IN THE SUPREME COURT OF FLORIDA

DONALD VOORHEES, :

Appellant, :

vs. : Case No. 83,380

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

References in this brief to pages in the first five volumes of the record on appeal will be designated by "R," followed by the page number. References to pages in Volumes VI-XIII will be designated by "T," followed by the page number.

STATEMENT OF THE CASE

On February 4, 1992, a Pasco County Grand Jury indicted Appellant, Donald Voorhees, and Robert Sager for the premeditated murder of Audrey Stephen Bostic.(R13-14)

Among other pretrial motions, Appellant filed a motion to suppress, on May 27, 1993.(R107-113) A suppression hearing was held before Judge Stanley R. Mills on July 1, 1993, at which testimony was taken.(R383-686) Argument on the motion was presented to Judge Mills at a hearing on July 19, 1993.(R715-794) On July 23, 1993, Judge Mills signed his order denying the motion to suppress.(R134-143)

Appellant was tried by jury on November 15-23, 1993, with Judge Mills presiding, and found guilty as charged.(R 256,T1-1337) Penalty phase was held on November 22-23, 1993.(T973-1337) By a vote of nine to three, Appellant's jury recommended that he die in the electric chair.(R313,T1325)

On January 28, 1994 a hearing was held at which Judge Mills sentenced Appellant to death.(T870-904) In aggravation, the court found that the capital felony was committed while Appellant was engaged in commission of a robbery and was especially heinous, atrocious or cruel.(R358-360,T892-894) In mitigation, the court

found: (1) Appellant was under the influence of extreme mental or emotional disturbance at the time of the offense; (2) Appellant's age of 24 at the time of the offense; (3) Appellant "did fewer physical acts which specifically inflicted pain upon the victim," than did his codefendant; and (4) Appellant was emotionally, physically and sexually abused as a child.(R361-364,T895-901) The court concluded that there existed a "reasonable and rational basis upon which the jury based its recommendation for the imposition of the death penalty," and that there were "sufficient aggravating circumstances in existence to justify the imposition of the sentence of death and that there [were] insufficient mitigating circumstances to outweigh the aggravating circumstances that [-had] been established."(R364,T901)[1]

STATEMENT OF THE FACTS

Suppression Hearing of July 1, 1993--State's Case

Bidmer Ray Walker was a deputy sheriff in rural Wayne County, Mississippi.(R386,473) On the afternoon of January 8, 1992, he and another deputy were dispatched to investigate after a Mr. Sanderson called stating that two men had come to his house, they were wet, and they were wanting something to eat and drink.(R387,460) The deputies eventually encountered two white males dressed in camouflage.(R388-389) Walker asked the men if they had any ID. (R389) They responded that they did not, but identified

[1] Appellant's codefendant, Robert Sager, was tried separately from Appellant on May 9-13, 1994, and convicted of first degree murder. Judge Mills sentenced him to death on September 15, 1994. Sager's appeal is currently pending before this Court in Case Number 84,539.

themselves as William Stephen O'Donnell and David Alan Scott.(R389) Walker had never seen the two before, and he asked what they were doing in town.(R389-390) One of them said they were going to camp out in the Southern Ashley Forest for a few days.(R390) Their vehicle had bogged down, and they left it and set up camp.(R390) They walked off from the camp, got lost and were unable to find their way back.(R390)

It was raining, and turning dark.(R390) Walker asked the men if they would like to spend the evening in jail, where they would be given dry clothes, have their clothes washed and dried, and receive a hot meal.(R390) They, said they would.(R390)

The man who said he was O'Donnell had a kitchen knife with a 6 to 8 inch blade sticking out of his shirt.(R391) Walker asked him for it, and the man handed it to him.(R391) The two men voluntarily got into the marked police car, and Walker drove them the 20-25 miles to the sheriff's office, which was attached to the courthouse.(R392-393,395) On the way, Walker asked about the car, and the man who said he was Scott described where he had driven down a dirt road, and said the car was his girlfriend's maroon Pontiac.(R393-394) They arrived at the sheriff's office at approximately 5:00, where arrest cards were completed, which included the men's names, addresses, social security numbers, and dates of birth.(R392-393,417) The two men were placed in a cell together and given food.(R396) They were allowed to shower in the cell, and given dry uniforms to wear.(R396)

The sheriff, Marvin Farrior, thought the activities of the men at Sanderson's house were suspicious, and he was going to hold them in custody until he found out. who they were and investigated what was going on.(R495-496) If they had produced satisfactory identification, they would have been released.(R497)

It was not unusual for the sheriff's office to ask people who were lost or needed some kind of assistance if they would like to spend the night in jail.(R394,476) They had done it on numerous occasions, especially for people just traveling through, and sometimes people came in and asked if they could just spend the night.(R394,455) Before such people were allowed to go on their way in the morning, they had to identify themselves to the satisfaction of the sheriff's office.(R414,428) Walker did not inform Sager and Vooshees before they were put in the jail cell that the identification they gave would have to be satisfactory to Walker before they could depart the next morning.(R415-416)

Later that night, Walker had the names, dates of birth, and social security numbers of the two men run on the NCIC, but no record was found.(R397) Walker was thinking the men had given fictitious names, but he did not know whether what they told him with regard to their names, social security numbers and dates of birth was true or false.(R397,414)

The following morning, the dispatcher told Sheriff Farrior that the names the two men had given did not come back with anything on them, no record as to who they were.(T463)

When Walker came to work that day (January 9) about 12:30 p.m., he found a note on his desk that said that Scott had given his real name as Robert John Sager.(R398) The note also contained a date of birth and another social security number, and indicated that the information had checked out in NCIC and was accurate and satisfactory.(R398,424) Additionally, Walker learned that the man who had originally said he was O'Donnell gave a different name to one of the deputies that morning, James Earl Densmore.(R399) Walker took Densmore out of his cell and asked for a positive identification.(R399) Densmore said that he had a friend in Jacksonville, Florida who would verify his identity.(R400) Walker retrieved a computer with telephone numbers from Densmore's personal property, which was locked up.(R400) Densmore dialed a number and, when someone answered, he said, "'This is James Earl Densmore. I need you to tell this person who I am.'"(R400) Densmore handed the telephone to Walker, who advised the man on the other end who he was.(R400) The recipient of the call said he was Tony Watson, and identified the man who placed the call as Donald Joseph Voorhees.(R400) Watson asked if John Robert Sager was with Voorhees.(R401) When Walker replied in the affirmative, Watson said that a deputy Lawless from Pasco County, Florida was at his residence or job the day before trying to locate those two people, as he wanted to talk to them concerning a murder in Pasco County.(R 401) Watson gave Walker a telephone number for Detective Lawless. (R401) When Walker hung up the telephone, he asked Densmore if his name was Donald Joseph Voorhees.(R401) He said it was, and gave

Walker another date of birth and social security number.(R401) Walker told Voorhees that the Pasco County Sheriff's Department was wanting to talk to them about a murder.(R401-402) At that point, Voorhees was not free to leave; Walker was going to hold him until he found out what Pasco County wanted.(R402) He separated Voorhees from Sager, moving him to a cell on another wing called the "lunacy cell."(R402,419)

Walker then called Detective Jim Spears in Pasco County, who told him they were looking for a maroon Pontiac with a "fender messed up on it," and gave Walker a tag number.(R403) Spears asked Walker to hold the two subjects until detectives from Pasco could get there to talk to them, and Walker said he would hold them for that night.(R442) After the conversation with Spears, Walker advised Voorhees that Pasco County was wanting to talk to them about the murder, and they would be in Waynesboro sometime that night.(R403) Voorhees asked if Sager had been told.(R403) Walker said he had not, and Voorhees asked if he could tell Sager.(R403) Walker agreed and walked Voorhees back to Sager's cell.(R403-404) Sager was standing against the wall, and Voorhees told him that Pasco County, Florida was coming to talk to them about the murder. (R404) Sager slid down on the floor and slumped down.(R404) Voorhees said, "'Everything will be all right. I'll take care of it.'" (R404)

That evening, Walker informed Sheriff Farrior, who had been out of town that morning, what he had learned.(R405) The dispatcher on duty or one of the trustees told Walker that Sager wanted to

talk to him, and Sager was brought into the sheriff's office.(R405, 437-438) Sager gave a taped statement in which he talked about his involvement in the murder in Florida, implicating both himself and Appellant.(R406-407,468) When he was finished, Sager was returned to his cell.(R407)

That same evening, Benny Humphrey, a trustee who was serving a 20-year sentence for manslaughter, was carrying toilet paper to a cell in the jail when Appellant asked him if his buddy had been taken out of his cell.(R469,499) Humphrey said that, as far as he knew, he was still in the cell at that time. (R500) Appellant wanted Humphrey to give his buddy a message that everything was going to be all right, that Appellant would take the blame for all of it.(R500) Humphrey asked him what happened, and Appellant told him that he and his buddy had been riding around with a fellow and they got pretty drunk.(R500) Humphrey thought Appellant said they went back to the fellow's apartment , where Appellant passed out on the couch.(R500) When ho came to, his buddy was having a fight with the fellow.(R500) Appellant got up and pulled his buddy off. (R500) They tied the man up, and he kept making a racket.(R500) Appellant grabbed him by the hair of the head and cut his throat. (R500) After that, the person continued to make noise, and Appellant returned and jabbed him in the side of the neck with a knife.(R508)

William Lawless, detective with the Pasco County Sheriff's Office, was designated the case officer in this matter when the body of the victim was first discovered on January 4, 1992.(R513-

514) Lawless went to the scene and observed that the residence was secured, there was no indication of forced entry.(R528) The victim was hogtied with three different telephone cords, his nose was broken, and his throat was slashed.(R521,528-529) Another deputy put out a BOLO for the victim's car that day.(R524) While Lawless was at the scene investigating, a witness told him that he heard the victim's vehicle leave the victim's residence the previous night around 10:00.(R527) Lawless also learned that there had been an argument between the victim and two males about 6:30 p.m. on January 3.(R550)

On January 5, Lawless learned that the victim had been with Appellant and Sager in room 4 of the Chasco Inn, which room was registered to Robert Sager and James Densmore, on January 3 at approximately 5:00 p.m.(R525-526) A witness also told Lawless that he had heard the three men discussing going out and partying, and he saw them leave together.(R526,591) That witness and the owner of the motel said that Densmore was building a mortuary somewhere in town.(R534,536) Lawless went to Meadowlawn Memorial Gardens on January 6 and asked the foreman, Johnny Pheifer, if anyone had not shown up for work that day.(R534) Pheifer told him that James Densmore had not shown up, and that Densmore had a paycheck waiting for him at the home office of the construction company in Madison, Mississippi or Alabama.(R534-537) [Lawless later learned that Densmore had picked up his check at the main office that day when the office first opened for business. (R537)] Lawless obtained the name and telephone number of Densmore's sister, Brenda King, who

lived in Jacksonville, from Densmore's job application.(R535) Lawless called her, and learned that Densmore's true identity was Donald Voorhees, and learned about Sager, and learned that Appellant had a friend named Tony Watson.(R532-533,535)

BOLOs for Sager and Appellant were put out on January 5 and 6, with an update on January 7 when Lawless learned that James Densmore's correct name was Voorhees.(R524-526)

On January 6, 1992, a Detective Powers searched room 4 at the Chasco Inn with the consent of 'one of the owners, Ms. Weiskopf.(R 538-539,541) She told Lawless that the rate for the room was $50 a week, and produced a receipt showing that $50 was paid on December 29, 1991.(R539) Lawless had contemplated obtaining a warrant to search the room, but abandoned that idea when he learned from Weiskopf that the rent was up, apparently, on January 5.(R540) Nothing was found during the search that led to any other witnesses or evidence.(R541)

On January 8, Lawless went to Jacksonville to investigate this case.(R517) There he spoke with Tony Watson, William Slaughter, and Melanie Cooper.(R517,521) Watson said that he originally met Appellant, whom he knew as James Densmore, at his place of work, Magic Rental, in Jacksonville.(R517) Appellant had spent some time at Watson's house, and Watson drove Appellant and his brother, Johnny, to New Port Richey in the latter part of December, 1991.(R 517-518) On January 4 [1992], Appellant called Watson at approximately 1:00 a.m., and Appellant and Sager arrived at Watson's home around 5:00 a.m., acting very suspicious and nervous. (R518,594)

They were driving a two-door burgundy sedan, which matched the description of the 1984 two-door, maroon Pontiac Grand Prix that belonged to the victim.(R518-519) They stayed until the evening, then left, and Watson believed they were heading to California.(R518) William Slaughter told Lawless that in the afternoon when Appellant and Sager arrived at Tony Watson's house, Slaughter and Sager went for a walk.(R520) At the intersection of 6th Avenue and A1A, Sager pointed out a burgundy colored, two-door Pontiac Grand Prix and said that he and James had beaten a guy to the ground and made a mess of his face in New Port Richey and stolen his car, and that that was the car.(R520) Slaughter identified the car from a photopack.(R522-523) Melanie Cooper had befriended the person she knew as James Densmore when he was in Jacksonville, and she told Lawless that she received a call from him a few days after the murder saying that he was in Alabama.(R 521)

Lawless was on the way back from Jacksonville on January 9 when he was told by Detective Spears that authorities in Mississippi had arrested both suspects for trespassing.(R 516,604-605)[2] There was an imminent prospect of them being released.(R558) Lawless traveled to Wayne County, Mississippi that same day, arriving at the sheriff's office around midnight.(R541-542)

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[2] Deputy Bidmer Walker testified that he never arrested Appellant and Sager for anything, nor did he hear 'anybody else arrest them at any time for anything.(R415-416) Sheriff Marvin Farrior testified that he did not arrest Sager for anything, nor did he hear anybody else arrest him for anything at any time.(R488) Although Farrior was not specifically asked whether he ever arrested Appellant for anything, he apparently did not, as he testified that he did not talk to Appellant at any point.(R496)

Lawless read Sager his Miranda rights, then obtained a taped statement in which Sager confessed to his involvement in the murder.(R543-544,547) Lawless then read Appellant his Miranda rights and obtained a taped statement in which Appellant confessed to his involvement in the offense.(R 545-547) The interview with Appellant began at 1:33 a.m., Florida time, or 2:33 a.m., Mississippi time.(R588) After the formal statement, Appellant asked if they had "found this card."(R547) When Lawless asked him what he meant, Appellant said that they had used the victim's telephone charge card at various locations, and left it at a phone booth in Alabama to try to throw the detectives off their track.(R547)

Lawless would have gotten a warrant for the arrest of Sager and Appellant when he returned from Jacksonville (R523), but it had been his experience that if a warrant was issued and executed prior to his arrival in Mississippi, this might have eliminated his chance to interview the suspects, and this was part of the reason Lawless chose to travel to Mississippi as quickly as possible to interview them.(R605) An arrest warrant was obtained on January 10, after the interviews with Sager and Appellant. (R 606)

On January 10, Appellant and Sager signed waivers of extradition before a court clerk and were taken away by the Pasco authorities.(R494,549,608) On the airplane flight back to Pasco County, Voorhees asked if Florida had the death penalty, and Lawless replied that it did.(R548) Lawless placed Appellant and Sages under arrest when they arrived back in Pasco.(R 548-549)

Also on January 10, Deputy Bidmer Walker located the vehicle

that was being sought, bogged down on forestry land.(R408-409) It was pulled out with a farm tractor.(R409)

Defense Case

Margaret Weiskopf ran the Chasco Inn in New Port Richey.(R619) On December 29, 1991, James Densmore and Robert Sager paid $100 to stay for two weeks at the Inn.(R620-622) On direct examination, she said she showed the registration and receipt to Detective Lawless when he came to interview her.(R621-622) However, on cross she said that she only showed him the registration, which gave the rate as $50, but did not think that she showed him the receipt (which would have shown that the men paid $100 for two weeks). (R 624-625) Weiskopf gave Lawless consent to search Room 4 because she thought it had been abandoned.(R626-627)[3]

Appellant, Donald Voorhees, testified that on January 8, 1992, they [he and Sager] had become lost in the woods.(R628-629) They were wet and had $5.01 between them.(R638,640) They were sitting in a house speaking with the owners when a pickup pulled up, followed by a marked police cruiser containing two uniformed officers with guns, one of whom was Deputy Walker.(R629-630) Appellant described Walker's attitude as "suspicious," wondering what they were doing there.(R629) Walker more or less told them to come to the jail with him so they could get cleaned up, have a shower, and get their clothes washed.(R629) When asked Appellant's

[3] At the guilt phase of Appellant's trial, Weiskopf testified that she told the detectives from the Pasco Sheriff's Office that, as far as she knew, the room was still being rented to Sager and Densmore.(T446)

impression as to whether he had any choice, he responded, "The police said, let's go to the jail, we got to go to the jail."(R629) Appellant assumed they would be free to go after they got cleaned up, had their clothes washed, and got something to eat.(R630) Walker told them they could stay overnight if they chose to, but did not tell Appellant that he would have to prove who he was before he would be released.(R630) If Walker would have so informed Appellant, he would have gone, but would have taken with him a piece of identification he had on him.(R630-631) During the ride to the jail, there was some discussion about the car. (R 631) The deputy had not advised Appellant of Miranda, but was asking him where the car was, what it looked like, etc.(R631) Sheriff Farrior told them the next morning, when they indicated that they wanted to leave, that they could be released as soon as the sheriff's department established positively who they were. (R 632, 650) Deputy Walker also told Appellant that they could be released as soon as sheriff's department personnel found out who they were.(R632,650-651) Walker suggested that maybe Appellant knew someone who could identify him.(R633) Appellant was cooperating because he did not like sitting in jail.(R633)

Appellant asked Benny Humphrey, who was in civilian clothing, to pass a message to his "brother" and tell him just to keep his mouth shut, not to say anything, that Appellant would take the rap on this.(R634) Humphrey asked Appellant what he was worried about, what it pertained to, and how it happened, but Appellant did not respond.(R634) Appellant was not happy to be in the Wayne County

Jail; he talked to Detective Lawless because he "figured" that by doing so, he could "get the heck out of jail and get on about [his] business."(R634) He knew that Lawless would take him out of that jail facility back to Pasco County.(R635)

Trial--State's Case

In December, 1991 and January, 1992, Ingram Construction Company was building a mausoleum at a cemetery in New Port Richey. (T450,455) Johnny Fifer was the supervisor of the project, and he hired Appellant, whom he knew as James Densmore, and let him live with Fifer in his trailer for three or four weeks.(T451,455-457) Appellant walked or hitchhiked to work.(T452,460) One day Appellant introduced Fifer to a man he said was his brother, whom he wanted Fifer to hire.(T456) Fifer did not need additional help, and told Appellant that he would have to move out of the trailer if he wanted to live with his brother, which Appellant did. (T456)

Margaret Weiskopf was owner of the Chasco Inn in New Port Richey.(T443) On December 29, 1991, Room 4 was rented to Robert John Sager and James E. Densmore for a period of two weeks, or until January 11, 1992, at a rate of $50 per week.(T445-447)[4]

On Friday, January 3, 1992, Carrie DiMichele was in Room 4 of the Chasco Inn, playing cards and listening to music with two men whom she knew as James and John, one of whom was Appellant.(T432-

[4] During Margaret Weiskopf's testimony at trial, Appellant interposed "a continuing objection regarding all the issues covered in the motion to suppress, including statements and fruits of those statements, tangible evidence fruits, as well as additional statements."(T447-448)

438)[5] Stephen Bostic came to the room around 12:30 p.m.(T433) Either James or John asked if anyone had any change, as he needed to make a telephone call.(T434) Bostic offered him the use of his calling card.(T434) About 3:30, DiMichele left to pick up her younger brother at a bus stop,. and the three men left also.(T434) The men had been drinking; they had a few beers apiece.(T441) They were going to be driving Bostic's vehicle, and Appellant was the designated driver, because he was not going to be drinking as much. (T441-442)

At 4:47 p.m. on January 3, 1992, $100 was withdrawn from Bostic's NCNB bank account via an ATM transaction.(T619-623)

On the morning of Saturday, January 4, 1992, Bostic's body was found in the bedroom of his triplex apartment.(T387-391,393-394) His legs, feet and arms were tied up behind his back with telephone cords, and there was a large brown-handled knife underneath the neck, around which a flag was tied.(T393-396,400,412,426,557) His pants pockets were pulled inside out and were empty. (T558-559) The drawers and cabinets in the bedroom and living room had been ransacked, and there was flooding in the bathroom area and standing water in the kitchen. (T394,396, 558) There were items such as a VCR and a cable box lying on the floor. (T399,427,558) The oven was turned on to 500 degrees, and the pots and pans inside it had melted.(T399,402) In the bathroom, there was a burnt shirt lying in front of the toilet, and a blue nightgown in the bathroom sink;

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[5] DiMichele identified Appellant in court as one of the men, but could not say if he was James or John.(T437-438)

it appeared that that was where the water came from that flooded the house.(T401) Deputy Roy Haynes, Pasco County Sheriff's Office, learned that the deceased owned a red Monte Carlo with a black roof and put out a BOLO for that vehicle.(T394-395)

Crime Scene Technician Jeffery Boekelootookthree knives into custody.(T402) The knife underneath the victim's neck was "just covered with blood."(T403) A knife found in the closet on the floor did not have any blood on it.(T403) The third knife, found between the bed and the south bedroom wall on the floor, had a few bloodstains on it.(T403)

Associate Medical Examiner Dr. Marie Hansen observed Bostic's body at the scene on January 4 and performed an autopsy the next day.(T680-682) She estimated that Bostic died between 2:00 and 4:00 in the morning, plus or minus 6 hours. (T694-695) Bostic, who was 44 years old, "died from a combination of homicidal violence, including blunt trauma to the head and chest, choking, binding and incisions to the neck." (T682) His hyoid bone was broken, and there was a slash or cut to his throat which went almost entirely through it and severed the windpipe, several other cuts to the right side of the neck, a broken nose, a laceration on the inside of the lower lip, and bruising along the side of the face and around the eyes. (T681,683,686, 688-690) There were two incised wounds--meaning they were longer than they were deep--to the back of Bostic's left arm that could have been caused by a knife.(T683,685) There was a small, pinpoint abrasion on Bostic's other arm that could also have been caused by a knife.(T684-685) There were no defensive wounds.

(T685,696) The wounds to the face and arms appeared to have occurred before the slashing -of. the neck.(T688) The stroke which severed the windpipe would have been a continuous one, with a slight hesitation, or "tag," in the middle; there was no back and forth sawing.(T691,697) This wound was the major cause of death, in combination with the strangulation; none of the other cutting or stabbing or puncture wounds would have contributed to his death. (T696) Bostic would have survived up to 10 to 15 minutes after the infliction of the first injuries, and up to several minutes after the severing of the windpipe.(T691-692) One or more blunt traumas Bostic sustained to the head could have rendered him unconscious, and it was possible, although unlikely, that Bostic was unconscious when the slashing of the throat occurred.(T695-696) However, if the blows to the head occurred first, especially a blow to the left temple that caused bleeding on the surface of the brain, Bostic probably would have been unconscious at the time his throat was cut.(T698) Dr. Hansen performed a drug screen which revealed that Bostic's blood alcohol level was .24, three times the legal limit for driving a car.(T692-693)

Appellant was supposed to work on Monday, January 6, but he did not show up at his job at the cemetery.(T458) On that same day, a man wearing a green, long-sleeved "army jacket," who identified himself as James Densmore, appeared with another man at the main office of Ingram, Construction Company in Madison, Mississippi and asked for and received his paycheck for the preceding week's work.(T459-467) Densmore asked where he could

cash the check, and the receptionist, Jean Womack, told him he could cash it at the Trustmart National Bank, which was about a mile from the office.(T462-463,466) The men left in a two-door maroon Grand Prix or Monte Carlo type car.(T463,466)[6]

Deputy Bilmer Walker gave testimony similar to that he gave at the suppression hearing regarding his encounter with Appellant and Robert Sager in rural Wayne County, Mississippi.(T470-524) On cross-examination, the State objected when defense counsel tried to elicit what Walker told Detective Spears of the Pasco County Sheriff's Office during a second telephone conversation with Spears on the night of January 10, 1992, after Robert Sager had given his taped statement to Sheriff Farrior in Walker's presence.(T499-503) Outside the presence of the jury, the defense proffered the testimony it was attempting to obtain.(T506-508) During the proffer, Walker stated that he told Spears that Sager had given a taped statement about the murder, but Walker did not recall telling Spears that Sager admitted to the murder.(T505-506) However, on deposition Walker was asked the following questions and gave the following answers(T507-508):

> Q Did you tell him [Spears] anything about the statement [given by Sager]?
> A I told him that Sager had just talked to us.
> Q But you didn't give him any of the information from the statement?
> A No, no more than he just admitted to the murder.
> Q Did you tell him he admitted to the murder?

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[6] Because Womack could not identify Appellant in court as the person who identified himself as James Densmore, defense counsel unsuccessfully moved to strike her testimony.(T464-465)

A I told him he gave. us a statement about the murder, and I can't tell you what I actually told him about as far as he had a tape pertaining to the murder.
Q That's what I want to ask you. You can swear that you told him you had a taped statement about the murder? You can swear to that?
A Yes.

After hearing arguments of counsel, the court refused to allow the jury to hear the proffered testimony.(T508-522)

Bennie Humphrey, a trustee at the Wayne County Jail when Appellant and Sager were housed there, testified to the same admission Appellant allegedly made to him that he testified about at the suppression hearing.(T525-539) He added an additional detail, that the victim's throat was cut because Appellant "got scared."(T529) Although the conversation occurred- in January, Humphrey did not tell anyone about it until the following September, when he spoke to Sheriff Marvin Farrior.(T533-534) Humphrey was to come up for parole consideration in December.(T533-534) Farrior sent a letter of recommendation to the parole board on Humphrey's behalf.(T536-537)

During the testimony of Detective Lawless, the State introduced into evidence and published to the jury the tape of the interview Lawless conducted with Appellant at the Wayne County Jail in the early morning hours of January 10, 1992.(T564-573)[7] Appellant told Lawless that someone asked him to drive "Steve" (the victim) home [from the Chasco Inn] because he was too drunk to

[7] The court reporter did not report the contents of the tape as it was being played, but a transcript thereof appears in the record.(R213-236)

drive.(R214) Appellant would then take a cab back to his apartment.(R214) On the way, they stopped at an NCNB bank where Bostic took out $100.(R214) The three of them (Appellant, Bostic, and Sager) then stopped at a little bar between New Port Richey and Hudson before proceeding on to Bostic's apartment.(R214) They also stopped at a Kash N' Karry liquor store.(R215) By that time, Sager was "feelin' pretty good, real cocky," from the earlier drinking, and he "copped an attitude with the guy behind the counter" at the liquor store who refused to accept his out-of-state identification. (R 215,234)

The trio arrived at Bostic's triplex just after dark.(R214-215) Appellant had not been drinking before they arrived at Bostic's apartment, but there he started drinking "Capt. Morgan's." (R215) They were all drinking' and listening to music, when Bostic and Sager got into argument. over Bostic's telephone calling card.(R216-217) Sager "copped [Bostic] one to the jaw and...everything started to get out of control..." (R217) Appellant was scared because he "didn't want to get in trouble for copping nobody in the head or anything like that." (R217) All he was supposed to do was drive Bostic home, get cab fare, and return to his apartment; he was supposed to be at work the next morning. (R217) Appellant told Sager to hit Bostic again to shut him up, as he was drunk and rambling, which Sager did.(R218) The argument continued, and Appellant told Sager to "keep the dude in the seat" while Appellant

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[8] Between the three of them, they drank almost a half gallon of Captain Morgan's.(R233)

began looking for something to take from the apartment.(R219) Appellant responded in the affirmative when Lawless asked, "So you were looking for something to rip then?" (R219)Sager moved Bostic out of his chair, hitting him a couple of times in the process, and put him face down on the front room floor.(R219-220) Sager ripped out the telephone wires and Appellant tied Bostic up with them.(R219-220) Bostic was bleeding from his nose or mouth.(R220) Every time he said something, Appellant would tell him to shut up, and Sager would kick him in the head.(R220) Bostic kept talking and talking, and Appellant told Sager to get something to shut him up.(R221) Sager took a "rebel flag" off the refrigerator and tried to gag him, but he managed to work his way out of it.(R221) They then dragged Bostic backwards into the bedroom by his legs.(R221-222) They both continued to hit him about the head to try to shut him up.(R222) When that did not work, Appellant went into the kitchen, grabbed a knife, got down on his knees, and stuck the knife in the right side of Bostic's neck and ran it down and in.(R222,230) Appellant was not trying to kill Bostic; he only wanted to shut him up.(R222) He left the knife at the scene.(R231) As far as Appellant knew, Sager did not use a knife on Bostic, and Appellant did not see Sager cut Bostic's throat.(R229-230)

There was blood on Appellant's shirt and hands, and so he went into the bathroom, where he washed his hands and put his shirt on the floor and set it on fire with a lighter.(R223) Appellant then "went to wipin' the place down" for fingerprints.(R223) Sager took all the remaining cash that Bostic had.(R224) They did not take

the stereo, TVs, VCRs, etc. because Appellant was concerned about them being traced.(R232) Appellant told Sager to turn the oven on if it was gas, because "it would have been a big boom," however, it was electric.(R224-225) They took the car keys off a hook and went out to the car and drove away, with Appellant at the wheel.(R224) It was about 9 or 10 p.m.(R226) They drove to Jacksonville, stopping at every NCNB bank they saw to try to obtain money with Bostic's "cash card," unsuccessfully, as they did not know his PIN number.(R225-226)[9] In Jacksonville they visited with Tony for awhile and told him that if cops came to the door they were actually dope dealers looking to kill Appellant and Sager.(R226) After leaving Jacksonville,- Appellant and Sager ended up in Madison, Mississippi, where Appellant picked up his check, cashed it, and spent the money on all kinds of survival gear.(R228) They got rid of all unnecessary items by throwing them out along a little logging road.(R228-229) They also decided to get rid of the car, because if Bostic said anything, people would be looking for it, and they did not want to get caught in it.(R229) When Lawless asked if Appellant thought Bostic "was alive after all that," Appellant responded, "I was hopin', God, I was hopin'..." (R229)

Appellant guessed that he was the more authoritative of the pair, the one who normally made the decisions, except when Sager

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[9] Ron Rager, an employee of NationsBank, testified from the bank records on Bostic's account that the last time an ATM transaction was completed on the account using the correct PIN number was at 4:47 p.m. on January 3, 1992, when $100.00 was withdrawn.(T622-623) From approximately 11:00 p.m. on January 3 until some time on January 4, there were about 15 attempts to withdraw money using an incorrect PIN number.(T623)

"cop[ped] his attitudes."(R227) Then, Sager was "the one in the go position."(R227)

According to Lawless, during the taped interview, Appellant demonstrated how he kneeled down in front of Bostic and "pushed the knife into the throat and then brought it back at him."(T573) Appellant never said that he cut the victim's throat.(T610)

Off the tape, Appellant asked Lawless if he found the victim's phone card.(T578) Appellant explained that they had used the card at several locations and left it at a phone booth in Alabama, hoping that someone would take it and use it to throw the detectives off their trail.(T578)[10]

Lawless subsequently obtained a warrant, arrested Appellant and transported him to Pasco County.(T588,607) On the plane ride from Mississippi, Appellant asked if Florida had the death penalty. (T588-589) When Lawless responded in the affirmative, Appellant "said that he and Johnny [Sager] were going to cook, and there wasn't a whole lot they could do about it now."(T589)

Crime Scene Technician Boekeloo traveled to Waynesboro, Mississippi on January 10, 1992, and transported Bostic's maroon Pontiac to New Port Richey.(T640-641,644) There was a road atlas in the car on the front passenger seat.(T641,645) Boekeloo found

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[10] Telephone records indicated that a calling card issued to the number in service at Bostic's residence was used on January 4, 1992 at 1:19 p.m. to place a call from a number within the 904 area code to Jacksonville.(T635-636) On January 5 the card was used to place a call from Alabama to California.(T636,679) Also on January 5, the card was used to place four calls from Alabama to Jacksonville and one call from Mississippi to Jacksonville.(T637-638) On January 6 the card was used to place a call from Mississippi to California.(T637-638)

a business card from Ingram Construction Company with the name "Johnny Fifer" on it between the driver's seat and the console. (T 646, 648) He also found a receipt from a Sun Bank automatic teller machine in Spring Hill on the dashboard.(T647)

Crime scene technician Sean Fagan assisted in inventorying the Pontiac.(T651-652) On the passenger side floorboard, Fagan found a checkbook with the name of the victim, Audrey Bostic, on it, and a 24 hour teller card.(T652,656)

Two fingerprints and a palm print matching those of Appellant were found on two pages of the road atlas recovered from the Pontiac.(T669-670)

When the prosecution rested, Appellant moved for a judgment of acquittal on the ground that the State had not proved a case of premeditated murder, which motion the court denied.(T701)

Defense Case

Before Appellant began his case, defense counsel indicated that he wanted to make a proffer of the testimony of four witnesses, and argue for the admissibility of their testimony.(T 702) The prosecutor, however, desired to proceed with the testimony of Sheriff Farrior, the first defense witness, in the presence of the jury, and to lodge such objections as he felt were appropriate.(T703-704)

Sheriff Farrior testified in the presence of the jury that there came a time when he had occasion to talk with Sager out of the presence of Appellant, and that Sager indicated to Farrior that he wished to talk about a situation that happened down in Florida.

(T706) When defense counsel asked, "And did Mr. Sager describe what you perceived to be a crime that had been committed?" a State objection on hearsay grounds was sustained.(T706) Defense counsel then asked, "Did Mr. Sager tell you anything that would incriminate him?"(T706) The court sustained another hearsay objection lodged by the prosecutor.(T707) The next question on direct was: "Did Mr. Sager tell you anything indicating that Mr. Voorhees was not involved in the crime?"(T707) Once again, a State hearsay objection was sustained.(T707) A lengthy bench conference then ensued, during which defense counsel argued the unconstitutionality of section 90.804(2)(c), Florida Evidence Code, and the parties agreed that the taped interview between Sheriff Farrior and Robert Sager, or a transcript thereof, would constitute the proffer of the testimony Appellant wished to elicit from the sheriff regarding statements made to him by Sager. (T707-717)

Farrior went on to testify that Bennie Humphrey told him in September of the statements Appellant allegedly made when he was incarcerated in the Wayne County Jail.(T720) Farrior wrote a letter to the parole board when Humphrey was up for parole consideration, which Farrior did "for all the inmates that work out."(T720)

On deposition, Farrior initially testified that Humphrey told him that Sager was the one who grabbed Bostic by the hair of his head and cut his throat, but he said later during the deposition that Appellant told Humphrey that he (Appellant) came back and stabbed Bostic.(T722-723) Farrior testified at trial that he

misspoke at the deposition when he used Sager's name rather than Appellant's.(T724)

Defense counselandthe prosecutor then essentially stipulated that a transcript of a taped interview Detective William Lawless conducted with Miklos Flinn would constitute Appellant's proffer of the testimony Flinn would give if Appellant were permitted to call him to the witness stand, but that Flinn's testimony would not be admissible in light of the trial court's rulings with regard to statements Robert Sager made to various people.(T730-732)[11] The transcript of the interview Detective William Lawless conducted with Sager, and the tape of the interview Sheriff Marvin Farrior conducted with Sager, would serve as Appellant's proffer of the testimony of those witnesses.(T735-742) The court ruled their testimony regarding statements Sager made was inadmissible hearsay, as said statements, while inculpatory as to Sager, were not exculpatory as to Appellant , and so did not fall within the hearsay exception for statements against interest.(T738-740) Subsequently, there was further discussion concerning the transcript of the interview between Miklos Flinn and Detective Lawless, and the trial court confirmed his earlier ruling that statements Flinn attributed to Robert Sager, in which Sager was "taking responsibility for slicing the deceased's throat," would not be admitted as statements against interest because, while they were *'terrifically inculpato-

[11] The transcript of the Flinn interview does not appear in the record, but Appellant is filing it as an appendix to this brief.(Al-9)

ry" as to Sager, they were not "similarly exculpatory as far as Mr. Voorhees [was] concerned."(T749-750)

As his final proffer, Appellant presented the testimony of Salem Lefils "live," with the jury not present.(T753-781) Lefils became aware of the instant homicide, which occurred about 1/2 mile from his home, when he read about it in the newspaper.(T754) Lefils was in the medical wing of the jail in Land 0' Lakes on February 6 or 7, 1992 when he met Robert Sager.(T755) Lefils told Sager that he "lost a DUI trial," and Sager blurted out that he killed somebody, he "murdered a guy."(T755) Sager also mentioned that "he had been on a drunk like 25 or 30 days."(T756) There was a corrections officer named Loretto sitting right between the two men when they had this conversation.(T755-756) Lefils subsequently had additional conversations with Sager, when Lefils was serving four weekends in jail, beginning around the middle of January, 1993.(T757-758,760) Sager went into more detail concerning the homicide.(T758) He told Lefils that he (Sager), the victim and Appellant had been drinking earlier, and that they went to the victim's house or apartment.(T759) Appellant passed out on the couch.(T759) Sager and the victim got into an argument.(T759) When the victim would not shut up, Sager "punched him in the head a few times."(T759) The "guy fell over,*' and when he still would not shut up, Sager "punched him a few more times and tied him up." (T759) Lefils thought Sager "kneed him in the back of the neck, basically beat the guy up, punched him in the face a few times, tied him up. Then about that time, he drug him into the bedroom

then went back into the kitchen" where he "got a knife and sawed the guy's throat."(T760) Sager said that he sawed it more than once, and gestured.(T779-780) Sager "said the guy was gargling, like on his own blood."(T762) With regard to Appellant's participation in the episode, Sager told Lefils that Appellant was awakened by the commotion, and he handed some type of line, apparently telephone line, to Sager, and helped him tie Bostic. (T759,761-762) While Sager was beating Bostic and using the knife on him, Appellant was "[r]unning around being a crazy person, being paranoid or scared" inside the apartment.(T761) Sager mentioned to Lefils that "there was two knives involved" in the incident, but did not explain this further.(T778)

Sager also talked to Lefils about Sager having been in the "nut house" and taking "crazy pills," and discussed an insanity plea.(T765-766,770) Sager was heavily medicated whenever he spoke with Lefils.(T775) Sager "always seemed keyed up" until he was placed on medication.(T777) He "usually got more flowing after his medication kicked in."(T775)

Lefils testified that he thought that in September of 1992 he told Detective Lawless what Sager had said to him initially, but he might have told Charlie May, who was working with Lawless.(T772) On deposition, Lefils indicated that it was Lawless to whom he related Sager's statements, and Lefils testified on the proffer

that he was "almost sure it was Bill Lawless," because Lefils knew him.(T773-774)[12]

The State proffered the testimony of Frank Loretto, Jr., a corrections officer at the Land O' Lakes detention facility, and Detective Lawless, in rebuttal.(T783-789) Loretto denied hearing any conversation in which Robert Sager said that he had killed someone or was involved in a murder.(T783-784) Lawless denied that Salem Lefils had related any conversation to him in which Robert Sager admitted that he murdered somebody.(T788-789)

The trial court then ruled that the proffered testimony of Salem Lefils was inadmissible 'because there were not "sufficient corroborating circumstances...to showthetrustworthiness" and the the testimony was not "something which totally exculpate[d] Mr. Voorhees."(T799) The court also rejected the defense argument that the statute dealing with the hearsay exception for statements against interest was unconstitutional. (T799-800)

The defense rested after its proffered evidence was ruled inadmissible.(T815) After announcing its intention to rest, the defense renewed its motion for judgment of acquittal and all other "motions, objections and proffers."(T813) The court stood by his previous rulings.(T813)

Penalty Phase--State's Case

The State put on no additional evidence.(T980)

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[12] The testimony of Flinn and Lefils had been the subject of an oral motion in limine by the State before trial testimony began on November 16, 1993.(T337-341) The motion was not ruled upon, because Appellant insisted upon a written motion, and the State said that the matter could be handled by way of proffer.(T341)

Appellant's Case

Appellant first introduced into evidence the tape recording of the interview Sheriff Marvin Farrior conducted with Appellant's codefendant, Robert Sager, in Mississippi on January 9, 1992. (T980-981) (This was the same interview which the trial court had ruled inadmissible during the guilt phase.)[13] During the interview, Sager described how he hit the victim and tied him up with phone cord, and how "blood went everywhere..." (Defendant's Exhibit ID "A," page 5) When Sheriff Farrior asked where Appellant was at this time, Sager responded (Defendant's Exhibit ID "A," page 6):

> Sleeping, he was passed out half drunk on the couch. He. ..he was pretty much out of it. And then. you know, it's like right at the end he came to, you know, and woke up and grabbed me and we took off out of the house. And he wants to cover for me on this, but I can't let him take the rap, you know, he don't want to see me back in there, back in the [mental] hospital.

Sager went on to say that he remembered "trying to slice his [Bostic's] throat" with a kitchen knife. (Defendant's Exhibit ID "A," page 6) When they left Bostic's residence, Sager took approximately $80.00 that was on a table. (Defendant's Exhibit ID "A," page 7) Later, this exchange occurred between Sager and Sheriff Farrior (Defendant's Exhibit ID "A," pages 8-9):

> SAGER: I just can't let Danny [Appellant] fall for this on, you know, Don will fall for something he didn't do, he was drunk.
> SHERIFF: Donald didn't have nothing to do with it?
> SAGER: No, he just... the only part he had was trying to keep me out of trouble. Because he knows how I am, I

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[13] The court reporter did not report the contents of the tape as it was being played, but a transcript of the tape appears in the record in the manila envelope marked "Donald Voorhees Evidence" as "Defendant's Exhibit ID 'A.'"

> have black outs and, you know, and multi personality, he just didn't want to see me get into any trouble.
> SHERIFF: Yeah.
> SAGER: And he was going to take this rap to keep me out of trouble. And I couldn't let him do it. And I know (inaudible) doesn't know why I did this, he's going to do everything, you know, to take the rap. And I don't want him, you know, to try and take it for something he didn't do.

Sager indicated that Appellant was not involved in harming Bostic. (Defendant's Exhibit ID "A," pages 8-9) "But right at the end...he yanked [Sager] and said let's go. He drug [sic] [Sager] out of the house." (Defendant's Exhibit ID "A," page 9) Appellant "didn't want to see [Sager] in trouble...he was risking his own self to help [Sager]." (Defendant's Exhibit ID "A," page 9) Bostic was still alive when the two men left his residence. (Defendant's Exhibit ID "A," page 8)

Appellant next called Detective William Lawless to the stand and introduced into evidence the tape recording of the interview Lawless conducted with Robert Sager in Mississippi on January 10, 1992, before Lawless spoke with Appellant.(T982-983) (This was the same interview the trial court had ruled inadmissible during the guilt phase.)[14] Sager told Lawless during this interview that he and Bostic and Appellant bought a "big bottle" of "Captain Morgan" before they went to Bostic's residence. (Defendant's Exhibit #1, page 2) They were all drunk when they left the Chasco Inn. (Defendant's Exhibit #1, page 23) The three were sitting around

[14] The court reporter did not report the contents of the tape as it was being played, but three transcripts of the tape appear in the record in the manila envelope marked "Donald Voorhees Evidence" as Defendant's Exhibit #1, Defendant's Exhibit ID "E" #4, and Defendant's Exhibit ID "B."

talking at Bostic's apartment, when Bostic "pissed [Sager] off," and Sager "busted him in his mouth" with his fist. (Defendant's Exhibit #1, page 3) Bostic kept "running his mouth," and Sager "just kept hitting him and telling him to shut up." (Defendant's Exhibit #1, page 4) Sager tied Bostic's hands and feet with telephone cord, in the living room, by the front door. (Defendant's Exhibit #1, pages 6-7) When Bostic would not be quiet, Sager dropped down to one knee and hit him hard; that is when Sager first saw the blood. (Defendant's Exhibit #1, page 6) Sager dragged Bostic into the bedroom. (Defendant's Exhibit #1, page 7) He then took a knife from the kitchen counter and "[p]roceeded to just cut his throat." (Defendant's Exhibit #1, pages 7-8) When Lawless mentioned that Bostic had other injuries and asked whether Sager "stab[bed] him at all besides cutting his throat," Sager responded, "No I just tried to cut his throat and beat him and kicked him, that's about it." (Defendant's Exhibit #1, page 8) Sager used a "rebel flag" from the refrigerator to try to tie Bostic's mouth closed, "[b]ut it didn't work, he still kept hollering." (Defendant's Exhibit #1, page 8) Sager took about $60-80 from Bostic's front pocket. (Defendant's Exhibit #1, page 12) He also looked through the apartment for "[d]ope mainly, but couldn't get that lucky." (Defendant's Exhibit.#l, page 9) With regard to Appellant's involvement, Sager told Lawless during the interview that, at Sager's direction, Appellant, who had apparently been asleep on the couch, handed him one of the telephone cords that was used to tie Bostic. (Defendant's Exhibit #1, pages 6, 10) Appellant

"started lookin' around to see what was around" and was "[j]ust running back and forth, just kinda head was spinnin [sic]...the alcohol..." (Defendant's Exhibit #1, page 10) "He was scared." (Defendant's Exhibit #1, page 13) Appellant burned his shirt, which Sager had been wearing, in the bathroom, because there was a little bit of blood on it. (Defendant's Exhibit #1, pages 9, 12)

During the interview, Sager said that he "tried to kill a man," but was "[g]lad [Bostic was] still alive because [Sager] told him. ..all you got to do is sit back and relax man." (Defendant's Exhibit #1, pages 7, 11)

During a recess which followed the direct examination of Detective Lawless, one of Appellant's jurors, Mrs. Zagurski, was observed crying hysterically.(T984-988) She was very upset because her husband had been admitted to Bayonet Point Hospital the previous day as an emergency patient with heart problems, and he had gotten worse that morning.(T984-989) I would be very difficult for her to keep her mind someplace other than on him, but she wanted to fulfill her duties as a juror and indicated that she was "fine," and would be able to stick with the testimony. (T 989-990,995)

Miklos, or William, Flinn testified for the defense that he was in lockdown with Sager, whom he knew by his nickname of "Shocker," at the county jail in Land O' Lakes in January, 1992. (T1016) Sager told Flinn that he was in for murder, that "he killed some guy."(T1017) Sager said that he tied the man up and cut his throat.(T1017) He gave him a "Columbian necktie."(T1020)

Sager also told Flinn that he was going to claim insanity and try to get off.(T1018)

During the lunch break on the first day of penalty phase, Mrs. Zagurski went to the hospital and learned that her husband was not doing very well, and had been given more morphine.(T1029-1033) However, Mrs. Zagurski preferred (in the words of the-trial court) "to try to push along now."(T1030) Appellant's counsel moved for a mistrial, fearing that the juror would not be able to be attentive to the upcoming testimony, because she was "obviously distraught," and was preoccupied with her husband's medical problem.(T1033) Zagurski was questioned by the court out of the presence of the other jurors, and said that her husband was no worse than before.(T1034) Blood tests were being run on him, and he was being given nitroglycerin and morphine and kept highly sedated.(T1034) He went into "pretty violent pain" when the sedation wore off.(T1034) Zagurski stated that she would be able to keep her mind on the proceedings, and said she would "be fine." (T1035) The court denied Appellant's motion for mistrial.(T1037)

Tina Voorhees, Appellant's 27 year old sister, who lived in Idaho, testified that she and her brother, who was 26 years old at the time of his penalty phase, grew up in Placerville, California. (T1039-1040) Their ethnic heritage was American Indian.(T1038) There were two other girls in the family, Brenda and Annette. (T1040) Appellant was the youngest child.(T1065) The family was poor, living on food stamps most of the time, because the father, Donald Voorhees, Sr., was lazy and did not work much.(T1041-1042)

He would poach for meat, but if he did not get any, the family would have to eat what was available; once they had spaghetti for three weeks.(T1046-1047)

The children were usually punished by their father, who would beat them with sticks, a flyswatter, a cat-o'-nine-tails, willow branches, a belt, for such things as eating his salami or breaking the clothesline.(T1041-1042) Tina explained that at the beginning of the month when her parents. received their food stamps, they would buy themselves treats (such as salami), which the children were not allowed to eat.(T1042) [The children had their treats in the lunches they took to school.(T1042)] Being hit with willow branches left a tremendous welt, and, generally, a bruise afterwards.(T1043) The cat-o'-nine-tails was a stick with leather strips about a foot to 18 inches long on the end of it, with knots at the ends of the strips.(T1043) Tina was six or eight when her father used this on her.(T1043) Donnie (Appellant) got punished more than the girls did, and at an earlier age.(T1043) There were times when he "took the rap" for something his sisters did and volunteered to take the beating for them.(T1046) When one child was punished, all the children were there.(T1045) Most of the time, when his sisters were beaten, Appellant "cried worse" than they did.(T1045)

Tina also remembered her father beating and raping her mother more than once, when Tina was four or five.(T1047-1048)

When Tina was about seven years old, the children in the family were also subjected to sexual abuse by their father.(T1047)

Two days after the abuse the girls suffered was revealed to their mother some years later, she had a massive heart attack and was hospitalized for weeks.(T1051-1052) The doctors told her that she would have to give up her children, as the strain of raising them could cause her death.(T1051-1052)

Tina first learned of the sexual abuse Appellant had suffered when she read an entry in a journal he kept.(T1052-1053) Appellant confirmed to Tina that his father had sexually abused him the same way he did the girls.(T1053) When Appellant's father worked as a long-haul trucker after Appellant's parents split up, the senior Voorhees would occasionally take his son on the road with him and hire prostitutes.(T1053-1054)

Appellant never really' had a good relationship with his father; his father never paid attention to him.(T1054)

As a child, Appellant was diagnosed as hyperactive and took medicine for his condition.(T1055) He could not sit still, and wet the bed for a long time.(T1055)

Appellant was smaller than the other kids his age when he was going to school.(T1056) Most of the time, the Voorhees children wore clothing from the Salvation Army Store because of the family's finances.(T1056) The other children teased them about their clothing and their ethnic heritage, and called them "Mexicans and niggers" because they were darker than the other kids.(T1056) Appellant was not really popular in school, except to handicapped kids, of whom he was very defensive; he would not allow them to be teased like he was.(T1056-1057) Appellant was definitely loyal to

his friends.(T1057) When Appellant was about eight or nine, a friend of his stole a check and signed the person's name to it and cashed it, but when the friend was confronted, Appellant said that he was the one who signed the check.(T1057-1058)

In dealing with anger and frustration when he was a boy, Appellant would mostly keep it inside, but would sometimes take it out on things by throwing his toys.(T1057)

When Tina was 14, their father took Appellant along on a burglary and left when he heard the police sirens, leaving Appellant in the building to be caught, and bragging about it when he got home.(T1058) After that, Appellant was in and out of correctional facilities.(T1058) He received his high school diploma when he was with the California Youth Authority, to which he was committed four or five times for theft-related offenses, never for acts of violence.(T1068,1079,1089)

Appellant's parents separated when he was about 13.(T1066)

As an adult, Appellant worked in a convalescent hospital. (T1058) He told Tina that he did not think it was fair that the Medicare patients in the hospital were not treated as well as the paying patients.(T1058-1059)

Tina had a son named Brian who was born with bilateral club feet and had a bone displacement in his arms.(T1059) Brian's father was dead, and Appellant was one of the only male role models he had ever had.(T1054,1060) Appellant loved the boy and had a very close relationship with him.(T1060) They played together, and Appellant took him trick or treating at Halloween, and took him out

to eat, took him to the park, etc.(T1060) Appellant was very defensive of Tina's son, and would not let anyone ridicule him or talk down to him because of his disability.(T1060) Appellant gave Brian things on birthdays, at Christmas, and anytime Appellant was working and had money.(T1060)

Appellant was very artistic.(T1060)

Appellant was generous, and would do just about anything for a friend.(T1061) Once when Appellant and Tina were driving downtown, Appellant asked her to stop, and gave his last five dollars to a man wearing raggedy clothes, who was holding a sign saying that he would work for money, even though Appellant had just lost his job.(T1061)

Appellant had a good relationship with his mother, whom he loved very much.(T1061) She died on May 16, 1991, when she was living in California, and Appellant was living in Utah.(T1061) Appellant arrived about a half hour to an hour after his mother died, and was very angry with himself that he could not be there before she died.(T1062) After his mother's death, Appellant "kind of sunk back into himself" and "was real quiet, didn't say much." (T1062)

When Appellant drank alcohol, even a small amount of hard liquor, he had a temper, and was easily influenced by others; his friends could talk him into anything.(T1063,1077,1088)

After he was arrested, Appellant told his sister that he met Robert John Sager in the California Youth Authority, that Sager was a friend of his, and that in December, 1991, he had Sager "released

into his custody out of a psycho ward, because of the fact he believed everybody should have a second chance."(T1063-1064,1072-1073)

Appellant's final penalty witness was Michael Maher, a psychiatrist.(T1096) Dr. Maher evaluated Appellant on four occasions, reviewed various medical, social and legal records pertaining to Appellant, and spoke with family members, as well as a counselor who saw the Voorhees family in California about 15 years before Appellant's penalty trial.(T1100,1103) The counselor, David McNulty, remembered that the family had "a longstanding... intense problem with incest. ..and that there was a pattern of. . ..brutal physical abuse in the family."(T1101) Dr. Maher himself characterized Appellant's family as "[a]n extremely sick pathological family."(T1174) "[D]ysfunctional [was] not even the right word for it."(T1174)

When Appellant was at Central High School in the Orville School District in 1980-1981, he had a number of problems following directions and following the rules.(T1164-1165) He had the same types of problems when he left Central High School and entered Salinas High School.(T1166-1167) Appellant was in and out of various facilities, such as a group home, boys ranch, etc., from the age of 15 to age 21.(T1162-1163) Dr. Maher characterized him as "an unruly and difficult child" who was "impossible to control," and "was defiant of authority," (T1187) Appellant's behaviors were consistent with hyperactivity.(T1221) Appellant also got into trouble because of suicidal behavior on a number of occasions.

(T1222) He engaged in fighting, but on many of these occasions, he was "trying to stand up for somebody who was handicapped or weak in some way."(T1223)

Appellant's sister, Brenda, told Maher that her first memory was of her alcoholic father beating her mother so that her mother bled significantly around her face.(T1105,1109) This incident occurred when Brenda was three or four, and she recalled wiping the blood away from her mother's face.(T1105-1106) Brenda also related the sexual abuse that all the children suffered, which remained hidden for a long time.(T1106-1108) The children saw their father beat and rape their mother on several occasions.(T1109) Brenda further noted that their father was extremely physically abusive to her sisters and to Appellant, who would sometimes take responsibility for things that his sisters had done.(T1108-1109) Their father would hit the children with his hands, or with various implements, such as willow switches, sticks, a shoe, a cat-o'-nine-tails.(T1110)

Brenda had had some problems with drugs, and her family background ruined her first marriage.(Tllll-1112) Her sister, Annette, with whom she had lost touch, was addicted to drugs, and was in an abusive relationship with someone in California.(T1111)

Maher's first meeting with Appellant led him to conclude that Appellant was competent to proceed to trial and that, although Appellant was sane at the time of the offense, he was affected by alcohol and other factors.(T1102-1103)

Appellant began using alcohol as a young teenager.(T1122) He was provided alcohol by his father, and obtained it from other sources as well.(T1122-1123) Appellant also had a significant history of drug use at a very early age, before 1984, that included marijuana, LSD, and cocaine.(T1179) Appellant had an extreme reaction to alcohol, becoming extremely emotional and impulsive and easily led; drinking aggravated-Appellant's hyperactivity.(T 1123-1124) He was drinking on the night of the offense and was intoxicated, which was particularly significant in view of his background history.(T1123-1124,1193)

Dr. Maher diagnosed Appellant as suffering from substance abuse in that he had an abnormal reaction to alcohol and could not handle it well.(T1124-1125) He also suffered from chronic and severe post traumatic stress disorder, resulting from the prolonged physical and sexual abuse.(T1125-1126) Blame-taking behavior, such as that exhibited by Appellant, was one symptom of the disorder. (T1129-1132) At times, Appellant tended to blame others for his problems, in inappropriate and.irrational ways.(T 1171-1174) He exhibited antisocial behaviors, such as getting in fights and not following rules.(T1187)

The effects of alcohol and long-term abuse have a concrete, physical effect on a person's brain that diminishes his ability to use judgment, to appreciate what he is doing, and to control impulsive, hostile, and aggressive or violent behavior.(T1133) This effect is characterized not merely as a psychological condition, but as an illness.(T1134) Due to alcohol and post

traumatic stress disorder, Dr. Maher opined that Appellant's ability to appreciate the wrongfulness of what he was doing and to conform his behavior to the requirements of law was severely diminished at the time of the offense.(T1132-1133) Furthermore, Appellant was under the effects of an extreme mental or emotional disturbance at the time.(T1133-1134)

Appellant had protective feelings toward Robert Sager and wanted to help him, but at the same time felt upset and angry toward him because of what he had done to Bostic.(T1135-1137) Appellant told Dr. Maher that he (Appellant) had not cut or slashed or stabbed the victim, but that Sager slashed his throat. (T1135,-1154) Appellant acknowledged to Maher that he had taken a telephone cord, at Sager's direction, and tied or helped tie Bostic's hands.(T1154)

Dr. Maher believed that Appellant was following Sager's lead in the activities at Bostic's residence, drinking and assaulting him.(T1137)

On cross-examination of Dr. Maher, the prosecutor asked him about Appellant having been evaluated by a number of mental health professionals from 1984-1987.(T1170) He asked whether Dr. Maher had read something from 1984, by a staff psychologist named John Zernanskiwhich "indicated that this defendant displays erratic and defiant behavior. Okay. And he's defiant towards the staff; for example, he urinates on the floor, on the walls and throws spitballs at the staff."(T1170) This questioning prompted defense counsel to move for a mistrial on the grounds that the prosecutor

was eliciting inflammatory matters which had nothing to do with Dr. Maher's diagnosis, depriving Appellant of due process and a fair trial.(T1170-1171) The court overruled Appellant's objection. The prosecutor asked the question again, and Dr. Maher testified that he did remember what Zernanski wrote.(T1171)

The prosecutor also propounded a lengthy hypothetical question on cross examination, to which defense counsel objected and moved for a mistrial, because the question assumed facts not in evidence. (T1209-1217) The trial court sustained the objection, but denied Appellant's motion for mistrial.(T1213-1217) The defense rested following Dr. Maher's testimony, and renewed all previous "motions and objections, proffers and such, in the guilt and penalty phases."(T1228) Defense counsel specifically renewed its motion for mistrial with regard to the State's attempted hypothetical question, which the court denied, commenting that "the jury knows they're supposed to depend on the answers of the witnesses and the other evidence and the law, not on the questions of the attorneys..."(T1229)

State's Rebuttal

The State called Sidney J. Merin, a clinical psychologist and neuropsychologist, as its only rebuttal witness.(T1230) At the request of the prosecutor's office, Merin reviewed a variety of documents pertaining to this case, including police reports, depositions, documents pertaining to Appellant's stay with the California Youth Authority, Salinas High School and Central High School records.(T1234-1235) Dr. Merin also had an audio tape and

transcript of Appellant's interview with Detective Lawless.(T1240) Merin found no evidence there that Appellant was suffering from alcohol intoxication when the murder was occurring.(T1240-1241) Similarly, Merin found no evidence in Dr. Maher's deposition that Appellant "was so intoxicated he couldn't think."(T1241-1242) Merin also disagreed with Dr. Maher's diagnosis that Appellant suffered from post traumatic stress disorder, although he did agree that Appellant's childhood was chaotic, and that severe child abuse, depending upon its nature, could cause PTSD.(T1244-1245, 1251-1253,1257-1258) Dr. Merin could find no evidence of suicidal behavior per se in the reports he reviewed, although engaging in the type of risky behavior in which Appellant engaged "can in some remote sort of way be thought of as being suicidal."(T1250) Merin seemed to say that Appellant suffered from a "conduct disorder" as a youth, which involved behavior similar to that which would be exhibited by a sociopath, or person with an antisocial personality disorder, if he were an adult.(T1246-1248) Merin also noted that Appellant was within the average or upper average range of general intelligence, but several reports mentioned that he suffered from attention deficit disorder, for which he was prescribed a medication called Cyclert.(T1249-1250) Tranquilizers were later prescribed for Appellant, and apparently worked for him.(T1250) Merin testified that tranquilizers were not given to a child with ADD in order to control it; tranquilizers were given when inappropriate behavior resulted from other causes.(T1250) Dr. Merin did not find from the records that taking the blame for misdeeds

committed by others was characteristic for Appellant, although "on occasion if he liked somebody particularly well, he may have taken blame on occasion for some minor sort of thing, or some incidental sort of thing."(T1251-1252)

Dr. Merin did not believe that Appellant was under the influence of extreme mental or emotional disturbance at the time of the crime; "he wasn't under the influence of any particular emotional distress that hadn't been part of him all along."(T1255) Nor did Merin agree that Appellant's capacity to appreciate the criminality of his conduct was substantially impaired.(T1255) Finally, Merin found no evidence that Appellant was under the substantial domination of another person (Sager).(T1255-1256)

State's Closing Argument

The prosecutor's penalty phase closing argument prompted defense counsel to move for a mistrial, on grounds that included that the argument was unduly theatrical and inflammatory. (T1288-1290) The court denied the motion.(T1290)

ISSUE I--THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Appellant's motion to suppress, and the court's order denying the motion, dealt with both the search of the room occupied by Appellant and Robert Sager at the Chasco Inn in New Port Richey and the incriminating evidence resulting from the detention of the two men in Wayne County, Mississippi. This issue will focus upon the events in Mississippi, as it does not appear from the record that law enforcement authorities obtained any incriminating evidence against Appellant when they searched the room.

The first matter to be addressed is whether Appellant was illegally detained from the outset of his encounter with the Wayne County deputies. This is important, because the knife that was admitted at Appellant's trial was seized before he was transported to jail, and certain statements were made regarding the automobile during the ride to police headquarters (although these statements were apparently made by Robert Sager). [Contrary to the trial court findings that information about the car was provided "without any questioning on the part of Deputy Walker" (R137), Walker testified that he did indeed ask the men about the car (R393-394), and Appellant provided similar testimony.(R631) At that point, Appellant and Sager had not beengiven any Miranda warnings.(R631)] The trial court erred in finding that Appellant's initial trip to jail and his overnight stay therein "was entirely voluntary on the part of the defendants and the Mississippi officers neither said nor did anything that would have provided a reasonable basis for the defendants to believe that they had no alternative but to accompany the Mississippi officers." The operative question is whether the officers, "'by means of physical force or show of authority,... in some way restrained the liberty of a citizen..."' Florida v. Bostick, 501 U.S. , 111 s. ct. , 115 L. Ed. 2d 389, 398 (1991), quoting Terry v. Ohio, 392 U.S. 1, 19, n. 16, 88 S. Ct. 1868, 1879, n. 16, 20 L. Ed. 2d 889 (1968).If, under all the circumstances, a reasonable person would have believed he was not free to leave, he has been seized within the meaning of the Fourth Amendment to the United States Constitution. Bostick; Hill

v. State, 561 So. 2d 1245 (Fla. 2d DCA 1990). Appellant testified, without contradiction, that he felt he had little choice but to accompany the two uniformed, armed officers. "The police said, let's go to the jail, we got to go to the jail."(R629) Thus, it appears that Appellant was merely acquiescing to the apparent authority of the police, negating the supposed voluntariness of the encounter. See State v. Richardson, 575 So. 2d 274 (Fla. 4th DCA 1991); Shelton v. State, 549 So. 2d 236 (Fla. 3d DCA 1989); United States v. Edmonson 791 F. 2d 1512 (11th Cir. 1986)(suspect does not consent to being arrested when said consent is prompted by a show of official authority); Dunawav v. New York, 442 U.S. 200, 99 S. ct. 2248, 60 L. Ed. 2d 824, 832, footnote 6 (1979) ("request to come to police station 'may easily carry an implication of obligation while the appearance'itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen"' [quoting from ALI, Model Code of Pre-arraignment Procedure § 2.01(3) and commentary, p 91 (Tent Draft No. 1, 1966)]). Although Deputy Walker indicated in his testimony that he would have taken the men to a motel if they had enough money, they did not have enough money for a motel [the trial court noted in his sentencing order that they only had $5.01 between them (R136)], nor did Walker communicate this offertothe men.(R449, 455-456,638,640) In fact, it does not appear that he informed them at any time that they were free to refuse his offer of jail accommodations for the night. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Bailey v. State, 319 So. 2d 22 (Fla. 1975); Acosta

v. State, 519 So. 2d 658 (Fla. 1st DCA 1988). Perhaps most importantly, Appellant was never told that the officers harbored a secret plan to detain him until he produced identification that the officers deemed satisfactory. If he had had such knowledge, he would have taken with him a piece of identification that he had on his person that might have secured his release.(R630-631) Without this knowledge, Appellant had been deceived as to his true position, and any agreement to go with the officers was not knowing and voluntary. See Thomas v. State, 456 So. 2d 454 (Fla. 1984); State v. Manning, 506 So. 2d 1094 (Fla. 3d DCA 1987) (police techniques calculated to exert improper influence or to trick or delude the suspect as to his true position will result in exclusion of self-incriminating statements thereby obtained); Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374, 381 (1966) ("The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area. [Citation omitted.]")

The trial court did correctly recognize that, at-least at some point, which the court established as approximately 7:00 a.m. on January 9, 1992, the detention of Appellant and Robert Sager had become illegal.(R139) The court properly found that the Mississippi authorities had neither probable cause nor even reasonable suspicion to believe that Appellant had committed, was committing, or was about to commit any crime whatsoever.(R140) Appellant and Sager were picked up merely because they were strangers in a rural community and, therefore, "suspicious." Without a warrant or

probable cause that Appellant had committed a felony, the sheriff could not hold Appellant for investigation, or because he did not have identification sufficient to satisfy the sheriff. Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); Dunawav; Hill. Such detention violated Appellant's Fourth and Fourteenth Amendment rights. Dunawav; Brown.

The court below also concluded, however, that the character of Appellant's detention

> changed at approximately mid-afternoon on January 9, 1992 when Deputy Walker of the Wayne County Sheriff's Office spoke on the phone with Detective Spears of the Pasco County Sheriff's Office and learned that the Pasco officers wanted to speak with the defendants concerning a murder in Pasco County, Florida.

(R140) The court determined that the detectives from Pasco County had probable cause to arrest Appellant for murder, and that the authorities in Wayne County "stood in virtually the same position as the authorities in Pasco County, Florida based upon the 'fellow officer' rule."(R140) There are several problems with the court's conclusions. The first is that later-occurring events could not somehow cure the fact that Appellant had been illegally detained for hours. Assuming, as the court found, that Appellant's detention was initially consensual, and therefore legal, Appellant was nevertheless entitled to immediate release as soon as his detention became nonconsensual and illegal. As the court below correctly pointed out, however, Appellant "existed in a type of legal 'limbo' in which [he] had no access to counsel or the judiciary and . . . had no ability to post bond."(R140) The police

could not merely hold on to him in the hope that something might turn up that would allow them to keep him in custody. This procedure violated at least three provisions of Mississippi's Uniform Criminal Rules of Circuit Court Practice. Rule 1.02 provides that where, as here, a person is arrested without a warrant, "the person making such arrest must inform the accused of the object and cause of the arrest, . . . and upon completion of the arrest the person or persons arrested should be taken forthwith before a magistrate." Appellant was neither told why he was under arrest (unless it was because he did not have identification adequate to satisfy the Wayne County Sheriff's Department), nor was he ever taken before a Mississippi magistrate, even though there was probably a judge on duty in the same building where the sheriff's office/jail was located.(R443-444,494-495) Rule 1.03 requires Miranda warnings to be given prior to any questioning "after the person is placed under arrest or physically detained prior to questioning." No Miranda warnings were given to Appellant until the detectives arrived from Florida, some 30 hours or so after his initial detention. Rule 1.04 deals with initial appearances in court, and requires that "[e]very arrested person shall be taken before a judicial officer without unnecessary delay."[15] [Florida Rule of Criminal Procedure 3.130(a), of course, requires that every arrested person shall be taken before a judicial officer within 24 hours of arrest.] Again, Appellant did

[15] Deputy Walker testified that people arrested during the week were normally taken before a judge within 24 hours.(R444-445)

not see a judge the whole time he was in Wayne County, even though one was readily available. In County of Riverside v. McLaughlin, 500 U.S. , 111 s. ct. , 114 L. Ed. 2d 49 (1991), the Supreme Court of the United States set 48 hours as the outside limit, the maximum time that may pass, before a person arrested without a warrant must be 'brought before a magistrate for a judicial determination of probable cause. See also Gerstein v. Push, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). Appellant here was picked up by the police in Wayne County on January 8, and not returned to Pasco County until some time on January 10. The authorities not only failed to comply with the Mississippi rules of court, but more importantly, violated the promptness requirements of the Fourth Amendment as explicated in McLaughlin.

Secondly, it is at least questionable whether the Pasco County detectives had probable cause to arrest Appellant before they went to Mississippi. If such probable cause existed, why did they not obtain a warrant prior to traveling to Mississippi, but instead waited until after they interrogated Appellant and Robert Sager? Lawless conceded in his testimony that he deliberately avoided obtaining a warrant, because if a warrant was issued and executed prior to his arrival in Mississippi, this might have eliminated his chance to interview the suspects.(R605) The authorities should not be permitted to so cavalierly evade the Fourth Amendment's preference for a warrant issued by a neutral and detached magistrate for the purpose of exploiting an in-custody suspect.

Finally, with regard to the "fellow officer rule," it should be noted that, as far as the record discloses, Detective Jim Spears in Pasco County did not tell Deputy Bidmer Walker in Mississippi that Pasco County authorities had probable cause to arrest Appellant, or that they were coming to arrest him, or anything of that nature. Spears just indicated that the Pasco detectives wanted to talk to the two men that were being held in the Wayne County Jail. As noted above, the constitution does not permit the holding of an individual for the purpose of investigation without probable cause, and so Walker's telephone conversation with Spears did not provide any further justification for detaining Appellant than Walker already possessed (and he had none).

In effect, the court below construed the facts in a manner that provided the police with the best of all possible worlds: the Mississippi authorities had the effects of their illegal detention of Appellant magically wiped out when they called Pasco authorities, who supposedly had probable cause to arrest Appellant, even though this fact was never communicated to Deputy Walker, and thus the Wayne County deputies thereafter were able to hold onto Appellant for as long as they wished, and the Pasco authorities were relieved of any problems regarding Mississippi's unconstitutional detention of Appellant, and the need to obtain an arrest warrant, and to be bothered with taking Appellant to a first appearance hearing before a judge within 24 hours of his arrest. See Anderson v. State, 420 So. 2d 574 (Fla. 1982) [statements suppressed, in part because defendant was not taken before a

judicial officer within 24 hours of his arrest, as required by Florida Rule of Criminal Procedure 3.130(b)].

Appellant would also note that he and Sager were questioned by the Mississippi sheriff's deputies before any contact with their fellow officers in Pasco County. Not only were they asked about the car while they were being driven to jail, but after Deputy Walker's telephone conversation with Deputy Spears, Walker asked Appellant if his name was Donald Joseph Voorhees, to which Appellant responded that it was, and gave Walker his date of birth and social security number. Walker then told Appellant that the Pasco County Sheriff's Department was wanting to talk to him and Sager about a murder, which could be construed as words designed to lead to an incriminating response, and, hence, interrogation. See Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); Travlor v. State, 596 So. 2d 957 (Fla. 1992).

With regard to the statements Appellant allegedly made to trustee Benny Humphrey, one must first note that Appellant was being unconstitutionally held for a protracted period of time after an illegal investigatory arrest made without probable cause for an unlawful purpose (to establish identity), and without any judicial intervention, or the administration of Miranda warnings. He would never had come into contact with Benny Humphrey if it had not been for the actions of the Wayne County Sheriff's Department. The most egregious combination of constitutional violations had been visited upon Appellant, and were ongoing at the time of the questioning by Humphrey. Furthermore, Appellant's request for Humphrey to deliver

a message to Sager was a response to a thought planted earlier by Deputy Walker when he told Appellant that Pasco authorities wanted to talk to Appellant and Sager -about a murder. Appellant was at a point of emotional weakness directly caused by the unconstitutional actions of the police, and the coercive effects of incarceration, and it was at that point that Humphrey questioned him. Although the court below stated in his order denying suppression that Appellant "initiated the communication with Humphrey," all Appellant wanted was for Humphrey to deliver a non-inculpatory message to Sager that Appellant would take the blame for what happened, so that Sager should not worry. It was only when Humphrey asked Appellant what happened that he allegedly made the statements that incriminated him. In addition, even the trial court recognized that Benny Humphrey was no ordinary inmate. The court wrote in his order denying suppression (R138):

> 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.

Humphrey was more akin to an adjunct of law enforcement, a de facto deputy sheriff, than he was to an inmate. See United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980); Maine v. Moulton, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985); Malone v. State, 390 So. 2d 338 (Fla. 1980). (Employment by state of an agent to obtain incriminating statements'from suspect

violates his right to counsel.) Although the court also stated that Humphrey did not expect or receive any reward for the information he received from Appellant (R138), Humphrey waited some eight months before he reported what he knew to Sheriff Farrior, relating the information in September at a time close to when he was up for parole consideration, in December, and the sheriff did write a letter of recommendation to the parole board on Humphrey's behalf.(R496)

The court below noted several factors that he found dissipated and purged any taint associated with Appellant's illegal detention. He discussed the span of time between the illegal detention and the statements.(R142-143) However, the court observed in State v. Stevens, 574 So. 2d 197, 203 (Fla. 1st DCA 1991) that the "factor of temporal proximity is "'scarcely outcome determinative' [quoting from State v. Reffitt, 145 Ariz. 452, 702 P. 2d 681, 688 (1985)]," and found it to "relatively insignificant" where, as here, the defendant "was in continuous police custody, unrepresented by counsel, and underwent considerable interrogation." 574 So. 2d at 203. Similarly, in State v. Rogers, 427 So. 2d 286, 288 (Fla. 1st DCA 1983), in upholding suppression of two statements, one of which was given the day after the defendant's illegal arrest, the court wrote that "[t]he concept of temporal proximity should not be applied mechanically [citation omitted]" and noted that in Dunawav the defendant's second inculpatory statement, which was suppressed, was also made the following day. The court also mentioned that Appellant and Sager both "became aware of the Pasco murder

investigation at approximately mid-afternoon on January 9, 1992" and that Appellant initiated his statement to the Wayne County Jail inmate (Benny Humphrey).(R143) However, as discussed above, the incriminating portion of the statement Appellant allegedly made to Humphrey was not initiated by Appellant, but was induced by Humphrey's questioning. Furthermore, the court did not explain how "becoming aware of the Pasco murder investigation" could in any way purge the taint resulting from the illegal detention. With regard to the court's finding that Appellant and Sager "were independently advised of their rights by the Pasco officers[,]" many cases have held that being advised of one's Miranda rights is not sufficient to eliminate the taint resulting from an unconstitutional seizure of the person. Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); Talley v. State, 581 So. 2d 635 (Fla. 2d DCA 1991). [Voluntariness in the making of the statements is a threshold requirement that must be satisfied before the Fourth Amendment issue is even reached. Dunaway; Stevens. It is not clear that the court below understood this and fulfilled his duty of first determining whether Appellant's statements were made voluntarily as required by the Fifth and Fourteenth Amendments.] Finally, the court found significance in the fact that "the officers who initiated the illegal detention for reasons completely unconnected with the Pasco County murder investigation, were from an agency other than the Pasco County Sheriff's Office and were from an entirely different state."(R143) However, those same officers who began the initial detention perpetuated it in

cooperation with the Pasco authorities as soon as they learned that Appellant and Sager were wanted for questioning, even though they had no legal basis for doing so.

Statements obtained from a person through custodial interrogation following an illegal arrest, as well as any evidence derived from those statements, should be excluded from evidence unless there are sufficient intervening events to purge the taint of the illegal arrest. Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982); Wons Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); Murphy v. State, 610 So. 2d 575 (Fla. 2d DCA 1992). The prosecution bears the burden of showing the admissibility of statements made after an illegal arrest by clear and convincing evidence. Brown v. Illinois; Stevens; Collins v. Beto, 348.F. 2d 823 (5th Cir. 1965). Furthermore, in close cases, our courts are "compelled . . . to decide in favor of the individual rights of the citizen as guaranteed by" the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution "because of the extreme importance of such rights to the maintenance of a free society." Taylor v. State, 355 So. 2d 180, 186 (Fla. 3d DCA 1978) (see also cases cited therein). The State failed to carrying its burden of showing during the proceedings below that Appellant's statements and the other evidence seized as a result of his unconstitutional detention was not tainted by the initial illegality. All statements Appellant made regarding this case, as well as the other evidence gathered by the authorities, including, but not limited

to, the knife taken from Appellant, and the automobile and its contents, should have been suppressed and not allowed to be used against Appellant. Because it was not, Appellant is entitled to a new trial.

ISSUE II--APPELLANT'S ABSENCE. FROM SEVERAL OF THE PROCEEDINGS CONDUCTED BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

The Sixth and Fourteenth. Amendments to the United States Constitution give a criminal defendant the right to be present at every stage of his trial. As the Supreme Court of the United States noted in Illinois v. Allen , 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353, 356 (1970):

> One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. Lewis v. United States, 146 U.S. 370, 36 L. Ed. 1011, 13 S.Ct. 136 (1892).

This Court has acknowledged that a defendant "...has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence.-" Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Turner v. State, 530 So. 2d 45, 47-48 (Fla. 1987). One such stage is the exercise of challenges to prospective jurors, where the right to counsel is also implicated, due to the need for the attorney and his client to consult with one another regarding who should be dismissed from the jury, and who should remain. [The right to counsel may be implicated at other stages where the defendant's presence is needed as well, whenever consultation between lawyer and client may facilitate the preparation and/or presentation of the defense.]

> Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated. This rule expressly provides:
> (a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:
> . . . .
> (4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury;

Francis, 413 So. 2d at 1177. In Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995), this Court recently had occasion to construe Rule 3.180(a)(4):

> We conclude that the rule means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See Francis. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So.2d 137 (Fla.1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry.[16]

Below, juror challenges were exercised at bench conferences, at which, as far as the record shows, Appellant was not present. (T176-178,217-218,247-249,263-264,281-287,301-302,317-318) As in Coney, "the record fails to show that he waived his presence or ratified the strikes." 653 So., 2d at 1013.[17] In Coney this Court

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[16] Although Appellant was tried before Coney was decided, and the ruling in that case was made prospective only, Appellant is entitled to benefit from the Coney decision pursuant to the principles expressed in Smith v. State, $98 So. 2d 1063 (Fla. 1992). See also State v. Brown, 655 So. 2d 82 (Fla. 1995); cf. Jarrett v. State, 654 So. 2d 973 (Fla. 1st DCA 1995).

[17] Appellant's silence after his attorney's exercise of challenges at the bench did not constitute ratification thereof. State v. Melendez, 244 So. 2d 137 (Fla. 1971).

found the error harmless because Coney was absent only when the purely "legal issue" of challenges for cause was addressed; no jurors were excused peremptorily. In Appellant's case, however, both for-cause and peremptory challenges were exercised in Appellant's absence, resulting in harmful error.(T176-178) In Francis this Court found harmful error in the trial court's having proceeded with the jury selection process in Francis' absence:

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permit8 rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In the present case, we are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised. Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial.

413 so. 2d at 1179. This Court must similarly conclude that Appellant is entitled to a new trial, his right to be physically present during the exercise of challenges to prospective jurors having been denied.

The exercise of juror strikes was not the only phase of the proceedings below where Appellant should have been present, but was not. In Proffitt v. Wainwright, 685 F. 2d 1227, 1256 (11th Cir.

1982), modified on pet. for reh., 706 F. 2d 311 (11th Cir. 1983), pet. for cert. denied, 464 U.S. 1002, 104 S. Ct. 508, 78 L. Ed. 2d 697 (1983), the court recognized the right of a criminal defendant to be present at

> all hearings that are an essential part of the trial- i.e., to all proceedings at which the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97,105-106, 54 S. Ct. 330,332, 78 L.Ed. 674 (1934).

One such critical phase requiring the defendant's presence, unless it is waived in writing, is any pretrial conference or meeting. Fla. R. Crim. P. 3.180(a)(3); Coney, 653 So. 2d at 1012. Appellant was not present at the pretrial conference held before Judge Mills on April 16, 1992.(R839-847) Nor was he present on November 16, 1993 when the court and counsel were discussing a motion in limine made by the State, despite def-ense counsel's specific request to have Appellant present.(T337-341) The trial court erroneously believed that Appellant's presence was not needed unless testimony was going to be presented, saying, "If we're not going to present any testimony, what do we need him [Appellant] here for?"(T338) The court and counsel then went on to discuss a defense penalty phase witness whose name was allegedly not supplied to the State in a timely manner, as well as the preliminary instructions, following which the jury was brought into the courtroom, and the trial commenced.(T341-350) Assuming that Appellant was present in the courtroom when the jury was present, it is not clear from the record at what point Appellant arrived, Appellant was also absent at the beginning of a hearing on November 19, 1993, the first day

of penalty phase, when the court and counsel discussed when Dr. Merin would be available for deposition and trial, and the fact that Merin would not need to examine Appellant.(T914-916) Finally, Appellant was not present on the morning of November 22, 1993 prior to that day's penalty phase proceedings, when the court and counsel discussed the schedule for the proceedings, Dr. Merin's availability, the fact that the defense would be using tapes and transcripts of the interviews Sheriff Farrior and Detective Lawless conducted with Robert Sager, and the introductory penalty phase instructions.(T973-987)

Appellant's presence at the stages of the proceedings discussed above was essential to vindicate his rights to a fair trial and to the effective assistance of counsel, and to assure the fundamental fairness of the proceedings. Amends. VI and XIV, U.S. Const.; Art. I, §§ 9, 16 and 22, Fla. Const. His absence from these phases requires that he receive a new trial.

ISSUE III--THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT THE GUILT PHASE OF APPELLANT'S TRIAL THE KNIFE THAT WAS TAKEN FROM HIM BY DEPUTY WALKER IN MISSISSIPPI, AS THIS ITEM WAS IRRELEVANT AND PREJUDICIAL.

During the testimony of Deputy William Lawless, the court admitted into evidence, over defense relevancy objections, the knife that Deputy Bilmer Walker took from Appellant in Mississippi when Appellant and codefendant Robert Sager were transported to the Wayne County Jail.(T487-488,599-604) This item was irrelevant to

any issue in this case, and should not have been admitted.[18] There was nothing to tie the knife to the homicide of Audrey Stephen Bostic. Appellant said in the taped statement taken by Deputy Lawless that the knife Appellant stuck into the side of Bostic's neck was left at the scene.(R222-223,230-231) This was corroborated by the State's witnesses. Deputy Roy Haynes and Crime Scene Technician Jeffery Boekeloo testified regarding the large brown-handled knife that was found in the flag around Bostic's neck.(T394,403) Furthermore, a total of three knives were recovered at the scene, two of which had blood on them; there was no indication in the testimony that the knife Appellant possessed in Mississippi had any blood on it. Although the prosecutor below represented that Appellant said in his statement to Lawless that he used a white-handled knife, and the knife in question had either a bone-colored or white-colored handle, and this persuaded the court to let it into evidence (T601-604), it is not at all clear from the statement that Appellant was saying that he used the white-colored knife to stab Bostic. The following exchange occurred during the

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[18] The State initially offered the knife into evidence during the testimony of Deputy Walker, even though the prosecutor conceded that he could not "determine by way of physical evidence what knife was used to cut the [victim]" and had "no idea to know what knife was used to puncture his wounds or slash his arm[,]" but the court refused to admit the knife at that time.(T491-497) Appellant moved for a mistrial because, although the knife had not been exhibited to the jury, Walker had testified about it, and said testimony was "cumulative and inflammatory."(T495-496) Defense counsel asked to argue the point during a break, but the court required him to argue right then, during the discussion at the bench.(T495-496) Defense counsel asked that the jury be instructed to disregard any testimony about the knife, "at the very least," but the trial judge refused to either so instruct the jury or grant a mistrial.(T496-497)

taped interview between Lawless and Appellant with regard to knives (R230-231--Lawless is asking the questions and Appellant is giving the answers):

> 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 [sic] 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."

A fair reading of this exchange is that Appellant was saying that the only knife he remembered in any detail was a knife that he found in Bostic's car, which had a white handle, while the knife used to stab Bostic was left in the apartment. (When Appellant said the knife had a "rag around it," he was likely referring to the flag in which the knife was found.)

Carter v. State, 560 So. 2d 1166 (Fla. 1990), a capital case, is relevant to this issue. In Carter, this Court found error in admission into evidence of a gun and knife taken from Carter that had no relevance to the case. -(However, the Court determined the error to be harmless.) Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA

1987) is also particularly apposite. Huhn was convicted of armed kidnapping and aggravated assault with a firearm. One of the points he raised on appeal was that the trial court should not have admitted into evidence a gun that was taken from the glove compartment of the car Huhn was driving when he was arrested several months after the alleged offenses. The appellate court agreed with the appellant that 'the gun was irrelevant where there was "nothing to connect the particular gun to the crimes for which Huhn was on trial." 511 So. 2d at 589. See also Garcia v State, 655 So. 2d 194 (Fla. 3d DCA 1995) (in prosecution for trafficking in cocaine and conspiracy to traffic, court erred in admitting empty holster recovered from defendant's car and $880 in cash that defendant was carrying when arrested at scene of crime, where there was no evidence connecting holster to any weapon recovered from scene of drug transaction, and items in question were not relevant to any portion of case); Sosa v. State, 639 So. 2d 173, 174 (Fla. 3d DCA 1994) (in prosecution for attempted second degree murder and possession of a firearm by a convicted felon, bullets found in appellant's vehicle irrelevant where there was "nothing to connect them to the crime for which Sosa was charged..."); Barrett v. State, 605 So. 2d 560, 561 (Fla. 2d DCA 1992) (in prosecution for sale of cocaine within one thousand feet of a school, evidence that over $250 in cash was seized from Appellant's person when he was arrested two days after the alleged sale was irrelevant where there was "no direct connection between the specific cash seized and the crime to which appellant [was] charged"); Dorsey v. State, 613 So.

2d 1368 (Fla. 2d DCA 1993) (reversible error to admit 38 photographs of property in the appellant's trailer where there was no evidence connecting those photos and property the appellant admitted receiving in exchange for cocaine, and no evidence they depicted stolen property, although that was clear inference to be drawn from them). Compare the instant case with Amoros v. State, 531 so. 2d 1256 (Fla. 1988), where the appellant's previous possession of the same gun as that used in the murder that was the subject of the appeal was relevant. The Court noted: "Simply allowing testimony that Amoros had possession of a gun does not serve to identify it as the same murder weapon." 531 So. 2d at 1260. The Court indicated that the gun would not be relevant if, as in the instant case, it was not established to be the very weapon that was used in the capital murder.

The prosecutor referred to the knife in his guilt phase closing argument to Appellant's jury, when he spoke of the episode in Mississippi when Appellant and Robert Sager were transported to the Wayne County Jail (T655-656):

> He [Deputy Walker] actually put them in the cruiser. Before he does that, he finds some kind of a knife on this defendant's person. Voorhees had a knife. So there's no ID. There's no car. There's no luggage. They've got no money. And one of them has a knife.

The admission of the knife, and the prosecutor's commentary thereupon, impermissibly conveyed to the jury the suggestion that because Appellant had a knife when he was taken into custody in Mississippi, it was more likely that he used a knife against Bostic

at his apartment several days previously, hence prejudicing Appellant. See Huhn, 511 So. 2.d at 589.

Because there was nothing to connect the knife in question to the crime for which Appellant was being prosecuted, it should not have come into evidence. Because it did, Appellant is entitled to a new trial.

ISSUE IV--THE TRIAL COURT ERRED IN PREVENTING APPELLANT'S GUILT PHASE JURY FROM HEARING TESTIMONY REGARDING STATEMENTS APPELLANT'S CODEFENDANT, ROBERT SAGER, MADE TO VARIOUS PEOPLE, THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND BY ARTICLE I, SECTIONS 16 AND 22 OF THE CONSTITUTION OF THE STATE OF FLORIDA, TO PRESENT EVIDENCE AND WITNESSES ON HIS OWN BEHALF TO ESTABLISH A DEFENSE.

During his case at guilt phase, Appellant proffered the testimony of Sheriff Marvin Farrior, Detective William Lawless, Miklos Flinn, and Salem Lefils, who would have testified regarding statements Robert Sager made to them, in which Sager essentially took the blame for the killing of Audrey Stephen Bostic and admitted that he was the one who cut Bostic's throat. (T707-717,730-732,735-742,753-781) The court ruled the proffered testimony inadmissible, primarily because he felt that it did not serve to exculpate Appellant, relying upon a rather obscure and seldom-cited case out of the Fourth District, Denny v. State, 617 so. 2d 323 (Fla. 4th DCA 1993). Although Appellant was able to introduce evidence as to Sager's statements at the penalty phase of his trial, his jury should have been permitted to consider the proffered evidence as it related to Appellant's guilt or innocence of the charged offense.

In order for testimony such as that proffered by Appellant to be admissible under the hearsay exception for statements against interest, three requirements must be met: (1) the declarant must be unavailable; (2) the evidence must tend to expose the declarant to criminal liability; and (3,) the statement must be corroborated by circumstances showing trustworthiness. § 90.804(2)(c), Fla. Stat. (1993).[19] The proffered evidence met these requirements, and should have been admitted. See Mauqeri v. State, 460 So. 2d 975 (Fla. 3d DCA 1984); Brinson v. State, 382 So. 2d 322 (Fla. 2d DCA 1979). Robert Sager was unavailable as a witness, because he was himself under indictment for the same offense with which Appellant was charged, and had a privilege under the Fifth Amendment not to incriminate himself. Sager's attorney indicated that he would advise his client to assert his privilege, and the court below ruled that Sager was unavailable to testify.(T331-332) His statements unquestionably exposed Sager to criminal liability. They were corroborated not only by the fact that he made them to several people [see Johnson v. Sinsletarv, 647 So. 2d 106, 111

[19] The civil procedure counterpart to this rule does not require corroboration. See § 90.804(2)(c), Fla. Stat. (1993); Peninsular Fire Insurance Co. v. Wells, 438 So. 2d 46 (Fla. 1st DCA 1983). This distinction irrationally gives civil litigants more protection than criminal defendants. It cannot be constitutionally acceptable to place an obstacle in the path of an accused in a criminal trial who seeks to exculpate himself by showing that another person has confessed to the crime, when no such obstacle would be in the path of a civil litigant who sought to introduce the same evidence. This violates Appellant's Sixth and Fourteenth Amendment right to present evidence to support his defense, which right is discussed in more detail below, as well as violating the equal protection doctrine by affording more protection to civil litigants.

(Fla. 1994), in which this Court remanded for an evidentiary hearing on Johnson's allegations that another person had confessed to committing the crime for which Johnson was convicted, finding significance in the fact that "not just one but several" people had signed affidavits that they heard the other person confess], but by other evidence possessed by the State indicating that Sager was involved in killing Bostic. (T-he State should not be permitted to argue that there were insufficient corroborating circumstances regarding Sager's admission that he killed Bostic when the State charged Sager with the very killing, and sought and obtained a sentence of death.) Rather, the trial court based his decision not to admit Appellant's evidence at penalty phase upon his reading of Denny as requiring that evidence must completely exonerate the proponent of the testimony in order to be admitted under the hearsay exception in question. Although the Dennv court did note that statements would not qualify under this hearsay exception "[i]f not exculpatory," 617 So. 2d at 325, the judge belowtooktoo narrow a view of what might. constitute exculpatory evidence. Although it is conceivable that Appellant's jury might still have convicted him of first degree 'murder under a principal theory,[20] it also conceivable that, had they heard from Appellant's witnesses at guilt phase, they would have concluded that Sager was solely responsible for Bostic's death, and that Appellant did not have sufficient involvement in the events at Bostic's residence to justify convicting him of first degree murder. Hedseman v. State,

[20] The jury was instructed on the law of principals.(T881)

661 so. 2d 87 (Fla. 2d DCA 1995) is instructive in this regard. Hedgeman was convicted of second degree murder after being indicted for first degree murder of the victim, who owed him ten dollars, and with whom Hedgeman had had at least two prior altercations involving the debt. During one of these, Hedgeman said that he was going to get the victim. On the night of the homicide, the victim was visiting a neighbor. Hedgeman accompanied Daniel White, who had also been involved in the earlier altercations with the victim, to the neighbor's apartment. White entered and shot the victim three times. Although there was conflicting evidence as to whether Hedgeman was in the apartment when the shots were fired, the appellate court concluded that it appeared that Hedgeman and another man "were either behind White at the time of the shooting or entered the apartment immediately following the shooting." 661 So. 2d at 88. As the victim lay wounded on the floor, Hedgeman walked over and kicked him. Later that day, Hedgeman made the statement, "We killed that f--king nigger." 661 So, 2d at 88. The Second DCA noted that Hedgeman could only be convicted of second degree if there was sufficient evidence to show that he was a principal to the crime, and found that evidence lacking. Similarly, Appellant's jury could have concluded that the evidence here was not sufficient to show Appellant's guilt as a principal, had they been allowed to hear Sager's statements that he, in effect, did it all. It is also worth noting that although admitted to sticking a knife into the side of Bostic's neck, this wound did not contribute to Bostic's death (T696), and in Hedqeman the appellate

court pointed out that Hedgeman's kicking of the victim did not contribute to the cause of his death. 661 So. 2d at 88. Furthermore, had the jury heard Appellant's proffered evidence, they might have been more inclined to exercise their pardon power with regard to the primary charge and find him guilty of a lesser included offense, or even not guilty.[21]

In Williamson v. United States, 512 U.S. ___, 114 s. ct., ___ 129 L. Ed. 2d 476, 482 (1994), the Supreme Court, in construing Federal Rule of Evidence 804(b)(3), the federal counterpart to Florida's hearsay exception for statements against interest, discussed the rationale for allowing such statements into evidence:

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.

The Court went on to note that statements of a codefendant, in which he seeks to inculpate the defendant, "'are less credible than ordinary hearsay evidence.' [Quoting from Lee v. Illinois, 476 U.S. 530, 541, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986).]" 129 L. Ed. 2d at 483. Where, as here, you have a codefendant attempting to absorb all the blame for the offense himself, thus exonerating the defendant, his statements must therefore be considered more credible than ordinary hearsay, and, for that reason, admissible.

Apart from whether the proffered evidence was strictly

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[21] This Court has recognized the inherent power of a jury to "pardon" a criminal defendant in cases such as Dougan v. State, 595 So. 2d 1 (Fla. 1992), Amado v. State, 585 So. 2d 282 (Fla, 1991), State v. Baker, 456 So. 2d 419 (Fla. 1984), State v. Wimberly, 498 So. 2d 929 (Fla. 1986), State v. Bruns, 429 So. 2d 307 (Fla. 1983), and State v. Abreau, 363 So. 2d 1063 (Fla. 1978).

admissible under the hearsay exception discussed above, Appellant was entitled to present the testimony to vindicate his constitutional rights to present witnesses on his own behalf and to establish his defense. ". ..[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." Gardner v. State, 530 so. 2d 404, 405 (Fla. 3d DCA 1988), citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Bovkins v. Wainwright, 737 F. 2d 1539 (11th Cir. 1984), rehearing denied, 744 F. 2d 97 (11th Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1775, 84 L. Ed. 2d 834 (1985). See also Miller v. State, 636 So. 2d 144 (Fla. 1st DCA 1994) (defendant was entitled to present testimony relevant to his defense). As the Supreme Court of the United States noted in Washington v. Texas, 388 U.S. at 19:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In Moreno v. State, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982), the court observed:

> Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. [Citations omitted.] Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. [Citations omitted.]

Furthermore, a person accused of a crime has a basic right to introduce evidence in his defense to show that the crime may have been committed by someone else, which is what Appellant was attempting to do below. Chambers v. Mississippi, supra; Pettiiohn v. Hall, 599 F. 2d 476 (1st Cir. 1979); Lindsav v. State, 69 Fla. 641, 68 So. 932 (Fla. 1915); Pahl v. State, 415 So. 2d 42 (Fla. 2d DCA 1982); Moreno ; Siemon v. Stouqhton, 440 A. 2d 210 (Conn. 1981); State v. Harman, 270 S.E. 2d 146 (W. Va. 1980); see also Audano v. State, 641 So. 2d 1356 (Fla. 2d DCA 1994). "The purpose [of such evidence] is not to prove the guilt of the other person, but to generate a reasonable doubt of the guilt of the defendant." State v. Hawkins, 260 N.W. 2d 150, 158-159 (Minn. 1977). The testimony need not be absolutely conclusive of the third party's guilt; it need only be probative of it. Pettiiohn; Harman; Siemon.

The third party confession is probably the most direct link that can be presented between the third party and the crime. Where another person has made an out-of-court statement admitting his own guilt of the crime for which the defendant is on trial, such a statement is obviously of crucial importance to the accused's defense. See Chambers. In this situation (and especially where the defendant is on trial for his life), the constitutional right to present one's defense must take precedence over exclusionary

rules of evidence, and "the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers, 35 L. Ed. 2d at 313. See also Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979); Pettiiohn; Williams v. State, 611 So. 2d 1337, 1338 (Fla. 2d DCA 1993) ("While a statutory enactment may provide an exception to the rule against hearsay, such a statute may not waive an accused's constitutional rights.") Appellant was attempting to show that, while he may have been present at Bostic's residence, it was his codefendant who actually cut Bostic's throat and killed him, and the jury should have been permitted to consider the evidence Appellant proffered to establish this.

This Court's recent admonition in Guzman v. State, 644 So. 2d 966, 1000 (Fla. 1994) is particularly pertinent here:

> We are...concerned about Guzman's contentions that the trial judge erroneously limited the testimony of two of Guzman's witnesses and refused to allow Guzman to recall one of those witnesses. We emphasize that trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life. [Emphasis supplied.]

Appellant was unduly hampered in the presentation of his defense by the trial court's ruling excluding his proffered evidence. As a result, Appellant was deprived of a fair trial, and must be granted a new one.

ISSUE V--THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATED MURDER.

When the State rested its case, Appellant moved for a judgment of acquittal on the grounds that the State had not proved a case of

premeditated murder.(T701) The judge not only denied the motion, but incredibly, in this capital murder case, did not even take it seriously, remarking to defense counsel, "Wow, you're really good. You did that with a straight face."(T701) Appellant renewed his motion at the conclusion of all the evidence, to no avail.(T813)

Contrary to what the trial judge seemed to think, Appellant's motion for a judgment of acquittal was no joke, and should have been granted.[22]

There was no direct evidence of premeditation adduced at Appellant's trial; any evidence of premeditation was purely circumstantial. Where the State seeks to prove premeditation circumstantially, the evidence relied upon must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). And if "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. [Citation omitted.]," Hoefert, 617 So. 2d at 1048.

The evidence presented below showed that whatever was done to Audrey Bostic was done in an effort to make him be quiet, not to kill him. Particularly relevant to the question of premeditation are the comments made by both Appellant and Robert Sager to law enforcement authorities when they were in custody. See Dupree v. State, 615 So. 2d 713, 715 (Fla. 1st DCA 1993) and Smith v. State,

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[22] Although the State proceeded on alternative theories of premeditated and felony-murder, with robbery or attempted robbery being used as the supporting felony (T878), as discussed in Issue IX below, the evidence was insufficient to show that Appellant was engaged in robbing or attempting to rob Bostic.

568 So. 2d 965 (Fla. 1st DCA 1990) (accused's actions before and after homicide are relevant on issue of premeditation). Both men either thought or hoped that Bostic was still alive after the events at his apartment. When Detective Lawless asked Appellant if he thought Bostic "was alive after all that," Appellant responded, "I was hopin', God, I was hopin'..."(R229) Robert Sager told Sheriff Farrior that Bostic was still alive when the two men left his residence (Defendant's Exhibit ID "A," page 8), and the State presented no evidence to contradict this statement. Sager similarly said during his interview with Detective Lawless that he "tried to kill a man," (rather than that he had actually killed him), and said he was glad that Bostic was still alive at the time of the interview (which, of course, Bostic was not). (Defendant's Exhibit #1, pages 7, 11) Thus, Sager and Appellant both indicated that they did not want to see Bostic dead at any point; he was stabbed in order to keep him quiet, not because of any premeditated intent to kill him. Obviously, if the men knew Bostic was alive when they left his apartment, they could have finished him off if their design was to kill.

The premeditation essential for proof of first-degree murder requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986). Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983), which was cited by this Court in Wilson, is particularly illustrative in this regard. Tien Wang, like the instant case, involved a stabbing. Even though there was evidence that the

defendant chased the victim down the street and struck him repeatedly, resulting in his death, and the appellate conceded that the testimony was "not inconsistent with a premeditated design to kill," the court nevertheless reversed the conviction for first-degree murder, because the evidence was "equally consistent with the hypothesis that the intent of the defendant was no more than an intent to kill without any premeditated design." 426 So. 2d at 1006. The evidence against Appellant was at least as equivocal on the issue of premeditation as was the evidence in Tien Wang. It demonstrated that the killing very well could have occurred during a rage over Bostic's refusal to shut up despite repeated attempts to obtain his silence. At the most, the proof might have supported a verdict for second-degree murder. Accordingly, as in Tien Wang, and pursuant to section 924.34 of the Florida Statutes, Appellant's conviction for murder in the first-degree should be reversed and this cause remanded with directions to reduce the conviction to one for second-degree murder, and to resentence Appellant accordingly?

ISSUE VI--THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR MADE A HIGHLY INFLAMMATORY ARGUMENT TO THE JURY AT THE GUILT PHASE OF APPELLANT'S TRIAL.

Appellant twice moved for a mistrial regarding the prosecutor's closing argument to the jury at the guilt phase of trial. The most egregious remarks came during the second part of the

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[23] For a recent case in which this Court found the evidence insufficient to support the defendant's conviction for premeditated first-degree murder, please see Rogers v. State, 660 So. 2d 237 (Fla. 1995).

State's bifurcated argument when the prosecutor said, near the end (T 873):

> What about the marks to the arms [of the victim], torture marks. They wanted money. They wanted the PIN number. They wanted his ATM number. He said no, so they stuck him in the arm. They slice him here. That's what those marks are there. Consciously intended to kill Mr. Bostic.[24]

As defense counsel stated in objecting and moving for a mistrial (T 874), there was absolutely no evidence that Bostic was tortured in an attempt to persuade him to reveal the personal identification number for his bank account. "It is well settled that a prosecutor must confine his closing argument to evidence in the record and must not make comments which could not be reasonably inferred from that evidence. [Citation omitted.]" Tillman v. State, 647 So. 2d 1015, 1015 (Fla. 4th DCA 1994). Accord: Adams v. State, 585 So. 2d 1092, 1094 (Fla. 3d DCA 1991): "Comments on matters outside the evidence are clearly improper. [Footnote omitted;]" Pose v. Wainwrisht, 496 So. 2d 798, 803 (Fla. 1986). See also Huff v. State, 437 So. 2d 1087 (Fla. 1983); Shorter v. State, 532 So. 2d 1110 (Fla. 3d DCA 1988). The prosecutor's torture theory was not naturally inferable from the evidence presented at Appellant's trial. For the jury to have received such a suggestion as almost the last thing they heard prior to hearing the court's instructions on the law could only have prejudiced Appellant.

> The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he

[24] The other improper remarks appear at T825-826,830.

> represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo.

Kirk v. State, 227 So. 2d 40, 43 (Fla. 4th DCA 1969). The prosecutor below failed to exercise his responsibility with the "circumspection and dignity" called for by this most serious of cases, a capital case. Appellant was deprived of a fair trial as a result, and he must be granted a new one.[25]

ISSUE VII--THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL DURING PENALTY PHASE DUE TO THE PROSECUTOR'S CROSS-EXAMINATION OF DEFENSE WITNESS DR. MICHAEL MAHER AND THE PROSECUTOR'S ARGUMENT TO THE JURY, WHICH WERE IMPROPER AND INFLAMMATORY.

Prosecutorial misconduct during the penalty phase of Appellant's trial tainted the jury's death recommendation herein and rendered it unreliable.

The first example of such misconduct occurred during the State's cross-examination of Appellant's mental health expert witness, Dr. Michael Maher. The prosecutor asked Dr. Maher whether he was aware that a number of mental health experts evaluated Appellant from 1984 through 1987 and conducted, psychiatric examinations.(T1170) Dr. Maher responded in the affirmative, whereupon the prosecutor asked the following question (T1170):

> And you're aware back in 1984, I think it's August 11 of '84, a staff psychologist named Timothy Miller--I'm sorry, John Zernanski (phonetic), indicated that this defendant displays erratic and defiant behavior. Okay. And he's defiant towards the staff; for example, he

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[25] Appellant has been unable to develop this issue fully due to the arbitrary 115 page limit placed on his brief. Appellant hereby requests the opportunity to submit a brief in which he may fully address this issue.

> urinates on the floor, on the walls, and throws spitballs at the staff.
> Remember reading something along those lines?

Defense counsel then lodged an objection and moved for a mistrial at the bench (T1170-1171):

> MR. SIAR [defense counsel]: Your Honor, this has gone way beyond inflammatory at this point. Mr. Halkitis [the prosecutor] is getting into things that are inflammatory for exactly the reason that they are inflammatory. It's not attempted to establish that there's any nexus between the behavior he is referring to and the diagnosis of this doctor. We obviously have issues with regard to due process and fair trial. We'd be moving for a mistrial.
> THE COURT: Well, I guess I don't understand your reasoning. This part of the record that the doctor has testified he based his opinion on, I fail to understand how I could stop the prosecutor from exploring that. We may be here for another couple hours. I wish I could stop it, but I don't think I can.

When Appellant's objection was overruled, the prosecutor asked the question again, and Dr. Maher responded, "Yes."(T1171)

As Appellant's lawyer below correctly pointed out, the questioning by the assistant state attorney was improper because it sought testimony that had no relevance, and could only inflame the jury. While it is proper for one to cross-examine a mental health professional regarding the materials he used in formulating his opinions, Muehleman v. State, 503 So. 2d 310 (Fla. 1987), there was no indication that the report of the staff psychologist at some unnamed institution played a part in the conclusions reached by Dr. Maher. Just as defense counsel noted, there was no nexus between the behavior described in John Zernanski's report, and the diagnosis formulated by Dr. Maher. This Court also noted in Muehleman that "the bottom line concern in questions involving the

admissibility of evidence is relevance." 503 su. 2d at 315. A report alleging that Appellant -urinated on walls and the floor had no relevance, and served only to case Appellant in a bad light. Even if the report did have some marginal relevance, it was far outweighed by the danger of unfair prejudice to Appellant, and confusion of the issues the jury was called upon to decide, and the testimony in question should have been excluded. § 90.403, Fla. Stat. (1991).

Later during his cross-examination of Dr. Maher, the prosecutor propounded a lengthy hypothetical to the witness, as follows (T1209-1211):

> Q Doctor, let me give you a hypothetical. Okay. Let's assume that two individuals who were transients, two individuals who were incarcerated most of their lives, two individuals, one of whom you've spoken with, but one of whom had a history of defiance, who had a record, had antisocial characteristics throughoutmost of his life, even through high school, adulthood. These two individuals come to Pasco County, which one of the individuals is working for a construction company, and that he's told that he's been a problem and that he may get fired when he returns.
> Let's assume that these two individuals are playing cards in the Chasco Hotel, a motel type of environment, and they meet an individual they never met before. Now this individual is highly intoxicated. He becomes almost overly intoxicated, literally drunk; that they take this individual and say, we're going to give him a ride home. We are going to drive him home. Thinking that maybe we can take something from this guy, either his money or maybe his dope, or maybe his possessions; that they drive him home; that they all begin to drink. All three of them begin to drink, especially the one who's already drunk; and that the individual who is driving the car is the individual named Voorhees; that they stop at an NCNB Bank before they go to this victim's home and take a hundred dollars, it's withdrawn.
> Now these two guys realize that the victim has some money. They go back to his house, drink, party down a little bit more ; and that they decide 'they're going to rob him; that they not only want his money, but they want his PIN

number for his ATM card. You know what I'm referring to by PIN number?
A Yes.
Q That he refuses to give them the PIN number, refuses. So they hog tie him, that he screams in the living room, and they're poking him with a knife in his arms. They're slashing at him and poking at him, They're kicking him, hitting him, both these individuals, because they want him to give them the PIN number.
While one individual is cutting him and hitting him, the other one is looking throughout that house, are [sic] ransacking the whole bedroom, looking in disarray; that these two individuals then, once again, approach this victim for his PIN number. Now he is screaming. He's rambling. He's raving. So they hit him, drag him to the bedroom so that neighbors won't hear; that in the bedroom they continually ask for this PIN number; that once again he refused to give them the PIN number; that they realize that he can witness them, they don't want to go back to the California Youth Authority or holding facility; that this individual's been kicked, he's bleeding all over the place, He's hog tied. He's screaming that he can obviously identify both of those guys.
So they decide, we're going to kill him and cut his throat. We're going to execute him. So that both of these individuals pick up knives and they both kill him. One on his throat, the other one stabs him. They're kicking him. They're kicking him in the head; that one of these individuals grabs his neck and actually squeezes it too hard, it breaks the hyoid bone, that the other individual says, hey, I'm going to wipe up the place. So he started taking and wiping down everywhere he touched. He got blood on his shirt. We know why he got blood all over the shirt, because he stabbed the guy in the neck.

At this point, Appellant objected to the prosecutor making what was, in essence, a closing argument, and the court sustained the objection.(T1211) However, despite the objection, the prosecutor continued with his hypothetical (T1211-1213):

Q Let's assume he then cuts this individual, getting blood all over his shirt. Okay. And then he takes a lighter that he either has on him or finds in the house, and lights the shirt on fire, actually burning it right there on the floor; that the water is turned on because he's washing down his hands, and he's--it's left on, the sink.
Let's assume that as they're going to leave, one of these individuals is going to take the stereo, going to take

the VCR, and the other individual says, no, you can't take it because we can't get rid of it. Okay.
Now they then, this one individual that's the driver of the vehicle, only driver of the vehicle, says, turn on the gas oven. And the other guy, not realizing it was an electric oven, turns it on, and they leave after taking the keys to the victim's car. They they in [sic] and they drive, stop at every NCNB Bank trying to use a PIN number, but they're recorded. That shows they couldn't get any money out because the PIN number was not working. They don't have the accurate PIN number; that they go to Jacksonville; that they go to Mississippi, and that this one individual, the driver of the car, picks up his check and buys all kinds of survival gear, and that they're then caught in Mississippi by Mississippi authorities, and that this one fellow who's the driver of the car, he tells an inmate there, a trustee, an inmate who cleans toilets and does all kinds of stuff at the jail that, I'm the person responsible 'for slicing the neck of this individual. And then this person then gives a taped statement to Detective Lawless where he has no problem recalling all of what happened there.
Okay. Let's assume all that. Would all those facts before you, Doctor, just those facts that I told you, would you feel you would you apine [sic] that that person was under alcohol intoxication at the time he committed the crime?
A You want me to assume all of the facts you told me are true?
Q Assume all those facts are true, with one other fact, that the defendant said, I didn't drink any time before I got to the home, and me and the two other guys split a half a bottle of Morgan liquor.
Let's assume all those facts.

Thereupon, defense counsel once again objected and moved for a mistrial, because the hypothetical contained embellishments and facts not in evidence.(T1213-1217) Although the court sustained the objection, he denied the motion for mistrial.(T1215-1217)

Hypothetical questions propounded to an expert witness must be based upon the evidence in the case. Autrey v. Carroll, 240 So. 2d 474 (Fla. 1970); Nat Harrison Associates, Inc. v. Byrd, 256 So. 2d 50 (Fla. 4th DCA 1971); see also Galban v. State, 605 So. 2d 579 (Fla. 3d DCA 1992) (no error in trial court's refusal to allow

defense counsel to cross-examine State's witness with a hypothetical that bore no relation to the facts of the case). 'As the court below correctly noted, the prosecutor's hypothetical contained many so-called facts which had not been proven by the evidence. For example, the prosecutor engaged in pure speculation when he commented upon Bostic's supposed degree of intoxication when he left the Chasco Inn with Appellant and Robert Sager, nor was there evidence to support the prosecutor's remark that Bostic was drinking more than Appellant and Sager ("[a]ll three of them begin to drink, especially the one who's already drunk"). Moreover, many of the supposed facts that enjoyed no support were extremely prejudicial, as when the prosecutor claimed thnt Appellant and Sager were "transients" who. were "incarcerated most of their lives," and that Appellant "had a record." The evidence did not show that the two men were transients. Although there was evidence that Appellant had been in various institutions as a juvenile, there was no evidence to support the remark that he had a "record," which implied commission of criminal (adult) offenses, and no evidence to support the comment that he had been incarcerated most of his life.[26]

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[26] In his closing argument, the prosecutor said that Appellant "had been incarcerated until he was 21" (when he was no longer a juvenile), and "committed the [instant] crime when he was 25, so for four years he's been, I guess, a law-abiding citizen."(T1273) [Actually, as the trial court found in his sentencing order (R362), Appellant was only 24 when the offense occurred, not 25.] Thus, the assistant state attorney, in effect, conceded that Appellant did not have an adult criminal record, and any "incarceration" was actually detention in facilities for juvenile offenders.

Perhaps the most prejudicial portions of the hypothetical were the following: (1) The claim that Appellant and his codefendant planned to steal from Bostic from the time they left the Chasco Inn. There was no testimony to show Appellant's state of mind when he and Sager drove Bostic from the Chasco Inn to his home; nothing to suggest that they sought anything other than a good time with someone who was willing to spring for drinks. The prosecutor was attempting to bolster his contention that Bostic was killed during a robbery by injecting this "fact" into his question to Dr. Maher. (2) The extended supposition that the two men tortured Bostic in an attempt to get him to reveal his PIN number (which was the same argument the prosecutor made in his guilt-phase closing argument). As discussed in Issue VI herein, there was no evidence that Bostic was tortured in an effort to make him tell Appellant and Sager his personal identification number. This was an attempt to bolster an argument for HAC, and was extremely prejudicial. (3) The speculation that Bostic was "screaming that he [could] obviously identify both of those guys," and that they therefore decided "to execute him." Again, there was no support for the prosecutor's suggestion that Bostic was screaming about identifying Appellant and Sager, or for the state of mind of Appellant and his codefendant. The prosecutor appears to have been using this part of the hypothetical to try to shore up an argument for CCP and/or witness elimination, although the State did not request and did not receive a jury instruction on the homicide having been committed to avoid arrest.(T938,1317-1318)

The extended hypothetical, including as it did matters for which there was no evidence, may have suggested to the jury that the State possessed evidence of these matters which, for whatever reason, had not been presented to the jury.[27] [See cases holding that it is highly improper for the assistant state attorney to imply that he had additional evidence of guilt which was not being presented in court, such as Williamson v. State, 459 So. 2d 1125 (Fla. 3d DCA 1984), Libertucci v. State, 395 So. 2d 1223 (Fla. 3d DCA 1981), Richardson v. State, 335 So. 2d 835 (Fla. 4th DCA 1976), and Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975).] The State's case must rest upon evidence, not innuendo. Kirk v. State, 227 So. 2d 40, 43 (Fla. 4th DCA 1969).

Although the hypotheticalquestionwas not answered, prejudice sufficient to require the granting of a new trial (or in this case, a new penalty phase) may arise from the question itself, Dawkins v. State, 605 So. 2d 1329 (Fla. 2d DCA 1992), and it did so here.

Appellant's final objections to the prosecutor's misconduct during penalty phase came during and immediately after the State's closing argument.(T1286,1288-1290) Defense counsel moved for a mistrial due to the "inflammatory nature of the closing argument in general," which was "theatrical," and included "banging on the podium, pointing at the defendant, yelling..."(T1288) Appellant's attorney also noted several specific examples of improper argument. (T1288-1289) The trial court agreed that the argument was

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[27] When Appellant lodged his first objection the hypothetical, the prosecutor said, in the presence of the jury, "This is a hypothetical question. These are facts."(T1211)

"animated," and included "slapping [of] hands on the podium," but refused to grant a mistrial.(T1289-1290)

The prosecutor's favorite theme throughout the proceedings below seems to have been that Appellant and Robert Sager tortured Audrey Stephen Bostic to try to get him to give up his PIN number. The assistant state attorney harped on this idea not only in his guilt phase closing argument (see Issue VI above), and not only in his hypothetical question to Dr. Michael Maher, but in his penalty phase closing argument as well.(T1270-1271,1275) Once again, however, this extremely prejudicial suggestion enjoyed no evidentiary support, and the State should not have been permitted to argue it.

The prosecutor also misled Appellant's jury with regard to the statutory mitigating factor of age when he said (T1278):

> Judge Mills is going to tell you there are certain mitigations you can consider. You can consider this; you can consider the age of this defendant. You heard, he's 26, I think. So you can consider that. Is it mitigating? I submit, it's not. The fact that he's 26 years old is mitigating? All that tells you is that he's old enough to be drafted. He's old enough to vote, and that when he's 51 years old, he can come out on parole, out of jail. There's a possibility of that. That's all that that tells you about this defendant.
> It tells you one other thing that I think is important. When we looked at all these records through Dr. Maher and Dr. Merin, we found out that he had been incarcerated until he was 21. He committed the crime when he was 25, so for four years he's been, I guess, a law abiding citizen. Four years of his life, I guess.

There are at least two problems with this argument. The first is that, as the trial court found in his sentencing order (R362), Appellant was 24 at the time of the offense, not 24 as the prosecutor stated. Furthermore, the prosecutor's argument

indicated to the jury that Appellant's age at the time of the penalty phase was the proper consideration. However, it was the "age of the defendant at the time of the crime" which the jury was obligated to consider, not his age at his penalty trial. § 921.141(6)(g), Fla. Stat. (1991) (emphasis supplied). It is improper for the assistant state attorney to misstate the law, as he did below. See, for example, Garron v. State, 528 So. 2d 353 (Fla. 1988); Rhodes v. State, 547 so. 2d 1201 (Fla. 1989); Eberhardt v. State, 550 So. 2d 102, 107 (Fla. 1st DCA 1989).

In his closing the prosecutor once again referred to the irrelevant and inflammatory records to which he had referred during his cross-examination of Dr. Maher, when he mentioned "[t]he records of an individual who urinates on the floor while he's incarcerated..."(T1280)

The prosecutor went on with his attempts to inflame the jury by characterizing Appellant as a "Dr. Jekyll and Mr. Hyde," and speculating whether Tina Voorhees would have given held such a favorable opinion of her brother if "she was sitting behind the couch in that room, and she watched what happened..." when Bostic was killed.(T1285-1286)[28]

Shortly thereafter, the prosecutor said that Appellant was put in a California Youth Authority correctional facility where he spent a couple of years, was then "paroled, four months later back in the slammer he goes. He's paroled, three months later, back in

[28] Appellant's counsel lodged a contemporaneous'objection to the inflammatory nature of these comments.(T1286)

the slammer he goes."(T1287) Once again, as he did in his hypothetical to Dr. Maher, the prosecutor was suggesting that Appellant had committed criminal offenses for which he had served time in prison, by use of the terms "paroled" and "slammer." This was extremely misleading because, as discussed above, the confinements to which the assistant -state attorney was referring were actually periods of institutionalization due to juvenile offenses, not prison terms resulting from adult criminal offenses.

"It is the responsibility of the prosecutor to seek a verdict based on the evidence without indulging in appeals to sympathy, bias, passion or prejudice. [Citations omitted.]" Edwards v. State, 428 So. 2d 357, 359 (Fla. 3d DCA 1983). Proper argument does not include attempts to inflame the minds and passions of the jurors, or to inject elements of emotion and fear into the deliberations, King v. State, 623 So. 2d 486 (Fla. 1993), as the assistant state attorney endeavored to do with his misstatements, inflammatory rhetoric, and theatrical thumping of the podium. See Spriggs v. State, 392 So, 2d 9 (Fla. 4th DCA 1981). -Furthermore, Florida courts recognize that among attorneys the prosecuting authorities must be especially circumspect in the comments they make within the hearing of the jury, because of the quasi judicial position of authority which prosecutors enjoy. Adams v. State, 192 So. 2d 762 (Fla. 1966); Gluck v. State, 62 So. 2d 71 (Fla. 1952); Stewart v. State, 51 So. 2d 494 (Fla. 1951); McCall v. State, 120 Fla. 707, 163 So. 38 (Fla. 1935); Washington v. State, 86 Fla. 533, 98 So. 605 (Fla. 1923); Knight v. State, 316 So. 2d 576 (Fla. 1st

DCA 1975); Kirk. See also Cochran v. State, 280 So. 2d 42 (Fla. 1st DCA 1973). The prosecutors at Appellant's trial, at both the guilt phase (as discussed above in Issue VI) and the penalty phase, did not conduct themselves with the requisite circumspection in their remarks to the jury and cross-examination of the defense mental health expert witness.[29] There is no way for the Court to determine from the record before it that the effect of the improprieties committed by the State did not prejudice Appellant, and so the Court must grant Appellant appropriate relief. Pait v. State, 112 So. 2d 380 (Fla. 1959). See also Grant v. State, 194 SO. 2d 612 (Fla. 1967) and Teffeteller v. State, 439 So. 2d 840 (Fla. 1983). But see Bertolotti v. State, 476 So. 2d 130 (Fla. 1985).

ISSUE VIII--THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS NOT SUPPORTED BY THE EVIDENCE AND WAS SUBMITTED TO APPELLANT'S PENALTY PHASE JURY UPON AN IMPROPER INSTRUCTION.

The State initially indicated (wisely) that it would not request an instruction on the cold, calculated and premeditated aggravating circumstance (CCP) set forth in section 921.141(5)(i) of the Florida Statutes.(T941-942,949) However, the prosecutor apparently changed his mind and requested that this factor be submitted to Appellant's jury during an off-the-record jury charge conference at which defense counsel objected to the submission of this aggravator.(T1264-1265) The jury was subsequently instructed

[29] It is worth noting that the prosecutor who gave both the second half of the State's bifurcated guilt phase closing argument and the penalty phase closing argument was the same assistant state attorney who was found to have made improper comments to the jury in Williard v. State, 462 So, 2d 102 (Fla. 2d DCA 1985).

on the cold, calculated and premeditated aggravating circumstance (T1318), but the court refused to find it in his sentencing order, where he wrote (R360-361):

> Although the Court did instruct the jury on the aggravating factor of cold, calculated and pre-meditated [sic] and the Court feels justified in having done so on the basis of Rose v. State, 472 So. 2d 1155 (Fla. 1985), the Court admits to severe reservations about this aggravating factor as applied to this particular case. Although there is evidence (the obtaining of the knife and bringing it to the place where the defenseless victim lay hogtied) which arguably could support this aggravating factor in the same sense that is explained in Rose v. State, 472 So. 2d 1155 (Fla. 1985) this Court declines to find that the factor or [sic] cold, calculated and premeditated is established and this Court assigns no weight to that factor in determining the appropriate sentence. Subsequent case law cases [sic] considerable doubt upon the continued validity of Rose v. State and this Court is in hopes that the Supreme Court of Florida will provide additional guidance in this difficult and confusing area.

"A judge should instruct a jury only on those aggravating circumstances for which credible and competent evidence has been presented. [Citations omitted.]" Hunter v. State, 660 So. 2d 244 (Fla. 1995). As discussed in Issue V above, the evidence was insufficient to show that Bostic was killed from a premeditated design to kill. Certainly, there was insufficient evidence of the heightened "premeditation beyond that normally sufficient to prove premeditated murder" that must be present for CCP to apply. Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). In order for this aggravator to be found, the defendant must have had "a careful plan or prearranged design" to kill. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); Capehart v.State, 583 So. 2d 1009 (Fla. 1991); Rogers v. State, 511

so. 2d 526 (Fla. 1987). This Court has "consistently held that application of this aggravating factor requires a finding of . . . a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987). The factor ordinarily applies in executions or contract murders. McCray v. State, 416 So. 2d 804 (Fla. 1982); Perry.

Insufficient evidence was adduced below to permit submission of the CCP aggravator to Appellant's penalty phase jury. There was no evidence that Appellant and Sager planned in advance to kill the victim. Rather, the evidence showed that an argument occurred between Sager and Bostic that escalated into a situation that ultimately resulted in Bostic's death when he would not remain quiet. Thus, the homicide was akin to a killing in a fit of rage or panic, which does not qualify as CCP. Crump v. State, 622 So. 2d 963, 972 (Fla. 1993);Mitchell v. State, 527 So. 2d 179 (Fla. 1988); Jackson.

It is also worth noting that both Appellant and his codefendant either thought or hoped that Bostic was still alive after the events at his apartment. They both indicated that they did not want to see Bostic dead at any point; he was stabbed in order to keep him quiet, not because of any pre-planned scheme to kill him. (See Nibert where, in rejecting the trial court's finding of CCP, this Court noted that "[t]here was evidence that the victim and his attacker had been drinking together before the stabbing and that

the victim was still alive when his attacker left." 508 So. 2d at 4.)

The dearth of evidence to support CCP may be seen in the trial judge's written remarks attempting to justify his submission of the factor to the jury. The only evidence he could muster in support of the factor was "the obtaining of the knife and bringing it to the place where the defenseless victim lay hogtied."(R360) Contrary to the court's assertion, this was not enough evidence even "arguably" to permit submission of CCP to the jury for its consideration. Compare Appellant's case with Barwick v. State, 660 so. 2d 685 (Fla. 1995). The trial court found that Barwick exhibited a great deal more. planning and calculation than did Appellant here. Barwick "'in a calculated manner selected his victim and watched for an opportune time. He planned his crimes, selected a knife, gloves for his hands, and a mask for his face so that he could not be identified.'" 660 So. 2d at 696. This Court rejected the trial court's finding of CCP because, while Barwick may have planned to rape, rob, and burglarize the victim, the evidence did not establish that he had a careful plan or prearranged design to kill the victim. Here, the evidence did not show an advance plan to commit any crime , much less a cold and calculated scheme to kill Bostic.[30]

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[30] The trial court was correct in saying that subsequent cases cast doubt upon his use of Rose to allow the jury to consider CCP. In light of the refinement and narrowing of CCP in such cases as Rogers v. State, 511 So. 2d 526 (Fla. 1987) and Amoros v. State, 531 So. 2d 1256 (Fla. 1988), as well as Barwick, it seems unlikely that Rose would be decided the same way today as it was in 1985.

The prosecutor below could not come up with any more evidence than the trial court in arguing to the jury that it should find and apply CCP.(T1276-1277)The only aspect of CCP that the prosecutor even addressed was the lack of any pretense of legal or moral justification for the killing. (T1276-1277) He did not even make an attempt to establish that there was a prearranged plan or design to kill Bostic. All the evidence pointed the other way. It indicated that the episode began as a social encounter for an evening of drinking and listening to music that ended in a tragic homicide. The fact recited by the prosecutor that the knife used to stab Bostic was obtained from his kitchen (T1277) is further evidence that there was no heightened premeditation involved in the killing. Had the perpetrators intended all along to kill Bostic, they most likely would have brought a weapon with them to his residence. See Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992), in which one factor cited by the appellant in arguing against CCP was that "the knife [used in the homicide] was a weapon of opportunity from the kitchen rather than one brought to the scene," and this Court agreed with the appellant's argument that CCP was inapplicable to his crime.

In cases such as Omelus v. State, 584 So. 2d 563 (Fla. 1991) and Bonifav v. State, 626 So. 2d 1310 (Fla. 1993), this Court has ordered new sentencing proceedings where the juries had been permitted to consider inapplicable aggravating circumstances. (See also White v. State, 616 So. 2d 21, 25 (Fla. 1993), in which this Court found that CCP "was not established beyond a reasonable doubt

and that the jury should not have been instructed that it could consider this aggravating factor in recommending the imposition of the death penalty.") Such a result is also dictated by Espinosa v. Florida, 505 U.S. ____, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), in which the Supreme Court held that "if a weighing State [such as Florida] decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." 120 L. Ed. 2d 859. Appellant's jury was permitted to weigh the inapplicable aggravating circumstance of CCP, and Appellant must therefore receive a new penalty trial.

Furthermore, the aggravating factor in question was submitted to Appellant's jury upon inadequate instructions. Appellant proposed three jury instructions to inform his jury as to how to consider CCP. His requested penalty instruction number 6 read as follows (R268):

> The phrase "cold, calculated and pre-meditated" refers to a higher degree of pre-meditation that [sic] which is normally present in a pre-meditated murder. This aggravating factor applies only when the facts show a calculation before the murder that includes a careful plan or prearranged design to kill, or a substantial period of reflection and thought by the Defendant before the murder.
>
> A heightened level of planning for a robbery, even if it does exist, does not go to prove a heightened premeditation for the murder.
>
> A pretense of moral or legal justification is any claim of justification or excuse that, although insufficient to reduce the degree of the homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Appellant's requested penalty instruction number 7 read as follows (R270):

> In considering the aggravating factor of cold, calculated and premeditated, you are instructed that simple premeditation does not qualify under this circumstance. This circumstance requires a "greater level" of premeditation or methodical intent than the amount of premeditation necessary for a first degree murder conviction. This aggravating circumstance requires proof of premeditation in a heightened degree, a degree higher than that required for premeditation necessary to convict for first degree murder.
>
> a) "Cold" means totally without emotion or passion.
>
> b) "Calculated" means a careful plan or prearranged design.

Appellant's requested penalty instruction number 8 read as follows (R271):

> The mere fact that it takes a matter of minutes to complete the killing is not proof that the killing was cold, calculated and premeditated.
> Hardwick v. State, 461 So. 2d 79 (Fla. 1984).
>
> "Cold" means totally without emotion or passion.
>
> "Calculated" means that the Defendant formed the decision to kill a sufficient time in advance of the killing to plan and contemplate.

The instruction the court actually gave to Appellant's jury was a modified form of his proposed instruction number 6. The court charged the jury as follows (T1318):

> Third, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any presence [sic] 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 aggravating factor applies only when the facts show a calculation before the murder that includes a careful plan or prearranged design to kill.

In Jackson, this Court held the then-current standard jury instruction on CCP to be constitutionally infirm, noting that "the CCP factor is so susceptible of misinterpretation and has been the

subject of so many explanatory decisions..." 648 So. 2d at 90.[31] The Court propounded a new standard instruction to be used until a permanent instruction could be adopted, as follows:

> 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. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated and that there was no pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means the defendant had a careful plan or prearranged design to commit the murder. "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

648 So. 2d at 89-90, footnote 8. Perhaps the biggest failure of the instruction the court gave' to Appellant's jury is its total failure to come to grips with the concept of a *'pretense of moral or legal justification." Appellant's proposed instruction defined this concept in virtually the identical language this Court approved in Jackson. It was important for the jury to have guidance in this area, in light of the prosecutor's argument that there was no pretense of justification for the homicide, and the argument Appellant's counsel made to the jury that the killing resulted from panic, and hence did not qualify as CCP.(T1298-1299) But instead of receiving the needed guidance, the jury was given an instruction that required the "presence" of moral or legal justification, not merely a "pretense" thereof, when the judge

[31] Jackson was decided several months after Appellant's November, 1993 penalty phase.

misspoke. Furthermore , a definition of what constitutes a pretense of moral or legal justification is necessary in order for the jury to understand what the aggravating circumstance of cold, calculated, and premeditated means; the aggravator cannot be fully defined without such a definition, as this Court recognized in Jackson. [One might analogize to the crime of manslaughter, which must be defined in terms of what it is not, and so definitions of excusable and justifiable homicide are essential components of an instruction on manslaughter. State v. Smith, 573 So. 2d 306 (Fla. 1990); Roias v. State, 552 So. 2d 914 (Fla. 1989); Hedges v. State, 172 So. 2d 824 (Fla. 1965); Ortaqus v. State, 500 So. 2d 1367 (Fla. 1st DCA 1987).] Appellant's jury was therefore given an unconstitutionally vague and inadequate instruction on CCP pursuant to this Court's opinion in Jackson and the opinion of the Supreme Court of the United States in Espinosa. The error in the jury charge was not rendered harmless by virtue of the fact that the trial court did not find CCP as an aggravating circumstance in his written findings in support of the sentence of death. Kearse v. State, 20 Fla. L. Weekly S300 (Fla. June 22, 1995). The jury's death recommendation cannot be considered reliable under these circumstances, and the remedy must be a remand for a new penalty phase (or reduction of Appellant's death sentence to a sentence of life imprisonment).

ISSUE IX--THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON, AND FINDING AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN COMMISSION OF A ROBBERY, BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THIS CIRCUMSTANCE.

Although Appellant was not charged with robbery, the court below instructed Appellant's jury that it could consider in aggravation that "the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery" (T1317),[32] and also found this aggravating circumstance to exist in his sentencing order, as follows (R358-359,892-893):

> 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 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.

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[32] The court charged the jury on the elements of robbery during the guilt phase instructions (T879-881), but did not re-instruct them on the elements during penalty phase instructions. (T 1316-1322)

The evidence adduced below, and the court's findings based thereupon, did not show that Audrey Stephen Bostic was killed during a "robbery," which is defined as "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." § 812.13(1), Fla. Stat. (1993). The findings quoted above describe a taking of property, as well as violence applied to Bostic, but do not demonstrate that the purpose of the violence was to accomplish the taking. Appellant would first note that the evidence showed that any money taken from Bostic, whether taken from his person or from a table in his apartment (the evidence was contradictory as to where money was taken from) was taken by Robert Sager, not by Appellant. Furthermore, the evidence did not establish that any violence against Bostic was directed at obtaining his money or other property. Rather, the initial use of force came about because of an argument between Bostic and Sager, and force was later applied for the purpose of trying to quiet Bostic. The taking of Bostic's property that subsequently occurred thus may well have been an afterthought, in which case the robbery felony-murder aggravating circumstance would be inapplicable. This conclusion is bolstered by the fact that the court's findings relied largely upon what occurred after Bostic was already dead, that is, the taking of his car and the unsuccessful attempts to

obtain cash using Bostic's ATM card long after Sager and Appellant had left Bostic's triplex.

Several cases are instructive. In Clark v. State, 609 So. 2d 513, 515 (Fla. 1992), this Court agreed with Clark's contention that the trial court erred in finding that the murder was committed during a robbery and stated:

> While there is no question that Clark took Carter's [the victim's] money and boots from his body after his death, this action was only incidental to the killing, not a primary motive for it. No one testified that Clark planned to rob Carter, that Clark needed money or coveted Carter's boots, or that Clark was even aware that Carter had any money. There is no evidence that taking these items was anything but an afterthought. Accordingly, we find that the State has failed to prove the existence of this aggravating factor beyond a reasonable doubt.

Similarly, here the fact that items were taken from Bostic's residence did not establish that the attack was motivated by a desire to obtain property. In this regard, one must remember that, although his job may have been in jeopardy, Appellant was gainfully employed doing construction work, and, as far as the record shows, had no particular need far money. Of similar importance is Parker v. State, 458 So. 2d 750, 754 (Fla. 1984) where, again, this Court refused to accept the trial court's finding that the murder was committed during a robbery and stated:

> Although Parker admitted taking the victim's necklace and ring from her body after her death, the evidence fails to show beyond a reasonable doubt that the murder was motivated by any desire for these objects....This evidence does not satisfy the standard of proof beyond a reasonable doubt on which the finding of an aggravating factor must be based. [Citation omitted.]

In Knowles v. State, 632 So. 2d 62, 66 (Fla. 1993) the defendant took his father's truck after killing his father and another

person. Because there was "no evidence that Knowles intended to take the truck from his father prior to the shooting, or that he shot his father in order to take the truck, the aggravating factor of committed during the course of a robbery" could not be permitted to stand. Similarly, here the aggravator cannot be upheld where there was no evidence that Appellant intended to take property from Bostic, and no evidence that he assaulted Bostic in order to take items from his apartment.

Where, as here, the facts that are known are susceptible to other conclusions than that an aggravating factor exists, that factor will not be upheld. Peavy v. State, 442 So. 2d 200 (Fla. 1983). Here, as in Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984), "In the absence of any material evidence in the record which would unequivocally support a finding that a robbery occurred, [this Court] must disallow this aggravating factor." See also Hill v. State, 549 So. 2d 179 (Fla. 1989) (pecuniary gain not proven where money could have been taken as an afterthought); Scull v. State, 533 so. 2d 1137 (Fla. 1988) (taking of victim's car insufficient to prove pecuniary gain was primary motive for killing where it was possible car was-taken to facilitate escape); Simmons v. State, 419 So. 2d 316 (Fla. 1982) (proof beyond a reasonable doubt of a pecuniary motivation for homicide cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance). See also Moody v. State, 418 So. 2d 989 (Fla. 1982) (record failed to support finding that capital felony

was committed while Moody was fleeing the scene after committing arson in deceased's trailer where it was clear that arson was committed after victim was killed).

The court erred in submitting the robbery felony-murder aggravating circumstance to Appellant's jury and finding it in his sentencing order, thus violating the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 2, 9, 16, 17, and 22 of the Florida Constitution. The death recommendation of Appellant's jury was tainted by its consideration of an improper aggravating circumstance, and Appellant's sentence of death, based in important part on said recommendation, must be vacated in favor of a life sentence, or a new sentencing proceeding held before a new jury. Omelus v. State, 584 So. 2d 563 (Fla. 1991); Bonifay v. State, 626 So. 2d 1310 (Fla. 1993); White v. State, 616 So. 2d 21, 25 (Fla. 1993); Espinosa v. Florida, 505 U.S. , 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). In the alternative, this aggravator must be stricken, the death sentence vacated, and Appellant's cause remanded for resentencing by the court.

ISSUE X--THE TRIAL COURT ERRED IN ALLOWING APPELLANT'S PENALTY PHASE JURY TO CONSIDER THE AGGRAVATING CIRCUMSTANCE OF ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, AND IN FINDING IT TO EXIST IN HIS ORDER IMPOSING THE SENTENCE OF DEATH, AS THIS FACTOR WAS NOT SUPPORTED BY THE EVIDENCE, AND WAS SUBMITTED TO APPELLANT'S JURY UPON AN IMPROPER AND INADEQUATE INSTRUCTION.

The trial court instructed Appellant's penalty phase jury that one of the aggravating circumstances they could consider, if established by the evidence, was that the instant homicide was especially heinous, atrocious, or cruel.(T1317-1318) The court

also found this factor applicable to Appellant's case in his written "Findings in Support of Sentence of Death."(R359-360)

In order for even a "vile and senseless" killing to qualify for the aggravating circumstance set forth in section 921.141(5)-(h), the perpetrator "must have intended to cause the victim unnecessary and prolonged suffering." Bonifav v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Kearse v. State, 20 Fla. Law Weekly S300, 304 (Fla. June 22, 1995). There must have been a "pitiless or conscienceless infliction of torture," Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), an intent "to inflict a high degree of pain or to otherwise torture" the victim. Stein v. State, 632 So. 2d 1361 (Fla. 1994). The facts of this case do not show that the means by which Bostic was killed were deliberately chosen "to cause unnecessary and prolonged suffering to the victim." Clark v. State, 609 So. 2d 513 (Fla. 1993). Rather, as even the trial court recognized in his order imposing the sentence of death, "the primary reason for slitting his throat was that the victim simply refused to be quiet..."(R359) The perpetrators used items at hand in the apartment in order to try to keep Bostic quiet; not to cause him undue pain or prolonged agony. As in Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990), the "record in consistent with the hypothesis that [this was] ...not a crime that was meant to be deliberately and extraordinarily painful. [Emphasis in original.]"

Furthermore, the medical examiner's testimony was that it was possible (though not likely) that Bostic was unconscious when his throat was cut.(T695-696) In fact, if the blows to Bostic's head

occurred first, especially a blow to the left temple that caused bleeding on the surface of the brain, he probably would have been unconscious at the time his throat was cut (T698), and thus "incapable of suffering to the extent contemplated by this aggravating circumstance." Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984).

A related factor is the fact that Bostic had been drinking heavily; his blood alcohol level was .24, three times the legal limit for driving a car.(T692-693) The trial court recognized in his sentencing order that Bostic was in a "state of apparent intoxication" (R360), but failed to note that this could well have diminished Bostic's ability to feel pain and to be aware of what was happening. See Herzog v. State, 439 So. 2d 1372 (Fla. 1983), in which this Court considered the fact that the victim was under the influence of a drug in finding the heinous, atrocious or cruel aggravating factor inapplicable, and Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), in which this Court indicated that where there is an evidentiary question as to the victim's ability to experience pain when she is killed, the question must be resolved in favor of the defendant, and the aggravator in question cannot be applied. See also DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (presence of a substantial amount of marijuana in victim's system was one fact which supported trial court's legitimate rejection of HAC in a strangulation killing).

One must also consider not only what was done to Bostic, but who did it. The Eighth and Fourteenth Amendments to the United

States Constitution require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the crime in comparison with the role played by his cohort. See Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); Jackson v. State, 575 So. 2d 181, 190 (Fla. 1991) ("a fundamental requirement of the eighth amendment of the United States Constitution is that the death penalty must be proportional to the culpability of the defendant....Individual culpability is key..."). In this case, not only did Appellant's codefendant, who was also sentenced to death, accept the blame for cutting Bostic's throat in his-statements to various people, but the trial court himself specifically found that Appellant "did fewer physical acts which specifically inflicted pain upon the victim" than Robert Sager did.(R362) For sentencing purposes, Sager's acts should not be imputed to Appellant; HAC cannot be applied to him vicariously. See Omelus v. State, 584 So. 2d 563 (Fla, 1991); Archer v. State, 613 So. 2d 446 (Fla. 1993); Williams v. State, 622 So. 2d 456 (Fla. 1993).

Furthermore, Appellant's responsibility for whatever was done to Bostic was diminished by his mental state at the time of the offense. Although the trial court found that Appellant was under the influence of extreme mental or emotional disturbance as a mitigating factor, he should have related this condition to HAC, but failed to do so. This Court has frequently recognized the interrelationship between a defendant's mental condition and the commission of acts which might be considered especially heinous,

atrocious, or cruel if perpetrated by a person of sound mind. E.g., Amazon v. State, 487 So. 2d 8 (Fla. 1986); Mann v. State, 420 so. 2d 578 (Fla. 1982); Miller v. State, 373 So. 2d 882 (Fla. 1979); Huckabv v. State, 343 So. 2d 29 (Fla. 1977).

In addition, the jury instructions given to Appellant's jury with regard to this aggravating circumstance were fatally flawed. The court charged Appellant's jury as follows (T1317-1318):

> Second, 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 the 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 the actions of the defendant that were taken after the victim was rendered unconscious or dead can be considered in terms of whether the murder was especially heinous, atrocious or cruel.

The last paragraph of the above-quoted instruction was clearly erroneous; actions taken after the victim is semiconscious, unconscious or dead cannot be considered as HAC. Jackson v. State, 451 So. 2d 458 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Rhodes. The jury may have been misled by this incorrect charge into thinking, for example, that even if Audrey Stephen Bostic was rendered unconscious by a blow to his head, as the medical examiner conceded was a possibility, actions taken thereafter, such as the cutting of the throat, or even the turning

on of the oven in an attempt to blow up the premises, could be considered in conjunction with this aggravator.[33]

The first two paragraphs of the instruction are virtually identical to the instruction this Court approved in Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, ____ U.S. ____, 114 s. Ct. 109, 126 L. Ed. 2d 74 (1993). However, without belaboring the point unduly, Appellant submitsthat the instruction is nonetheless too vague to pass constitutional muster, as it does not provide a jury with sufficient guidance regarding when a crime is HAC. The definitions of "heinous," "atrocious," and "cruel" are insufficient to cure the defects in the jury instruction the Supreme Court identified in Espinosa v. Florida, 505 U.S. ____ 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990); Atwater v. State, 626 So. 2d 1325 (Fla. 1993). The portion of the instruction dealing with the kind of crime intended to come within the ambit of this factor contains terms ("conscienceless," "pitiless," "unnecessarily torturous")

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[33] Appellant's requested penalty phase instruction #9 read (R 273): "You are instructed that actions of the defendant which were taken after the victim was rendered unconscious or dead cannot be considered in determining whether the murder was especially wicked, evil, atrocious or cruel." At the jury charge conference, the trial court agreed to give a modified version of this instruction. (T946-950) The written instruction appearing in the record reads (R309): "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." During his penalty phase closing argument to Appellant's jury, the prosecutor read the instruction as follows(T1271): "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 by you in determining whether this was heinous, atrocious or cruel."

which are themselves vague and subject to overbroad interpretation, and the instruction as a whole still focuses upon the meaningless definitions of terms condemned in Shell.[34]

For these reasons, the section 921.141(5)(h) aggravating circumstance should not have been submitted to Appellant's penalty phase jury, and should not have been found to exist in the trial judge's sentencing order.

ISSUE XI--THE SENTENCING JUDGE USED AN INCORRECT LEGAL STANDARD OF PROOF, AND FAILED TO GIVE ADEQUATE AND PROPER CONSIDERATION TO ALL FACTORS, WHEN EVALUATING THE EVIDENCE IN MITIGATION.

Throughout his discussion of mitigating circumstances in the order sentencing Appellant to death, the court below used a standard of "reasonable certainty" in evaluating whether mitigation had been established.(R361-364) It is unclear from what source the court derived this standard of proof, but it was not the correct one. In Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995), this Court observed that "[a] mitigator is supported by evidence if is mitigating in nature and reasonably established by the greater weight of the evidence." The Florida Standard Jury Instructions in Criminal Cases charge that jurors may consider a mitigating circumstance established if they are "reasonably convinced" that it exists. The court used his stricter standard to reject the statutory mitigating circumstances of impaired capacity and extreme duress or substantial domination.(R361,363) There was evidence of the impaired capacity mitigator in the testimony of Dr. Michael

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[34] Appellantproposedtwo instructions regarding the aggravator in question, which the court refused to give.(R275,301)

Maher, and the prosecutor virtually conceded that it existed in his penalty phase closing argument to the jury when he -claimed that Appellant was a sociopath, whom he defined as "a person who can't conform to the law," and went on to say that Appellant "could never conform to the law. When he was in fifth grade, he couldn't conform to the law..."(T1280) There was evidence of the extreme duress or substantial domination mitigator in the testimony of Dr. Maher.(T1137) The trial court might have found these mitigators to exist if he had viewed the evidence according to the correct standard of proof. Furthermore, it is not clear that he considered the evidence as to these proposed mitigators in the context of nonstatutory mitigating circumstances, as he was obligated to do if he felt that the evidence did not rise to his arbitrary standard of "reasonable certainty," Cheshire v. State, 568 So. 2d 908 (Fla. 1990) His failure to consider the evidence properly violated the principle of the line of cases that includes Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Eddinss v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) and Penrv v. Lynaugh, 492 U.S. 302, 109 S. Ct 2934, 106 L. Ed. 2d 256 (1989) that the sentencer may not refuse to consider valid mitigating evidence.

The court also used irrational considerations in failing to give substantial weight to Appellant's traumatic upbringing. While the court did find that Appellant was emotionally, physically, and sexually abused as a child, and that this "could not fail to have a serious effect upon the defendant's mental and emotional health

as an adult," he discounted the force of the mitigator because Appellant's sister, Tina, was "raised in the same abusive environment and yet turned out to be a decent person," and because Appellant's "prior difficult&s" did "not appear to demonstrate that he was a violent person prior to this particular incident." (R363)

With regard to Tina, she testified that Appellant was punished more and at an earlier age than the girls.(T1043) Furthermore, he often took the blame for things his sisters did, and thus received the beatings in their stead.(T1046) It is also likely that the fact that the physical, mental, and sexual abuse in the family was being meted out by his father, who should have been his role model, took an excessive toll upon Appellant as opposed to his sisters. It is evident from the evidence, particularly the testimony of Dr. Maher, that Appellant had very ambivalent feelings toward his father. Undoubtedly, he felt a keener sense of betrayal resulting from the father's actions than did the girls. Additionally, although Tina may have escaped her family situation relatively unscathed, she was the only one who did. Another sister was a drug addict somewhere in California who was involved in an abusive relationship and who could not be located by the defense, and the other sister was "an emotional basket case" in Jacksonville.(R887, T1111) One wonders how the court might have viewed Appellant's mitigation if the defense had been able to put these siblings on the stand.

As for the fact that Appellant had not engaged in violence prior to this incident, it is difficult to understand how the court could use this fact against him. Surely it must be mitigating that the instant acts were totally out of character for Appellant, that his character was basically non-violent. See, for example, Craig v. State, 585 So. 2d 278 (Fla. 1991), in which this Court recognized that the appellant's non-violent nature was one legitimate factor which could support a life recommendation.

In giving short shrift to Appellant's abusive upbringing, the court made an error similar to the mistake made by the trial judge in Nibert v. State, 574 So. 2d 1059 (Fla. 1991). Nibert, like Appellant, had been subjected to many years of physical and psychological abuse as a youth, but the trial judge dismissed the significance of this because Nibert was 27 at the time of the homicide and had not lived with the abusive parent since he was 18. This Court found the trial judge's "analysis inapposite," and wrote:

> The fact that a defendant had suffered through more than a decade of physical and psychological abuse during the defendant's formative years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history of a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

574 So. 2d at 1062. The analysis of the court below was no more compelling. The fact that one child fortuitously, for unknown reasons, escaped childhood abuse without suffering the severe consequences visited upon a sibling who was subjected to greater

abuse is not a legitimate reason for according anything less than substantial weight to this mitigating circumstance.

Finally, the court ignored certain of the factors Appellant proffered in mitigation, notably, his good relationship with his sister, Tina, the extent to which Appellant had bonded with his handicapped nephew, Brian, Appellant's compassionate and caring nature for those less fortunate, his artistic talent, and the devastation he felt when his mother, with whom he had a good relationship, died less than eight months before the incident in question. By ignoring these factors, the trial court failed to fulfill his responsibility under Camsbellv. State, 571 So. 2d 415, 419 (Fla. 1990) to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. [Citation omitted.]"

Perhaps some insight into why the court failed to find or accorded little weight to Appellant's mitigation, much of which came through the testimony of Dr. Michael Maher, a psychiatrist, may be found in some of the trial court's remarks, in which he disparaged the testimony of mental health professionals. For example, when the court and counsel were discussing the scheduling of Dr. Maher's testimony, the court made the following comments (T 973-974) :

> I don't want to start with a psychologist at 11:30, to be honest with you. I always wondered how much the jury really listens to them. Let's at least get it at some

> point where they might be slightly refreshed and have some prayer of listening to what is being said there.

Not long after that, the prosecutor mentioned that Dr. Maher would testify, and that Dr. Merin would testify after him, which prompted the trial court to make the following remarks (T993):

> They're all going to be bored to death, but I'll leave that up to you guys as to whether they really pay much attention to psychologists or whether we all just spend a ton of money and keep the psychologists very happy.

It is indeed unfortunate that the court allowed his personal predilections to color his view of the mitigating evidence Appellant presented, and the weight it should receive.

Because the sentencer failed to consider and properly evaluate all the evidence Appellant offered in support of a sentence less than death, Appellant's death sentence cannot stand without violating the 8th and 14th Amendments to the U. S. Constitution and Article I, Sections 2, 9, and 17 of the Florida Constitution.

ISSUE XII--THE COURT BELOW SHOULD HAVE GRANTED APPELLANT'S MOTION FOR MISTRIAL AFTER JUROR ZAGURSKI'S HUSBAND WAS HOSPITALIZED AS AN EMERGENCY PATIENT WITH HEART PROBLEMS, AS IT WAS IMPOSSIBLE FOR THIS JUROR TO GIVE HER FULL ATTENTION TO THE PENALTY PROCEEDINGS.

ISSUE XIII--THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON, AND FINDING AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN COMMISSION OF A ROBBERY, BECAUSE THE FELONY MURDER AGGRAVATING FACTOR IS UNCONSTITUTIONAL, AS IT DOES NOT GENUINELY NARROW THE CLASS OF INDIVIDUALS WHO MAY BE SENTENCED TO DEATH,

ISSUE XIV--THE COURT BELOW ERRED IN GIVING THE JURY'S DEATH RECOMMENDATION UNDUE WEIGHT, THUS FAILING TO EXERCISE HIS INDEPENDENT JUDGMENT CONCERNING THE SENTENCE TO BE IMPOSED, AND ABROGATING FLORIDA'S DEATH PENALTY SENTENCING SCHEME, RESULTING IN A DEATH SENTENCE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.

ISSUE XV--THE COURT BELOW ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT.

Appellant is unable to develop issues XII, XIII, XIV and XV further due to this Court's arbitrary limit of 115 pages placed upon Appellant's initial brief. Appellant requests the opportunity to submit a brief which fully addresses these issues. Even without further briefing, Appellant requests and expects a ruling by the Court on Issues XII, XIII, XIV. and XV, in addition to the other issues raised in this brief.

CONCLUSION

Appellant, Donald Voorhees, prays this Honorable Court to grant him appropriate relief pursuant to the issues raised herein (that is, a new trial, reduction of sentence to life, or new sentencing proceeding).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7th day of December, 1995.

Respectfully submitted,

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