversation, the questioning was not in the form of an interrogation, but merely for purpose of clarifying what Voorhees was voluntarily relating.

. . . . . .

. . . . . (R 136 - 138)

From the facts adduced at the suppression evidentiary hearing, the court concluded:

> "2. The defendants' initial trip to the Wayne County, Mississippi jail on January 8, 1992 and the overnight stay herein, was entirely voluntary on the part of the defendants and the Mississippi officers neither did nor said anything that would have provided a reasonable basis for the defendants to believe that they had no alternative but to accompany the Mississippi officers, "

Appellant argues that the lower court's finding was erroneous because Voorhees was merely acquiescing to authority. A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the appellate court must interpret the evidence and reasonable inferences and deductions therefrom, in a manner most favorable to sustaining the trial court's ruling. Terry v. State, ___ So. 2d ___, 21 Fla. Law Weekly S 9 (Fla. 1996); McNamara v. State, 357 So. 2d 410 (Fla. 1978); see also Johnson v. State, 660 So. 2d 637 (Fla. 1995); Wuornos v. State, 644 So. 2d 1012 (Fla. 1994); Savage v. State, 588 So. 2d 975 (Fla. 1991); Owen v. State, 560 So. 2d 207 (Fla. 1990); Henry v. State, 586 So. 2d 1033 (Fla. 1991); Medina v. State, 612 So, 2d 1370 (Fla. 1992). The testimony of Deputy Walker clearly reveals the non-coercive nature of the invitation'; according to Walker, the two men stated they had walked off from the camp and gotten lost and were unable to find their camp. When he asked if they would like to come to the sheriffs office and obtain dry clothes and a hot meal, they said,

---

'Such invitations are not unusual (Tr 394).

"they would love to go". They were willing to stay overnight in the jail (Tr 390). The trial court did not err in concluding that Walker was more credible than Voorhees.

Appellant's effort to portray Deputy Walker's conduct as guileful must fail since he had no basis for suspecting the two men were involved in any Florida homicide for a stratagem to be employed by him.

Appellant next complains about the trial court's treatment of the Mississippi authorities detaining appellant and his colleague the following day. The trial court explained:

> However, starting at approximately 7:00 a.m. on January 9, 1992, the nature of the contact between the defendants and the Mississippi authorities changed and the continued detention of the defendants became involuntary. As shown in Hill v. State., 561 So.2d 1245 (Fla. 2nd DCA, 1990), mere suspicion that a defendant has provided false information would not, in and of itself, justify detention. The Mississippi authorities had neither reasonable suspicion nor probable cause to believe that the defendants had committed, were committing or were about to commit any crime and the detention imposed upon the defendants was far more significant than that described in Hill.
>
> 4. Unfortunately for the defendants, the character of their detention again changed at approximately midafternoon on January 9, 1992 when Deputy Walker of the Wayne County Sheriffs Office spoke on the phone with Detective Spears of the Pasco County Sheriffs Office and learned that the Pasco officers wanted to speak with the defendants concerning a murder in Pasco County, Florida. Prior to this point in time, it is acknowledged that the defendants existed in a type of legal 'limbo' in which they had no access to counsel or the judiciary and, not having been formally arrested, had no ability to post bond. It is, however, also apparent that the purposes or motive for the detention by the Wayne County authorities were completely unrelated to the Pasco County charges since they were not aware of the Pasco County charges prior to midafternoon on January 9, 1992. A number of cases indicate that

the purpose of [sic] motivation for such detention is a significant factor Brown v Illinois, 95 S.Ct. 2254, 2262 (1975 Dunaway v. New York, 99 S.Ct. 2248, 2258 (1979); Hayes v. a, 105 S.Ct. 1643, 1647 (1985); State v. Stevens, 574 So. 2d 197 (Fla. I st DCA 1991).

5. As of mid-afternoon on January 9, 1992, the authorities in Wayne County, Mississippi stood in virtually the same position as the authorities in Pasco County, Florida based upon the 'fellow officer' rule. Carroll v. State, 497 So.2d 253 (Fla. 3rd DCA 1985). Although it is clear that the standing of the officers in Wayne County, Mississippi rises or falls with the standing of the officers in Pasco County, this Court has determined that Pasco County Detective William Lawless had sufficient information to constitute probable cause to arrest the defendants for murder prior to the time that any contact was made between Pasco County authorities and Wayne County authorities The fact that Pasco County authorities did not specifically request the Wayne County authorities to make an arrest or take any action is not significant. Carroll v. State, 497 So.2d 253,.260 (Fla. 3rd DCA 1985).

6. It is also important to keep in mind that the exclusionary rule's theory of deterrence operates 'only if an excludable piece of evidence is the target of police activity'. Collins v. Reto, 348 F.2d 823 (5th Cir. 1965). In the instant cases, the purposes of the admittedly illegal detention by the Wayne County officials from approximately 7:00 a.m. on January 9, 1992 to approximately midaftemoon on that same date was to obtain the defendants' true names, not to further the investigative efforts of Florida authorities. The decision of the Illinois Supreme Court in People v. Gabbard., 398 NE 2d 574 (111. 1979), as explained in People v. White, 5 12 NE 2d 677 (111. 1987), 'held that a confession to a crime other than the one for which the defendant been illegally arrested need not be suppressed as the fruit of an unlawful arrest. The arresting and interrogating officers belonged to different police forces. Neither the arresting officer nor the governmenta l entity by which he was employed was investigating, or reseonsible for investigating the crime to which the defendant confessed. This Court held that suppression of the confession would not serve the deterrent purpose of the exclusionary rule' (emphasis supplied), Further, the White Court provided the following logical observation:

> Very few officers would illegally arrest a suspect on the off chance that the officer for another police force, investigating a different crime, might later interrogate the suspect and obtain a confession. It is much more likely, however, that an officer would illegally arrest a suspect in the hope that an interrogating officer of the same force, investigating the same crime and conveniently left unaware of the illegality, might obtain the suspect's confession.

The logic of the Supreme Court of Illinois is compelling. It is apparent that the Mississippi authorities were not acting for purposes of furthering Pasco County's murder investigation. If that had been the case, the Mississippi authorities would either have either initiated or attempted to initiate interrogations with the defendants, In fact, the Mississippi authorities only spoke to defendant Sager about the murder when Sager initiated the communication. There is no indication that the Mississippi authorities made any effort to initiate conversation concerning the Pasco County charges with either defendant after the Mississippi authorities became aware of the Pasco investigation, This reasoning applies equally to statements communicated to trustee Benny Humphrey by defendant Voorhees. Once again, there is no question that Voorhees initiated the communication with Humphrey. Although it is readily acknowledged that Humphrey occupied a highly unusual position in the Wayne County Jail, the record is devoid of evidence Humphrey was instructed to "cultivate' Voorhees or Sager for information regarding the Pasco County investigation. There is, likewise, no evidence that Humphrey received any reward as a result of his actions or that he expected to receive any such reward.

7. As to the statements made by the defendants to Pasco County authorities while defendants were incarcerated in the Wayne County jail, it is apparent to the Court that said statements constituted an act of free will on the part of the defendants and that

> there were sufficient intervening factors to dissipate and purge any taint associated with the earlier illegal detention by the Wayne County authorities. State v. Gifford 558 So.2d 444 (Fla. 4th DCA 1990) has held that a four (4) hour span of time between the illegal detention and the defendant's statements and the elements that supported the investigating detective's probable cause, constituted sufficient intervening factors. In this case, a span of time considerably longer than four (4) hours was involved. The fact that both defendants became aware of the Pasco murder investigation at approximately midafternoon on January 9, 1992 also appears to be a significant intervening factor between the illegal detention and the incriminating statements. The same can be said concerning the fact that the defendants were independently advised of their rights by the Pasco officers. Of course, as noted in the Gabbard case, it is significant that the officers who initiated illegal detention for reasons completely unconnected with the Pasco County murder investigation, were from an agency other than the Pasco County Sheriffs Office and were from an entirely different state. It is also significant to note that Sager's initial statement to Wayne County authorities and Voorhees' initial statement to a Wayne County jail inmate were both initiated by the defendants themselves and can also be considered as significant intervening factors which ought to purge any taint arising from the period of illegal detention in the Wayne County jail. "
>
> (R 139 - 143)

Voorhees argues that even with an initially consensual, legal detention, he was entitled to release when the detention became nonconsensual and illegal. He complains that he was not taken before a magistrate who depending on his court calendar might have been available later to see them (Tr 444). Appellant cites County of Riverside v. McLaughlin, 500 U.S. 44, 114 L.Ed.2d 49 (1991), wherein the Supreme Court held that judicial determination of probable cause for warrantless arrests within forty-eight hours after arrest generally complied with the promptness requirement of the Fourth Amendment.

In the instant case, appellant was not arrested when accepting the overnight stay at the jail and a hot meal (Tr 415). Voorheees' and Sager's status changed on January 9, 1992. Deputy Walker arrived at the jail at 12:30 p.m. At about 1:00 p.m. he told Voorhees that he just needed a positive name and Voorhees told him that he could phone a friend in Jacksonville to verify his identity (Tr 398 - 400). Voorhees phoned Tony Watson and Watson told Deputy Walker that appellant's name was Voorhees and that Pasco County Deputy Lawless wanted to talk to Voorhees and Sager about a murder. Deputy Walker phoned Detective Spears and then told Voorhees that Pasco County authorities would arrive that night to talk to them about the murder. Walker allowed Voorhees to go to the cell to tell Sager (Voorhees told Sager he would take care of it) (Tr 401 - 404). Lawless arrived from Pasco County and interviewed Voorhees at about 1:30 a.m. on January 10 (Tr 588). The alleged "illegal" detention lasted only a period of hours -- less than a day -- well within the time constraints of McLaughlin.

Appellant disagrees with the trial court's judgment regarding the Pasco County detectives having probable cause to arrest. Detective Lawless testified at length about the information he had obtained from talking to various witnesses (DiMichelle, Watson, etc.), all prior to being informed by Mississippi authorities as to Voorhees' whereabouts (R 513 - 551); further, Lawless testified that in part he did not attempt to obtain an arrest warrant prior to his arrival in Mississippi because he was told that Mississippi was holding them in custody on their own charges (R 604 - 605)[2]

[2] To the extent that Voorhees may be urging that Pasco County authorities did not direct Mississippi

Appellant argues that he and Sager were questioned by Mississippi deputies before any contact with Pasco officers; he refers to a conversation when they were driven to jail and the request for Voorhees' name. But that occurred prior to Mississippi authorities having any awareness of a Florida homicide. Walker did ask appellant if his name was Voorhees but that was immediately after the phone call to Voorhees' friend in Jacksonville, Tony Watson -- not Detective Spears; since the purpose of the phone call was appellant's effort to identify himself, there is little impropriety. Walker subsequently phoned Detective Spears (R 401 - 403). After talking to Spears, Walker merely told appellant that Pasco officers would be arriving later and he allowed Voorhees to talk to Sager (R 402 - 404) (The only interrogation, if it can be called that, was Lawless asking about the car after Miranda warnings following Walker's conversation with Spears and received a similar answer to what had been given the day before -- R 453 - 454).

Voorhees next complains about his statement to Benny Humphrey, the inmate-trustee who was approached by Voorhees on the evening of January 9th to pass along a message to Sager that everything was going to be all right, that Voorhees would take the blame for all of it. Voorhees also said he cut the victim's throat (R 499 - 500). Humphrey testified that he was not a paid informant and was not instructed by anyone to obtain incriminating statements (R 501).

The trial court's finding that Voorhees initiated the conversation and that there was no evidence that law enforcement cultivated Humphrey to obtain information from the defendants is

---

authorities to arrest appellant for murder that is not significant. See Carroll v. State, 497 So. 2d 253, 260 (Fla. 3d DCA 1985); E. Johnson v. State, 660 So. 2d 648 (Fla. 1995).

supported by the record and need not be rejected by an appellate court that lacks the opportunity to evaluate live testimony (R 142). See, e.g., Wainwright v. Witt, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858 quoting from Marshall v. Lonberger, 459 U.S. 422, at 434:

> " . . . How can we say the judge is wrong? We never saw the witnesses, . , . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal. "

In State v. Gifford, 558 So. 2d 444 (Fla. 4th DCA 1990), the defendant was arrested on a probation violation warrant but subsequent inquiry confirmed the defendant's claim that the warrant was no longer in force. The officer who was interviewing victims of the sexual offense at the hospital emergency room (for which Gifford was a suspect), instructed jail authorities to continue to detain him since he had probable cause to make an arrest. Four hours later, the detective arrived at the jail, advised the defendant of his Miranda rights and obtained a written confession. Subsequently, he arrested defendant for the sexual offense crime, The trial court ruled that the continued detention was lawfully based on probable cause but that the written statement was inadmissible because it flowed from an initial illegal arrest. The appellate court reversed, The appellate court agreed that the officer had probable cause and "the sequence of events and totality of the circumstances were such that the officer had no realistic alternative but to order appellee detained rather than released and re-arrested. " Id. At 445. The Gifford court applied the standard enunciated in Runaway v. New York, 442 U. S. 200, 60 L.Ed.2d 824 (1979)[3] and concluded that the passage of four hours between the illegal arrest and the statement

---

[3] These factors include (1) the temporal proximity of the illegal arrest and the statement; (2) the

and the elements supporting the detective's probable cause were intervening factors and the official conduct was performed in good faith. The lower court correctly reasoned that the test was satisfied. Here, a considerably longer time period had elapsed, the defendants' awareness of the Pasco murder investigation and furnishing of Miranda warnings were intervening factors, as were Sager's comments to Wayne County authorities and Voorhees' remarks to Mr. Humphrey, and the initial illegal detention by Mississippi authorities to discern their true names was unconnected to the Pasco County murder investigation.

In summary, applying Brown v. I I 1 '- , 422 U. S. 590, 45 L.Ed.2d 416 (1975), the lower court's order must be affirmed.

1. Temporal Proximity --

The alleged improper detention began on the morning of January 9, and lasted until the early afternoon when Tony Watson informed Deputy Walker that Pasco County officers were looking for Voorhees regarding a murder. Voorhees and Sager had the opportunity then to reflect on this turn of events until Lawless arrival at midnight -- several hours later. Cf. State v. Gifford, 558 So. 2d 444 (Fla. 4th DCA 1990) (Four hour time lapse between illegal arrest and confession); United States v. Edmondson, 791 F.2d 1512 (11th Cir. 1986) (Forty-five minute gap after arrest sufficient)

2. Presence of Intervening Circumstances --

Unlike the situation presented in other cases where the accused is illegally detained as a

---

presence of intervening circumstances; (3) the purpose and flagrancy of the official misconduct.

suspect in the very crime being investigated to which the suspect ultimately confesses, here Voorhees and his colleague were not -- in the eyes of Mississippi officers - suspects in an ongoing investigation on the morning of January 9th.

In addition to Detective Lawless having acquired probable cause to arrest Voorhees for murder (Cf. State v. Gifford, 558 So. 2d 444 [Fla. 1st DCA 1990], where officer had no realistic alternative but to order continued detention rather than release and re-arrest), Voorhees and Sager were advised of the change in their circumstances, i.e. that Pasco authorities now focused on them regarding the Bostic homicide and -- prior to any interrogation by Detectives Lawless and Spears and without their knowledge or approval -- Sager chose to make admissions to Sheriff Farrior and Voorhees chose to make admissions to Benny Humphrey.

3. Purpose and Flagrancy of the Officers' Misconduct --

There was no misconduct at all by Florida officers; they arrived as promptly as they could from Pasco County and proceeded to interview the two suspects -- after giving Miranda warnings -- and without even being aware Sager had spoken to Sheriff Farrior. Similarly, there was no flagrant misconduct by Mississippi officers attempting to exploit the defendants' presence, They attempted no interrogation after learning that Pasco authorities were interested in the two men regarding the Bostic homicide. Since there was no flagrant misconduct employed to derive evidence implicating Voorhees and Sager in **the Florida crime by Mississippi authorities,** appellant's challenge must fail. State v. Stevens, 574 So. 2d 197 (Fla. 1st DCA 1991).

ISSUE II

WHETHER APPELLANT'S ALLEGED ABSENCE FROM SEVERAL PROCEEDINGS BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

Appellant next contends that the record does not clearly establish whether appellant was present when juror challenges were exercised at bench conferences (Tr 176 - 178, 217 - 18, 247 - 49, 263 - 64, 281 - 287, 301 - 02, 317 - 318). Appellant does not contend that there was any objection presented below pertaining to any alleged absence from the proceeding, and appellant did not assert any such error in his motion for new trial (R 332 - 335). Mr. Voorhees was present in the courtroom (Tr 27) even if he did not verbally participate on certain matters.

The instant trial occurred in November of 1993, some fourteen months prior to this Court's decision in Coney v. State, 653 So. 2d 1009 (Fla. 1995), wherein the Court announced a rule which was "prospective only" Id. At 1013 -- that the trial court must certify the defendant's approval of juror challenges through proper inquiry. See also Ogden v. State, 658 so, 2d 621 (Fla. 3d DCA 1995), Quince v. State, 660 Sol.2d 370 (Fla. 4th DCA 1995) (reaffirming that the Coney rule is prospective only).

Appellee respectfully submits (1) that this issue must be deemed procedurally barred or waived for the failure to complain or bring it to the attention of the trial court. See, e.g., United States v. Gagnon, 470 U.S. 522, 84 L.Ed.2d 486 (1985) (defendant's failure to invoke right to be present at a conference between judge and juror constitutes a valid waiver of that right); (2) there is no Coney violation since the instant trial pre-dated the prospective application of the

Coney rule; (3) any error is harmless. See Coney.

Appellant also contends that he was absent during a pretrial conference held before Judge Mills on April 16, 1992 (R 839 - 847). The record reflects that the trial court desired to have Mr. Voorhees present to explain why counsel Kester was standing in for counsel Loefler who was out of town taking depositions and that defense counsel Kester suggested that it would be preferable to reschedule the matter rather than bring Mr. Voorhees in (R 843). The court agreed that this more cautious approach was preferable (R 844) and nothing substantive occurred.

Appellant also complains that he was not present on November 16, 1993, when the court and counsel were discussing a motion in limine made by the state (Tr 337 - 341). At that hearing both the state and defense announced that they intended to present no testimony (Tr 338). Trial defense counsel did not attempt to answer the court's inquiry why the defendant's presence was necessary if no testimony was to be taken and presumably acquiesced. See Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979).

In any event, nothing transpired at this hearing since the defense insisted the state submit a written motion and the prosecutor then agreed to do the proffer later (Tr 340 - 341). While there was some discussion about witnesses and preliminary instructions (Tr 341 - 350) none of these matters required the defendant's presence. Coney v. State 653 So. 2d at 1013, Hardwick v. Dugger 648 So. 2d 100, 105 (Fla. 1994); Hall v. Wainwright, 850 F.2d 945 (11th Cir. 1986); Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674 (1934).

Voorhees contends that he was absent at the beginning of a hearing on November 19, 1993

(Tr 914 - 916) when the court and respective counsel discussed the logistics of deposing Dr. Merin and when he would testify during the penalty phase. Appellant's presence during that brief colloquy was not necessary and Voorhees arrived to be present during the colloquy on penalty phase instructions (Tr 916).

Moreover, there is no reversible error in a defendant's absence when his presence could not have assisted counsel in arguing motions. Beltran-Lopez v. State, 583 So. 2d 1030 (Fla. 1991); Roberts v. State, 510 So. 2d 885 (Fla. 1987); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Parker v. State, 641 So. 2d 369 (Fla. 1994).

Appellant complains that he was not present on the morning of November 22, 1993, during the discussion of the schedule for the proceeding (Tr 973 - 987), prior to the testimony of Mr. Lawless. The record does not reflect that Mr. Voorhees was absent, no one objected or complained or asserted that he was absent, nor was such a ground asserted in Voorhees' motion for new trial (R 332 - 335). This claim is procedurally barred for the failure to present to the trial court.

ISSUE III

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ADMITTING INTO EVIDENCE AT GUILT PHASE THE KNIFE TAKEN FROM APPELLANT IN MISSISSIPPI?

At trial, crime scene technician Boekeloo identified state's exhibits 2 - 4 (B 1, B 2 and B 3) as three knives that he impounded from the residence of murder victim Bostic (Tr 404 - 408). Deputy sheriff Bilmer Walker testified that he took a knife off of appellant (who was using the name Densmore) that he had stuffed down in the short pocked and later turned it over to Detective Lawless (Tr 487). When the state offered this knife -- Exhibit GG -- into evidence, the defense objected on relevancy grounds and the prosecutor responded that it circumstantially showed that the knife was taken from the crime scene (Tr 491) and that it could have been used on the victim by Voorhees and/or Sager (Tr 492). The court temporarily kept the exhibit out of evidence and reserved ruling (Tr 495, 497).

In his taped interview with Detective Lawless, the following colloquy occurred:

> Q: "How come there were so many knives in the room there? There was more than the one knife. There was a knife at another location in the room that also had blood on it. How did that come into play or do you know?"
>
> A: "I don't remember. The only one I remember is the white-handled knife that had like uh like uh serrated edges, "
>
> Q: "A white-handled knife?"
>
> A. "If I remember it, yeah, it's white, white-handled knife, I know the blade had a serrated edge. "
>
> Q: "Is that the same knife that was in Johnny's possession?"

A: "No that knife that's out here is in my possession. That was in the car, I found that in the car. "

Q: "That was in your possession?"

A: "Yeah. "

Q: "We haven't . . . we haven't had a chance to talk with the officers that already spoke with you or that uh bought you in last night because they went home for the evening, so that's why I'm asking you these questions again But that's not the same then?"

A: "No sir."

Q: "You left that knife there at the scene?"

A: "Yes sir, with a rag around it. "

When the state sought to introduce this knife which Lawless obtained from Walker, the prosecutor argued:

Mr. Attridge: He says he got the knife from the car, so he's got his taking a knife along from the defendant, which was from the car, so we're placing him now in the car, by his own admission, And it's been tied into the theft, the robbery of this offense and, you known, he's part of this. Part of this is it's felony murder, robbery being committed; money, the car, other items relating to the defendant. And by his own admission, what better record do you have for placing this as evidence of the crime. He took the knife from the car. So that's evidence of intent to steal that still existed when he was taken into custody on January 8th 1992.

(Tr 600)

***

Mr. Attridge: during the interview he talks about a white-handled knife that he believes he used in the commission of the murder.

Okay. The knife in question is, I believe, I think is a bone colored. And I think the argument is that he might have confused which knife he actually used. I can see a defense argument right now. Well, there wasn't any white-handled knife ever recovered at the crime scene. Now we've got the Defendant Voorhees in possession of a white-handled knife, by his own statement. That's the one he may have used in the commission of this offense.

So arguably, Judge, he had the murder weapon. And part of this exhibit that we have ties into this.

If you don't allow that, in closing arguments., they're going to be asking, where is that white-handled knife. Well, Judge, it's right here.

(Tr 601 - 602)

* * *

Mr. Attridge: Judge, his own statement said he used and had in his possession a white-handled knife, and this is a white-handled knife.

THE COURT: None of the other knives are white handled to the best of my recollection.

MR. HALKITIS: No, sir. And there's a case, there's one I have here, Sloan versus State, 429 So. 2d 355 and 54. And there's a more recent case I could find with a few minutes up in my office which talks about the defendant's possession of a weapon which could have been used during the commission of a crime.
There's a load of Federal cases that I have that I've looked at which all say the same thing. I can give the Court those cites, but let me find the other more recent Florida case other than Sloan. Sloan, Judge, set the standard for that proposition, the fact that a defendant has possession of a weapon that could have been used in the murder is relevant and material and should be admitted,
Which you've got here, Judge, is the possibility that he used that knife, there's the possibility that both of them, both individuals, used the knife; that the defendant stabbed him and took the knife with him,

> THE COURT: Well, what persuades me here is the fact there's only one white-handled knife that has been introduced. And strangely enough, Mr. Voorhees had possession of it, and he himself says he used a white-handled knife. I guess the State's entitled to argue that.
>
> All right. I'm going to let it in as 39. (Open court).
>
> THE COURT: All right. State's Exhibit GG will come in as Exhibit 39.
>
> (Tr 602 - 604)

A trial court has wide discretion concerning the admissibility of evidence and absent an abuse of discretion a ruling regarding admissibility will not be disturbed on appeal. Jent v. State, 408 So. 2d 1024 (Fla. 1981); Hannon v. State, 638 So. 2d 39 (Fla. 1994); Gaskin v. State, 591 So. 2d 917 (Fla. 1991); Blanco v. State, 452 So. 2d 520 (Fla. 1984); Welty v. State, 402 So. 1159 (Fla. 1981). In the instant case, the challenged knife was relevant and admissible, Appellant had mentioned that he remembered the white-handled knife and as the prosecutor and trial court noted below this was the only knife recovered with a white handle. Additionally, even if this knife -- in the possession of Voorhees when invited to spend the night in the Mississippi jail -- was not used as the murder weapon, since appellant admitted having "found" and retained it in the car stolen from Bostic after the murder it is admissible with the other items taken as part of the felony-murder.

See Slater v. State, 316 So. 2d 539 (Fla. 1975) (trial court properly admitted two pistols, a .22 caliber which was the murder weapon and a .32 caliber stolen from the motel); United States v. Gandolfo, 577 F.2d 955 (5th Cir. 1978) (no error in admitting sawed off shotgun into evidence

in armed robbery prosecution despite fact that neither photographs of robbery nor description given by witness was sufficient to positively identify shotgun received into evidence as shotgun used in robbery).

Appellant relies on Carter v. State, 560 So, 2d 1166 (Fla. 1990) where the Court discovered harmless error in the introduction into evidence of a gun and a knife that had no relevance to the case. The victim there had died of asphyxiation and the opinion does not suggest that the state had contended that the knife and gun had been stolen from her. He also cites Amoros v. State, 531 So. 2d 1256 (Fla. 1988) wherein the Court upheld the admissibility of evidence that the defendant had been in possession of a gun (for which he was acquitted of the murder of one Walter Coney), the same gun used a month later to kill Omar Rivero (the crime being tried). The Rivero murder weapon had been abandoned several miles from the scene and there was no other substantial evidence linking Amoros to the gun in the Rivero shooting. Amoros' possession of a gun on a prior occasion and the proof that it was the same weapon used to murder the victim rendered the evidence relevant.[4]

Other cases cited by appellant also are inapposite. Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987) (evidence concerning gun and ATF records of its purchase not linked to offenses charged; "here there is nothing unlawful about Huhn's ownership of the gun and nothing to connect the gun to the crimes for which Huhn was on trial". Id. At 589); Dorsey v. Sate, 613

---

[4] That a weapon, standing alone, might not be relevant in those circumstances does not mean that a weapon -- in other circumstances -- cannot have relevance to a case.

So. 2d 1368 (Fla. 2nd DCA 1993) (error to admit photographs of property in defendant's trailer where no connection shown to stolen property charge); Garcia v. State, 655 So. 2d 194 (Fla. 3d DCA 1995) (error to admit holster and $800 in cash since neither relevant to any portion of the trafficking and conspiracy charges); Sosa v. State, 639 So. 2d 173 (Fla. 3d DCA 1994) (.380 bullets retrieved from defendant's car which could not have been fired in the gun fired at victim in attempted murder case and thus were not relevant); Barrett v. State, 605 So. 2d 560 (Fla. 4th DCA 1992) (evidence of cash seized at time of arrest two days after drug transaction since there was no connection between seized cash and crime charged).

Finally, any error on this point must be deemed harmless. State v. Diguilio, 491 So. 2d 1129 (Fla. 1986). In light of Voorhees' admitted culpability in the crime and the physical evidence including possession of the victim's auto, the challenged knife added nothing to the jury's result.

ISSUE IV

WHETHER THE LOWER COURT ERRED IN PREVENTING THE JURY AT GUILTY PHASE FROM HEARING TESTIMONY OF HEARSAY STATEMENTS MADE BY CO-DEFENDANT SAGER?

Appellant contends that at guilt phase he proffered the testimony of several witnesses who ostensibly would have testified that Sager made statements indicating that he was more culpable than Voorhees (Tr 707 - 717, 730 - 732, 735 - 742, 753 - 781) [The state also proffered the testimony of corrections officer Frank Loretto and Detective Lawless to rebut proffered defense witness Lefils -- Tr 783 - 789]. The court refused to allow the testimony at guilt phase (Tr 982 - 83, 1016 - 1028).[5]

Following some discussion, this colloquy ensued:

> THE COURT: Don't confuse the poor old Judge. Let's deal with this witness who's sitting here on the witness stand. This witness is simply, at the very best, going to say that Mr. Sager said, we were both involved, but I'm the one that actually did the slashing of the throat, right?
>
> MR. LOEFFLER [Defense attorney] Right.
>
> THE COURT: Does everyone agree with that?
>
> MR. HALKITIS [prosecutor] Yes, sir.
>
> THE COURT: Okay. If that's the problem that I'm to decide upon, I don't think that passes the test which is described in Denny versus State found at 617 So. 2d 323, Fourth DCA, 1993, In which case

---

[5] At guilt phase, defense counsel stated regarding Miklos Flinn, "And I would represent to the court it is truly not exculpatory, other than to the extent to which Sager inculpates himself." (Tr 73 1 - 732) (emphasis suppled).

> it does in fact indicate that certainly from what I can see, that the witness not only has to inculpate himself, but also must exculpate the other person. And in a situation like this one, I don't think they're saying, well, I did a little bit more than the other person did, or even I did a lot more than the other person did, but we were still in there together doing the same stuff, exculpates Mr. Voorhees. Granted, it undoubtedly inculpates Mr. Sager. It just didn't exculpate Voorhees. And under those circumstances, it looks to me like it flunks the test under Denny.
>
> Now, again, it doesn't make any difference whether I agree with Denny or not, which I don't. I think you ought to be able to get it in, but I only get paid to think what I think the law to be. I need to follow what the Appellate courts say. And if the Second District hasn't said something to the contrary, I'm required to follow any other Appellate Court in this state that spoke on the topic. And it looks to me like the most recent thing that seems to be right on the topic we're at here is the Denny case I just cited. So I'm going to follow it.
>
> Based upon what we have now agreed to be the proffer up here, I'm not going to let you get into that.

(TR 713 - 714)[6]

The trial court reiterated that Sager's statements were not exculpatory (Tr 736 - 740, 749 - 752) and that Lefils' statements were not trustworthy and did not exculpate Voorhees (TR 790, 799).

Through defense witness Farrior the jury did hear testimony that jail trustee Benny Humphrey told him Voorhees had told him that Voorhees had cut the victim's throat and that Farrior had temporarily mischaracterized the names at deposition (Tr 717 - 726).

Florida Statute 90.804(2)(c) providing as an exception to the hearsay rule a statement against interest recites:

---

[6]The trial court later noted that it did agree with Denny. (Tr 740).

> Statement against interest. -- A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.
>
> (Emphasis supplied)

In Denny v. State, 617 So, 2d 323 (Fla. 4th DCA 1993), the Court ruled:

> [5, 6] Lastly, Denny argues that his convictions should be reversed because the trial court erred in refusing to allow him to introduce portions of statements of codefendant who were tried separately. Denny argues the evidentiary purpose of admitting these separate pretrial statements made by the codefendant would tend to show his lesser involvement in the murder. These statements were offered by Denny as being a hearsay exception, i.e., a statement against interest. Section 90.804(2)(c) of the Florida Statutes provides in pertinent part that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statements." The trial court found there were not sufficient corroborating circumstances to show trustworthiness and the statements were not admitted at trial. Furthermore, the trial court also questioned whether or not the codefendant' statements were exculpatory at all in that they clearly implicated Denny in these crimes. If not exculpatory, then the statements would not qualify under this hearsay exception. The standard for review of a trial court's decision on the admissibility of evidence is generally that wide discretion is given. Evidentiary rulings will not be disturbed unless there is a showing of an abuse of discretion. *Blanco v. State,* 452 So. 2d 520 (Fla. 1984), *cert. denied, 469* U.S. 1181, 105 S.Ct. *940, 83* L.Ed.2d *953* (1985); *Maggard v. State,* 399 So. 2d 973 (Fla.), cert. *denied, 454* U.S. 1059, 102 S.Ct. 610,70 L.Ed.2d 598 (1981). Under these facts, we find the trial court did not abuse its discretion in this evidentiary ruling,

(Text at 324 - 325)

Appellant cites Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994) and Hedgeman v. State, 661 So. 2d 87 (Fla. 2nd DCA 1995). In Johnson during a pending death warrant and the "possibility of factual innocence", Id. at 111, this Court held that a remand for evidentiary hearing was appropriate when the factual context showed four affidavits asserting that another man admitted the killing when the trial testimony showed there was only one perpetrator. In Hedgeman, the victim was shot three times by one White and Hedgeman subsequently kicked the victim. The appellate court held that there was no testimony that either White or Hedgeman intended to kill the victim on prior occasions (there were two prior altercations) and no testimony that the shooter White planned to kill the victim that night or that Hedgeman knew of his plans and intended the crime be committed. Further, there was no evidence that Hedgeman took any action prior to or during the shooting to aid, encourage or participate in White's act. Finally, the evidence established that his act of kicking did not contribute to the cause of death.

Johnson does not aid Voorhees; if it was true what the affiants had been told in Johnson, then Johnson could not be guilty. But here, as the defense proffer admitted, Sager was claiming in the hearsay declarations that he was more culpable than Voorhees. But since the two acted together in tying the victim, beating and kicking him, Voorhees is not exculpated by Sager's statements. See Maugeri v. State, 460 So. 2d 975, 977, n. 2 (Fla. 3d DCA 1984) (Exculpatory statements are declarations against the declarant's interest which indicate that the defendant is not responsible for the crime charged); Ehrhardt Florida Evidence $804.4, p. 740, n. 12 (1995).

Similarly, unlike Hedgeman, Voorhees' own statements in his interview with Lawless establish his culpability and involvement with Sager in this robbery and premeditated killing.[7]

Appellant urges that he was inhibited in his effort to present a defense but he is not entitled to ignore the rules of evidence and present inadmissible testimony. See, e.g., Pittman v. State, 646 So. 2d 167, 172 (Fla. 1994) (We find that the trial judge correctly excluded Hodges' testimony as substantive evidence under the hearsay rule and that there is no applicable hearsay exception); Lee v. McCaughtry, 933 F.2d 536, 538 (7th Cir. 1991) (Chambers did not do away with the hearsay rule. . . . It did not abolish the hearsay rule on constitutional grounds),

Williamson v. Umted States, 512 U.S. ___, 129 L.Ed.2d 476 (1994) was set in a context of the government's attempt to introduce a declarant's hearsay statement that included both self-inculpatory and non self-inculpatory elements. The case also involved the Court's clarification of Federal Rule of Evidence 804 (b)(3). The Court reasoned -- in its effort to determine the scope of the word "statement" -- that because of the common-sense notion that reasonable people tend not to make self-inculpatory statements unless they believe them to be true, but since a statement collateral to a self-inculpatory statement says nothing about the collateral statement's reliability, the preferable rule is that only the declarant's self-inculpatory statements should be admissible.

In the instant case, the government was not attempting to introduce a declarant's self-inculpatory remarks; rather, the defense was seeking to introduce the hearsay statements of a declarant ostensibly to exculpate the accused. While the state agrees with the Supreme Court's

---

[7] Appellant argues that had the jury heard this material they might have awarded him a pardon. That is not a likely scenario since after hearing Sager's admissions at penalty phase they recommended death for Voorhees by a nine to three vote (R 3 13) after thirty-five minutes of deliberations (R 19 1).

observation that reasonable people do not tend to make self-inculpatory statements unles they believe them to be true, it does not ineluctibly follow that when one admits his culpability in a crime, his statements about his fellow actor's behavior carries with it the same aura of reliability. William recognizes this.

> "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature. "

(129 L.Ed.2d at 482, 483)

Even under the federal rule, according to concurring Justice Kennedy, when applied in the exculpatory context a declarant's statement, "I robbed the store alone." would have to be edited to, "I robbed the store", thus reducing the value of the testimony. 129 L.Ed.2d at 494. In the instant case, Sager's admission to Detective Lawless that he cut Bostic's throat -- while certainly inculpatory to himself -- does not tend to exculpate Voorhees (especially when the Sager statement admits that Voorhees provided the teelphone cord to tie the victim - p. 10 and Sager denied stabbing the victim which by a process of elimination leaves only Voorhees as the inflictor of these wounds). Any error is harmless beyond a reasonable doubt.

Moreover, appellant failed to satisfy the criteria of F.S. 90.804(2)(c) requiring that corroborating circumstances show the trustworthiness of the statement. Appellee does not challenge the Sager statement as a whole, only the portions which allegedly exculpate Voorhees. Note the suppression hearing testimony of Deputy Walker that Voorhees told Sager that Pasco County officers were coming to talk about the murder and that he would take care of it (R 402 -

404) and Benny Humphrey's trial testimony that Voorhees asked him on January 9 to convey a message to Sager that he would take the rap for everything (Tr 528). Additionally, Sager's statement to Lawless denied any stabbing aside from the cut thoat (Defense Exhibit 1, p. 8), which was contradicted by the medical examiner's testimony (Tr 681).

Error, if any, is harmless. State v. Diguilio, 491 So, 2d 1129 (Fla. 1986).

ISSUE V

WHETHER THE LOWER COURT ERRED IN DENYING A MOTION FOR JUDGMENT OF ACQUITTAL ON THE BASIS THAT THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATED MURDER?

The record reflects that when the state had rested, defense counsel "for the record" moved for a judgment of acquittal "without argument, just on the general ground that the state had not proved a case of premeditated murder" (Tr 701). Cf.. Rhodes v. State, 638 So. 2d 920,925 (Fla. 1994), rejecting pro forma complaint about unavailability of witnesses. Even if it were true that the state had failed to prove a premeditated murder, it would avail Voorhees naught since appellant's admissions in his confession of his desire to rob Bostic and search of the house for valuables contemporaneously with Bostic's murder and taking of his automobile constitutes first degree murder under the felony-murder doctrine. See G. W. Brown v. State, 644 So. 2d 52 (Fla. 1994).

But Voorhees is not correct in asserting that the state failed to prove a premeditated murder. Appellant needed money -- his supervisor Fifer testified that he had warned Voorhees that if he couldn't show up for work on time he didn't need him (Tr 457); both Fifer and co-worker Novici stated that appellant didn't have a car -- he walked to work or hitchhiked (Tr 452, 460). Voorhees admitted to trustee Bennie Humphrey that after tying up the victim he "caught him by the hair of the head and cut his throat" (Tr 529). In his taped confession Voorhees admitted telling Sager to hit the victim to shut him up (Exh. IDF, No. 5, p. 6), that he looked through the house for things to steal (P. 7), that he and Sager tied the victim with telephone wires

(P. 7), that Sager tried to gag the victim with a Rebel Flag and that they dragged the victim to the bedroom (p. 9). Voorhees and Sager continued to beat him about the head and Voorhees washed the blood off his hands, started his shirt on fire and wiped the place clean of fingerprints (p. 11). They took the remaining cash and car keys and turned on the stove for the purpose of destroying the crime scene (P. 12) (although he asserted he was hoping the victim was still alive) (P. 17).

Appellant cites Hoefert v. State, 617 So. 2d 1046 (Fla. 1993), for the proposition that where the state's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first degree murder cannot be sustained. In Hoefert, the state was unable to prove the manner in which the homicide was committed and the nature and manner of any wounds inflicted. The asphyxiation could have been caused during a sexual incident without a premeditated intent. In contrast in the instant case, expert medical testimony established that Mr. Bostic died from a combination of homicidal violence, including blunt trauma to the head and chest, choking, binding and incisions to the neck. (Tr 682). The state satisfied the standard repeated in Hoefert:

> " 'Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presences or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.'" *Holton v. State, 573 So.* 2d 284, 289 (Fla. 1990), *cert. denied,* ___, U.S. ____, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991) (quoting *Larry v. State,* 104 So. 2d 352, 352 (Fla. 1958)).

(Text at 1048)

Any contention of an accidental homicide here would be frivolous in light of the multiple

severe injuries inflicted on the helpless hog-tied victim.

ISSUE VI

WHETHER THE LOWER COURT ERRED IN DENYING A MISTRIAL REQUEST FOR THE PROSECUTOR'S ALLEGEDLY INFLAMMATORY ARGUMENT AT GUILT PHASE?

At the conclusion of prosecutor Attridge's initial closing argument, defense counsel approached the bench and this colloquy ensued:

> MR. SIAR: Your Honor, I think it's incumbent at this juncture to move for on a mistrial based on some statements Mr. Attridge -- particularly those at the close, obviously inflammatory. In addition, there was a misrepresentation in the factual scenario regarding the second-degree murder. I would ask for a curative instruction in this trial at this juncture. Again, this is all based on constitutional grounds.
>
> THE COURT: I don't find anything inflammatory at all. Do you care to be specific?
>
> MR. SIAR: Certainly. For what, an ATM card, a hundred dollars, that value he places on human life. Those statements of Mr. Attridge.
>
> THE COURT: That really doesn't sound very inflammatory to me. But I'll deny the motion
>
> (Tr 831)

Appellee agrees with the trial judge; there is nothing inflammatory and it is a fair comment on the evidence.

Similarly, appellant's complaint about prosecutor Halkitis' final closing argument was properly rejected:

> MR. SIAR: Your Honor, I did want to register an objection to only one thing Mr. Halkitis said. That was the comment about torture

marks, PIN number. There wasn't any evidence to indicate that. It was inflammatory . I would move for a mistrial. Since we're at the end of closing, we would renew all of our objections and motions.

THE COURT: All right. I understand that there's no direct evidence to support what Mr. Halkitis said, but he gets to argue inferences, and that's probably an inference from the evidence. I'll deny your motion.

(Tr 874)

The court correctly ruled that the prosecutor's comments were a valid inference from the evidence. Dr. Hansen had testified that the victim had a slash or cut to this throat, several other cuts to the side of his neck and bruising on the side of the face and around the eyes (Tr 681). There were two wounds on the back of the left arm (Tr 683). They were not defensive wounds. The abrasion depicted on Exhibit 11 and 12 would be caused by a knife (Tr 684 - 685). There were different type wounds in the neck (Tr 686). Additionally, there had been blunt trauma to the head (Tr 687). Lacerations on the inside of the lip would have been consistent with the victim being pushed or kicked in the face (TR 690).

ISSUE VII

WHETHER THE LOWER COURT ERRED IN DENYING MISTRIAL REQUESTS DURING PENALTY PHASE BECAUSE OF THE PROSECUTOR'S CROSS-EXAMINATION OF DR. MAHER AND ALLEGEDLY INFLAMMATORY CLOSING ARGUMENT?

A motion for mistrial is addressed to the sound discretion of the trial judge and should be exercised with great care and caution and should be done only in case of absolute necessity. It should not be presumed that error has injuriously affected substantial rights of the defendant. Salvatore v. State, 366 So. 2d 745 (Fla. 1978). See also Esty v. State, 642 So. 2d 1074 (Fla. 1994) (prosecutor's argument that defendant is a vicious murderer and that police could not protect society from people like him was not so prejudicial as to vitiate entire trial and did not require mistrial); Spencer v. St&, 645 So. 2d 377 (Fla. 1994) (prosecutor's argument which improperly referred to facts not in evidence did not require mistrial); Parker v. State, 641 So. 2d 369 (Fla. 1994) (no abuse of discretion in refusing mistrial on prosecutor's comments characterizing defense as theory or fantasy); Carroll v. State, 636 So. 2d 1316 (Fla. 1994) (prosecutor's cross-examination of psychiatrist as to whether defendant would still desire to have sex with young children when his schizophrenia was in remission to which objection was sustained did not require mistrial); Gorby v. State, 630 So. 2d 544 (Fla. 1993) (mistrial not required where prosecutor argued in closing that defendant showed no remorse).

Appellant alludes to the prosecutor's cross-examination of Dr. Maher at Tr 1170 where the prosecutor inquired whether the witness was aware of the report in August of 1984 by staff psychologist John Zernanski regarding Voorhees' erratic and defiant behavior. The defense

contended that question was inflammatory and the lower court responded that it didn't understand that reasoning, that the doctor had testified about what he had based his opinion on and that the prosecutor could properly explore that (Tr 1171). Indeed, Dr. Maher answered that he had read such a report (TR 1171). The trial court ruled correctly. In Parker v. State, 476 So, 2d 134, 139 (Fla. 1985), this Court opined:

> "We find that it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis (citations omitted). We conclude that the trial court properly allowed the cross examination of the psychologist on the contents of the case history."

Accord, Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987).

It was eminently appropriate for the prosecutor to explore the bases for the defense expert's opinions since (1) the witness had testified that he had frequently testified for the defense in other first degree murder cases (Tr 1140), (2) his opinion that Voorhees suffered from post-traumatic stress disorder (Tr 1125) and that appellant's ability to appreciate the criminality and ability to conform to the requirements of law was several diminished and that Voorhees was under the effects of extreme mental or emotional disturbance (Tr 1133 - 1134) was completely contradicted by rebuttal witness Dr. Sidney Merin who disputed al of these factors (Tr 1237 - 1255); and (3) the report of Dr. Zernanski and other early evaluators might be deemed important since Voorhees had not mentioned any alleged sexual abuse from his father (Tr 1172) and that there was no corroboration of this in any reports and Dr. Maher only learned of this from Tina Voorhees (Tr 1172), a witness who testified that she had previously given a court statement on behalf of appellant in 1986 and did not mention this alleged sexual abuse (Tr 1085).

Appellant next complains that the prosecutor propounded a lengthy hypothetical question to the witness which the prosecutor thought embraced the facts of the case (Tr 1209 - 1211). The defense objected that this was a closing argument and the court sustained the objection (Tr 1211). The prosecutor then propounded another lengthy hypothetical question (Tr 1211 - 1233) and the defense objected on the basis that a substantial portion of this hypothetical corresponded with the prosecutor's guilt phase closing argument and were inferences from the facts as well as the facts. The defense requested a mistrial (Tr 1213 - 1214). The prosecutor responded:

> MR. HALIUTIS: Judge, it's evident counsel is ignorant with the Rules of Evidence. The Rules of Evidence clearly state that you can give a witness a hypothetical question based on facts that are in evidence. It doesn't say that I have to give him every single fact in evidence. That's something that counsel can clear up if he wishes to on cross, but I have to give him all the facts that are in evidence. Every fact I gave him was in evidence either by way of his statements, either by way of looking at photographs or reading a transcript .
>
> (Tr 1214)

The court ruled:

> THE COURT: Not so. You put too many things in there that are assumptions from the facts, which you may well be able to, but you're not going to put them in a hypothetical here, so I'm going to sustain the objection.
>
> (Tr 1215)

When the defense requested a ruling on the mistrial motion, the lower court declared:

> THE COURT: I'm going to deny the motion for mistrial, but if we're going to have a problem with the hypothetical question, because my understanding of the law is that you are not permitted to draw inferences from the facts. You are only permitted to set facts. I'm certainly not saying you have to put every fact in there,

> they can get up and object to any other facts they think were established. But I'm not going to permit inferences to be drawn from those facts. I will in closing argument, which that might be permitted. If he's going to have a continuing problem with this, I'm not going to let you practice your closing argument over and over again in front of this jury. They're already getting antsy, but nobody seems to be paying attention to that. In any event, if he's going to have a problem with that, we'll just give them a break right now and we can work out the hypothetical so it contains nothing but facts, no inferences are drawn from it.
>
> MR. HALKITIS: Judge, two things, I'm not going to have any hypothetical questions after this witness. Number 2, I think Mr. Loeffler and Mr. Siar are doing quite an admirable job of paying attention to what I'm saying. I don't think this Court is correct in saying nobody is paying attention to what I'm saying. And maybe I misunderstood the court in that last statement, but I think Mr. Loeffler's objection is, obviously, a viable objection, and he is paying close attention to what I'm saying, and most of the time when I turn to that table, he is staring at me.

(Tr 1215 - 1216)

The prosecutor asked no further hypothetical questions in this area (Tr 1217 - 1218).

While it is true that the lower court agreed with the defense that the prosecutor was relying on assumptions as well as facts in sustaining the defense objection, the prosecutor's attempt certainly fell within the ambit of the rule announced in Mutual Ben. Health & Accident Association v. Bunting, 183 So. 321 (Fla. 1938), that although an expert may not be interrogated upon an hypothesis having no foundation in the evidence, it is yet not necessary that the hypothetical case put to him should be an exact reproduction of the evidence or an accurate presentation of what has been proved. Counsel may present an hypothetical case in accordance with any reasonable theory of the effect of the evidence. Id. At 331. See also Seibels. Bruce & Company v. Giddings, 264 So. 2d 103 (Fla. 3d DCA 1972) (In propounding a hypothetical, a party is entitled to use evidence

even if it be conflicting viewed in a light most favorable to him in propounding a hypothetical); Nat Harrison Assocrates. Inc., v. Byrd, 256 So. 2d 50 (Fla. 4th DCA 1971) (Facts submitted to experts in hypothetical question must be supported by competent substantial evidence or by reasonable inferences from such evidence). Burnham v. State, 497 So. 2d 904, 906 (Fla. 2nd DCA 1986) (not necessary for hypothetical question to be limited only to facts directly established by the evidence; such a question can be based on assumed state of facts which evidence in the record tends to prove, even by inference) (emphasis supplied).

Appellant now criticizes as speculation a comment on victim Bostic's supposed degree of intoxication but medical examiner Dr. Hansen testified that the victim's blood alcohol level was .24, three times the legal limit for driving a car (Tr 692 - 693). Appellant complains about a reference to Voorhees and Sager as transients who were incarcerated most of their lives. Deputy Walker who charitably picked up the two men in Wayne County, Mississippi described the camouflage-clothed duo with no identification walking along and they said they were going to California from Florida (Tr 475 - 476). That sounds like a transient to appellee.[8] With respect to the reference that appellant had a record and was incarcerated for a good period of time, defense witness Tina Voorhees admitted that appellant was arrested for burglary, at age thirteen (Tr 1066 - 1067), and that he was committed to the California Youth Authority four or five times for theft -related crimes (TR 1079). And defense witness Dr. Maher conceded that Voorhees had been incarcerated from the time he was fifteen to age twenty-one, spending about seven months

---

[8] The American Heritage Dictionary defines the adjective transient as passing through from one place to another and the noun transient as one that is transient, especially a person staying a single night at a hotel.

in society (Tr 1160 - 1162).

Appellant claims that it was unduly prejudicial for the prosector to repeat his guilt phase closing argument that Voorhees and Sager planned to rob Bostic, that Bostic was tortured and that he was killed so the assailants could not be identified. One wonders how unduly prejudicial the impact could be on the jury if they had already heard the closing argument at guilt phase and found Voorhees guilty. In any event, appellant's own confession to Detective Lawless described his intent to rob the victim as his companion was beating the victim, and Dr. Hansen had described "several other cuts to the side of the neck as well as bruising along the side of the face and around the eyes" (Tr 681). Voorhees' confession also described the efforts to shut up the victim and dragging him to the bedroom.

If there was any error in the prosecutor's unanswered hypothetical question propounded to witness Maher, any such error is harmless in light of the entirety of evidence.

Appellant also points to the conclusion of the prosecutor's argument (Tr 1286, 1288) that "the tenure [sic]and tone of his closing arguably was clearly inflammatory and theatrical, complete with banging of his hands. " . . . . (Tr 1288). The trial court denied the mistrial request, observing:

> "THE COURT: Okay. Well, I'm going to deny that. While I certainly would classify his closing argument as animated, and while I'm not without my limits as to how far it can go, I think -- don't think emphasizing things by slapping your hands on the podium falls into a fair characterization that I would describe as theatrical.
>
> As far as the contrast, I think he's entitled to put Tina's testimony in context, and while there may have been some indication there which, if taken in one way, would be an expression of opinion on

> his part. I think the overall tone of it was that we saw Tina, who had never seen this side of her brother, and subsequently was thinking of him as she was years ago. And I think he's entitled to make that contrast.
>
> And as far as the juvenile matters are concerned, you've got a doctor that must have spent three hours on the witness stand trying to convince these folks, and maybe he did, that this is a poor unfortunate youth who is not a sociopath, but is merely suffering from some sort of post traumatic stress. And he's entitled to point out the fact that the records the doctor was relying upon tend to do quite a bit to support Dr. Merin's theory that he is just flat out a sociopath. So while under normal circumstances he wouldn't be able to get that stuff in, I think it's fair game here.
>
> So, the motion for mistrial is denied. "
>
> (Tr 1289 - 90)

Appellant complains here about the prosecutor's reference to defendant's age at Tr 1278. Appellant may not initiate a complaint here since he did not object below. See Lindsey v. State, 636 So. 2d 1327 (Fla. 1994); Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994); Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994). Similarly, appellant did not object or register any complaint about the prosecutor's reference to Dr. Maher at Tr 1280.

Appellant has failed to demonstrate any abuse of discretion; the lower court did not err in failing to grant a mistrial.

ISSUE VIII

WHETHER THE CCP AGGRAVATING CIRCUMSTANCE WAS SUPPORTED BY THE EVIDENCE WARRANTING AN INSTRUCTION AND WHETHER THE JURY WAS GIVEN AN IMPROPER INSTRUCTION?

It would appear that initially the prosecutor commented that he would not be asking for a CCP instruction and the defense withdrew its proposed defense instruction 6, 7, and 8 (Tr 949 - 950; R 267 - 72. The court commented that nothing was cast in stone (Tr 967).

After another charge conference (Tr 1264 - 1266) in which the court mentioned an awareness that the defense did not desire that a CCP instruction be given, the court instructed the jury:

> "Third, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The phrase cold, calculated and premeditated refers to a higher degree of premeditation than that which is normally present in a premeditated murder. This factor applies only when the facts show a calculation before the murder that includes a careful plan or prearranged design to kill. "
>
> (R 309 - 310)[9]

The instruction was apparently a modified form of the defense proposed instruction number 6 at R 267. Since the defense motion in essence was granted appellant cannot now complain that

---

[9] While the court reporter typed "presence" instead of "pretense" (R 309 - 310), appellant did not complain of an alleged misstatement after the court instructed the jury (Tr 1322), the correct written instruction was provided to the jury (Tr 13 16) and appellant did not even urge this in his new trial motion (R 332 - 335)

the trial court provided what he wanted. See McPhee v. State, 254 So. 2d 406 (Fla. 1st DCA 1971).

The instant trial was conducted in November, 1993 and appellant now for the first time urges that the lower court erred because of the failure to comply with the subsequently-decided case of Jackson v. State, 648 So. 2d 85 (Fla. 1994). submits that the claim is (a) procedurally barred for the failure to assert below that the CCP instruction was unconstitutionally vague and (b) on the merits, the now challenged instruction is not violative of Jackson, supra. The claim is barred because not only, as stated above, was the instruction given one submitted by the defense, but also, whatever complaint was adduced below concerned the assertion that CCP was inapplicable because of the evidentiary basis. See Motion for New Trial, R 334 - 335 and Hearing on Motion for New Trial, R 704 - 707. A complaint that an aggravator lacks evidentiary support does not suffice to assert on appeal the constitutional invalidity of the instruction. See Occhicone v. State, 618 So. 2d 730 (Fla. 1993); Lightbourne v. State, 644 So. 2d 54 (Fla. 1994); Gamble v. State, 659 So. 2d 242 (Fla. 1995).

Secondly, there is no violation of Jackson. this Court held that an instruction was inadequate which only recited:

> " . . . The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. "

While that instruction may have been vague, the instant one is not since it informed the jury that a higher degree of premeditation was required (one of the concerns of the Jackson Court -- id. At 89) and that what was required was a careful plan or prearranged design to kill (which

identifies the calculated prong of CCP -- id, At 89). And if we are to engage in criticism of the trial court for the failure to anticipate the subsequently-issued Jackson opinion, it must also be pointed out that the proposed defense instructions are in error under Jackson. The proposed defense instructions 7 and 8 sought to define "cold" as totally without emotion or passion (R 269, 271) whereas Jackson describes "cold" as the product of calm and cool reflection. n d n. 8. Since Voorhees' proposed instruction would have erroneously informed the jury that "cold" focuses on passionless rather than calm reflectiveness, again appellant has failed to demonstrate that his current challenge was appropriately preserved for appellate review below.

Voorhees correctly points out that the trial court ultimately declined to make a finding of the presence of the CCP factor because of case law decided subsequent to Rose v. State, 472 So. 2d 1155 (Fla. 1985) (R 360). Nonetheless, there is no reversible error. A judge should instruct a jury on those aggravating circumstance for which credible and competent evidence has been presented and the trial court, as in Hunter v. State, 660 So. 2d 244, 252 (Fla. 1995) did not err in instructing the jury where some evidence supported CCP even if at sentencing later the court determined the aggravator was not proven beyond a reasonable doubt. In Hunter this Court approved submission of the CCP factor to the jury where the defendant "deliberately and successively fired bullets from a handgun into four human beings lying helplessly on the ground without any apparent reason or justification". Id. At 252. The trial court's subsequent determination that heightened premeditation was not established beyond a reasonable doubt did not render the submission erroneous. Similarly, in the instant case Voorhees' infliction of the fatal knife wound to the hapless victim after the latter was rendered helpless by a brutal beating

and being hogtied to immobilize him suffices for presentation to the jury. See also Walls v. State, 641 So. 2d 381, 388 (Fla. 1994) (victim bound and gagged, taunted and abused prior to being shot). Mordenti v. State, 630 So. 2d 1080, 1085 (Fla. 1994) (given conflicting evidence on whether victim died instantly, no error to instruct on HAC). Voorhees argues that he either thought or hoped that Bostic was alive after the incident; he fails to mention that this hope was accompanied by, according to his admission to Detective Lawless, an instruction to his companion to tun on the oven so that the resulting (hopefully) explosion would leave nothing of the crime scene. Appellant argues that the evidence does not an advance plan to commit any crime, yet Voorhees admitted to police that he began looking around the victim's home for anything to steal, prior to the homicide, With respect to Voorhees' contention that the evidence would not support a fmding of CCP, no reversible error appears since the trial court ultimately agreed and as stated in Sochor v. Florida, 504 U.S. 527, 119 L.Ed.2d 326 (1992) a jury is likely to disregard a factor which is supported by evidence.

Appellant argues that perhaps the lower court's "biggest failure" was to come to grips with the concept of a pretense of moral or legal justification. Really? When the prosecutor in closing argument invited the defense to explain the moral or legal justification ("Hopefully counsel is going to get up here and tell you that there was some moral or legal justification for this. " -- Tr 1276), the defense understandably declined the opportunity (Tr 1298). Regardless of whether the jury was given any explanation of pretense of moral or legal justification, under any definition the facts could not support any such "pretense" where a defenseless victim has his throat slit while lying on the floor. As explained in Walls v. State, supra,

> "we have repeatedly rejected claims that the purely subjective beliefs of the defendant, without more, could establish a pretense of moral or legal justification [citations omitted]. However, we have found such justification where some factual evidence or testimony supported a colorable though incomplete claim of self-defense, typically because the victim had threatened violence against the defendant at some recent point in the past."

Id. At 388. Not even the most twisted and distorted view of the facts could support a conclusion of pretense of moral or legal justification sub judice.

ISSUE IX

WHETHER THE LOWER COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING AS AN AGGRAVATING CIRCUMSTANCE THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY BECAUSE THE EVIDENCE ALLEGEDLY WAS INSUFFICIENT?

At the penalty phase jury charge conference, appellant did not complain of the lack of evidence to support the aggravating factor of homicide committed during a robbery; rather, he complained only on constitutional grounds, i.e., that felony-murder was an automatic aggravator and raised double jeopardy and fair trial implications (Tr 936 - 938). His claim now -- to the evidentiary sufficiency -- is barred now for the failure to object and argue below. See Steinhorst v. State, 412 So. 2d 332 (Fla. 1989); Occhicone v. State, 570 So.2d 902 (Fla. 1990).

In its sentencing order, the trial court made the following finding:

> "(a) the capital felony of which the defendant was convicted was committed while the defendant was engaged in the commission of a robbery. The facts presented during the case clearly indicate that, when discovered, the victim's body was clothed, however, the clothing contained no money, car keys, money machine card or other items of substantial value. In addition, the victim's pockets were turned out, indicating that someone had gone through his pockets or removed items from his pockets. Further evidence indicated, that shortly prior to the time of his death, the victim had withdrawn approximately one hundred dollars ($100.00) from his bank account by using his money machine card at a bank ATM and had only purchased one bottle of alcoholic beverage before arriving at his home, where his body was found, The inescapable conclusion is that the victim should have had a reasonable amount of cash after deducting the price of the bottle of alcoholic beverage from his $100.00 withdrawal. The victim should have also had in his possession the money machine card used to make the $100.00

> withdrawal. The fact that the defendant and his co-defendant made numerous unsuccessful attempts to withdraw money from numerous ATMs utilizing the victim's money machine card and the fact that they had possession of the victim's car keys and the defendant's car all strongly support the conclusion that the defendants removed the car keys, the ATM card and the cash from the victim against his will. It is noted that the victim was beaten severely and hogtied during the course of the events that occurred in the victim's home. The Court assigns great weight to this factor. "
>
> (R 358 - 359)

Appellant contends that the evidence did not demonstrate victim Bostic was killed during a robbery. He argues that while violence was applied to Bostic that does not mean that the purpose of the violence was to accomplish the taking. The taking of property, he continues, could well have been an afterthought.

Deputy Sheriff Roy Haynes testified that when he arrived at the scene where the victim's body was found the drawers and cabinet areas of both the bedroom and living room area had been ransacked (Tr 394). The victim's red Monte Carlo was missing (Tr 395). Thomas Novici who worked with appellant Voorhees (appellant was using the name James Densmore) at Ingram Construction Company testified that appellant would walk to work. (Tr 452). Supervisor Fifer stated that appellant didn't have a car; he hitchhiked to the job when he met him (Tr 460). Jean Womack who gave appellant his paycheck on January 6, 1992, in Madison, Mississippi saw appellant and his companion get into the maroon Monte Carlo (Tr 463).

Detective Lawless described the ransacked bedroom, the victim's pants pockets were pulled inside out (Tr 558). There was no money found on the victim. The victim's automobile

was recovered in Wayne County, Mississippi (Tr 560).

In his confession Voorhees admitted having driven the victim to the bank to get a one hundred dollar withdrawal. Voorhees also stated that while his colleague (Sager) kept the victim in his seat he -- Voorhees -- "started looking' around the house for anything . . . just going through the house". When asked what he was looking for, Voorhees' answered "Whatever the dude had". Voorhees didn't want the victim to see him going through the house. He admitted looking for something to "rip" (Exhibit 5, p. 7). After Voorhees stabbed the victim he stated "We got all the remaining cash he had", They took the car keys and drove away (Exhibit 5, p. 12). Afterwards, they tried to get more money out of an ATM but they didn't know the PIN on the card (Exhibit 5, p. 13). Voorhees acknowledged he knew he was stealing the victim's car (P 14) and he was hoping the victim was still alive (p. 17).

Voorhees repeated that he was planning on robbing the victim at the time the victim was beaten and killed. He convinced his partner not to take the VCRs and TVs because they would be easily traced (Exhibit 5, p. 20). (See also Tr 613 - 614, testimony of Detective Lawless regarding Voorhees' admission of his effort to steal things inside the apartment).

Ron Rager of Nations Bank confirmed that there had been a one hundred dollar withdrawal from the Bostic account on the ATM transaction on January 3, 1992, and approximately fifteen attempted transactions thereafter using an incorrect PIN number (Tr 623).

Appellant's possession of the victim's auto, use of his bank card and admissions as to the intended robbery during the beating and killing of Mr. Bostic warranted a finding of the presence of aggravating factors F.S. 921.141(5)(d); Cf. Finney v. State, 660 So. 2d 674 (Fla. 1994) (claim

that taking of VCR was anything but an after thought is without merit); Jones v. State, 652 So, 2d 346 (Fla. 1995); Bruno v. State, 574 So. 2d 76 (Fla. 1991).

ISSUE X

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE HAC AGGRAVATOR AND IN FINDING IT BECAUSE ALLEGEDLY IT LACKED EVIDENTIARY SUPPORT AND THE INSTRUCTION WAS INADEQUATE.

The trial court gave the following instruction to the jury:

> "The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. 'Heinous' means extremely wicked or shockingly evil. 'Atrocious' means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim. You are instructed that actions of the defendant that were taken after the victim was rendered unconscious, semi-conscious or dead cannot be considered in determining whether the murder was especially heinous, atrocious or cruel. "

(R 309)

Appellee notes that the trial court gave the standard post-Espinosa instruction which has been approved by this Court-see Hall v. State, 614 So. 2d 473 (Fla.1993)- with the exception of the last sentence which was added by the court pursuant to defendant's requested instruction # 9(R 273). While appellee disagrees with the addendum to the instruction (who can doubt that a homicide would satisfy the HAC factor by the deliberate incineration of a sleeping child by gasoline and fire?), appellant Voorhees is in no position to complain about having received the instruction he sought. See McPhee v. State, 254 So. 2d 406 (Fla.lDCA 1971). The instruction

is beneficial to defendant and the additional sentence, if erroneous, is harmless since the victim was not dead or unconscious prior to appellant's murderous actions.

Appellant refers to the oral instruction to the jury containing an apparent slip of the tongue or court reporter transcription error stating can instead of cannot in the last sentence of the HAC instruction (Tr 1318) but this lapse went unnoticed by all concerned, was unobjected to at the conclusion of the instructions (Tr 1322) , and thus, has not been preserved for appellate review. Nor did appellant assert this issue in his motion for new trial, arguing only that HAC was vague(R 332-335). Not only is this argument unpreserved for appellate review, but it is also harmless error since the written correct (that post-conscious or post-mortem acts cannot be considered) instructions were submitted to the jury for their deliberations (Tr 13 16)

Additionally, there is little merit to the claim that the jury was probably confused about the matter since the prosecutor also conceded in his argument to the jury:

> "You're instructed that the actions of the defendants that were taken after the victim was rendered unconscious, semi-conscious or dead can't be considered in determining whether this was heinous, atrocious or cruel. "
>
> (Emphasis supplied)(Tr 1271 - 72)

Turning to the findings made below, the lower court's sentencing order recites:

> "(b) The capital felony of which the defendant was convicted was especially heinous, atrocious or cruel. In arriving at this conclusion, the Court specifically utilizes the standards set forth in

> Dixon v. State, 283 So. 2d 1 (Fla. 1973). Specifically, the evidence indicates that the victim's body was beaten severely, the victim was manually strangled and the victim's throat was slit. Evidence provided by the defendant's own statement indicates that the victim's throat was slit after he had already been beaten and hogtied and that the primary reason for slitting his throat was that the victim simply refused to be quiet while the defendant and his co-defendant were beating and robbing him. It should also be noted that the vicious attack upon the victim took place in the supposed safety of the victim's own home, a factor which the Supreme Court has previously held adds to the atrocity of the crime. Perry v. State, 522 So. 2d 817 (Fla. 1988); Troedel v. State, 462 So2d 392, 398 (Fla. 1984); Breedlove v. State 413 So. 2d 1 (Fla. 1982). It is apparent from the defendant's statement that the victim was alive at the time his throat was cut and, although the medical examiner indicated that the severe beating could have rendered unconsciousness, the defendant's statement would tend to indicate that it did not render unconsciousness in this case. The serious nature of the beating would tend to indicate that the victim was in considerable pain and the fact that he was conscious and shouting at the time a knife was used to cut his throat would clearly show that he was aware of what was happening to him, even if only for a short while. Case law tends to indicate that knife wounds inflicted after the victim has been bound and/or gagged will support a finding of heinous, atrocious and cruel. Henry v. State, 328 So. 2d 430 (Fla. 1976); Mines v. State, 390 So. 2d 332 (Fla. 1980) (remanded for other reasons); Reed v. State, 560 So. 2d 203 (Fla. 1990). Clearly the continued beating, strangulation and cutting of the victim's throat after the victim had been reduced to total helplessness by being hogtied demonstrates the infliction of a high degree of pain with complete indifference to if not an actual enjoyment of the suffering of the victim. Given the victim's state of apparent intoxication, it is obvious that any robbery or theft could have been accomplished without the infliction of the high degree of physical pain and suffering. Once again, the Court assigns great weight to this factor." (R 359-360)

Appellant contends that this factor was impermissibly found because there was no intent to cause unnecessary and prolonged suffering, that the victim may have been unconscious when

his throat was cut, that the victim had been drinking heavily with a blood alcohol of .24, and that appellant should not be held vicariously culpable under Omelus v. State, 584 So. 2d 563 (Fla. 1991). Further, he claims that his responsibility was diminished by his mental state at the time of the offense and that although the trial court found a mental mitigator, in essence the court should have considered it twice to erase the HAC factor,

(1) The suffering of the victim--This Court has held that strangulation, that stabbing and having one's throat cut, and blunt trauma to the head constitutes a heinous, atrocious or cruel homicide. See Sochor v. State, 580 So. 2d 595 (Fla.1991); Holton v. State, 573 So. 2d 284 (Fla.1990); Preston v. State, 607 So. 2d 404 (Fla.1992); Espinosa v. State, 589 So, 2d 887 (Fla. 1991); Zeigler v. State ,580 So2d 127 (Fla. 1991); Reed, 560 So. 2d 203 (Fla.1990); Hannon v. State, 638 So, 2d 39 (Fla. 1994). The medical examiner testified that all three methods were the cause of death (Tr 682). . Voorhees intimates that he and his partner attempted not to cause undue pain. While a portion of Voorhees' self-serving statements might lead one to that conclusion, appellant overlooks other, contrary evidence. The medical examiner described a number of knife wounds to the arms after the victim had been tied that were not defensive wounds(Tr 685), presumably as the prosecutor argued below, the wounds were inflicted for the purpose of coercing Bostic into providing his PIN number(Tr 1275)

It may be argued that this Court has not been uniform in its description of the HAC factor. On the one hand, the Court has stated that the fact that the defendant did not intend the killing to be unnecessarily torturous does not preclude the imposition of this factor since this aggravator is perceived more from the victim's perspective than the defendant's Hitchcock v. State, 578 So. 2d

685 (Fla. 1990). This view finds support in the line of cases approving the finding of the HAC factor when the victim contemplates and anticipates imminent death. Stano v. State, 460 So. 2d 890 (Fla. 1994); Wyatt v. State, 641 So. 2d 1336 (Fla. 1994); Gaskin v. State, 591 So. 2d 917 (Fla. 1991); Preston v. State, 607 So. 2d 404 (Fla. 1992). On the other hand the court has also indicated that the HAC factor is inapplicable where the defendant did not intend to torture the victim. McKinney v. State, 579 So. 2d 80 (Fla. 1991); Bonifay v. State, 626 So. 2d 1310 (Fla. 1993); Kearse v. State, 662 So. 2d 677 (Fla. 1995). Tellingly, most of the cases cited by apellant are shootings, which this case is not. The others involve strangulation of an unconscious victim which are inapposite since Voorhees confessed that the victim was killed to quiet him.

(2) The claim that the victim may have been unconscious- Dr. Hansen described the severe injuries sustained(broken nose, broken ribs, bruises in the side of the neck) Dr. Hansen opined that it would take up to several minutes for death following the infliction of the wound severing the windpipe and that it is unlikely the victim was unconscious at that point since there would be no point in severing the windpipe if Bostic were unconscious(Tr 696); added to this is the Voorhees' admission that his actions were motivated by the desire to silence the noise making of the victim.

(3) The victim may have been intoxicated, - Killing an intoxicated person can still be a heinous killing. See Merck v. State, So. 2d___, 20 Fla. Law Weekly S537 (Fla.1995). Bostic was obviously not unaware of what was happening to him when, according to Voorhees' statements to Lawless the victim complained about why he was being beaten by Voorhees and Sager. He would have been aware and feeling pain when knife wounds were inflicted on his arms

after being hogtied and put in a defenseless position and having his throat slit.

(4) The vicarious liability claim- Appellant is not entitled to the benefit of Omelus v. State, 584 So. 2d 563 (Fla. 1991) where the defendant was not present at the time of the killing and had not been apprised prior thereto by the actual killer as to the method to be employed. Similarly, in Archer v. State, 613 So. 2d 46 (Fla. 1991), the defendant was not present when the triggerman he hired performed the act without his knowing the victim would beg for his life. It is frivolous for Voorhees to urge that he was unaware and therefore should not be deemed culpable of the severe beating, kicking, strangling and stabbing that occurred in his presence that he and Sager administered to the hapless victim.

(5)Whether HAC is diminished by appellant's mental state- The trial court explained that it could not accord much weight to the mitigating factor of extreme mental or emotional disturbance since Voorhees and Sager had set in motion the forces that created the disturbance (R 361) , Additionally, Dr. Sidney Merin, the state's rebuttal witness, opined that Voorhees was not under the influence of any particular emotional distress; he was fully aware of the prospect of being discovered and wiped off his fingerprints and left town(Tr 1254-1255).

Especially in light of Dr. Merin's total rejection of the defense proffer in this regard, the lower court properly accorded little weight to it.

ISSUE XI

WHETHER THE SENTENCING JUDGE USED AN INCORRECT LEGAL STANDARD AND FAILED TO GIVE ADEQUATE AND PROPER CONSIDERATION OF ALL MITIGATING EVIDENCE?

The trial court found that the defendant had established that he was under the influence of an extreme mental or emotional disturbance at the time of the offense (although not entitled to much weight), that the defendant had failed to establish that his capacity to appreciate the criminality of his conduct and to conform his behavior to the requirements of law was substantially impaired, and explained why other proffered mitigating evidence should be deemed nonexistent or accorded very little weight (age of twenty-four not connected to anything showing relative youth to be mitigating, participation was not relatively minor since he assisted in tying the beaten victim and stabbed him in the neck, he did not act under extreme duress or the substantial domination of another since he was the leader of the two defendants, and his abuse as a child did not seem to have rendered him violent in his prior difficulties with California authorities and his sister, in a similar abusive environment, did not turn to crime) (R 361 - 364).

Appellant criticizes the lower court 's use of the term "reasonable certainty" in his sentencing order; the trial court's 1994 sentencing order of course antedates this Court's 1995 articulation in Ferrell v. State, 653 So. 2d 367 (Fla. 1995). It is not clear to appellee, however, that there is any substantial deviation. In Ferrell, this Court stated " a mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. " 653 So. 2d at 371 (emphasis supplied). This Court's reasonably established language

appears to be what the trial court employed in its analysis. Appellant benefitted from a finding of the presence of under the influence of extreme mental or emotional disturbance (although with little weight) (R 361) and the court found that Voorhees did not establish that his capacity to appreciate the criminality of his conduct and to conform his behavior to the requirements of law was substantially impaired, as evidenced by his purposeful law-evading conduct (R 361 - 362). See also Dr. Merin's testimony.

Appellant seems to be contending that the trial judge should have given the same weight to his proffered mitigation that he or his expert desired but that is not required.

See Atkins v. Singletary, 965 F.2d 952, 962 (11th Cir. 1992); Nixon v. State, 572 So. 2d 1336, 1334 (Fla. 1994) (clear that trial court considered and rejected all mitigating evidence offered); Robinson v. State, 574 So. 2d 108, 112 (Fla. 1991)(trial court's comprehensive order discussed all mitigating evidence presented and reflected it considered it and weighed it); Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991) (resolution of factual conflicts is solely the responsibility and duty of the trial judge and as appellate court we have no authority to reweigh that evidence); Zeigler v. State, 580 So. 2d 127, 130 (Fla. 1991) (no error in weight trial judge assigned to mitigating evidence; judge could properly consider witnesses' relationship to defendant and their personal knowledge of his actions in deciding what weight to give their testimony); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991) (deciding whether family history establishes mitigating circumstances is within trial court's discretion); Pettit v. State, 591 So. 2d 618, 621 (Fla. 1992) (decision as to whether mitigation has been established lies with the trial court), There was a sound basis for not accepting as total gospel the testimony of Dr. Maher. The

defense expert's opinion regarding mental mitigation for Voorhees was contradicted on virtually every point by state rebuttal expert Dr. Sidney Merin. Dr. Merin noted appellant's goal-directed behavior at the time of the offense (turning on the oven, wiping fingerprints, burning shirt and washing hands) (Tr 1240 - 47); he was fully aware of prospect of being discovered (wiped off fingerprints and left town in the victim's car) (Tr 1255). Voorhees had the maintenance of a sociopath (Tr 1247) which is a conduct disorder; Cf. Harris v. Pulley, 885 F.2d 1354, 1383 (9th Cir. 1988) that he behaved contrary to the law for many years does not imply that constraints were placed on him rendering him unable to choose to follow the law, And, according to Dr. Merin, Voorhees was not under the domination of Sager: appellant considered himself to be the leader, he suggested to Sager to hit the victim to shut him up and drove the car away (Tr 1255). Quite apart from Dr. Merin's contradicting Dr. Maher, the latter's testimony contained weaknesses. Maher acknowledged that he was unaware of the specifics of Voorhees' statements to Detective Lawless when he interviewed him and Voorhees told him that he wasn't responsible for any of the cutting (Tr 1153 - 54), acknowledged that Voorhees blamed others for his predicament. Voorhees did not mention that he was sexually abused by his father -- only appellant's sister reported that -- and it was not corroborated by other reports. Voorhees blames others in an inappropriate and irrational way (Tr 1172 - 74). Voorhees had been described as flippant in prior interviews (Tr 1175). Dr. Maher admitted that appellant had lied in regard to some of the facts of his confession (Tr 1178). His view of appellant's alcohol intoxication was based on what the defendant told him (Tr 1193) and Voorhees' taped statement didn't mention being confused or unable to recollect -- he was specific (Tr 1200). His sisters may have been more traumatized than

appellant (Tr 1207). [10]

Appellant also contends that more weight should have been given to the Tina Voorhees' testimony regarding abuse. Tina Voorhees also mentioned that appellant was arrested for burglary at age thirteen (Tr 1067), she was unaware that he was a behavior problem at the California Youth Authority (Tr 1069), testified that he had no history of psychological problems (Tr 1070) and her parents were investigated for welfare fraud (Tr 1074). She only had one ticket despite a similar upbringing as appellant (Tr 1075). She had previously given a court statement on behalf of Voorhees in 1986 and did not mention the alleged sexual abuse by the father and had characterized Voorhees as a punk who was bitter (TR 1085).

Appellant is critical of the lower court's remark at Tr 973 - 974, and Tr 993, In context, it appears that it was during a colloquy between respective counsel and the court on scheduling certain witnesses near the lunch hour when the jury might be fatigued:

> "THE COURT: I don't want to start with a psychologist at 11:30 to be honest with you. I wondered how much the jury really listens to them. Let's at least get it at some nomt where they might be slightly refreshed and have some prayer of listening to what is being said there . . . . . If you can keep the morning full, we'll just get him on right after lunch.
>
> (Tr 973 - 974)
> (Emphasis supplied

---

[10] See also Rogers v. State, 511 So. 2d 526,535 (Fla. 1987) ("We thus find that the record factually does not support a conclusion that Rogers' childhood traumas produced any effect upon him relevant to his character, record or the circumstances of the offense so as to afford some basis for reducing a sentence of death") [emphasis supplied].

Similarly, the remark at Tr 993 was a response to counsel's prediction at the length of time to be consumed by expert witnesses' testimony.

Appellant complains that the trial court gave short shrift to his alleged abusive upbringing, urging that the lower court erred as the trial judge did in Nibert v. State, 574 So. 2d 1059 (Fla. 1990). But that it not true. The trial judge in Nibert found no statutory mitigators and determined that abused childhood was "possible" mitigation; in the instant case, the trial court found both statutory and non-statutory mitigation, but explained that little weight was given to the childhood abuse because it did not produce the violent result here, since the sister suffering similar abuse did not turn to a life of crime -- Rogers v. State, supra.[11] If capital jurisprudence now requires that a finding of childhood abuse also requires that the weight to be accorded must out balance all in aggravation, that would be a result not required or foreseen by prior rulings. The trial court certainly gave sufficient consideration to the childhood abuse to satisfy Bar-wick v. State, 660 So. 2d 685 (Fla. 1985).

ISSUE XII

WHETHER THE LOWER COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR MISTRIAL AFTER JUROR ZAGURSKI'S HUSBAND WAS HOSPITALIZED AS AN EMERGENCY PATIENT WITH HEART PROBLEMS?

ISSUE XIII

WHETHER THE LOWER COURT ERRED IN INSTRUCTING THE JURY ON, AND FINDING THE AGGRAVATING

---

[11] The lower court's conclusion is buttressed by Dr. Merin an expert who contradicted the defense proffered mitigation on virtually every point.

CIRCUMSTANCE OF CAPITAL FELONY WHILE COMMITTED IN THE COMMISSION OF A ROBBERY BECAUSE THE FELONY-MURDER AGGRAVATOR IS ALLEGEDLY UNCONSTITUTIONAL?

ISSUE XIV

WHETHER THE LOWER COURT ERRED IN GIVING THE JURY RECOMMENDATION UNDUE WEIGHT AND FAILING TO EXERCISE INDEPENDENT JUDGMENT?

ISSUE XV

WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE?

Appellant's failure to brief these issues following this Court's permitting appellant to submit a brief not in excess of one hundred and fifteen (115) pages constitutes an abandonment of those claims. Appellant could have chosen to apportion the number of pages to other issues or the statement of facts differently and chose not to. In Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1991), this Court declared:

> "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to be waived."

Accord, Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990); Roberts v. State, 568 So. 2d 1255 (Fla. 1990); see also Rodriguez v. State 502 So. 2d 18 (Fla. 1987); Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So. 2d 958 (Fla. 4th DCA 1984) (when points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy . . . .it is not the function of the court to rebrief an appeal).

CLAIMS XII through XV must now be deemed defaulted or abandoned for the failure to brief them. [12]

[12] Appellee notes that with respect to Issue XII juror Zagurski repeatedly indicated she could perform her judicial duties (Tr 990, 994-995, 1035, 1263). With respect to Issue XIII, this Court has consistently rejected challenges to the felony-murder aggravator. See Taylor v. State, 638 So. 2d 30 (Fla. 1994), cert. denied, U.S. ___, 130 L.Ed.2d 424; Stewart v. State, 588 So. 2d 972 (Fla. 1991).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No.: 0134101
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
(8 13) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P. 0. Box 9000, Drawer, P.D., Bartow, Florida 33830, this 8TH day of March, 1996.

COUNSEL FOR APPELLEE.