IN THE SUPREME COURT OF FLORIDA

ROBERT CARL SAGER,

Appellant,

vs.

CASE NO. 84,539

STATE OF FLORIDA,

Appellee,

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

(1) The Pre-Trial Motion to Suppress

Mississippi deputy sheriff Walker had contact with Voorhees and Sager on January 8, 1992 when two men in the rain were asking for food from Mr. Sanderson. They provided as names William Stephen O'Donnel and David Alan Scott (R 205 - 206). They claimed their vehicle was bogged down, they had gotten lost and were unable to find camp. Walker offered them lodging at the jail with a hot meal and a change of clothes and they said, "they'd love to go" (R 207). They voluntarily got in his car, were not handcuffed (R 209), they were not fingerprinted at the jail (R 211) and they were not arrested (R 232). Walker testified that it was not unusual to offer this type of assistance and they had done it on numerous occasions (R 211). A subsequent review on NCIC showed no record on the information provided and Walker went home at 10:00 p.m. (R 214). Walker returned to work at 12:30 p.m. the next day, learned that Scott had given his real name as Robert John Sager (Voorhees' codefendant) and that O'Donnell had given deputies another name, James Earl Densmore. Walker told Densmore (Voorhees) all he needed was a positive name (R 216). Voorhees told him he had a friend in Jacksonville who could verify who he was and dialed the phone; the

man on the other end identified himself as Tony Watson who said he knew the caller as Donald Voorhees. Watson asked if Sager were with Voorhees and told Walker that Pasco County deputies wanted to talk to them about a murder. Walker then asked Voorhees to confirm that he was Voorhees (R 218), told Voorhees what Watson had said and allowed Voorhees to speak to Sager. Voorhees told Sager at about 2:00 or 2:30 that everything would be all right, he would take care of it (R **220 - 221). At** about 7:00 p.m. Sager told Walker he wanted to talk to him and after Miranda warnings gave a taped statement to Sheriff Farrior (R **222** - **224).**

Wayne County Mississippi Sheriff Marvin Farrior testified that at about 8:00 p.m. on January 9th, Sager indicated that he wanted to talk to him about the murder-incident in Florida and after Miranda warnings gave a taped statement (R 282 - 285). Farrior was not present when Pasco detectives subsequently arrived **(R 286).**

Jail trustee Benny Humphrey testified that on January 9th, Voorhees asked him to relay a message to Sager that everything was going to be all right, that he would take the blame for all of it. Voorhees admitted to Humphrey that he had cut the victim's throat (R 317). He was not instructed by law enforcement to get incriminating statements, was not paid and was not an informant (R

318).

Pasco County sheriff's detective William Lawless testified that he had been informed by Detective Spears on January 9th, that both defendants were arrested in Mississippi (R 333). He had been the case officer for five days and had spoken to Tony Watson and others in Jacksonville (R 334). Watson told him he met Voorhees whom he knew as James Densmore in Jacksonville and that he had seen Voorhees and Sager on January 4th (R 334 - 335). Voorhees and Sager, according to Watson, were driving a burgundy, two door sedan from Pasco County (and Lawless knew the victim's car was a maroon two door Pontiac Grand Prix) (R 336). Lawless knew Voorhees' identity prior to going to Jacksonville. William Slaughter told Lawless that Sager told him that he and James had beaten a guy and stolen the burgundy Grand Prix on January 8th (R 337). Lawless knew the victim's injuries included a broken nose (R 338). Melanie Cooper told Lawless that she received phone calls from Voorhees saying he was in Alabama a few days after the murder (R 338). Lawless would have gotten grand theft auto arrest warrant upon his return to Pasco County when he received the call that the defendants were in Mississippi (R 340). BOLOS had been put out for the vehicle and Voorhees and Sager on January 5th, 6th and 7th (R

341 - 342). Lawless had learned on January 5th that both defendants were seen with the victim at Room 4 of the Chasco Inn which was registered to Robert Sager and James Densmore (R 342) and that there was an argument overheard by neighbors there (R 343). The victim's body was discovered the morning of January 4th (R 344). The fact that the victim was hogtied led the investigator to believe that more than one perpetrator was involved. The news media was not informed of the condition of the body (R 349). All of this was learned prior to his visit to Mississippi (R 348). Lawless did not tell Spears to ask Mississippi authorities to question the suspects because he didn't want anyone messing up his interview; he was told they were under arrest in Mississippi (R 348). Lawless had been told by Brenda King that James Densmore was Donald Voorhees (R 349 - 350). Phifer told him that Densmore had not shown up for work. King also gave the name and home number of Tony Watson in Jacksonville (R 351 - 352). He learned that Densmore had picked up his paycheck in Madison, Mississippi on January 6th (R 354). He learned that Room 4 of the Chasco Inn was registered to Densmore and Sager. The landlady, Mrs. Weiskopf, indicated they had rented the room at fifty dollars a week -- the receipt showed December 29th, indicating that the rental period

would be up on January 6th. Mrs. Weiskopf consented to a search of the room (R 356). There was no evidence discovered that led to other witnesses or tangible evidence (R 358).

Lawless flew to Mississippi, arrived at Wayne County jail after midnight. He spoke to Sager who after Miranda warnings admitted his involvement in the victim's murder (Lawless was unaware Sager had given a prior statement) (R 360 - 361). Lawless also spoke to Voorhees who also confessed (R 363). Lawless also testified that Watson told him that Voorhees said that if cops came looking for him they were drug dealers from whom the defendants stole money (R 411). Lawless also learned there had been a withdrawal from the victim's ATM account (R 412). One of the reasons for not seeking an arrest warrant was that he was told Mississippi was holding them on their charges (R 421).

Margaret Weiskopf talked to Detective Lawless and gave the key to police to search the room. She told the detective she thought the room was abandoned (R 441 - 443). When she talked to detectives she was unaware the renters had paid for two weeks (R 443).

Voorhees testified at the suppression hearing and admitted telling Humphrey to tell Sager to keep his mouth shut and that he'd

take the rap (R 452).

The trial court denied the motion to suppress in a lengthy and comprehensive order (R 160 - 169).

Since appellant's statement appears to be an incomplete recitation of the evidence presented, appellee submit the following statements regarding the guilt and penalty phases.

(2) Guilt Phase --

Heinz Haase discovered the victim's body on Saturday, January 4, 1992, and called the police (Tr 177 -183). Deputy sheriff Roy Haynes arrived at the victim's residence and saw a man laying between a bed and a bathroom, hogtied, in pool of blood (Tr 185). Crime scene technician Jeffrey Boekelou arrived and noticed that the living room carpet was wet, there was an inch or two of standing water on the kitchen floor and the oven was on, set at five hundred degrees. The victim had been tied with phone cord (Tr 192 - 193). Three knives were discovered on the premises (Tr 195). There was a large gaping wound to the neck exposing internal parts (Tr 196).

Sean Fagan, another crime scene technician, impounded a flag from around the victim's neck and retrieved the phone wires used to tie the victim from the medical examiner (Tr 223 - 224). He

videotaped the scene and it was played to the jury (Tr 228).

Carrie DiMichellee saw victim Stephen Bostic with two men at the Chasco Inn in Room 4 on Friday, January 3, 1992 (Tr 240). She phoned Bostic's residence because he had asked her to call to make sure he got home safely but no one answered her call at 11:30 p.m. (Tr 242). She subsequently selected Sager's photo as one of the two men who had been with Bostic (Tr 244). Bostic had mentioned that he wanted to stop by the bank to withdraw some money and the three men were going to stop off at the bar and then go to Bostic's house (Tr 245). She apparently also identified Mr. Voorhees (Tr 248).

Margaret Weiskopf, owner of the Chasco Inn, testified she rented room 4 to one James Densmore and Robert Sager from December 25, to January 11, but they left sooner (Tr 250). Prior to January 11, she spoke to a detective and allowed him to enter that room (Tr 251).

The parties stipulated to the reading of testimony of John Pfeiffer and Jean Womack (Tr 252). Pfeiffer was a superintendent with Ingram Construction who had hired James Densmore (Tr 255 - 256). Pfeiffer had told Densmore (Voorhees) that if he couldn't show up for work, he didn't need him; he knew he was low on money

(Tr 257 - 258). Densmore (Voorhees) did not show up for work on the following Monday (Tr 260). Jean Womack, a receptionist for Ingram Construction testified that James Densmore arrived in Madison, Mississippi on January 6, 1992, for his paycheck and she told him the bank where he could cash it (Tr 262 - 263). Densmore and his companion were in a maroon Grand Prix, Monte Carlo type car (Tr 263 -264).

Bilmer Walker, formerly a Wayne County, Mississippi deputy sheriff, testified that it was cold and raining on January 8, and a freeze was predicted that night (Tr 277). He contacted two men in the late afternoon who gave their names as David Allen Scott and O'Donell (Tr 281). They said their car was bogged down in the woods and couldn't find their camp (Tr 282). Walker offered to put them up for the night at the county jail and provide dry clothes and a **hot** supper. They wanted a warm place to spend the night (Tr 283). They said they **were** lost (Tr 283). The **next** day he learned the names they had given, David Allen Scott and O'Donell were not their true names (Tr 285 - 286). Scott was Robert Sager; O'Donell gave another, Densmore, and eventually Walker learned **that** his name was Voorhees (Tr 286).

Sheriff Marion Farrior testified that on January 9, he was

told Sager wanted to talk to him (Tr 332). He had a taped conversation with appellant (Tr 333) and the tape was played for the jury (Tr 338).

After some discussion, the court reiterated that Voorhees' statement was not admissible under F.S. 90.804(2)(c) (Tr 372; Tr 404; Tr 427 - 428).

Thomas Novici testified that two men worked with him for Ingram Construction Company; Sager worked for about a day, the other man a month. Sager told him he needed money to pay for his rent (Tr 375 - 376). He never saw them again (Tr 377). Detective William Lawless of the Pasco County Sheriff's Office described his talking to various people (Pfeiffer, Toney Watson) prior to flying to Mississippi on the evening of January 9, 1992 (Tr 378 - 381). Twenty minutes after his arrival at the jail he spoke to Sager (Tr 382). Appellant waived Miranda rights (Tr 383). Lawless directed crime scene technician Boekelou to retrieve and drive back to Pasco County the maroon Pontiac that belonged to victim Bostic (Tr 385). There was no money on the victim and his pants pockets were pulled out as though something had been taken (Tr 387). Sager's taped statement to Lawless was played to the jury (Tr 389). Carrie DiMichelle selected photos of Sager and Voorhees -- although both

had shaved their heads between February 10, and February 20, 1992 (Tr 390 - 391). Crime scene technician Boekeloo brought the Bostic vehicle back to Florida, and inventoried it (Tr 441 - 442). Inside the car were ATM receipts from the SunBank, a business card from Ingram Construction, and a road atlas (Tr 443 - 444). Technician Sean Fagan identified a checkbook and 24 hour teller card of the victim found in the car (Tr 447). The parties stipulated that the custodian of bank records Ron Rager would testify that the ATM card belonging to Bostic was used on January 3, 1992, (a $50.00 withdrawal in the morning and a $100.00 withdrawal in the afternoon) and that unsuccessful attempts at withdrawal were made because the PIN was incorrect several times on the night of January 3, and January 4 (Tr 449 - 450). There was also a stipulation that Bostic's telephone calling card was used after the victim's death, on January 4, and 5. Both sides stipulated that the calling card was in the name of Bostic's mother and that she would testify that she didn't use it at all in January (Tr 450 - 451).

Sager's and Voorhees' prints were on the road atlas in the Bostic vehicle (Tr 461). Corrections officer Richard Benn testified that on February 2, 1992, at the Land O'Lakes detention facility , Sager stated that he was in jail charged with murder and

probably couldn't beat it; he admitted he was man enough to admit it and turn himself in (Tr **507** - **508).**

Associate Medical Examiner Dr. Marie Hansen observed victim Bostic hogtied face down with rebel flag around his neck in the bedroom **(Tr 467).** She performed an autopsy and found that Bostic "died of combination of homicidal violence including blunt trauma to the head and chest, choking, binding and incisions to the neck" (Tr **468).** He had a fractured nose and black eye, bruising along the neck and multiple incised wounds to the neck (Tr **468).** There were six incised wounds on the body; an incised wound is longer than it is deep, a stab wound is deeper than it is wide. There were two incised wounds to the right side of the neck and four others on the shoulder and arm (Tr 417 - **472).** The hyoid bone was fractured, consistent with choking (Tr **474).** She would not expect the rebel flag tied around the victim's neck to cause the fracture of the hyoid bone since this fracture occurred only on one side (Tr 479). Dr. Hansen testified that after the throat was slashed, one could survive for several minutes. There were no defensive wounds on Bostic (Tr **482);** the wounds on his forearm were not defensive because of their location and these injuries were not the result of being hogtied (Tr 483). If Mr. Bostic had been kicked in the neck

with enough force to break the hyoid bone, he could have survived several minutes, maybe longer (Tr 485).

The windpipe was severed as result of the slashing. If the head and facial injuries occurred first and injuries to windpipe last, the lapse of time could have been up to ten or fifteen minutes, maybe longer (Tr **488**). All the injuries would have been painful if he were conscious (Tr 489). Bostic also had fractured ribs.

(3) Penalty Phase --

Defense witness Detective William Lawless testified that in Mississippi he first took a taped statement from Sager, then one from Voorhees (Tr **731**). Court Exhibit 1 was the transcript of the Voorhees interview (Tr **778**). The tape (Defense Exhibit 1) was played to the jury (Tr 734). Lawless also received, months later, a written statement from jail trustee Benny Humphrey (Tr 736). Lawless stated that the victim had suffered a slash wound where his throat was cut and had a stab wound to the right side of the neck. Voorhees told him he stabbed the victim in the right side of the neck (Tr 739). Voorhees held his hand up indicating he stabbed the victim downward, in a downward motion; he did not say or suggest he sliced the neck (Tr 740). Lawless was not aware when he spoke to

Sager that the victim's hyoid bone was broken. Neither defendant mentioned strangling or choking the victim. Voorhees sa d that he and Sager were like brothers (Tr 741). Voorhees said Sager started the incident with Bostic and that he wasn't involved initially. Voorhees mentioned the he was the leader of the two unless Sager copped an attitude, which he did on January 3 (Tr 742). Voorhees said Sager got the phone cord which Voorhees used to tie the victim (Tr 743).

Voorhees said that he and Sager dragged the victim to the bedroom when they tried to shut him up (Tr 744). Voorhees said he didn't know what Sager was doing with the victim when Voorhees went in the bathroom (Tr 745 - 46). Sager followed Voorhees' instruction to turn on the oven and Voorhees said that both of them hit and kicked the victim (Tr 746 - 747). Voorhees said Sager took the victim's cash and car keys (Tr 747). They were unsuccessful in making bank withdrawals since they did not have the PIN (Tr 748) Voorhees mentioned the white handled knife in his possession in Mississippi and the knife by the victim's neck but did not mention another knife at the scene with blood on it (Tr 749).

The defense played to the jury defense exhibit 2, a videotape of testimony by Benny Humphrey regarding Voorhees' statement to him

and Sheriff Farrior. Humphrey's written statement was admitted as defense exhibit 3 (Tr 754 - 775).

Appellant Sager informed the court of his decision not to testify (Tr 780).

Detective Lawless also spoke to Miklos Flinn -- whose whereabouts was unknown -- in April of 1993 (Tr 808). Flinn told him that Voorhees had told Flinn that Sager had cut the victim's throat and that he had nothing to do with killing the victim (Tr 808). Flinn also said he had talked to Sager and Sager told him that he had killed the victim and mentioned that he had given the victim a Columbian necktie (Tr 809). Flinn had several prior felony convictions (Tr 81) and Flinn was not under oath when he talked to Lawless (Tr 812). In Flinn's taped statement he said Voorhees said he didn't participate in the murder at all (Tr 814). According to Flinn, Sager said he wanted his admission of cutting the victim communicated to Voorhees' lawyer (Tr. 817). The parties stipulated a one page excerpt of Miklos Flinn's September 1992 deposition could be admitted (Tr 830 - 833). The state and the defense agreed that if Dr. Michael Maher were present he'd testify that Voorhees told Maher that he had helped Sager tie the victim Bostic, that Voorhees began to look around the house for something

to steal, and that Voorhees saw Sager take a knife and slash the victim Sager; Voorhees said he told Lawless he stabbed Bostic to cover up for Sager (Tr 834 - 835).

After closing argument (Tr 837 - 868), the jury recommended a sentence of death by an eight to four vote (Tr 879). The trial court entered its findings that two aggravating factors had been established (homicide while engaged in the commission of robbery, and that it was especially heinous, atrocious or cruel) and accorded little weight to the mitigation offered (R 733 - 739) and imposed a sentence of death.

SUMMARY OF THE ARGUMENT

I. The trial court correctly ruled in its comprehensive order that suppression of appellant's confession was not required. Sager was not initially detained illegally, but rather consented to spending the night free of the inclement weather.

11. The trial court correctly denied the motion to suppress statements and correctly determined that there was little, flagrant misconduct by Mississippi law enforcement officer; they did not impermissibly detain appellant for the purpose of attempting to aid Florida authorities in solving the Florida homicide on the morning of January 9, 1992, and upon learning of that incident merely detained appellant who promptly confessed to authorities after receiving Miranda warnings.

III. The lower court correctly excluded at guilt phase the statements made by appellant's companion Mr. Voorhees since his statements did not exculpate appellant Sager. F.S. 90.804(2)(c); Denny v. State, 617 So. 2d 323 (Fla. 4th DCA 1993).

IV. The Court correctly excluded at guilt phase the statement made by co-defendant Voorhees to jail trustee Benny Humphrey, since it did not exculpate Sager from his complicity in the charged offense.

V. Dr. Hansen's testimony does not establish reasonable doubt as to Sager's guilt especially when one considers the totality of evidence of Sager's involvement in the Bostic murder.

VI. The evidence was sufficient to support a verdict for premeditated murder. Even, assuming arguendo that it were insufficient, the evidence demonstrates a felony-murder and thus relief must be denied. Frown v. State, 644 So. 2d 52 (Fla. 1994).

VII. Appellant is procedurally barred from challenging the trial court's action on instructing the jury on the aggravating factor of homicide committed during a robbery for the failure to object at trial; the defense agreed such an instruction could be given. The evidence supports the finding of such an aggravator.

VIII. Appellant did not argue below that the HAC factor lacked evidentiary support; consequently, his challenge now is barred. This Court has consistently held that beatings, strangulation and throat slashes qualify as HAC. See Geralds v. So. 2d 21 Fla. Law Weekly s 85 (Fla. 1996).

IX. Since no evidence was seized at the Chasco Inn or introduced into evidence, the trial court's denial of the motion to suppress cannot be error. The search of the motel room was lawful since the police and landlady reasonably believed the property to

have been abandoned (and it was).

X. Appellant did not preserve the issue below that he now asserts. This Court has rejected Sager's argument in Torres-Arboledo v. State, 524 So. 2d 423 (Fla. 1988). The Court did make inquiry and appellant acknowledged that he did not desire to testify.

XI. Trial counsel did not assert that he was unqualified to defend a first degree murder case. Counsel merely acknowledged that he did not meet the stringent requirements suggested by Juge Schaeffer and Judge Case. Since the suggested requirements would bar almost all lawyers and would subvert United States Supreme Court precedents and since appellant expressed a desire to keep the counsel he had, no reversible error appears.

XII. The trial court did not err in denying various motions to declare certain Florida Statutes unconstitutional.

ISSUE I

WHETHER THE ALLEGED UNLAWFUL DETENTION OF MR. SAGER BY MISSISSIPPI LAW ENFORCEMENT AUTHORITIES REQUIRES REVERSAL OF HIS CONVICTION.

Appellant first contends at page 16 of his brief that Wayne County authorities acted illegally 'because they deceived him and took him into unlawful detention against his informed will." After a lengthy evidentiary hearing the trial court made the following findings:

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

himself as Mr. O'Donnell. Basically the defendants stated that they had been camping in the nearby DeSoto National Forest, that their car had been thoroughly bogged down and that they had somehow wandered away from their campsite and become lost. Although Deputy Walker was somewhat dubious about the defendants' story, he followed what appears to be a long standing procedure in Wayne County, Mississippi. He offered to put the defendants up for the evening at the county jail, wash and dry their clothes, give them a hot meal and give them some dry clothes to wear. Deputy Walker was of the opinion that the defendants were broke and, indeed, subsequent inventory of their belongings revealed that they had total of $5.01 between them. It was for this reason that Deputy Walker did not offer to take them to one of the county's four motels, however, he made it plain that he would have done so if they had asked. At this point there is no objective evidence that the defendants were not free to leave and the Court finds that a reasonable individual would have understood that he was free to leave and was simply receiving an offer. The Court further finds that the offer extended by Deputy Walker and authorized by long standing policy not only has some beneficial effects for individuals in Wayne County, Mississippi who have suffered some misfortune, but also has the benefit of not requiring Deputy Sheriffs to run all over the county answering calls about "strangers" in the community. Unfortunately, the defendants were not told that this policy also requires the defendants provide truthful information about their names and that they will not be released from the county's "hospitality" until their true names can be determined. In any event, the defendants voluntarily agreed to spend the night in the jail and were transported to the jail in the rear seat of Deputy Walker's

marked police cruiser. The defendants were not handcuffed or restrained in any way and, although Deputy Walker could not recall whether or not he locked the back door to the cruiser, he indicates that he would have stopped at any time and allowed them to leave the cruiser if they had asked. Neither asked. The only precaution Deputy Walker took was to remove a white handled kitchen knife which was observed in Mr. Voorhees' (O'Donnell) breast pocket. Upon arrival at the jail, Deputy Walker filled out an arrest card as means of accounting for the defendants' presence in the jail, however, the individuals were not fingerprinted or photographed. During the ride to the jail, Sager (Scott) indicated, without any questioning on the part of Deputy Walker, that the car that they had gotten stuck was a maroon Pontiac that belonged to his (Sager's) girlfriend. At the jail, the defendants were, as promised, fed and given dry clothing and placed in holding cell which was separated by a short distance from the main jail."

(R 162 - 163)

The court concluded:

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

(R 165)

Sager claims that the record indicates that he accompanied the

officer to the sheriff's office not because he chose to do so, but because of the apparent authority of uniformed armed policeman. The record does not so indicate. Deputy Walker testified that he offered the two men lodging at the jail with a hot meal and change of clothes during this cold, rainy day and they said they would love to go; they voluntarily got into his car (R 207 - 209).

Mr. Sager did not testify at the suppression hearing and contradict Walker. Walker further testified that he had offered similar assistance to others in the past numerous times (R 211). A trial court's ruling on a motion to suppress comes to the appellate clothed with presumption of correctness and the appellate court must interpret the evidence and reasonable inferences, and deductions therefrom in a manner most favorable to sustain the trial court's ruling. Terry v. State, ___ So. 2d , 21 Fla. Law Weekly S 9 (Fla. 1996); McNamara v. State, 357 So. 2d 410 (Fla. 1978); Savage v. State, 588 So. 2d 975 (Fla. 1991); Owen v. State, 560 So. 2d 207 (Fla. 1990); Henry v. State, 586 So.2d 1033 (Fla. 1991); Medina v. State, 612 So. 2d 1370 (Fla. 1992).

Appellant cites Schneckloth v. Bustamonte, 412 U. S. 218, 36 L.Ed.2d 854 (1973) for the proposition that an accused must be informed of the option not to accompany the officer; actually, Schneckloth, which dealt with consent to search of a vehicle,

states that an accused need not be informed of his right to refuse consent. 36 L.Ed.2d at 865. There was no intentional deception to pursue a hidden agenda as appellant argues.

Appellant relies heavily on the decision in Brown v. Texas, 443 U.S. 47, 61 L.Ed.2d 357 (1979) in which police officers arrested an individual for violation of a Texas statute making it criminal act to refuse to give his name and address to an officer who has lawfully stopped him and requested the information. Brown is inapposite. Walker's testimony is clear that Voorhees and Sager were not arrested or even fingerprinted when they accepted the invitation for hot meal, change of clothes and place to sleep at the jail (R 232)

The trial court correctly ruled that the Mississippi authorities did not act improperly in allowing Sager and his companion to spend overnight in jail, protected from the harsh and inclement elements.

ISSUE II

WHETHER THE TRIAL COURT ERRONEOUSLY RELIED ON CASES ABSOLVING MISSISSIPPI LAW ENFORCEMENT OFFICIALS FROM THEIR ALLEGEDLY FLAGRANT MISCONDUCT.

Sager next contends that the lower court in its order denying the motion to suppress misread or misapplied the cases relied on. The court's order, in pertinent part, recites:

> 6. It is also important to keep in mind that the exclusionary rule's theory of deterrence operates "only if an excludable piece of evidence is the target of police activity." Collins v. Beto, 348 F.2d 823 (5th Cir. 19651. In the instant cases, the purposes of the admittedly illegal detention by the Wayne County officials from approximately 7:00 a.m. on January 9, 1992 to approximately mid-afternoon on that same date was to obtain the defendants' true names, not to further the investigative efforts of Florida authorities. The decision of the Illinois Supreme Court in People V. Gabbard, 398 N.E. 2nd 574 (Ill. 19791, as explained in People v. White, 512 N.Ed. 2d 677 (Ill. 1987), "held that confession to crime other than the one for which the defendant had been illegally arrested need not be suppressed as the fruit of an unlawful arrest. The arresting and interrogating officers belonged to different police forces. Neither the arrestins officer nor the governmental entity by which he was employed was investigating, or responsible for investigating 'the crime to which the defendant confessed. This Court held that suppression of the confession would not serve the deterrent purpose of the exclusionary rule" (emphasis supplied). Further, the White

Court provided the following logical observation:

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

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

> Voorhees or Sager for information regarding the Pasco County investigation. There is, likewise, no evidence that Humphrey received any reward as result of his actions or that he expected to receive any such reward.
>
> **(R 167 - 168)**

Appellant criticizes the lower court's reading of ~~Collins~~, supra, Gabbard, supra, and White, supra. Appellee does not read the trial court' order to hold that evidence not specifically sought is necessarily admissible; rather that the exclusionary rule theory of deterrence operates, that is, deters police from illegal conduct when they know that evidence they seek to obtain from such conduct will be suppressed.

It is difficult to see how the trial court's reading of People Y. White is "off the mark". The Illinois court, while holding that the accused had been illegally arrested which tainted his later confession, explained in rejecting the state's theory that it could not accept the doctrine that it was permissible for one officer on police force to make an illegal arrest and another to conduct an interrogation. The situation was not that presented in Gabbard (and the instant case) where different law enforcement agency which had no responsibility for investigating the crime to which the defendant confessed had detained the accused initially. The trial court's discussion and analysis of Gabbard and white comports

with the requirement of Brown v. Illinois, **422 U.S. 590, 45** L.Ed.2d 416 (1975) to examine the purpose and alleged flagrancy of conduct of the police. See also Dunawav **v.** New York, 442 **U.S.** 200, 60 L.Ed.2d **824** (19790); State v. Gifford, **558 So.** 2d **444** (Fla. 4th DCA 1990).

An examination of the Mississippi law enforcement officers actions reveals little misconduct, nothing flagrant. Sager and Voorhees were permitted to stay overnight at jail, out of the cold and rain, with a warm meal and clean clothes. While they were detained briefly for a few hours the next day, it was merely to clear up the fictitious name problem -- it was not in furtherance of the investigation of the Pasco County homicide since they were unaware of any Florida homicide. Sager's subsequent statements to Sheriff Farrior and to Detective Lawless were not compelled but voluntary; indeed, the statement to Farrior was initiated by Sager.[1]

Sager also criticizes the lower court for having failed to point out that Gabbard and White had yielded different results,

'Sager mentioned to Farrior the morning of January 9th, that he had nervous condition and Farrior indicated they could check it out if they knew who he was (R **280).** Farrior went to Jackson, Mississippi and returned at around 5:00 p.m.. Sager decided to talk to him about the Florida incident at **8:00** p.m. (R **281** - **282).**

that the challenged evidence was deemed admissible in one case and not in the other. But the lower court explained why relief should be denied:

> 'The logic of the Supreme Court of Illinois is compelling. It is apparent that Mississippi authorities were not acting for purposes of furthering Pasco County's murder investigation. If that had been the case, the Mississippi authorities would either have initiated or attempted to initiate interrogations with the defendants. In fact, the Mississippi authorities only spoke to defendant Sager about the murder when Sager initiated the communication. There is no indication that the Mississippi authorities made any effort to initiate conversation concerning the Pasco County charges with either defendant after the Mississippi authorities became aware of the Pasco investigation."
>
> (R **168)**

In contrast., in White, after the defendants' improper arrest he was interrogated by the arresting officers and then by two different officers. That was not like the instant case where Mississippi authorities conducted no interrogation of the defendant regarding the Pasco County homicide offense.

The lower court correctly noted there were sufficient intervening factors to dissipate and purge any taint associated with the earlier illegal detention by the Wayne County authorities:

"In this case, a span of time considerably

> longer than four (4) hours was involved. The fact that both defendants became aware of the Pasco murder investigation at approximately mid-afternoon on January 9, 1992 also appears to be significant intervening factor between the illegal detention and the incriminating statements. The same can be said concerning the fact that the defendants were independently advised of their rights by the Pasco officers. Of course, as noted in the Gabbard case, it is significant that the officers who initiated illegal detention for reasons completely unconnected with the Pasco County murder investigation, were from an agency other than the Pasco County Sheriff's Office and were from an entirely different state. It is also significant to note that Sager's initial statement to Wayne County authorities and Voorhees' initial statement to Wayne County jail inmate were both initiated by the defendants themselves and can also be considered as significant intervening factors which ought to purge any taint arising from the period of illegal detention in Wayne County jail."
>
> (R 169)

As the trial court found, after the alleged illegal detention on the morning of January 9th, when Mississippi authorities asked the defendants their real names, the intervening factors of Voorhees and Sager learning that Pasco authorities wanted to talk to them about the murder and Voorhees telling Sager at 2:30 in the afternoon that he would take care of it and it would be all right plus Sager's self-initiated statement to Sheriff Farrior dissipated whatever prior taint there had been when Pasco detectives arrived

hours later and received their voluntary confessions.

Sager's claim is without merit and this Court should affirm the trial court's suppression order.[2]

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[2]Appellee notes that Detective Lawless testified at length about his independent investigation in Florida, prior to learning that Voorhees and Sager were in Mississippi, connecting them to the robbery-murder of Mr. Bostic. See State v. Stevens, 574 So. 2d 197, 204 (Fla. St. DCA 1991).

ISSUE III

WHETHER THE LOWER COURT ERRED REVERSIBLY BY EXCLUDING PROFFERED HEARSAY STATEMENTS ALLEGEDLY MADE BY SAGERS' CO-DEFENDANT.

Appellant does not identify with precision the witnesses or testimony he contends was improperly excluded. If Sager is referring to the taped interview that Mr. Voorhees gave to Detective Lawless in Mississippi, the trial court's ruling was correct. As stated in Denny V. State, 617 So.2d 323, 324 - 325 (Fla. 4th DCA 1993):

> 'Lastly, Denny argues that his trial convictions should be reversed because the trial court erred in refusing to allow him to introduce portions of statements of co-defendants who were tried separately. Denny argues the evidentiary purpose of admitting these separate pretrial statements made by the codefendants would tend to show his lesser involvement in the murder. These statements were offered by Denny as being hearsay exception, i.e., statement against interest. Section 90.804(2)(c)) of the Florida Statutes provides in pertinent part that [a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.' The trial court found there were not sufficient corroborating circumstances to show trustworthiness and the statements were not admitted at trial. Furthermore, the trial court also questioned whether or not the codefendants' statements were exculpatory at all in that they clearly implicated Denny in these crimes. If not exculpatory, then the

statements would not qualify under this hearsay exception. The standard for review of trial court's decision on the admissibility of evidence is generally that wide discretion is given. Evidentiary rulings will not be disturbed unless there is showing of an abuse of discretion. [citations omitted] Under these facts, we find the trial court did not abuse its discretion in this evidentiary ruling."

(Emphasis supplied)

The transcript of the Voorhees/Lawless interview -- Court Exhibit 1 -- does not exculpate Sager; rather, it shows the culpability of both defendants in the robbery and murder of Mr. Bostic. Voorhees told Lawless that Sager struck the victim and that he (Voorhees) told him to hit him again **(pp.** 5- 6), that Voorhees told Sager to keep the victim in the seat as Voorhees looked around the house for 'whatever the dude had" (p. 7), that he and Sager tied up Bostic with telephone wires (p. 7). Voorhees would tell the victim to shut up and Sager would kick him in the head (p. 8). Sager put a gag in the victim's mouth (p. 9). Voorhees and Sager dragged Bostic into the bedroom **(p.** 9). Both Sager and Voorhees continued to hit the victim and kicked him about the head. Voorhees claimed he stuck the knife in the neck (p. 10). Voorhees and Sager took Bostic' cash and car keys and Sager obeyed Voorhees' instruction to turn the oven on, in an attempt to blow up the house (p. 12). They unsuccessfully attempted to withdraw money

with the victim's bank card, but didn't have the PIN (p. 13) . Sager wanted to take TV's and VCR's, but Voorhees explained they'd be too easy to trace (p. 20).

In his statement of facts (brief, p. 8) Sager refers to a portion of the proffer of Lawless' testimony on cross-examination wherein Sager and Voorhees each individually claimed to have tied up the victim alone (Tr 419 - 420) Witness Lawless explained later in the proffer:

> "The victim is actually tied with three different types of phone cord, so it's conceivable, as Mr. Voorhees had said with the stabbing, that he wasn't sure what Mr. Sager had done. It's conceivable that he could also have tied the victim, being as it was three different types of phone cord. And I really wasn't sure who tied who with what type of phone cord, and I don't know any way of finding that out."
>
> (Tr 422)

A review of Court Exhibit 1, the Voorhees/Lawless transcripted interview, shows that Voorhees alternately asserted that "we tied him up with some telephone wires" (p.7) and that "I tied him" (p. 8).

The trial court correctly ruled that Voorhees' statement to Lawless did not exculpate Mr. Sager and thus was inadmissible under F.S. 90.804(2)(c) (Tr 427 - 428). Even if the lower court were

deemed to have committed error, the record taken as whole demonstrates that any such error is harmless under State v. DiGuilio., 491 So. 2d 1129 (Fla. **1986).**

The only decisional law cited by appellant in his effort to challenge the lower court's ruling that Voorhees' statement did not exculpate Mr. Sager is Woodard v. State, 579 So. 2d 875 (Fla. 1st DCA 1991), wherein the court only discussed whether there had been trustworthiness by corroborating circumstances and Walker v. State, 483 So.3d **791** (Fla. St. DCA **1986),** which also determined that there was lack of corroborating circumstances to demonstrate trustworthiness. In the instant case it is not even necessary to reach the trustworthiness issue since Voorhees' statement inculpates -- not exculpates -- Sager as participant in the robbery-killing of Mr. Bostic.

Appellant is not aided by Williamson v. United States, 512 U.S. __, 129 L.Ed.2d 476 (1994) which held that the hearsay exception on Rule 804(b)(c) of the Federal Rules of Evidence for statements against penal interest did not cover non-self-inculpatory statements even if they are made within a broader narrative that is generally self-inculpatory. It is important to keep in context what was and was not in issue there. There, the government sought to introduce declarant's out-of-court statement

which contained both self-inculpatory and non-self-inculpatory parts over the defendant's objection that it violated Rule 804(b)(3) and the Sixth Amendment Confrontation Clause. The Court interpreted the word "statements' in the rule narrowly to "cover only those declarations or remarks within the confession that are individually self-inculpatory" 192 L.Ed.2d at 482. The Court reasoned that the Rule:

> " . . . is founded on the common sense 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. . . . One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
>
> (129 L.Ed.2d at 482 - 483)

While it may be a common sense notion that reasonable people tend not to make self-inculpatory statements unless they believe them to be true, the same cannot be said for exculpatory or non-self-inculpatory statements. Indeed, that is why the Court rejected the broader interpretation urged by the government and the concurring opinion of Justice Kennedy.

The instant case -- unlike Williamson -- involves not the prosecutors' effort to introduce evidence of declarant's out-of-court statement inculpating defendant but one that the defense

seeks assertedly to exculpate him. Exculpatory statements are declarations against the declarant's interest which indicate that the defendant is not responsible for the crime charged. Ehrhardt, Florida Evidence §804.4, p. 740, n. 12 (1985), Maugeri v. State, 460 *So.* 2d 975, 977, n. 2 (Fla. 3d DCA 1984). As argued above, nothing in the Voorhees statement to Lawless, exculpates Sager i.e. indicates that he is not responsible for the crime charged (even if Voorhees admits to stabbing the victim or tying him up).

ISSUE IV

WHETHER THE EXCLUSION AT GUILT PHASE OF *AN* ALLEGEDLY EXCULPATORY STATEMENT TO TRUSTEE BENNY HUMPHREY CONSTITUTED REVERSIBLE ERROR?

After the state had rested its case, the defense announced it would proffer the testimony of Benny Humphrey regarding his written statement as well as Humphrey's deposition or trial testimony regarding Voorhees' statement that he slashed the victim's throat (Tr 524 - 525). The trial court commented that its recollection was that neither defendant had completely exculpated the other but only assigned a lesser role to the other, which the defense conceded was a fair assessment (Tr 524 - 525). The court opined that this might be admissible should there be a penalty phase and the defense argued that if the Humphrey testimony were admitted in the defense case during guilt phase it might preclude a finding of premeditated murder (Tr 527). The trial court continued to adhere to its reliance on the Denny case[3]

At the penalty phase the state and defense agreed that the defense could present videotaped testimony of Benny Humphrey and Sheriff Farrior taken two days earlier in lieu of live testimony so that they could return to Mississippi (Tr 754 - 755). In the

[3]Denny v. State, 617 So. 2d 323 (Fla. 4th DCA 1993).

videotaped statements, Humphrey stated that he had a conversation with Donald Voorhees in the Wayne County jail prior to the arrival of the Pasco county detectives (Tr 756). Voorhees told him that he cut the victim's throat (Tr 757). He gave a written statement about this on September 1, 1992 (Tr 758). In his written statement of 1992, Humphrey reported that Voorhees said that the needed to get word to his buddy that everything was going to be all right, that he was going to take the rap for everything (Tr 761). Voorhees and Sager had the opportunity to talk together (Tr 762). Voorhees did not indicate how much he and Sager had been drinking but he mentioned he passed out on couch (Tr 765). The witness agreed that Voorhees said he woke up and Sager was beating on the victim. Voorhees said Sager kicked the victim's face in (Tr 765 - 766). Voorhees and Sager tied the man up (Tr 767).

Appellant now argues that Benny Humphrey's statement of September 1, 1992, (court exhibit 3) was absolutely vital to his defense and that without it, " the jury was led inexorably to return the verdict it returned." Brief, p. 41. Interestingly, it should be noted that the jury after hearing all this "vital" information at the penalty phase returned a recommendation of death by a vote of eight to four (Tr 879) after deliberating a mere eighty-three (83) minutes (R 586 - 587). Apparently, the jury did

not feel -- at penalty phase --that innocence had been established (unless, of course, this were a rogue jury intent on recommending death for an innocent man).

Appellant appears to complain that the prosecutor's task was made unfairly easier by the trial court's having granted the motions for severance by Mr. Sager and Mr. Voorhees (R 170 - 172).[4] Appellant erroneously assumes that the state's case rests on which perpetrator slashed Bostic's throat with a knife. But as the prosecutor pointed out in his closing argument the state was relying on the law of principals -- that if two person help each other commit a crime, each must be treated as if he had done all the things the other person did (R 597, R 613, R 616, R 619, R 622, R 625). See also F.S. 777.011.

The point remains that the Benny Humphrey statement constituted inadmissible hearsay in the Sager trial. See Denny v. State, 617 So. 2d 323, 324, - 325 (Fla. 4th DCA 1993):

> [5,6] Lastly, Denny argues that his convictions should be reversed because the trial court erred in refusing to allow him to introduce portions of statements of codefendants who were tried separately. Denny

[4]The state would prefer to have joint trials in most instances for the reasons articulated by Justice Scalia in Pichardson v. Marsh, 481 U.S. 200,209 - 211, 95 L.Ed.2d 176,187 - 188 (1987).

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

The hearsay rules have not been repealed for the guilt phase of a capital trial. See, e.g., Pittman v. State, **646** So.2d **167,** 172 (Fla. 1994) (trial judge correctly excluded Hodges' testimony as substantive evidence under the hearsay rule and that there is no

applicable hearsay exception).

Appellant's claim must be rejected.

ISSUE V

WHETHER DR. HANSEN'S EXPERT TESTIMONY ON CAUSE OF DEATH ESTABLISHES REASONABLE DOUBT AS TO SAGER'S GUILT ALONG WITH THE UNADMITTED EVIDENCE OF THE CO-DEFENDANTS' STATEMENT AND THAT OF TRUSTEE BENNIE HUMPHREY?

To clarify matters, the jury did hear the testimony of medical examiner Dr. Hansen (Tr 463 - 505). Hansen described the multiple injuries inflicted upon victim Bostic. She observed his body at the crime scene and saw that he was facedown, hogtied with a rebel flag around his neck (Tr **467)** and testified that he 'died of a combination of homicidal violence, including blunt trauma to the head and chest, choking, binding and incisions to the neck" (Tr **468).** There were several incised wounds to the neck (Tr **471).** The hyoid bone was fractured (Tr 474). The most severe wound was the wound to the middle of the neck that severed the windpipe (Tr 490). The overwhelming medical probability is that fingers caused the break to the hyoid bone (Tr **497).** The witness did not testify as to the identify of the perpetrators.

Prior to opening statement the state requested by motion in limine to preclude the defense from mentioning in opening statement the fact of, or the contents of, a confession made by Sager's co-defendant Voorhees (Tr **134** - 135). The court advised defense

counsel not to mention it in opening statement but the court would have to learn the context before any other ruling were made (Tr 139, 141).

Prior to Detective Lawless' testimony at guilt phase, the prosecutor reiterated his motion in limine to preclude the defense from asking Lawless about Voorhees' statements (Tr 359 -360). The prosecutor argued that what Voorhees told Lawless constituted hearsay (Tr 362). The court relied on F.S. 90.804(2)(c) and would not permit the contents of Voorhees' statement to Detective Lawless (Tr 371 - 372; R 404).[5]

Sager contended that if the jury had heard at guilt phase the Lawless-Voorhees interview, Court Exhibit 1, the jury could have concluded that appellant was not involved in a premeditated or felony-murder. Appellee reiterates that the trial court was correct in its evidentiary ruling -- the Voorhees' statement was inadmissible hearsay and did not exculpate Sager. See Denny, supra. While Voorhees asserts that he stuck the knife in the side of his neck (Court Ext. 1, p. 10), he also confessed that Sager

[5] At penalty phase the court permitted the defense to present evidence of Lawless' interview with Voorhees by having Lawless testify and introducing the tape and transcript of the interview, Defense Exhibit 1 (Tr 732 - 752). Lawless was also recalled by the state (Tr 807 - 829).

started beating the victim (p. 5), that he told Sager to hit him again (p. 6), that he told Sager to keep the victim in the seat as Voorhees went through the house looking for money or dope ("whatever the dude had") (p. 7), that Sager kicked him in the head as Voorhees tied him (p. 8), that they tried to gag the victim with a rebel flag and dragged him to the bedroom (p. 9), that both defendants hit the victim in the head (p. 10), that the to of them took the victim's cash and automobile and that he told Sager to turn the oven on for the purpose of destroying the crime scene (pp. 11 - 12). This evidence -- if admitted -- would have aided the state in demonstrating a premeditated and felony-murder. They were planning to rob the victim at that time and did not take TV's & VCR's since they could be traced (p. 20).

ISSUE VI

WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A PREMEDITATED MURDER CONVICTION?

The victim, Audrey Stephen Bostic, had been hog-tied (with his arms and legs tied behind his back), he had been beaten, strangled, stabbed and had his throat slashed. The hyoid bone was fractured (Tr **467 - 491).** The instant case is unlike Boefert v. State, **617 So.** 2d **1046** (Fla. 1993), wherein "the state was unable to prove the manner in which the homicide was committed and the nature and manner of any wounds inflicted." Id. At 1048. There, the asphyxiation killing was consistent with an unpremeditated killing.

Prior to the homicide, Sager told Thomas Novici that he needed money to pay for his rent (Tr **376)** and Novici never saw Sager again (Tr **377).** Sager told Richard Benn, a corrections officer at the jail that he was charged with murder and probably couldn't beat the charge; he blurted out that he was "man enough to turn myself in and admit that I did it" (Tr 507 -508). Detective Lawless testified that there was no money found on the victim and his pants pockets had been "pulled out as though somebody had taken something from him" (Tr **386 - 387).**

Sager's taped interview with Lawless **was** played to the jury (Tr 389) and the transcript of that interview establishes Sager

admitting punching the victim with his fist (p. 3 of transcribed statements), remembering tying the victim up with telephone cord from the wall (p. 6 of transcribed statement), getting a knife from the kitchen and dragging the victim to the bedroom (p. 7) where he cut his throat and beat and kicked him (p. 8). Sager admitted looking for dope in the victims' residence but observed he "couldn't get that lucky" (p. 9). Voorhees assisted him in tying up the victim (p. 10). Sager had the victim's wallet, took sixty to eighty dollars from the pocket of Bostic (p. 12) and the victim's car keys (p. 13).

Even if this Court were to agree with appellant that the evidence was insufficient to support a premeditated killing, it avails Sager naught for there is overwhelming evidence of felony-murder in appellant's admitting to taking eighty dollars and the car from the victim as well as the other evidence adduced, at trial regarding Sager and Voorhees' use of the telephone card. See Mungin v. State, ___ So.2d ___, 20 Fla. Law Weekly S 459 (Fla. 1995); G. W. Brown v. State, 644 So. 2d 52 (Fla. 1994).

Appellant alludes at page 46 of his brief to the transcribed statement of co-defendant Voorhees -- which was not presented to the jury. To the extent that he seeks support from Voorhees' comment at page 17 of that transcript that Voorhees hoped the

victim was still alive, he must also accept the damaging details that Voorhees told Sager to hit the victim again **(p.** 6), that they tried to gag the victim with a rebel flag tied around his neck, that the two of them dragged Bostic to the bedroom **(p.** 9), that both Voorhees and Sager hit the victim in the head and Voorhees stuck the knife in the victim's head (p. 10). Sager got the money from the victim's pockets and before leaving Sager turned the oven on because if it was "the whole place would have went up" and not much of a crime scene would remain **(p.** 12). Voorhees admitted intending to take the victim's money or dope at that time and although Sager wanted to take TV's and VCR's Voorhees warned they'd be easily traced (p. 20).

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING THE AGGRAVATOR OF HOMICIDE COMMITTED DURING A ROBBERY?

Appellant is procedurally barred from now challenging the trial court's action in instructing the jury on the aggravating factor of homicide committed during a robbery for the failure to object below. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Not only did appellant fail to urge evidentiary insufficiency to support the giving of the instruction, he also acknowledged that the swiftness of the jury's verdict indicated "that this is a crime for which unanimity was achieved based on a felony murder theory" (Tr 699). When the court inquired as to his view about the wording of an instruction that the crime was committed while he was engaged in or an accomplice in the commission of the crime of robbery and/or kidnapping, counsel responded:

> "If the court's going to give that instruction, I have no objection to that form."
>
> (Tr 699)

Quite apart from the procedural default in failing to object below and in agreeing that the factor should be given to the jury, the lower court made an appropriate finding:

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

(R 733 - 734)

Appellant contends that the finding of this factor is erroneous because the taking "was in the nature of an after thought" and incidental to the killing. This Court has previously rejected defense arguments that the taking of property from a dead victim is only an afterthought. See Bruno v. State, 574 So. 2d 76, 80 (Fla. 1991); Jones v. State, 652 So. 2d 346, 350 (Fla. 1995) (We have upheld a robbery conviction and the finding of the robbery aggravator in a case involving a similar posthumous taking of a murder victim's property); Finney v. State, 660 So. 2d 674, 680 (Fla. 1995).

Thomas Novici who worked for Ingram Construction Company in January of 1992 testified that the last time he saw Sager the latter claimed he needed money to pay his rent (Tr 376 - 377). Days before the homicide John Pfeiffer, Voorhees' supervisor, knew that he was low on money and thought he'd ask for some (Tr 258). The record reflects that Sager and Voorhees' took the victim's auto and unsuccessfully attempted bank withdrawals on the ATM card but didn't have the right PIN number (Tr 449 - 450).

Sager's own statement to Detective Lawless admitted that during the struggle with the victim he was looking in the house for dope (Transcript of Lawless -- Sager interview, p. 9), admitted

taking sixty to eighty dollars from the pocket of his victim (p. 12). With appellant's successful effort to introduce the Lawless-Voorhees tape and transcript (Court Exhibit 1), before the jury, it was revealed that Voorhees told Sager to "keep the dude in the seat" as he looked around the house for "whatever the dude had" (P. 7). The colloquy continued:

> "Q. You were looking for something to rip then.
>
> A. Yeah, I guess so.
>
> Q. Well, is it so or is it, or is it not?
>
> A. Yeah."

(P. 7)

Then, "We got all the remaining cash he had" (p. 12). Voorhees confirmed that they attempted to get money from the bank with the victim's cash card but, "The only problem with that was, we didn't' know the PIN" (p. 13). The transcript also reveals:

> "Q. Were you planning on robbing him or taking his money or dope at that time or . . . ?
>
> A. Yeah.
>
> Q. What were you guys lookin' for when . . . I mean it looked like somebody had looked for something in that apartment.
>
> A. Tearin it up, just seeing if there was anything else in there.

> Q. What about the stereos and stuff? Why were the stereos laying on the floor?
>
> A. Johnny [meaning Sager] wanted to take the stereo and TVS and VCRs and shit like that. I said, Man, they'll trace us to that in a heartbeat. What's the use in taking that? 'Cause there ain't no way you can get rid of it by morning."
>
> (P. 20)

Since the context of Voorhees' remark is at the point when Bostic was being beaten, prior to being killed, any contention that robbery was an afterthought is frivolous. And the cases cited by appellant are plainly distinguishable. Clark v. State, 609 So. 2d 513, 515 (Fla. 1992) (robbery held to be afterthought since there was no testimony of a plan to rob the victim or that Clark needed money or coveted the property stolen); Parker v. State, 458 So. 2d 750, 754 (Fla. 1984) (evidence failed to show murder was motivated by any desire for the property stolen and expressed motive was to keep victim Sheppard from implicating murderers in the death of victim Padgett); Knowles v. State, 632 So. 2d 62, 66 (Fla. 1993) (defendant's taking father's truck after shooting victim did not establish the element of during the course of a robbery since the defendant had free access to his father's truck prior to the shooting and no evidence that he shot his father in order to take the truck); Scull v. State, 533 So. 2d 1137 (Fla. 1988) (no showing

that taking of car was motivated by desire for pecuniary gain; it is possible it was taken to facilitate escape).

Appellant's claim is meritless.

ISSUE VIII

WHETHER IT WAS ERROR TO INSTRUCT THE *JURY* ON AND TO FIND HAC BECAUSE THE EVIDENCE ALLEGEDLY FAILED TO ESTABLISH THAT AGGRAVATOR?

First of all, it is not entirely clear whether appellant has adequately preserved this issue for appellate review. At the penalty phase instruction colloquy (Tr 684 - 723), appellant seemed to be arguing that all the statutory aggravators were vague (Tr **688** - **689)** or challenging the CCP instruction (R **708** - 709). Sager did not appear to be specifically asserting that the HAC aggravating factor lacked evidentiary support and if he did not his argument in this Court should be deemed procedurally barred. See generally, Hodges v. State, **619 So. 2d 272** (Fla. **1993);** Thompson v. State, **619** So. **2d 261** (Fla. **1993);** Davis v. State, **620** So. **2d 152** (Fla. **1993);** Occhicone v. State, 618 So. 2d **730** (Fla. 1993); Lightbourne v. State, **644** So. 2d **54** (Fla. **1994)** (objection to HAC and CCP aggravators only on ground of evidentiary sufficiency did not preserve issue as to constitutional validity).

With respect to the HAC aggravating factor, the trial court found as follows:

> "(b) The capital felony of which the defendant was convicted was especially heinous,

atrocious or cruel. In arriving at this conclusion, the Court specifically utilizes the standards set forth in Dixon v. State, 283 So. 2d 1 (Fla. 1973). Specifically, the evidence indicates that the victim's body was beaten severely, the victim was manually strangled and the victim's throat was slit. Evidence provided by the defendant's own statement indicates that the victim's throat was slit after he had already been beaten and hogtied and that the primary reason for slitting his throat was that the victim simply refused to be quiet while the defendant and his co-defendant were beating and robbing him. It should also be noted that the vicious attack upon the victim took place in the supposed safety of the victim's own home, a factor which the Supreme Court has previously held adds to the atrocity of the crime. Perry v. State, 522 So. 2d 817 (Fla. 1988); Troedel v. State, 462 So. 2d 392, 398 (Fla. 1984); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). It is apparent from the defendant's statement that the victim was alive at the time his throat was a cut and, although the medical examiner indicated that the severe beating could have caused unconsciousness, the defendant's statement would tend to indicate that it did not cause unconsciousness in this case. The serious nature of the beating would tend to indicate that the victim was in considerable pain and the fact that he was conscious and shouting at the time a knife was used to cut his throat would clearly show that he was aware of what was happening to him, even if only for a short while. Case law tends to indicate that knife wounds inflicted after the victim has been bound and/or gagged will support a finding of heinous, atrocious and cruel. Henry v. State, 328 So. 2d 430 (Fla. 1976); Mines v. State, 390 So. 2d 332 (Fla. 1980) (remanded for other reasons); Reed v. State, 560 ***So.* 2d 203** (Fla. 1990).

> Clearly the continued beating, strangulation and cutting of the victim's throat after the victim had been reduced to total helplessness by being hogtied demonstrates the infliction of a high degree of pain with complete indifference to if not an actual enjoyment of the suffering of the victim. Given the victim's state of apparent intoxication, it is obvious that any robbery or theft could have been accomplished without the infliction of the high degree of physical pain and suffering. Once again, the Court assigns great weight to this factor."
>
> (R 734 - 735)

Appellant notes his objection to the lower court's use of the "reasonable certainty" test (Brief, p. 56), but since the lower court employed that language in its discussion of the mitigating factors and since that portion has no relevancy to the issue being argued -- the correctness of instructing and finding the HAC aggravating factor -- no extensive response is required here. Indeed, Sager makes no challenge in the brief to the trial court's resolution of mitigating factors.

Sager next criticizes the lower court's mentioning several decisions of this Court. For example, the lower court mentioned that case law indicated that knife wounds inflicted on a bound and/or gagged victim supported a finding of HAC, citing Henry v. State, 328 So. 2d 430 (Fla. 1976); Mines v. State, 390 So. 2d 332 (Fla. 1980) and Reed v. State, 560 So. 2d 203 (Fla. 1990). Sager

asserts that reliance on Henry is misplaced because "he killed a police officer with the officer's own weapon by repeatedly shooting the victim as he kneeled and sought mercy." (Brief, p. 59). A closer reading of that opinion discloses that Henry was tried and convicted of the murder of Z. L. Riley, and that victim died of suffocation, but additionally, injuries included that he was bound, had extensive head and facial wounds of the jaw, and cuts on the hands and arms. 328 So. 2d at 430 - 431. Subsequently, when officer Ferguson went to arrest Henry several days after the murder, Henry took his gun and shot him. While the trial court found that the assault on Officer Ferguson demonstrated a callous indifference to life, that does not demonstrate that the lower court's comparison of the Bostic homicide sub judice to the Riley murder in Henry was improper.

Sager urges that the lower court's reliance on Mines is puzzling since HAC "was simply not an issue addressed by the Mines Court" (Brief, p. 60). While it is true that this Court extensively discussed mental mitigation there, the purpose of the lower court's reference was to the HAC finding where the victim was bound, hand and feet, beaten severely about the head and face and cut and stabbed -- a fate similar to that inflicted on Mr. Bostic. 390 So. 2d at 334. In Reed, this Court approved a finding of HAC

where the victim was tied and severely beaten, choked, raped, then had her throat slashed. With the exception of the rape element, the instant homicide is identical.

Similarly, there was no error committed by the court in citing Breedlove v. State, 413 So. 2d 1 (Fla. 1982); Troedel v. State, 462 So. 2d 392 (Fla. 1994) and Perry v. State, 522 So. 2d 817 (Fla. 19881, all of which observe -- as the trial court noted -- that a killing in the supposed safety of one's own home adds to the atrocity of the crime and sets the crime apart from the norm. In any event, the issue really is not whether the lower court used the best-possible precedents in drafting its order unless the purpose of appellate review becomes an exercise in grading the trial judge's order. Cf. Larkins v. State, 655 So. 2d 95, 102 (Fla. 1995) (J. Wells, concurring in part and dissenting in part).

Recent case law supports the trial court's ruling. In Geralds v. State, __ So. 2d __, 21 Fla. Law Weekly S 85 (Fla. 19961, this Court explained:

> Besides the medical evidence and testimony in this case, several cases which are factually analogous support the trial court's finding of the heinous, atrocious, or cruel aggravating circumstance. In Perry v. State, 522 So. 2d 817 (Fla. 1988), the victim was "brutally beaten in the head and face" and "choked and repeatedly stabbed in the chest and breasts as she attempted to ward off the knife" while she

was in her own home. *Id.* At 821. The victim "died of strangulation associated with stab wounds, comparable, in the medical examiner's testimony, to drowning in her own blood" *Id;* see *also Pittman v. State,* **646** *So.* 2d **167,** 172 - **73** (Fla. **1994)** (finding heinous, atrocious, or cruel aggravating factor was warranted where each victim was stabbed numerous times and bled to death and one victim's throat was cut), ***cert.*** *denied,* 115 S.Ct. **1982,** 131 L.Ed.2d **870** (1995); *Whiten* ***v.*** *State,* **649** *So.* **2d 861, 866** - **67** (Fla. 1994) (finding heinous, atrocious, or cruel aggravating factor was properly applied where medical examiner testified that attack lasted approximately thirty minutes, where blood trail showed that blows to head must have come late in attack, and where it was shown that, despite victim's intoxication, he was aware of what was happening to him), *cert. denied,* **116** S.Ct. **106 (1995);** *Hardwick* ***v.*** *State,* **521** *So.* 2d **1071** (Fla.) (Finding evidence supported heinous, atrocious, or cruel aggravator when victim became unconscious within five to six minutes of being stabbed three times in chest and back, then shot in back and then struck about head), *cert. denied,* **488 U.S. 871, 109** S.Ct. **185, 102** L.Ed.2d **154 (1988);** *Preston* ***v.*** *State,* **444** *So.* **2d 939, 945** - **46** (Fla. **1984)** (holding murder was especially heinous, atrocious, or cruel where, after robbing store, defendant forced victim to accompany him on mile and a half journey then forced her to walk at knife point for 500 feet, though victim may not have been aware of wounds inflicted after defendant's initial slashing of her throat which severed jugular vein, trachea, and other main arteries of neck).

In *Taylor* ***v.*** *State,* **630** *So.* **2d 1038** (Fla. **1993),** cert. *denied,* **115 S.** Ct. **107,** 130 L.Ed.2d **54 (1994),** we found that the heinous, atrocious, or cruel aggravator was supported

> by the evidence despite the fact that appellant contended there was no evidence the victim was conscious or that she endured great pain or mental anguish during the murder. Id. At 1042 - **43**. Rather, the record in *Taylor* reflected the victim was stabbed at least twenty times with two different weapons. The victim also suffered twenty-one other lacerations, bruises, and wounds, and received several blows to her head and face from blunt objects. A medical examiner also testified that the victim in *Taylor* was alive while she was stabbed, beaten, and finally strangled. Id. At 1043; see *also* ***Allen v. State, 662 So.*** 2d 323, **31** (Fla. 1995) (as in *Taylor,* the medical examiner in ***Allen*** testified that the victim was alive when she was beaten repeatedly). We find no error in the trial court's finding that the heinous, atrocious, or cruel aggravating factor should be applied.
>
> (Text at 588)

Appellant challenges the trial court's finding, arguing that he and his companion did not intend to inflict a high degree of pain or torture; he relies on a number of cases where this court has held that murder by gunshot -- which frequently leads to instantaneous death -- did not satisfy the HAC criteria. The instant case is not a shooting death.[6] But quite apart from

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[6] In another line of cases the court has observed that the HAC aggravator is perceived more from the victim's perspective than the defendant's and the defendant's intent is not dispositive. Hitchcock v. State, **578** So. **2d 685** (Fla. **1990**). HAC is established when the victim contemplates and anticipates imminent death. Stano **v. State, 460 So. 2d 690** (Fla. **1994**); Wyatt v. State, **641** So. **2d**

certain self-serving statements in appellant's admissions to police, any sentient human being would be able to recognize that the beating, stomping and slitting of the victim's throat would reasonably lead to pain and suffering. See State Exhibit 60, photo depicting the victim's face. Dr. Hansen had described in addition to the abrasions to the face (Tr 468 - 470), six incised wounds on the body, two to the neck and the rest on the shoulder and arm (Tr 471 - 472). The hyoid bone was fractured, consistent with a choking (Tr 474). The throat-slashing injury would lead one to "survive for up to several minutes in that condition" (Tr 482). If the first injuries were to the face and head, it could have been up to ten or fifteen minutes or longer until the last injury was inflicted (Tr 488). With the windpipe severed, the victim would not be able to make noise because the air would not go past the vocal cords (Tr 489). Mr. Bostic also had sustained several fractured and cracked ribs (Tr 490).

Finally, the trial court disposed of Sager's reliance on Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140 (1982) opining:

> "The court must also consider the defendant's argument that the death penalty may not be imposed on him based on the principles set

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1336 (Fla. 1994); Gaskin v. State, 591 So. 2d 917 (Fla. 1991); Preston v. State, 607 So. 2d 404 (Fla.1992).

> forth in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The facts clearly demonstrate that Mr. Sager acted with reckless and brutal indifference to human life. Mr. Sager was present in the victim's home throughout the events culminating in the victim's death and did nothing to prevent the killing. To the contrary, Mr. Sager participated and, arguably, was the sole participant in the binding of the victim, the dragging of the victim from the living room to the bedroom, the beating of the victim and made an effort to gag the victim before the killing. Sager's statement also supports a jury finding that it was Sager who actually sliced the victim's throat. The Court finds these acts to constitute "major participation" in the offense perpetrated against the victim and would make such a finding even if it was clearly established that the co-defendant was the person who did the actual slashing of the victim's throat. In binding and beating the helpless victim in his own home and in inflicting knife wounds to the victim's neck (even if Mr. Sager did not inflict the fatal slicing wound to the victim's neck) the Court finds that Mr. Sager acted with reckless indifference to human life.
>
> (R 738 - 739)

Sager criticizes the lower court's rejection of his reliance on Enmund. In that case the United States Supreme Court held that it would violate the Eighth Amendment to impose a death sentence on a person who does not kill, attempt to kill or intend to kill but only aids and abets a felony in which a murder is committed by others. Enmund was apparently in a car by the side of the road

when the victims were killed in a farmhouse. Sager's participation in this crime was far more egregious; he was present beating the victim and according to his confession inflicted a fatal knife wound. Enmund does not aid Mr. Sager.

ISSUE IX

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING THE MOTION TO SUPPRESS EVIDENCE SEIZED FOLLOWING A SEARCH OF THE ROOM AT THE CHASCO INN?

A. No tangible evidence was seized at the Chasco Inn that was introduced into evidence --

The dispositive fact is that nothing was seized and introduced into evidence at Mr. Sager's trial from the search at the Chasco Inn. Accordingly, there is no reversible error in the trial court's ruling denying the motion to suppress (and the effect is the same as if the motion had been granted below). At the suppression hearing, Detective Lawless testified:

> "Q. Was there anything that you discovered in that room that led you to any other witnesses or any other tangible evidence in this particular case?
>
> A. No.
>
> * * *
>
> Q. Whatever was found inside the room, the papers, whatever, had no significance to you and did not play any type of role in your investigation of this particular case?
>
> A. That's correct.

(R 358)

All that was found was scrap paper (R 368).

Even now, appellant does not identify what items were improperly seized and introduced into evidence against him; rather, Sager asks this Court to remand for another hearing to determine what evidence resulted from the search of the motel room. (Brief, pp. 90 - 91). Appellant is not entitled to yet another hearing when as movant below he failed to establish that any evidence was seized, and improperly introduced at his trial.[7]

B. The merits of the search issue --

If it is necessary to discuss the academic question of whether the search of the motel room was appropriate, appellee will do so. The trial court's order denying relief recites:

> "1. As to the initial search of the defendants' room at the Chasco Inn on January 6, 1992, it is clear that the officers' reasonably believed that Mrs. Weiskopf, the landlady, had appropriate authority to consent to a search of the room by the officers. Although hindsight reveals that the information initially provided by Mrs. Weiskopf was inaccurate, the case law stands for the proposition that the officers are not always required to be correct, but are only

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[7] Appellee notes that in the companion case of Voorhees v. State, FSC Case No. 83,380, Mr. Voorhees admits at page 45 of his brief that "it does not appear from the record that law enforcement obtained any incriminating evidence against appellant [Voorheesl when they searched the room."

required to be reasonable. Illinois v. Rodriguez, 110 S.Ct. 2793, 2799 - 2801 (1990)."

(R 165)

In Illinois v. Rodriguez, supra, the Court addressed the issue whether a warrantless entry is valid when based upon the consent of a third party whom the police at the time of the entry reasonably believe to possess common authority over the premises but who in fact does not. The Court explained that to satisfy the reasonableness requirement of the Fourth Amendment what is generally demanded of government agents is not that they always be correct but that they always be reasonable. The Court concluded that determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises. If so, the search is valid. 111 L.Ed.2d at 161.

In the instant case, Detective Lawless was under the impression from his conversation with Mrs. Weiskopf that Sager and his companion (Voorhees) had rented the room for one week from December 29 to January 5 and that the rental period expired by January 6th (R356). Lawless contemplated getting a search warrant prior thereto but instead chose to ask the landlady's consent on

the "abandoned" property on January 6th (R 357).[8] Lawless acted cautiously, having an officer stay near the premises for the dual purpose of being present if someone showed up and for the arrival of the search warrant if that were obtained (R 369 -370). Lawless insisted that Mrs. Weiskopf did not tell him that the rent was paid two weeks in advance (R 398). Mrs. Weiskopf agreed that the detective received a copy of the registration dated December 29,1991, which listed a fifty dollar rate; she did not show him a copy of receipt 220944 (R 440). She gave consent to the deputies to search because she thought the room had been abandoned (R 441 - 442). See Parman v. United States, 399 F.2d 559 (D.C. Cir. 1968) (abandonment in fact and in law occurred where defendant fled Washington almost immediately after crime and was in Ohio under an assumed name at the time of the search); Feguer v. United States, 302 F.2d 214 (8th Cir. 1962) (Warrantless search with landlord's permission approved even though room rent paid up to days after search since property abandoned even though abandonment not known by the police). Rejecting the defense argument as "intriguing but

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[8] It would appear that the room truly had been abandoned; there was no clothing nor other personal belongings such as wallet, money, jewelry, shaving gear, etc. (R 368).

. . . .without substance", Judge [later Justice] Blackmun concluded that abandonment in fact had been effected before the search). In United States V. Sledge, 650 F.2d 1075 (9th Cir.1981), the court addressed the legitimacy of a police search of the defendant's apartment which appeared to have been abandoned when in fact the defendant may have intended to return and the court concluded, through Judge (now Justice) Kennedy, that the officer could rely reasonably on the authority of the landlord to admit him to the apartment. The court noted that the ultimate requirement is reasonableness under the Fourth Amendment, not strict compliance with technical state properly law concepts.

Appellant argues that the motel room was not abandoned since Sager and Voorhees had paid rent for another week, which he claims is the functional equivalent of advising the owner of the intent to stay as in Paty v. State, 276 So. 2d 195 (Fla. 1 DCA 1975).But unlike Paty where the defendant had left personal belongings in the room Sager and his companion had not left such items behind; clearly they had fled after the Bostic murder. Voorhees did not return to his job the following Monday, but instead went to Madison, Alabama to get his paycheck (R 354) [Voorhees and Sager told Tony Watson if the police were looking for them, it was really drug dealers whom they ripped off R 411. No serious assertion can

be made that they intended to return to the Chasco Inn].

Both Mrs. Weiskopf, the landlady-owner of the Chasco Inn, and Detective Lawless thought that Sager had abandoned the premises by expiration of the lease. During Weiskopf's examination the following colloquy is presented:

> "Q. But you thought the room had been abandoned, correct?
>
> A. Yes.
>
> Q. You all had discussed about the room being abandoned, and that's why you gave Lawless consent to search, correct?
>
> A. Yes.

(R442)

Lawless testified:

> "Q. According to her, what did she tell you as to when she thought that the term of rent the duration of the rent was for?
>
> A. Was for a week.
>
> Q. Terminating on the 5th where it was vacated on the 6th?
>
> A. Correct.

(R 357)

The instant case is like Jones v. State, 332 So.2d 615 (Fla.

1976) where the defendant hurriedly left his shack after the murder and this court determined that he had abandoned the premises.

Even if Lawless were mistaken and the lessees intended to return to the premises, he did not act unreasonably. See Sledge, supra; Illinois v. Rodriguez, supra.

Sager argues that the police could not have relied on the obtained consent from Mrs. Weiskopf because they knew or should have known the room was rented and occupied by Sager and his co-defendant; he cites an excerpt of her testimony on direct examination. On cross examination she clarified that she provided to the police a copy of the registration dated December 29,1991, listing a rate of fifty dollars per week. She did not show the officer the receipt of 220944.[9] She thought the room had been abandoned (R **440 - 442**). The police acted reasonably as required by Rodriguez., supra, and Sledge, supra.

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[9] Lawless denied being told the rent lasted to January 12th (R 370). A copy of the rental receipt subsequently was recovered in a search of the Bostic vehicle days after Sager's arrest and return to Florida (R 439).

ISSUE X

WHETHER THE COURT SHOULD ESTABLISH A "BRIGHT LINE" RULE REQUIRING A RECORD WAIVING OF THE RIGHT TO TESTIFY DURING THE PENALTY PHASE?

Appellant now complains that he was not informed of the right to testify at penalty phase; it does not appear that he interposed any timely and contemporaneous objection below. Consequently, the claim should be deemed procedurally barred.

Additionally, Sager acknowledges that this Court has previously rejected his argument in Torres-Arboledo v. State, 524 So. 2d 403, 409 -411 (Fla. 1988). Accord, Wilson v. State, 659 So.2d 1253 (Fla. 1995). This Court should again decline the opportunity to establish a bright line rule requiring an on the record waiver of the right to testify.

Moreover, appellant is mistaken. After the defense had called all its witnesses at penalty phase, the trial court inquired of Sager if he desired to testify and Sager responded, "No, sir, I have nothing to say" (Tr 780).

ISSUE XI

WHETHER THE TRIAL COURT ERRED REVERSIBLY BY PROCEEDING WITH THE TRIAL DESPITE DEFENSE COUNSEL'S ALLEGED OBJECTION THAT HE WAS NOT QUALIFIED TO TRY A FIRST DEGREE MURDER CASE?

The record reflects that after being appointed to represent Mr. Sager, trial counsel Larry Hart filed a motion to reconsider said appointment (R 16 - 17). A hearing was held on January 21,1992 (R 1280 -1297). Mr. Hart noted that he did not meet the criteria for appointed counsel in capital cases, apparently established by Judge Case or Judge Schaeffer (R 1280 - 1287). Mr. Hart satisfied the criterion of having five years criminal defense litigation experience, he had no fewer than nine felony jury trial (counting his prosecutorial experience but not so only counting his defense work) (Tr 1288). Mr. Hart stated that he had prosecuted cases in which the death penalty was sought but had not defended enough to satisfy the criteria (Tr 1288 -1289). The court observed that the standard was "ridiculous" and the prosecutor noted that only one attorney (Bob Focht) would qualify (R 1289).

The court inquired of Mr. Sager as to his thoughts and he responded:

> "I think he would represent my case quite well from what I understand and from speaking to other people about his ability as an

attorney."

(R 1292)

Contrary to appellant's brief, attorney Hart stated that "I certainly feel like I'm competent to handle that type of representation. . . . " (R 1283)

The trial court gave Sager the opportunity to keep Mr. Hart or have another attorney appointed and Sager declared:

> "I feel I'd like to stick with Mr. Hart. I feel he can do a fine job with this case, the best that I can be expected of an outcome."

(R 1296)

The court permitted Sager to keep Hart and advised the both of them that if there were a change of mind, the court would revisit the issue (R 1297).

This is not a case -- as appellant now suggests -- where the defense attorney confessed his inability to go forward where defense counsel and client had irreconcilable differences

This Court should take this opportunity to declare a nullity the administrative order of Judge Case based on Judge Schaffer's memorandum (R 1286) because, although it may have been prompted by noble motives, the effect of it is to subvert United States Supreme Court precedents such as United States v. Cronic, 466 U.S. 648, 80 L.Ed.2d 657 (1984) and Strickland v. Washington, 466 U. S. 668, 80

L.Ed..2d **674 (1984).** In **Cronic,** the Court concluded that the Court of Appeals erred when it utilized a standard of five criteria (including the experience of counsel) to infer that counsel was unable to discharge his duties. The Court observed that "Every experienced criminal defense attorney once tried his first criminal case." 80 L.Ed.2d at 672. See also United States ex rel. Williams v. Twomey, 510 F.2d **634, 639** (7th Cir. **1975)** (Portia without experience was a remarkably successful representative of Antonio).

Similarly, in Strickland, supra, the court rejected the 'checklist" approach for judicial evaluation of attorney performance and noted that prevailing norms of practice as reflected in American Bar Associations standards and the like are "only guides". 80- L.Ed.2d at **694.**

If the Court were to place its stamp of approval on the administrative order below, it would mark a step backward to the pre-Strickland days and defendants would be free to urge -- as appellant apparently seeks here -- that the appellate courts find that the failure to meet "guidelines" imposed by judicial ukase alone a sufficient reason for a finding of counsel ineffectiveness, rather than focusing on the actual performance of counsel.[10]

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[10] Moreover, one wonders about the effect on the criminal justice

Appellant's claim is without merit .

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system if all court appointments for capital defendants under criteria that only one or two attorneys in the area could meet (R 1289). Would the quality of their representation for the appointed client and their other clients be diminshed by overwork when other competent counsel are available but fail to satisfy the criteria of Judges Schaeffer and Case.

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN DENYING VARIOUS DEFENSE MOTIONS TO DECLARE VARIOUS FLORIDA STATUTES UNCONSTITUTIONAL?

On May 27, 1993, appellant filed, inter alia, a first motion to declare Section 921.141, Florida Statues unconstitutional (R 85 - 86), a second motion to declare §921.141 unconstitutional (R 54 - 55), a motion to declare Sections 782.04 and 921.141 unconstitutional (R 56 - 58), a motion to declare section 921.141 and 922.10 unconstitutional (R 67 - 73), and a motion to declare section 921.141(5)(d) unconstitutional (R 87 - 88) These motions were denied by the trial court at a motion hearing on July 1, 1993 (R 140 - 141; R 1173, 1174, 1177, 1178, 1183 - 84).

This Court has repeatedly and consistently rejected similar or identical attacks on the death penalty statute. See, e.g., Johnson v. State, 660 So. 2d 637 (Fla. 1995); Jackson v. State, ___ So. 2d ___, 20 Fla. Law Weekly S 251 (Fla. 1995); Gamble v. State, 659 So. 2d 246 (Fla. 1995); Thompson v. State, 619 So. 2d 261(Fla. 1993); Wuornos v. State, 644 So. 2d 1000 (Fla. 1994); Spencer v. State, 645 So.3d 377 (Fla. 1994). See also, Taylor v. State, 638 So.2d 30 (Fla. 1994); Stewart v. State, 588 So. 2d 972 (Fla. 1991).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to, James A. Boyko, Esq., 5390 School Road, Suite 1102, New Port Richey, Florida 34652, this 5TH day of April, 1996.