ON APPEAL TO THE SUPREME COURT OF FLORIDA

ROBERT SAGER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CT. CR.' NO.
92-102CFAWS

APPEAL NO.
84,539

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

INITIAL BRIEF OF APPELLANT

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PREFATORY STATEMENT REGARDING REFERENCES TO THE RECORD

References to the first seven volumes of the Record on Appeal will follow the format (R. ___) with the underline replaced by the appropriate page designation(s). Volume 8, where the trial transcript commences, through Volume 12, will similarly be cited (T. ___). The Court's Exhibit #1, consisting of a transcription of a tape recording of Detective William Lawless's interrogation of Donald Voorhees, Mr. Sager's severed co-defendant, was entered into the record for appellate purposes, although it was not admitted into evidence or published to the jury during the guilt phase of Mr. Sager's trial. (T. 404; T. 428.) In addition, a one page statement by a trustee in the Wayne County jail, Bennie Eugene Humphrey, was excluded during the guilt phase, but entered into the record as Court's Exhibit #3. (T. 524.) These materials will be cited as (Ct. Exh. #a, p. ___) and (Ct. Exh. #3), respectively. The Appellant, ROBERT SAGER, will be referred to as "Mr. Sager," and the Appellee, the State of Florida, will be referred to as "the state" or "the prosecution."

STATEMENT OF JURISDICTION

This is an appeal from a final judgment adjudicating Mr. Sager guilty by a trial court in a criminal case, and from the death sentence imposed as a result of the conviction, The Court's jurisdiction is invoked under Article V, Section 3(b) (1) of the Florida Constitution, and in accordance with Fla. R. App. P. 9.140(b) (4).

STATEMENT OF THE CASE

On February 4, 1992, a Sixth Judicial Circuit Grand Jury sitting in Pasco County, Florida, returned an indictment charging Mr. Sager and his co-defendant Donald Voorhees with the First Degree Murder of Audrey Stephen Bostic in violation of s 782.04(1)(a), Fla. Stat. (R. 18-19.) On February 11, 1992, Mr. Sager was assigned a Special Public Defender, who entered a plea of not guilty on February 21, 1992, (R. 21.) On the same day that the not guilty plea was entered, counsel filed a motion to reconsider the appointment because ". . . in conversations with the Office of the Court Administrator, the undersigned has been advised that he, in spite of past experience in first degree murder cases, does not meet the strict and specific criteria for court appointment to represent individuals so charged." (R. 16-17.)

On May 27, Mr. Sager and his co-defendant filed a motion to suppress evidence obtained during the warrantless search of their room at the Chasco Inn in Pasco County. (R. 117-123.) The motion also sought the suppression of self-incriminating statements obtained while the co-defendants were incarcerated in Wayne County, Mississippi. The motion to suppress was based on Amendments IV, V, VI, VIII, IX and XIV to the United States Constitution, and Article I, Sections 2, 9, 12, 16, 17, 21 and 23 of the Florida Constitution. (R. 121.) Two hearings were held pursuant to the motion to suppress. A hearing at which testimony was taken was conducted on July 1, 1993. At a second hearing, held on July 19, 1993, the trial court heard argument by counsel, (R. 765-844).

Three days later, on July 22, 1993, Mr. Sager filed a "Supplement to Oral Argument of July 19, 1993." (R. **149-159.)** The trial court entered an order denying the motion on July **23,** 1993. (R. **160-169.)**

Mr. Sager was tried by jury on May 9 through May 13, **1994** and found guilty as charged. (R. 655.) Penalty phase proceedings were conducted on May 12, **1994.** (T. 730-888.) **By** a vote of eight to four, the jury recommended the death sentence, and on September 9, 1994, the trial court sentenced Mr. Sager to die in the electric chair. (R. 1249.) In its imposition of the death penalty, the trial court determined, by way of aggravating circumstances: "The capital felony of which the defendant was convicted was committed while the defendant was engaged in the commission of a robbery" and; "The capital felony of which the defendant was convicted was especially heinous, atrocious or cruel.** (R. **733-734.)**

As mitigating factors, the trial court ruled: (1) "(T)he defendant has established that he was under the influence of an extreme mental or emotional disturbance at the time of the offense," although the court declined to "accord much weight to this particular circumstance even though it has been found to exist"; (2) With respect to the mitigating circumstance of substantially impaired capacity of a defendant to appreciate the criminality of his conduct: and to conform his behavior to the requirements of law, the trial court ruled "that the defense has only marginally succeeded in this regard"; (3) The court assigned "very little weight to . . . the defendant's relative youth"; (4) The court rejected the argument that "the defendant's participation

was relatively minor"; (5) Finally, the court determined that, judged by the standard of "reasonable certainty, the mitigating circumstance of extreme duress or the substantial domination of another "has not been established." (R. 735-738.)

On May 27, 1993, following several continuances, defense counsel filed a motion to preclude the removal for cause of jurors who were not death qualified or alternatively for separate juries for the guilt and sentencing phases with only the sentencing jury death qualified. R. 77-82. Counsel also moved to preclude advising the jury that its recommendation as to the penalty in a capital case is only advisory, based on the holding in Tedder v. State, *322* So. 2d 908, 910 (Fla. 1982), that binds a trial court to a jury's recommendation of life imprisonment unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ . . ." R. 94-99. The defense simultaneously moved for a pre-trial determination of the prosecution's good faith in pursuing the death penalty or a determination that death was not a possible sentence under § 921.141, Fla. Stat. (R. 100-116.)

STATEMENT OF THE FACTS

NOTE: The combined record and trial transcription of this case comprise over 2,200 legal sized pages. In addition to and conjunction with the statement of facts as set out below, and in order to facilitate a concise presentation of the facts, the Court's attention is respectfully directed to the trial court's Order Denying Defendant's Motion to Suppress (R. 160-169). The

order presents a clear chronological exposition of the facts of the case, and is generally acceptable, with three major exceptions: the erroneous statement that Pasco County Sheriff Detective Lawless had probable cause to arrest Mr. Sager prior to his contact with Wayne County, Mississippi authorities (R. 162); the erroneous statement that Mr. Sager accompanied Wayne County Deputy Sheriff Walker to the jail voluntarily (R. 162); and the statement that Mrs. Weiskopf, proprietor of the Chasco Inn in Pasco County, clearly communicated to Pasco County authorities that Room 4 was vacant and that the room was entered and searched in the officers' good faith reliance on the accuracy of that communication (R. 165).

(1) Incarceration in Wayne County, Mississippi

On January 8, 1992, Deputy Bidmer Ray Walker of the Wayne County, Mississippi, Sheriff's Office, was dispatched along with another officer to investigate a report of two men seeking food from homes located within the boundaries of the Desota National Forest in rural Wayne County. (T.276-278.) Deputy Walker contacted the men and asked them to identify themselves. Although the men produced no paper identification, they gave the deputy what turned to be assumed names, William Stephen O'Donnell[1] and David Alan Scott, and fake social security numbers, (T. 281.) The men told the officers that they had come to Wayne County to camp out, but had wandered away from their vehicle and campsite. (T. 282.) Because the weather was wet and cold, and darkness would soon fall, Deputy

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[1] In the trial transcript, the court reporter spells Voorhees' assumed name "Odonell."

Walker offered to transport the men to the county jail facility, where they could get a hot meal and a change of clothing. The men accepted the offer and Deputy Walker drove them to the Sheriff's Office. (T. 284-285.)

The trial court determined, in its Order Denying Defendant's Motion to Suppress (R. 160-169), that Mr. Sager and his co-defendant accompanied Deputy Walker to the jail facility as an exercise of their own free will. (R. 162.) Mr. Sager contests this view, however, as will be developed in Argument I, below.

At the jail facility, Mr. Sager and his co-defendant provided, along with their supposed names, social security numbers and addresses (T. 298), and were given a meal, dry clothes, and allowed to shower in the cells that were provided to them (T. 284). Wayne County Sheriff Farrior learned the following day that a check of the names provided by the two men did not correspond to any computerized record in the possession of the National Crime Information Center. (R. 163.)

On that same day, January 9, 1992, Deputy Walker came to work in the early afternoon and found a note that the man who originally identified himself as David Alan Scott was actually named Robert John Sager. (R. 163.) Meanwhile, the man originally identified as William Stephen O'Donnell gave officials another name, James Earl Densmore. This man offered to call a friend in Jacksonville, Florida, in order to confirm his identity. (T. 306-307.) The person who answered the call identified Densmore as Donald Voorhees (T. 324).) When Donald Voorhees was confronted on the matter, he

admitted that he was, indeed, Voorhees. (R. 163.) The Jacksonville party also informed Wayne County authorities that Detective William Lawless from Pasco County had come to Jacksonville looking for Mr. Sager and Donald Voorhees, and wanted to talk to them about a Pasco County homicide. (T. 325.)

Mr. Sager and Donald Voorhees were then separated, the Wayne County authorities having decided to hold them until Pasco County officials could travel to Mississippi and talk with the prisoners. (R. 163-164.)

That evening, Mr. Sager gave a self-incriminating taped statement to Sheriff Farrior. (T. 333.) Also that evening, a trustee named Bennie Eugene Humphrey spoke to Donald Voorhees out of Mr. Sager's presence, and was told by Donald Voorhees that he, Voorhees, had stabbed and slashed the throat of a man in Florida. (Ct. Exh. #3.)

(2) The Florida Investigation

Back in Florida, Detective Lawless had already been designated the case officer in the homicide of Audrey Stephen Bostic. At the scene of the homicide on January 4, 1992, there was no sign of forced entry (T.192), and the victim was "hogtied" with telephone wires. (T.193.) On the following day, Detective Lawless discovered that the victim had been with Mr. Sager and a man known as James Densmore in Room 4 at the Chasco Inn. Room 4 was registered to Mr. Sager and the man known as James Densmore. (T.165.)

On January 6, 1992, another Pasco County officer, Detective Powers, conducted a warrantless search of Room 4 at the Chasco Inn.

(R. ___.) Although the landlady supposedly gave officers permission to search the room, in fact it was still registered to Mr. Sager and Donald Voorhees, who had paid two weeks rent in advance. (R. 437-438.)

The investigation next took Detective Lawless to Jacksonville where he interviewed Tony Watson and other friends or acquaintances of Donald Voorhees. (T. 380.) Donald Voorhees and a friend - Mr. Sager - had travelled through Jacksonville in a vehicle which matched the description of the victim's automobile. On his way back to Pasco County from Jacksonville on January 9, 1992, Detective Lawless learned that Mr. Sager and Donald Voorhees were being held by authorities in Mississippi and were on the verge of being released. Detective Lawless immediately travelled to Wayne County, Mississippi, arriving there at approximatelymidnight. (T. 380-381.)

By the time her was questioned by Detective Lawless, Mr. Sager had already given a self-incriminating statement to Wayne County Sheriff Farrior. (T. **332-333.)** Detective Lawless, in the presence of Detective Spears, also from the Pasco County Sheriff's Office, interviewed Mr. Sager from approximately **1:33** a.m. to 2:33 a.m. on January 10, 1992. (T. **387,)** Later that same morning, at about 10:00 a.m., Mr. Sager and Donald Voorhees waived extradition and boarded a flight back to Pasco County. (R. 12.) After talking to Mr. Sager and Donald Voorhees in Mississippi, Detective Lawless obtained a warrant for their arrest; he officially arrested them after the return flight to Pasco County from Mississippi. (R. 8.)

(3) Proffered Testimony Regarding Statements Made **bv** Co-Defendant

During Mr. Sager's trial, on May 11, 1994, the defense proffered testimony by Detective Lawless in regard to hearsay statements made by Donald Voorhees, Mr. Sager's co-defendant. One critical issue in this felony murder/premeditated murder prosecution was who tied the victim up with telephone cords prior to the homicide. Using the transcript from a statement given previously by the officer, defense counsel pursued this line of inquiry in his examination of Detective Lawless.

> Q. Now, in your interview with Voorhees, Voorhees probably five or six times insisted that he tied up the victim alone?
>
> A. He states he tied him up, yes he did.
>
> Q. And if you asked even if Sager had helped, he said, no, he, Voorhees tied up the victim?
>
> A. Again, I don't recall giving that -- do you have a specific page in that transcript where it says that?
>
> Q. Well, Page 8, the bottom of the page, question, "What happened next? So Johnny started tying him up?" And his answer, "No, I tied him."
>
> A. Okay.
>
> Q. So you would agree that Voorhees said that he did not -- that is, Sager did not help Voorhees tie up the victim?
>
> A. That's correct.

(T. 419-420.)

(4) Detective Lawless's Interrosation of Donald Voorhees

Court's Exhibit #1, consisting of a transcription of a tape recording of Detective Lawless's interrogation of Donald Voorhees, was entered into the record for appellate purposes, although it was not admitted into evidence or published to the jury during the

guilt phase of Mr. Sager's trial. In addition, a statement by a trustee in the Wayne County jail, Bennie Eugene Humphrey, was excluded during the guilt phase, but entered into the record as Court's Exhibit #3. Taken together, the two excluded items raise a substantial question as to Mr. Sager's specific actions at the time of the homicide. Indeed, It is Mr. Sager's position that had the two excluded items gone to the jury at the guilt phase, they may well have raised a reasonable doubt as to his culpability in the minds of the jurors.

With respect to Mr. Sager's specific actions at the time of the homicide, the following exchanges took place between Detective Lawless and Donald Voorhees in the excluded (in the guilt phase) interrogation.

> Q. O.K., so what happened next?
>
> A. I told Johnny (Mr. Sager) to keep . . . keep the dude in the seat and I started lookin' around the house for anything. I don't know what I wa lookin' for, just (coughs) going through the house.
>
> Q. Were you looking for money, dope?
>
> A. Whatever the dude had.
>
> Q. O.K., so why'd you want Johnny to deep him in the seat?
>
> A. So he didn't see me going through the house. It didn't make much sense in the long run.

(Ct. Exh. #1, p. 7.)

> Q. O.K., what happened next? So Johnny started tying him and you . . .
>
> A. No, I tied him.
>
> Q. You tied him, What did Johnny do, just held him down?

A. No, I took care of the holding while he was down but every time he said somethin' I'd tell him to shut up and Johnny'd kick him in the head and I told him to shut up again.

(Ct. Exh. #1, p. 8.)

Q. O.K. What happened next?

A. Continued to hit him about the head to try and shut him up but he wouldn't shut up, tryin' . . . kickin' him about the head to try and shut him up.

Q. Did you hit him or did Johnny hit him?

A. We both did.

Q. You both hit him. O.K. About his head?

A. Uh huh.

Q. O.K., what happened next?

A. I got up, went into the kitchen . . . grabbed a knife and walked back in there, got down on my knees and stuck the knife in the side of his neck.

(Ct. Exh. #1, p. 10.)

(5) Trustee Bennie Humphrey's Conversation with Donald Voorhees

As noted above, trustee Bennie Eugene Humphrey made contact with Donald Voorhees in the Wayne County Jail. The pertinent segment of the conversation, preserved in a one page statement, follows, The statement sheds critical light on the nature of the wounds incurred by the victim in this case.

I then asked Voorhees what happened? He said that he and Sager had got with a fellow and had been drinking and wound up at the man's place. Voorhees said that he had been drinking pretty heavy and that he passed out on the couch. He said that Sager and this other fellow got into a fight and it woke him up. He said Sager had beat him up pretty bad and was still beating on the fellow and that he went and pulled Sager off him. Voorhees said the fellow's face was all beat in and the fellow kept on moaning and making a racket. I think he said that they tied the man up and the man kept making a racket and that

they got scared and Voorhees said, I caught him by the hair of the head and cut his throat. Voorhees said he was still making a noise so then I ran up to him and jabbed him in the neck.

(6) Doctor Hansen's Testimony re: Cause of Death

Marie Hansen, M.D., was accepted by the trial court, over defense objection, as an expert in forensic pathology. (T. 466.) Dr. Hansen performed the autopsy on the victim (T. 467) and testified, inter *alia*, as to the cause of death, Dr. Hansen was unable to identify a single, discrete cause of death, testifying instead that "Mr. Bostic (the victim) died of a combination of homicidal violence, including blunt trauma to the head and chest, choking, binding, and incisions to the neck." (T. 468.)

Dr. Hansen was able to shed considerable light on the precise nature of the cutting wounds to the victim's neck area.

Q. Dr. Hansen, you were describing to us the blunt trauma to the head, and you were about to tell us about the incised wounds, and I stopped you. Could you now tell us about those incised wounds?

A. Okay. There was six incised wounds on the body

Q. Let me stop you a minute again. Could you tell us what incised wounds mean?

A. An incised wound is longer than it is deep. A stab wound is deeper than it is wide. All his wounds were incised; in other words, the portion that broke the skin was longer than the depth of penetration of the wound.

Q. Now, you said there were two incised wounds, what did you say, to the right side of the neck?

A. Yes. There was one in the right upper neck four inches below the ear, and one and a half inches anterior to (in front of) the ear, three inches to the left of midline -- I'm sorry that should be to the right of midline, was 15/16th of an inch, so it only went into the subcutaneous (beneath the skin) tissue of the neck.

(T. 471-472). Dr. Hansen also described the victim's fractured hyoid bone, which she stated was consistent with either strangulation or a kick or other straight blow. (T.474-475.) The doctor did not think that a flag found wrapped around the victim's neck was likely to have caused the hyoid bone fracture. (T. 479.)

Perhaps the most noteworthy wound suffered by the victim was the slash or slice directly across the throat.

> Q. Now doctor, let's go to the third cause of death, possible cause of death here. You mentioned the slashing of the throat.
>
> A. Yes.
>
> Q. Tell us about your finding as it relates to the slashing of the throat.
>
> A. There is a wound that's four inches long in the middle of the throat, and there is a little bit of a snag in the middle where it looks like something came across -- and the skin is a lot tougher than most people think -- and possibly got caught and then started again, rather than one clear slash.
>
> It goes through the soft tissues in the neck, through the windpipe into the posterior larynx, in this case the back of the throat.

(T. 479-480.)

SUMMARY OF ARGUMENT

The detention in Wayne County was an impermissible violation of the Fourth, Fifth and Fourteenth Amendment rights of Mr. Sager. When he was taken to the jail facilities, it was by an armed law enforcement officer who neglected to divulge that Mr. Sager and Donald Voorhees would be held against their wills until they had satisfied the Sheriff's Office as to their identities. All of the direct and vicarious evidentiary results of the illegal detention and questioning should have been excluded or suppressed by the

trial court, and they provide a sufficient basis for reversal of Mr. Sager's conviction.

It was likewise a violation of Mr. Sager's Fourth and Fourteenth Amendment rights to conduct the warrantless search of Room 4 at the Chasco Inn in Pasco County. Even under intense questioning by defense counsel, Detective Lawless did not reveal the results of the illegal search. This concealment was exacerbated by the trial court's stated lack of knowledge of what the search had produced. What is clear is that after the search, Detective Lawless was able to locate Donald Voorhees's friends and acquaintances in Jacksonville, and that his trip there led inexorably to Donald Voorhees's identification by Wayne County authorities. It also alerted those authorities that Mr. Sager and Donald Voorhees were wanted for questioning in connection with the victim's homicide. An appropriate remedy for this infringement of constitutional guarantees is the issuance of instructions on remand that the trial court conduct a hearing to determine precisely what evidence was obtained as a result of the illegal search. Then, that evidence and all its fruits should be suppressed or excluded on retrial.

The trial court erred by excluding Detective Lawless's interrogation of Donald Voorhees. The inculpatory statements elicited in the interview raise grave doubts about the extent of Mr. Sager's participation in either tying up the victim or in actions which resulted in the victim's death. The critical nature of the statements made by Donald Voorhees is underscored by the

statement of trustee Bennie Eugene Humphrey and the testimony of Dr. Hansen, both of which are addressed below. The remedy for the improper exclusion of this vital evidence is reversal of Mr. Sager's conviction, with a retrial in which the trial court is instructed to admit the evidence at issue.

By excluding the signed statement of trustee Bennie Eugene Humphrey, the trial court withheld information from the jurors which may well have created a reasonable doubt in at least some of their minds. For one thing, the statement referenced a conversation with a fellow inmate, not a police officer. The point is, it may be that Donald Voorhees was motivated by a desire to protect his friend when responding to official questioning, But this desire would arguably be much diminished in a casual exchange with a fellow prisoner. This is, to a large extent, why casual conversations among inmates are often deemed credible. Also, the trustee's statement explains the confusion in how the various blade wounds were inflicted in the victim's neck area. According to Bennie Eugene Humphrey, Donald Voorhees stated that when the victim kept making a racket, he became scared, grabbed his hair and cut his throat, Then, when the victim continued making noise, Donald Voorhees attacked his neck with a knife, delivering the incisions which Dr. Hansen described in addition to the incision that cut through the victim's windpipe.

Dr. Hansen's testimony provides the thread which unites, in their importance to this appeal, the excluded statements of Donald Voorhees to Detective Lawless and that of Bennie Eugene Humphrey

regarding Donald Voorhees conversation with him. While it is not possible, based on the doctor's testimony, to determine a precise cause of death, it is quite clear what act was deliberately intended to kill the victim: the slashing of his throat. (T. 490.) The fracture of the hyoid bone was more likely caused by a kick or punch than by mechanical strangulation and the incisions to the muscled areas of the neck may not have significantly contributed to the victim's demise. It was when the killer slashed the victim's throat that he was engaging in premeditated homicide. It was error for the court to exclude evidence that tied Donald Voorhees to the throat slashing, as well as evidence tending to show that he, not Mr. Sager, was the one who bound the victim. These errors are harmful and reversible, and should be remedied by the Court.

There are other discrete arguments set forth in this initial brief, as well. Among the foremost of these is the constitutional challenges to statutory provisions under which, and procedures by means of which, Mr. Sager, despite the availability of clearly and dramatically exculpatory evidence, was convicted of a heinous, premeditated crime, and sentenced to die by electrocution.

ARGUMENT I

THE UNLAWFUL DETENTION OF MR. SAGER BY MISSISSIPPI LAW ENFORCEMENT OFFICIALS UNTIL HE AND HIS CODEFENDANT WERE FORCED TO IDENTIFY THEMSELVES VIOLATED MR. SAGER'S RIGHTS UNDER THE UNITED STATES CONSTITUTION, MANDATING REVERSAL OF HIS CONVICTION

Mr. Sager and his co-defendant were travelling on foot when located by Wayne County, Mississippi law enforcement authorities in the Desota National Forest. (R. 157; T. 280-281.) Deputy Bilmer Walker offered to put the co-defendants up overnight in the Wayne

County jail, allowing them to obtain a hot meal and dry clothes. (T. 283-284.) Once at the jail facility, however, the co-defendants were locked in a cell and told that they would have to identify themselves before they could be released. They were initially put in the same cell, but in the afternoon after the day they were incarcerated, Mr. Sager and his co-defendant were placed in different jail cells, (T. 286-287.)

Mr. Sager, who had recently been released from a psychiatric facility (R. 737), asked for medical attention, but was told that he first would have to provide proof of his identification. A check through the NCIC identified Mr. Sager, and disclosed that he was not wanted by law enforcement. Mr. Sager's co-defendant placed a telephone call to an acquaintance, who informed the Wayne County authorities that Pasco County authorities wished to speak to the two prisoners about the death of Audrey Stephen Bostic.

As a threshold issue, one must inquire as to the legality of taking Mr. Sager and his co-defendant into custody in the first place. Mr. Sager argues that Wayne County authorities acted illegally, because they deceived him and took him into unlawful detention against his informed will. The question in cases such as these is whether the police, "by means of physical force or show of authority . . . in some way restrained the liberty of a citizen." Florida v. Bostick, 501 U.S. ___, 111 S. Ct. , 115 L.Ed.2d 389, 398 (1991), quoting Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The inquiry should along these lines: After considering all the attendant circumstances, is it reasonable to believe that a person put into the situation under analysis would conclude that he was free to leave? If a reasonable person would not in fact entertain such a belief, then he has been seized as contemplated by the language and intent of the Fourth Amendment. Hill v. State, 561 So. 2d 1245 (Fla. 2d DCA **1990).**

In the case at bar, the record indicates that Mr. Sager accompanied the officer to the Sheriff's Office not because he chose to do *so,* but because of the apparent authority of a uniformed, armed policeman. See, United States v. Edmonson, 791 F.2d 1512 (11th Cir. **1986).** As stated **by** the United States Supreme Court, the "request to come to the police station 'may easily carry an implication of obligation while the appearance itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen.'" Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824, **832,** footnote 6 **(1979),** quoting from ALL, Model Code of Pre-arraignment Procedure § 2.01(3) and commentary, p. 91 (Tent. Draft No. 1, **1966).**

The record does not indicate that, if Mr. Sager was free to leave in the eyes of Deputy Walker, he was informed of that option by the armed officer suggesting that he accompany him to the jail facility. There is substantial authority that such notification is a requirement. See, Schneckloth v. Bustamonte, 412 U.S. 218, **93** S.Ct. 2041, **36** L.Ed.2d 854 **(1973);** Bailey **v.** State, 319 So. **2d** 22 (Fla. **1975);** Acosto v. State, 519 So. 2d 658 (Fla. 1st DCA 1988).

Most tellingly, the Wayne County authorities, through the agency of Deputy Walker, harbored a secret agenda. They planned - and carried out their plan - to detain Mr. Sager and his co-defendant until they satisfied themselves as to both their identities. (It is noteworthy that Mr. Sager, who eventually identified himself to the officers (T. 286), was not thereupon released.) Because Mr. Sager had no way of knowing what was in store for him at the jail facility, he was intentionally deceived as to his legal position, and any apparent agreement to go into custody was illusory. The illegality of this deception extends into and fatally taints inculpatory statements later obtained by law enforcement officials from Wayne and Pasco Counties, while Mr. Sager was in Wayne County custody. See, Thomas v. State, 456 So. 2d 454 (Fla. 1984); State v. Manning, 506 So. 2d 1094 (Fla. 3d DCA 1987); Hoffa v. United States, 385 U.S. 293 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). These cases stand for the propositions that police maneuvers employed to trick a suspect as his true position, as well as guileful intrusions into a suspect's privacy may well constitute both Fourth and Fifth Amendment violations. In the case at bar, both Amendments were violated, and this stands in addition to the Fifth Amendment violation consisting of the coerced statements extracted by Wayne County and Pasco County officers while Mr. Sager was being illegally detained in Wayne County, Mississippi.

The authorities' action as outlined above constitute an egregious denial of Mr. Sager's Fourth Amendment rights. It was

egregious misconduct for the Wayne County authorities to have detained Mr. Sager against his will until he satisfied them as to his identity, an identity that was literally none of their concern. It is intolerable that police authorities utilize the kind of procedure used in this case some 13 1/2 years after the issue was set to rest by a unanimous United States Supreme Court in Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

In Brown v. Texas, the Court reviewed an El Paso municipal court's $20.00 fine of a man under a Texas statute, Texas Penal Code Ann. § 38.02(a) (1974), making it a crime to refuse to identify oneself in response to a policeman's demand. The defendant, Zackary C. Brown, was stopped in a "high drug problem area," ostensibly because he had never been seen in the neighborhood before. Brown v. Texas, at 99 S.Ct. 2639. Then-Chief Justice Burger took exception to the state's failure to offer a reasonable articulation of a basis for the arresting officer's suspicion of Mr. Brown.

> The flaw in the State's case is that none of the circumstances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal conduct. Officer Venegas testified that the situation in the alley "looked suspicious," but he was unable to point to any facts supporting that conclusion. There is no indicating the record that it was unusual for people to be in the alley. The fact: that appellant was in a neighborhood frequented by users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.

Brown v. Texas, at 99 S.Ct. 2641.

The Brown v. Texas Court ends with an Appendix to Opinion of the Court which graphically illustrates the fallacies in the

state's position within the context of a society which extols the freedom of individuals from unwarranted government interference.

> THE COURT: . . . What do you think about if you stop a person lawfully, and then if he doesn't want to talk to you, you put him in jail for committing a crime.
>
> MR. PATTON [Prosecutor]: Well, first of all, I would question the Defendant's statement in his motion that the First Amendment gives an individual the right to silence.
>
> THE COURT: . . . I'm asking you why should the State put you in jail because you don't want to say anything.
>
> MR. PATTON: well, I think there's certain interests that have to be viewed.
>
> THE COURT: Okay, I'd like you to tell me what those are.
>
> MR. PATTON: Well, the Governmental interest to maintain the safety and security of the society and the citizens to live in the society, and there are certainly strong Governmental interests in that direction and because of that, these interests outweigh the interests of an individual for a certain amount of intrusion upon his personal liberty. I think these *Governmental interests outweigh the individual's interests* in this respect, as far as simply asking an individual for his name and address under the proper circumstances.
>
> THE COURT: But why should it be a crime not to answer?
>
> MR. PATTON: Again, I can only contend that if an answer is not given, it tends to disrupt.
>
> THE COURT: What does it disrupt?
>
> MR. PATTON: I think it tends to disrupt the goal of this society *to maintain security over its citizens* to make sure they are secure in their gains and in their homes.
>
> THE COURT: How does that secure anybody by forcing them, under penalty of being prosecuted, to giving their name and address, even though they are lawfully stopped?
>
> MR. PATTON: Well, I, you know, under the circumstances in which some individuals would be lawfully stopped, *it's presumed that perhaps this individual is up to something,* and the officer is doing his duty simply to find out the individual's name and address, and to determine what exactly is going on.

> THE COURT: I'm not questioning, I'm not asking whether the officer shouldn't ask questions. I'm sure they should ask everything they possibly could find out. *What* ***I'm asking is what's*** *the* ***State's*** *interest in* ***putting*** *a man in jail because he* ***doesn't*** want *to* answer *something.* I realize lots of times an officer will give a defendant a Miranda warning which means a defendant doesn't have to make a statement. Lots of defendants go ahead and confess, which is fine if they want to do that. But if they don't confess, you can't put them in jail, can you, for refusing to confess a crime?

Brown v. Texas, at 2641-2642, (Emphasis added.)

If anything, the conduct of the Mississippi officers in Mr. Sager's case was even more outlandish than that of the Texas police in Brown v. Texas. Surely a national forest cannot reasonably be deemed an area which leads the police to suspect criminal activity on the part of citizens who visit there. In addition, the Mississippi authorities did not even act under color of an ordinance or statute, however constitutionally flawed. They simply locked Mr. Sager up, and refused to release him or to make arrangements for the medical attention he requested, until he **broke** down and identified himself.

As Chief Justice Burger makes clear, the arguments of the prosecutor in Brown v. Texas constitute a disturbing exaltation of the prerogatives of the state over individual rights as guaranteed by the United States Constitution. Indeed, the prosecutor took a statist position which can hardly be said to be within the pale of social discourse in America. The prosecutor is adamant that the state has the right to maintain the security (*i.e.*, authority) over its citizens, and that the state's interests generally outweigh those of the individual citizen. The remark about disruption is

especially telling. As the judge asked, what disruption is avoided by putting a citizen in jail for not talking to the police. It can only be the disruption of the power of the government to dominate its citizens, a power which must be viewed with grave reservations in a democracy.

It is, moreover, eminently arguable that the Mississippi authorities' actions were illegal not just under Brown v. Texas, but under the seminal search and seizure/investigative stop opinion, Terry v. Ohio, 392 U.S. 1, **88** S.Ct. **1868, 20** L.Ed.2d **889** (1968). **In** his concurring opinion in that case, Justice White flatly asserted that "refusal to answer furnishes no basis for arrest." Terry, at 88 S.Ct. 1886. Justice White correctly distinguished a permissible detention from an invalid one, on the basis of police compulsion.

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. ***Absent*** *special* ***circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on*** *his* ***way.*** However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of *course,* ***the person is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis fox arrest*** . . .

Id. (Emphasis supplied.)

In the case at bar, Mr. Sager was incarcerated against his will, without probable cause or even any rational basis for the detention, and was compelled to provide responses to questions he preferred not to answer. All of this is bad enough, but it is substantially exacerbated by the fact that Mr. Sager was pleading

for medical/psychiatric attention, which he distinctly required. Under these conditions, it was unconscionable for the police to keep him locked in a cell until he submitted to this illegal interrogative technique.

One respected commentator takes a conservative view of the degree to which a suspect is protected from intrusions in the form of police questions, but on the facts of Mr. Sager's case, he qualified for protection against he actions of the Wayne County Sheriff's office.

> If (JusticeWhite's concurrence in Terry) only means that the refusal to answer cannot itself be made criminal and that such refusal standing alone does not constitute grounds for arrest for some other type of crime, then it is doubtless correct. But it does not necessarily follow that the suspect's refusal must be ignored completely by the officer. Though it has occasionally been held that "no adverse inference may be drawn" from a refusal to respond, the better view is that refusal to answer is one factor which an officer may consider, *together with* ***the*** *evidence which gave* rise *to* ***his*** *prior suspicion,* in determining whether there are grounds for an arrest.

Wayne R. LaFave, Search and Seizure, s 3.6(f) (2d ed. 1987). Sub *judice,* no reasonable observer could conclude that the actions of the Mississippi authorities meet the standards implicit in the foregoing, because there were literally no evidentiary grounds for the officers' prior suspicion of Mr. Sager.

ARGUMENT II

THE TRIAL COURT'S RELIANCE ON COLLINS v, BETO, PEOPLE v. WHITE AND PEOPLE v. GABBARD IS PROFOUNDLY MISPLACED; NONE OF THOSE DECISIONS ABSOLVES MISSISSIPPI LAW ENFORCEMENT OFFICIALS OF THEIR FLAGRANT MISCONDUCT IN COERCING *AN* ILLEGALLY DETAINED SUSPECT INTO MAKING SELF-INCRIMINATING STATEMENTS, WHETHER OR NOT THE OFFICERS WERE INVESTIGATING THE CRIME WITH WHICH MR. SAGER WAS CHARGED

In its Order Denying Defendant's Motion to Suppress (R. 160-

169), the trial court ruled as follows:

> 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. **1965).** In the instant cases, the purposes of the admittedly illegal detention by the Wayne County officials from approximately 7:00 a.m. on January **9, 1992** to approximately mid-afternoon on that same date was to obtain the defendants' true names, not to further the investigative efforts of Florida attorneys. The decision of the Illinois Supreme Court in People v. Gabbard, **398** N.E. 2d **574** (Ill. 1979), as explained in People v. White, **512** N.E. 2d **677** (Ill. 1987), "held that a confession to a 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. *Nether the arresting officernor 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).

(R. 167), citing Collins, at 348 F.2d **827,** and White, at 512 N.E. 2d **689.**

The trial court's reading and application of Collins, Gabbard and White are plainly mistaken. The court misunderstands the point mae in the quote from Collins, in which the trial court's suppression of evidence was upheld in a habeas corpus action: "(T)he exclusionary rule's theory of deterrence operates 'only if an excludable piece of evidence is the target of police activity.'" Id. The inner quote is from a law review student comment.[2] Contrary to what the trial court *sub judice* supposes, neither the Fifth Circuit in Collins, nor the student article cited in the opinion, argue that so long as evidence obtained as a result of an illegal

[2]Comment, **69** Yale L.J. **432,** 436 n. **12.**

arrest, or, as in the case at bar, an illegal detention, was not being specifically sought by the arresting or detaining officers, it is necessarily admissible,

Rather, the argument is that if *the evidence* was ***otherwise*** *properly obtained,* then it may be admissible, but only if it was not being specifically sought. In Mr. Sager's case, the Wayne County officers' flagrant misconduct while Mr. Sager was detained irredeemably taint *any* evidence obtained thereby, under Wong Sun.

The trial court's reading of Gabbard and White is, if anything, even more off the mark. Gabbard was a case in which a defendant convicted of armed robbery and burglary appealed the denial of a motion to suppress articles seized and inculpatory statements made while he was later being detained pursuant to a warrantless arrest that he claimed was illegal. An Illinois appellate court held that the seized articles should have been suppressed, but that the inculpatory statements were admissible. Gabbard, at 398 N.E. 2d 575. The state successfully sought leave to appeal, and the Illinois Supreme Court upheld the appellate court on both issues.

With respect to the issue of inculpatory statements, the Illinois high court returned to United States Supreme Court precedent on which it had relied in reaching its decision in Gabbard:

> (T)he Supreme Court has rejected a simple "but for" test under which any statement by a defendant following his unlawful arrest must be suppressed on the ground that the statement would not have been made had he not been taken into custody. The evidence in the cases considered by the court: showed a causal connection between the illegal

> arrest and the statement such that the statement could be said to have been obtained by exploitation of the illegality. (Wong Sun v. United States, 371 U.S. **471, 487-488, 83** S.Ct. **407, 417, 9** L.Ed.2d **441, 455** (1963); Brown v. Illinois, 422 U.S. **590,** 598-599, **604 S.Ct. 2254, 2259, 2262, 45** L.Ed.2d **416, 424, 427 (1975);** Dunaway v. New York, 442 U.S. 200, **218,** 99 S.Ct. **2248,** 2259, 60 L.Ed.2d 824, **8839-840 (1979).** The opinions mention as significant factors in ascertaining whether such causality exists the "temporal proximity" of the arrest and confession, the presence or absence of intervening circumstances, and the purpose of the official misconduct. Brown v. Illinois, **422** U.S. 590, **5603-604, 604** S.Ct. **2254,** 2261-2262, **45** L.Ed.2d **416, 427 (1975).**

Gabbard, at **398 N.E.2d 577.** The relevance of this and other courts' attention to "intervening circumstances" is that the nexus between an illegal detention and its tainted evidentiary fruit may in some instances be "attenuated" or weakened by the presence of an intervening circumstance to the point that the intervening circumstance, not the illegality of the detention, becomes the "catalyst" of the evidence, thereby sanitizing it of the original illegality.

The Gabbard court's characterization of Brown v. Illinois on the three significant factors for ascertaining causality is inaccurate in one respect and exposing that inaccuracy is important to the case at bar. In regard to the third factor, Brown v. Illinois did not limit itself to the purpose of official misconduct. It also spoke to that misconduct's flagrancy: "The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered, The temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and,

particularly, ***the*** *purpose* and *flagrancy* ***of*** *the* official *misconduct are all* ***relevant.!!*** Brown v. Illinois, at 95 S.Ct. 2261-2262 (citation omitted).

In the case before this Court, the purpose and flagrancy of the official misconduct are extremely important factors to be assessed in arriving at a just result. Its purpose was to coerce Mr. Sager into providing information to which the officers were not entitled. It is true that the officers were not directing their efforts at obtaining information about the Florida homicide. But, as demonstrated by the United States Supreme Court in Brown v. Texas, the coercion itself can provide a reason for suppression, where its target has a reasonable claim to constitutional protection, whether that target is evidence of a specific crime where the evidence is sought through improper means, or private information about a suspect in which the police have no compelling interest.

The flagrancy of official misconduct in this case provides an even more compelling reason for according Mr. Sager appellate relief. As noted earlier in this brief, Mr. Sager was incarcerated against his will, without probable cause. Nor did the arresting/detaining officer have reasonable suspicion of criminal activity or any other rational basis for the detention. Then, Mr. Sager was compelled to answer questions he preferred not to answer, because they intruded on his privacy and compelled him to incriminate himself. Worse still, during his illegal detention, Mr. Sager was pleading for attention, which he clearly required. The

conduct of the Wayne County authorities were unconscionable. It was flagrant misconduct for the police to keep him locked in a cell, holding out the insincere promise of psychiatric assistance, until he submitted to their misleading and coercive interrogative routine.

Backing up in the sequence of Brown v. Illinois's three factors, there are no intervening circumstances to which the state can point as weakening or "attenuating" the connection between Mr. Sager's self-incriminating statements and the illegal seizure and detention of his person. He was taken into custody under the pretext of an offer of a night of shelter, clean clothes and a hot meal. Then he was held against his will until his mental condition (T. 338; T. 340-341), combined with his forcible detention and the bogus promise of medical attention coerced him into making self-incriminating statements.

The trial court failed to appreciate the importance of flagrant official misconduct as explicated in Brown v. Illinois. In addition, the facts of Gabbard, on which the court also ostensibly relied, are immediately and tellingly distinguishable from the facts of Mr. Sager's situation. In Gabbard, the defendant was (illegally) arrested when he was observed walking along a roadway and gave confused answers to a police officer's questions about his identity and activities. The defendant also was found to have two driver licenses that did not bear the name he gave the officer. Gabbard, at 398 N.E.2d 575.

While on the way to the county jail, the officer learned via

his radio that the defendant was wanted for violation of parole and escape from a secure mental institution. This circumstance standing alone fundamentally distinguishes the facts in Gabbard from the facts before this Court. A search upon arrival at the jail produced a loaded weapon, concealed in a bag. One of the licenses in the defendant's possession, the officers determined, belonged to a victim of the crimes of which he was ultimately convicted. Gabbard, at 398 N.E. 2d 575. All this constitutes acute intervention or attenuation, but in addition, Gabbard presents the additional factor of a temporally substantial *legal* detention during which the intervening factors had time to impress themselves on the mind of the defendant,

Informed of his Miranda rights, the defendant: unequivocally waived them. Knowing that the sheriff's office in a nearby county was investigating the crimes for which the defendant was eventually prosecuted, the detaining agency drove him to that county, where he again waived his Miranda rights and submitted to questioning. Gabbard, at 398 N.E. 2d 577-578. The defendant was confronted with the license from the scene of his crimes, and with a composite sketch of the perpetrator. He was also identified in a lineup. It was at that point, after all these dramatic intervening circumstances, that the defendant made inculpatory statements. Gabbard, at 398 N.E. 2d 578.

As pointed out in the defense's Motion to Reconsider Order Denying Motion to Suppress, in Gabbard, it was the arresting officer who was unaware that the robbery at issue had occurred. The

interrogating officer knew that the defendant was lawfully detained due to the escape and the parole violation. There was no coordination between the two agencies, which is just the contrary of the facts underlying the present appeal. (R. 178.)

Indeed, the whole fact scenario facing the Illinois Supreme Court is fundamentally unlike that of the case at bar. When Mr. Sager was first contacted by the police, he was in a national forest and told the very plausible story of having become separated from his campsite and vehicle. At the outset of the illegal detention, the Mississippi authorities had no indication - and could find none - that Mr. Sager was wanted anywhere. No firearm was discovered on Mr. Sager's person, and the knife carried by his co-defendant was a very natural possession of anyone on foot in a national forest. Nor was Mr. Sager read his Miranda rights until after he had incriminated himself, under duress and in reliance on the officers' promise of the medical/psychiatric attention which was, in fact, never forthcoming.

To reiterate the trial court's treatment of White, the court stated that the opinion:

> "held that a confession to a 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. *Nether the arresting 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).

(R. 167), White, at 512 N.E. 2d *689.* The trial court's point is

that in Gabbard, which the Illinois Supreme Court viewed as consistent with White, it was not necessary to suppress evidence where the arresting and interrogating officers were not acting as an organic entity with respect to the suspect and the crime with which he was eventually charged.

The trial court failed, however, to point out that while Gabbard's general holding and that of White may be consistent (White, at 512 N.E.2d 689), the cases ended in diametrically opposed evidentiary rulings. That is, the challenged evidence in Gabbard was judged admissible, while the evidence in White was ruled inadmissible. Why the opposite results? "(I)n Gabbard, the connection between the arrest and the confession was attenuated by intervening factors, the defendant's confrontation with a preexisting sketch of the man suspected of the robbery, an intervening circumstance are not present here." White, at 512 N.E.2d 690.

As Mr. Sager's defense pointed out in its Second Motion for Rehearing of Motion to Suppress and Second Motion to Suppress (Second Motion):

> (I)n White, the Illinois Supreme Court noted that there would be few instances in which a police agency making an illegal arrest would do so based on the "off chance ***that*** *the* officer ***for*** *another* ***police force*** *investigating a different crime* might later interrogate the suspect and obtain a confession" (emphasis added). In the case at bar, the testimony reflects that the very purpose of continuing the incarceration of the defendant, already found to have been illegal in nature, was to provide an officer from another police force investigating a different crime to interrogate the suspect in the hopes that a confession might be obtained.

(R. 535), citing White, at 512 N.E.2d 689-690.

As we have seen, there was no intervening circumstance to fray or attenuate the tie between Mr. Sager's incriminating statements and his illegal arrest/detention. As we have also seen, in Gabbard there were more intervening circumstances than just the sketch. *E.g.*, the suspect in Gabbard was confronted with a driver license from the scene of his crimes, and he was identified in a lineup. The significance of these elements is this: the facts of Mr. Sager's situation are distinguishable from those of Gabbard with respect to one of Brown v. Illinois' three significant factors **for** ascertaining a causal relation between an illegal arrest and an inadmissible confession (or other fruit of the poisonous tree). Exposure of this distinction illuminates the crux **of** the trial court's error in its interpretation and reliance on Gabbard and Brown v. Illinois.

The defense's Second Motion concisely summed up the significance of the trial court's failure to take into account the vitally important element of intervening or attenuating circumstances *vel non:*

> (T)here has been no finding in the instant cause, nor has the State ever argued the existence of, any attenuating factor that would suggest that the so-called confessions obtained from Defendant Sager were anything other than the product of his illegal detention. The burden of proving attenuation between an illegal arrest and a subsequent confession, sufficient *to render* ***the confession*** *admissible*,rests upon the prosecution. The existence of any attenuating circumstance, viewed from the perspective of the accused, has never been posited by the State.

(R. *535.)*

In this case, the trial court properly acknowledged in its

Order Denying Defendant's Motion to Suppress that the detention of Mr. Sager in Mississippi, beginning on the morning of January 9, 1992, after he and his co-defendant had gotten a meal and change of clothes and spent the night: in the jail facility, was illegal. (R. **165-166.**)

In Talley v. State, 581 So. 2d 635 (Fla. 2d DCA 1991), the Second District ruled that once a Fourth Amendment: violation has been established, a presumption of illegality attaches to a subsequent confession, shifting the burden to the prosecution to demonstrate by competent evidence that the illegal search was not the legal cause of the defendant's self-incrimination. The logic of Talley is equally compelling whether the initial illegality was a an illegal search or, as in Mr. Sager's case, an unwarranted detention. The Talley court also noted that the taint attaching to the confession was not necessarily remedied by properly administered Miranda warnings.

The prosecution in the instant case argued that there exists an intervening factor that erases the initial illegality on the part of law enforcement. Where, as here, such an alleged factor consists of conduct by the defendant - ***sub*** *judice,* Mr. Sager's self-incriminating statements - then, in the words of a carefully reasoned federal decision addressing the issue, the defendant's act must be determined by his or her free will, and must take place in a situation that is "devoid of coercion." United States v. Scios, 590 F.2d 956, 960 (D.C. Cir. 1978), citing Wong Sun v. United States, 83 S. Ct. 407 (1963).

Put differently, even if evidence of a proper notification of a defendant's Miranda rights is convincing, so that when the defendant spoke, he or she did so "voluntarily," such so-called voluntariness satisfies only the threshold requirements of Fourth Amendment inquiry. At that point, one must ask whether the initial illegality resulted in a lingering, disabling psychological impact on the defendant. If it did, the ostensible voluntariness may well be illusory, as it surely is here. See, State v. Stevens, 574 So. 2d 197 (Fla. 1st DCA 1991).

ARGUMENT III

THE TRIAL JUDGE ERRED BY EXCLUDING PROFFERED HEARSAY TESTIMONY OF STATEMENTS MADE BY MR. SAGER'S CO-DEFENDANT; THE PROFFERED TESTIMONY WAS EXCULPATORY AS TO MR. SAGER AND WAS ADMISSIBLE UNDER THE HEARSAY EXCEPTION CODIFIED IN §§ 90.802 AND 90.804, FLA. STAT.

Section 90.804 of the Florida Evidence Code addresses four hearsay exceptions[3] that, with qualifications, may be invoked when the declarant is unavailable for cross examination. The component of provision (2) that applies *sub judice* states:

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

[3]Former testimony, statement under belief of impending death, statement against interest and statement of personal or family history.

§ 90.804(2)(c), Fla. Stat.[4]

Mr. Sager's co-defendant, Donald Voorhees, was protected by the privilege against self-incrimination secured by the Florida and United States Constitutions (Art. I, § 9, Fla. Const.; Amend. V, U.S. Const.). According to the applicable case law, this circumstance brings Donald Voorhees under the purview of the "unavailability" classification defined in § 90.804(1)(a), Fla. Stat., *i.e.*: "Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of his statement . . ." Department of HRS v. Bennett, 416 So. 2d 1233, 1224 (Fla. 3d DCA 1982); Brinson v. State, 382 So. 2d 322, 324 (Fla. 2d DCA 1979).

Consequently, since Donald Voorhees' statement was a statement tending to expose the declarant to criminal liability, it was admissible as *a statement offered to exculpate* Mr. Sager, providing that its trustworthiness was corroborated. To simplify, in order to be admissible, Donald Voorhees's statements would have to satisfy

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[4]Prior to 1990, the provision contained a final sentence: "A statement or confession which is offered against the accused in a criminal action, and which is made by a co-defendant or other person implicating both himself and the accused, is not within this exception." The Legislature amended the subsection by deleting the final sentence, the amended version taking effect in cases pending or filed on or after October 1, 1990. The final sentence appeared for the last time in § 90.804(2)(c), Fla. Stat. (1989); it disappeared in § 90.804(2)(c), Fla. Stat. (Supp. 1990). The change does not affect the arguments in this brief.

three conditions. (i) Donald Voorhees was unavailable. (ii) The statements tended to expose Donald Voorhees to criminal liability. (iii) The statements were corroborated as trustworthy.

Donald Voorhees was protected by the privilege against self-incrimination, rendering him effectively unavailable. Statements that he, not Mr. Sager, committed the homicide exposed Donald Voorhees to the most serious criminal liability. Finally, corroboration was not an issue for the trial court. The state had sufficient evidence of Donald Voorhees' involvement in the same homicide for which Mr. Sager was prosecuted to seek and obtain Donald Voorhees' conviction and death sentence. So, the trial court's decision to exclude the statements at issue turned on its perception that they were not sufficiently exculpatory with respect to Mr. Sager.

The trial court based its decision to exclude the evidence on an excessively strict interpretation of Section 90.804(2)(c): "For that statement by Mr. Voorhees to come in, the statement is going to have to be exculpatory as to Mr. Sager, not just lessen his involvement, and I do not view it as being exculpatory as to Mr. Sager. It may certainly lessen his involvement, but I'm still going to stick by the ruling, it doesn't come in. So we have got the record now." (T. 427-428.)

Opinions construing the standard set forth in the last sentence of Section 90.804(2)(c) concentrate on the corroboration of the trustworthiness of the statement, which is not the issue in the trial careful review of the opinions cited by the trial

court took an unreasonably narrow approach to the interpretation and application of the concept of "exculpatory" statements as presented in the statute.

Woodard v. State, 579 So. 2d 875 (Fla. 1st DCA 1991), grew out of a shoplifting incident in Duval County. A security guard observed three women enter a department store and saw one of them, Janice Harris, putting items into a shopping bag she obtained from behind a register. She then proceeded to place individual items of merchandise into the shopping bag. Each time an item was put into the bag, John Woodard stood directly in front of Janice Harris, the woman appropriating the item. Woodard, at 579 So. 2d 876. Then the bag was given to John Woodard, and he along with the three women left the store. When the security officer confronted John Woodard and identified herself to him, he attempted to run. John Woodard and Janice Harris were apprehended and returned to the store, where they were questioned by a deputy sheriff,

At trial, during cross examination of the deputy sheriff, defense counsel proffered a statement by Janice Harris admitting that she took all the stolen items, and stating that John Woodard was not involved in the crime. When Janice Harris pleaded guilty to grand theft, however, she contradicted the exculpatory declaration in a sworn statement in connection with the plea. In the sworn statement, Janice Harris asserted both her own culpability, and that of John Woodard. For his part, John Woodard testified that when he was given the shopping bag by Janice Harris, he had no idea that it contained stolen merchandise. Woodard, at 579 So. 2d 876.

The trial judge **applied** the 1989 version of Section 90.804(2)(c), which is identical in all relevant respects to the provision applicable in this case. The court ruled that the preferred statement by Janice Harris was not sufficiently corroborated as to trustworthiness, and excluded it. The First District affirmed. The pertinence for this appeal is not the resolution of the corroboration issue, but the fact: that neither the trial nor the appellate court had any difficulty in grasping the exculpatory nature of the proffered statement.

Yet it can hardly be said that it was absolutely, *indubitably* exculpatory, as would be required by the trial court in Mr. Sager's case. In the first place, the proffered testimony was contradicted by the sworn statement given **in** conjunction with Janice Harris's plea. Moreover, it is conceivable that even if Janice Harris proffered the truth on the witness stand, yet lied **while** pleading guilty (so that as far as she knew, John Woodard did not know what was in the bag), John Woodard might have had independent knowledge that **the** shopping bag contained stolen goods. Clearly, there is a fundamental difference in the First District's understanding of the term "exculpate" as used in the statute, and that of the trial court below.

In Walker **v.** State, 483 So. 2d 791 (Fla. 1st DCA 1986), review denied, 492 So. 2d 1336, the First District upheld a Leon County trial court's exclusion of an exculpatory letter in a sex murder case. After the defendant, Clifford Walker, was in custody, a schoolmate of the victim received an anonymous letter threatening,

"I am going to kill you like I killed Millicent on FAMU campus." According to the appellate court, the letter's recipient "had no connection with this case" and "(i)t is clear that Walker could not have authored the letter." Walker, at 483 So. 2d 795.

The letter was properly excluded under Section 90.804(2)(c), on grounds of non-corroboration for trustworthiness, but, again, the relevance to the present appeal lies in the fact that neither trial nor appellate court had any difficulty recognizing the exculpatory nature of the letter. It was exculpatory, yet could hardly hope to meet the unreasonably strict test of the trial court in Mr. Sager's case, if only because the circumstances surrounding the anonymous letter fail to meet the test that "a person in the declarant's position would not have made the statement unless he believed it to be true." § 90.804(2)*(c)*, Fla. Stat.

The letter's content, non-corroboration aside, certainly would not satisfy the requirement of being utterly, comprehensively exculpatory, as insisted on by the trial court in Mr. Sager's case. Yet neither the trial judge nor the First District had any difficulty treating it as exculpatory based on a reasonable interpretation of the statute.

In the trial of Mr. Sager's co-defendant, the trial court explicitly relied (T. 526) on an opinion that, as will be demonstrated below, does not support the state *sub judice*. That decision, Denny v. State, 617 So. 2d 323 (Fla. 4th DCA 1993), grew out of another murder, and involved the exclusion of hearsay

testimony concerning statements made by separately tried co-defendants.

The statements at issue, which are not reproduced in the opinion, were excluded on two grounds. First, the trial court ruled, and the appellate court affirmed, that the statements lacked sufficient corroboration as to trustworthiness to qualify under the hearsay exception provided by Section 90.804(2)(c). Secondly, "the trial court also questioned whether or not the codefendants' statements were exculpatory at all in that they clearly implicated Denny in these crimes." Denny, at 617 So. 2d 325.

ARGUMENT IV

EXCLUSION DURING THE GUILT PHASE OF THE EXCULPATORY STATEMENT OF TRUSTEE BENNIE EUGENE HUMPHREY WAS HARMFUL, REVERSIBLE ERROR; IT LED TO MR. SAGER'S CONVICTION WHICH IN **TURN** CORRUPTED THE JURY'S DELIBERATIONS DURING THE PENALTY PHASE BY ANTICIPATORILY "SETTLING" THE **ISSUE** OF HIS GUILT

To reiterate the statement made by trustee Bennie Eugene Humphrey which, in Mr, Sager's view, sheds critical light on the nature of the wounds incurred by the victim in this case:

> I then asked Voorhees what happened? He said that he and Sager had got with a fellow and had been drinking and wound up at the man's place. Voorhees said that he had been drinking pretty heavy and that he passed out on the couch. He said that Sager and this other fellow got into a fight and it woke him up. He said Sager had beat: him up pretty bad and was still beating on the fellow and that he went and pulled Sager off him. Voorhees said the fellow's face was all beat in and the fellow kept on moaning and making a racket. I think he said that they tied the man up and the man kept making a racket and that they got scared and Voorhees said, I caught him by the hair of the head and cut his throat. Voorhees said he was still making a noise so then I ran up to him and jabbed him in the neck.

(Ct. Exh. #3.)

This putative evidence was absolutely vital to Mr. Sager's defense, It is the only available positive indication countering the questionable evidence that Mr. Sager delivered what is fairly assumed to be the fatal incision. Without it, the jury was led inexorably to return the verdict it returned.

Bennie Eugene Humphrey's report of Donald Voorhees's statement, in conjunction with Detective Lawless's interview of Donald Voorhees, set against a backdrop of expert medical testimony heard at the guilt phase, would have constituted the foundation for a finding of reasonable doubt as to Mr. Sager's culpability. Yet the trial court, which also presided over Donald Voorhees's separate trial, which also resulted in a conviction and sentence of death (in Case No. 83,380, presently on appeal before this Court), refused to admit the crucial evidence at issue. By utilizing an unreasonably narrow and strict interpretation of § 90.804(2)(c), Fla. Stat., the trial court ignored the admonishment of ~~Guzman v.~~ State, 644 *So.* 2d 966, 1000 (Fla. 1994) that, "trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant: is on trial for his or her life." (See below for further discussion of Guzman.)

Had the defendants not been severed in this case (albeit on motion of the defense), the prosecution's task would have been to convince the jury that one and only one of the defendants committed the actual homicide. The evidence of Bennie Humphrey, in that circumstance, would have been vital to the state's case, and the

prosecuting attorney would rightly have exerted every effort to have it admitted. It would be the key to ensuring that a true verdict was returned. In Mr. Sager's severed trial, however, the state exerted itself to keep the testimony out during the guilt phase. Why? For the same reason that the prosecution would have wanted it in had the trial involved both defendants. *Because the testimony imparted essential information to a jury seeking the truth.* In the separate trial, however, ferreting out the truth would not have served the state's narrow interest of securing Mr. Sager's conviction, *despite the inconvenient fact that the available evidence indicates that the homicide* was ***not*** *committed by* ***Mr.*** *Sager, but* ***by*** *his* ***co-defendant.***

What the prosecution managed to pull off in the case of these co-defendants was to convict each of them on the basis of inculpatory statements while pushing successfully for the exclusion of exculpatory evidence. This denied Mr, Sager his right to a fair trial and to due process of law cognizable by the Florida and United States Constitutions, and mandates a new trial.

ARGUMENT V

DR. HANSEN'S EXPERT TESTIMONY AS TO THE CAUSE OF DEATH PROVIDES THE EXPLANATORY THREAD WHICH WOULD HAVE ESTABLISHED REASONABLE DOUBT ABOUT MR. SAGER'S GUILT, HAD IT BEEN CONSIDERED BY A JURY THAT WAS AWARE OF THE EXCULPATORY EVIDENCE ORIGINATING FROM MR. SAGER'S CO-DEFENDANT AND TRUSTEE BENNIE EUGENE HUMPHREY

The jury in the guilt phase was limited to a consideration of self-incriminating statements by Mr. Sager, made under the impaired capacity and extreme duress first of being effectively refused desperately needed psychiatric attention (the statement to Sheriff

Farrior and then of having already incriminating himself (the statement to Detective Lawless). In conjunction with this evidence, the jury was presented a confused depiction of the homicide. What was clear was that Mr. Sager had been present and since he was the defendant on trial, the jury predictably found him guilty of the crime.

Had the jury been able to assess the medical evidence provided by Dr. Hansen (T,463-505) in the light of the excluded exculpatory evidence originating from Donald Voorhees (Ct. Exh. #1) and trustee Bennie Eugene Humphrey (Ct. Exh. #3), a reasonable doubt in the minds of at least some jurors would very likely have been raised. Cumulatively, that evidence indicated that Mr. Sager did not tie up or participate in tying up the victim, and that what the jury was justified in seeing as the definitive, deliberated attack - the slashing of the victim's throat - was admittedly done by Donald Voorhees. These evidentiary indications would have severely weakened both alternative prongs of the state's case-in-chief, *i.e.*, that Mr. Sager engaged in felony murder or in premeditated murder.

Even had the jury uncritically accepted evidence that Mr. Sager participated in beating the victim, they could reasonably have believed that there was no homicidal intent and, indeed, that the beating was not shown beyond a reasonable belief to have resulted in death. The one injury that standing alone would necessarily have caused the victim's death was the slashing incision that severed his windpipe. And in the excluded statements,

these were ascribed to Donald Voorhees, not Mr. Sager. Indications that the victim may have lived for just 10 minutes after his throat was cut show that severing the larynx may be viewed as the likeliest cause of death (T. 490), and it is fair to assume that at least some of the jurors made that connection. This, had it been seen in the light of the excluded testimony, might well have produced reasonable doubt and an acquittal of Mr. Sager. The fractured hyoid, although in itself a very serious medical condition, is consistent with a punch or kick to the neck that was not necessarily fatal.

The trial court's exclusion of the evidence at issue rendered useless to the defense medical evidence which would otherwise have been a key to the establishing of reasonable doubt. The court abused its discretion in this respect, a conclusion supported by this Court's ruling in Guzman v. State, 644 So. 2d 966, 1000 (Fla. 1994):

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

Mr. Sager was treated, if anything, even more unfairly than was Guzman, because the testimony he sought to introduce was not just limited by the trial court, it was out and out excluded. This error on the part of the judge constitutes a violation of Mr. Sager's right to a fair trial under the Sixth and Fourteenth Amendments, and requires a new trial with the evidence at issue

admitted in the guilt phase,

In its discussion of the Federal Rule of Evidence that: mirrors Florida's analogous rule on the admissions of hearsay statements against interest, the United States Supreme Court reasoned: "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory Statements unless they believe them to be true." Williamson v. United States, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 476, 482 (1994).

Moreover, if it is well-founded to state, as the United States Supreme did in Lee v. Illinois, 476 U.S. 530, 541, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), that a co-defendant's statements that seek to inculpate a defendant "are less credible than ordinary hearsay statements," then it seems reasonable that a co-defendant's exculpatory statements should be assigned *more* credibility than ordinary hearsay. At the very least, the jury should have been made aware during the guilt phase that his co-defendant had on at least two recorded occasions taken on all the blame both for tying up the victim, and for delivering the fatal incision wound.

ARGUMENT VI

THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT MR. SAGER'S CONVICTION OF PREMEDITATED MURDER

This Court held in a recent opinion that if "the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be obtained." (Citation omitted.) Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). The evidence in Mr. Sager's trial indicated

anything but premeditation on his part. What was done to the victim, as tragic as it was, was done in a desperate, drunken attempt to quiet him down so that neighbors would not be alerted to a violent altercation. The statements made to the authorities by both co-defendants show that this, not premeditated homicide, motivated the violence incurred by the victim.

It might be argued that in the act of slashing the victim's throat, Donald Voorhees demonstrated an instantaneous premeditation sufficient to support his conviction. But that very evidence, which was used effectively in Donald Voorhees's separate trial, was kept from the jury in Mr. Sager's trial, leaving the impression with the jurors that *someone* must have intended to commit murder, and that the someone in question must be the defendant on trial.

Donald Voorhees hoped that they had left the victim alive (Ct. Exh. #1, p. 17) and there is no evidence that Mr. Sager thought otherwise, Neither tried to make sure he was deceased before leaving. Florida courts have consistently recognized that the actions of a defendant prior to and after the crime are pertinent to the issue of premeditation. Dupree v. State, 615 So. 2d **713,** 715 (Fla. 1st DCA 1993); Smith v. State, 568 So. 2d 965 (Fla. 1st DCA 1990). In the case at bar, neither the co-defendants' desire to quiet the victim down before the homicide nor their failure to make an attempt to "finish him off" before they fled, manifests premeditation to commit murder.

As to the technical requirements of a finding of premeditation, as this Court has ruled, first degree murder

requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986). In Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983), the Third District similarly found that even where a victim was chased and stabbed to death, a finding of premeditation had to be reversed because the evidence was "equally consistent with the hypothesis that the intent of the defendant was no more than an intent to kill without any premeditated design." Tien Wang, at 426 So. 2d 1006. Surely, in this case, the evidence is consistent with an hypothesis of non-premeditation, especially with respect to Mr. Sager's actions.

The specific non-premeditation alternative hypothesis available in this case is that the victim died as a result of the drunken rage of a person or persons trying to quiet him down. On the basis of that reasonable hypothesis, a verdict of second degree murder is the most serious offense supported by the evidence. Thus, just as the Third District did in Tien Wang, this Court should, pursuant to § 924.34, Fla. Stat., reverse and remand with instructions to reduce the conviction to a conviction for second degree murder. See, Rogers v. State, 660 So, 2d 237 (1995).

ARGUMENT VII

BECAUSE THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE VICTIM WAS MURDERED DURING THE COMMISSION OF A ROBBERY, IT WAS REVERSIBLE ERROR FOR THE COURT TO MAKE A FINDING THAT, AND TO INSTRUCT THE JURY THAT, THE HOMICIDE TOOK PLACE DURING A ROBBERY

Neither Mr. Sager nor his co-defendant were ever charged with robbery. Yet in support of its imposition of the death penalty, the

court determined, by way of aggravating circumstances:

> 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 the 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 also have 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 and the defendant's (sic) 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.

(R. 733-734.)

§ 812.13(1), Fla. Stat., defines robbery as "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault or putting in fear."

Although the trial court's findings describe violence and a taking, they fail to state that the violence was employed in order

to effect a robbery. Force was initially used pursuant to a dispute, then in a subsequent attempt to make the victim quiet down. The actual taking was in the nature of an afterthought, and was merely incidental to the killing. The evidence certainly does not support the contention that the victim was killed in order to rob him. Moreover, the taking of the victim's money or other property either certainly did or may well have occurred after his death.

In Clark v. State, 609 So. 2d 513, 515 (Fla. 1992), the Court disapproved a trial court's finding in a case strikingly like the case at bar.

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

In Mr. Sager's situation, as in that of the defendant's in Clark, there was no evidence that taking the victim's property and money was planned before the fact. The robbery was strictly incidental to the killing. The homicide, in turn, resulted not from a motive of greed or covetousness, but from a senseless, drunken altercation that got tragically out of hand. In Mr. Sager's case, as in Clark, the state failed to prove the existence of the aggravating circumstance, namely, that the homicide was committed "while the defendant was engaged in the commission of a robbery.'' Consequently, it was error for the trial judge to enter a finding

acknowledging the existence of the aggravating circumstance. It was likewise error to instruct the jury as to the aggravating circumstance. The case should be reversed and remanded with instructions to omit all references to the challenged aggravating circumstance.

Predating Clark by almost a decade, Parker v. State, 458 So. 2d 750 (Fla. 1984), had already established the importance in Florida of the timing of a taking of property vis-a-vis a murder which, on its face, was originally motivated by a desire to steal. When the robbery takes place after the homicide, as it may most intelligently be said to have been done in the case at bar, and there is no evidence of a "premeditated" robbery, the state has a heavy burden of establishing the taking as an aggravating factor.

> Although Parker admitted taking the victim's necklace and ring from her body after her death, the evidence fails to show beyond a reasonable doubt that the murder was motivated by any desire for these objects. . . . This evidence does not satisfy the standard of proof beyond a reasonable doubt on which the finding of an aggravating factor must be based. Parker, at 458 So. 2d 754. (Citation omitted.)

In the case at bar, as in Parker, there is evidence on the record that Mr. Sager or his co-defendant took money and property from the victim. Here, even more persuasively than in Parker, there is absolutely no credible evidence on that record that the victim's homicide was motivated by a desire for stolen items. The standard of proof which must be satisfied in order to establish an aggravating circumstance in this type of case - proof beyond a reasonable doubt - is not even approached, much less met.

This procedural situation calls for a reversal and, on remand,

appropriate directions to the trial court. These include directions as to the finding of the aggravating circumstance, *i.e.*, that the homicide was committed "while the defendant was engaged in the commission of a robbery." With respect to the jury instructions, the court should be directed that it is not to instruct the jury that the robbery is an aggravating circumstance that may be taken into account in reaching their decision.

In a more recent opinion Knowles v. State, 632 So. **2d 62** (Fla. 1993), the Court considered an appeal from a conviction where, as in Mr. Sager's case, the suspect fled in the victim's vehicle after the victim was killed. The Court held that since there **was** "no evidence that Knowles intended to take the truck from his father prior to the shooting, or that he shot his father in order to take the truck, the aggravating factor of (murder) committed during the course of a robbery" would be struck down. Knowles, at *632* So. 2d **66.**

The logic of Knowles applies to the instant appeal. There is absolutely no evidence on the record that either Mr. Sager or his co-defendant planned to steal the victim's car prior to the homicide, As in Knowles, the vehicle was seen as an after-the-fact means of escape, and its taking cannot reasonably be viewed as the before-the-fact motivation for the attack on the victim. The point was explicitly made in Scull v. State, 533 So. 2d 1137 (Fla. 1988), that taking a victim's car in order to facilitate escape cannot prove that pecuniary gain was the motive for killing the victim. Under these circumstances, the aggravating circumstance at issue

cannot be permitted to stand.

This Court has followed another, related line of reasoning to reach the same result in this type case. Where the known facts support alternative conclusions inconsistent with an aggravating factor, that factor has not been established. This was the logic of Peavy v. State, 442 So. 2d 200 (Fla. 19831, and it applies *sub judice*.

In Eutzy v. State, 458 So. 2d 755, 758 (Fla. 19841, the Court reasoned that "(i)n the absence of any material evidence in the record which would unequivocally support a finding that a robbery occurred, [this Court] must disallow this aggravating factor." Eutzy is relevant in the case at bar, but there is no unequivocal evidence that a robbery occurred while the victim was alive, or that robbery was the motive behind killing the victim.

A 1982 decision, Simmons v. State, 419 So. 2d 316 (Fla. 19821, ratified the general thrust of the opinions cited above. In Simmons, the Court held that the sole way that proof beyond a reasonable doubt that a homicide was motivated by pecuniary considerations may be established is if the evidence is inconsistent with any reasonable hypothesis that excludes the aggravating circumstance. That holding applies to the case at bar, and mandates an outcome favorable to Mr. Sager.

Moody v. State, 418 *So.* **2d** 989 (Fla. 1982), another 1982 decision, is especially interesting *sub judice*. In Moody, the Court refused to uphold a trial court determination that where a defendant set the victim's trailer afire after killing him, the

defendant was guilty of a capital felony based on aggravating circumstances. In the case at bar, there was competent evidence that an attempt at arson may have taken place before the co-defendants fled the victim's premises. Yet no count of arson or attempted arson appears in indictment. This may reasonably be seen as an implicit recognition on the part of the state that the fact that an attempted arson taking place after the homicide is irrelevant as far as aggravating circumstances are concerned.

The trial court erred in its treatment of the aggravating circumstance issue in question in two ways. First, the circumstance never should have been entered as a finding by the judge. Second, it should not have been submitted to the jury. The court's error worked violations of Mr. Sager's rights under Amendments VI, VIII and XIV to the United States Constitution, and Article I, Sections 2, 9, 16, 17 and 23 of the Florida Constitution, In concurrence with Omelus v. State, 584 So. 2d 563 (Fla. 1991), Boniface v. State, 626 So. 2d 1310 (Fla. 1993), White v. State, 616 So. 2d 21 (Fla. 1993) and Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), Mr, Sager's death sentence must be disallowed. It should be vacated in favor of a life sentence, or the matter should be remanded with a new sentencing hearing conducted in front of a new jury, which must not be instructed with respect to the aggravating factor of murder committed during the course of a robbery.

ARGUMENT VIII

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE AGGRAVATING FACTORS OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL HOMICIDE; ACCORDINGLY, IT WAS REVERSIBLE ERROR FOR THE COURT TO MAKE A FINDING THAT THOSE FACTORS EXISTED, AND TO IMPROPERLY INSTRUCT THE PENALTY PHASE JURY WITH RESPECT TO THEM

(1) Précis of the Trial Court's Position

In the trial court's Findings in Support of Sentence of Death, the following aggravating circumstances were adduced pursuant to s **921.141,** Fla. Stat.: **(1)** "The capital felony of which the defendant was convicted was committed while the defendant was **engaged** in the commission of a robbery"; (2) "The capital felony of which the defendant was convicted was especially heinous, atrocious or cruel" [citing State v. Dixon, **283 So.** 2d **1** (Fla. 1973), Perry v. State, **522 So, 2d** 817 (Fla. 1988), Troedel v. State, **462** So. 2d **392** (Fla. 1982), Breedlove **v.** State, 413 So. **2d** 1 (Fla. 1982), 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)]. (R. 733-735.)

As to mitigating factors, the trial court found: (1) "(T)he defendant has established that he was under the influence of an extreme mental or emotional disturbance at the time of the offense . . . (although) (u)nder the circumstances, it is difficult for the Court to logically accord much weight to this particular circumstance even though it has been found to exist"; **(2)** "Judged by the standard of 'reasonable certainty' and with the understanding that 'insanity' is not the test when considering this mitigating circumstance (substantially impaired capacity of a

defendant to appreciate the criminality of his conduct and to conform his behavior to the requirements of law), the Court determines that the defense has only marginally succeeded in this regard"; (3) "(T)he Court assigns very little weight to . . . the defendant's relative youth"; (4) "(I)t is difficult for the Court to accept that the defendant's participation was relatively minor"; (5) "The defense also asserts that the evidence demonstrates that the defendant acted under extreme duress or the substantial domination of another. . . . Judged by the standard of 'reasonable certainty', the Court finds that this mitigating circumstance has not been established." (R. 735-738.)

In addition to Florida Supreme Court cases, the trial court cited Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (19821, for the proposition that sentencing Mr. Sager to death did not violate his constitutional rights. The trial court ruled that the facts showed a reckless indifference to human life, justifying a death sentence under Enmund.

Based on its analysis of the Florida cases and of Enmund, the trial court ruled:

> The Court, having considered the foregoing facts and, the Court having determined that there exists a reasonable and rational basis upon which the jury based its eight to four (8-4) recommendation for the imposition of the death penalty, a recommendation that: must be accorded great weight by the Court, the Court hereby determines that there are sufficient aggravating circumstances in existence to justify the imposition of the sentence of death and there are insufficient mitigating circumstances to outweigh the aggravating circumstances that have been established.

(R. 739.)

(2) The Court's Use of the So-called "Reasonable Certainty" Test

The trial court ostensibly determined that the defense did not establish the mitigating factor of Mr. Sager's acting under the extreme duress of not being given attention for his psychiatrically impaired capacity or the substantial domination of Donald Voorhees, the trial court faulted the defense for failure to meet what it called the "reasonable certainty" test. (R. 738.) The prima facie problem with this test is that, outside of the trial judge's courtroom, it does not exist.

This Court ruled in Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995), that a mitigator (such as impaired capacity, extreme duress or substantial domination) "is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence." True, the Florida Standard Jury Instructions in Criminal Cases state that a jury may find that a mitigating factor exists if the jury is "reasonably convinced" that it does. But the primacy of Ferrell determines that a jury *cannot* be reasonably convinced of the existence of a mitigating factor unless it exists by a preponderance of the evidence. Conversely, where a mitigating circumstance exists by the greater weight of evidence, a reasonable jury must be reasonably convinced that it does.

To be sure, the trial court explicitly acknowledged the evidence of extreme duress and substantial domination by another person. Moreover, the court implicitly acknowledged the existence of the psychiatric impairment that resulted in the duress. Yet the

court employed its own standard of so-called "reasonable certainty" to reject the statutory mitigating circumstances. Mr. Sager contends that the court's ambiguous standard could reasonably be supposed to have imposed an impermissibly heavy burden on the defense, that is a burden heavier than a preponderance of evidence.

(3) Distinguishability of Florida Opinions Cited Below

With respect to the trial court's finding of an "especially heinous, atrocious or cruel" offense, the opinions of this Court addressing those categories cited by the trial court are readily distinguishable from the offense for which Mr. Sager was convicted. In State v. Dixon, 283 So. 2d 1 (Fla. 1973), heard along with several companion cases, this Court reviewed convictions involving the validity of Florida's death penalty in the wake of the recent United States Supreme Court decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Furman struck down on Eighth and Fourteenth Amendment cruel and unusual punishment grounds the Georgia and Texas death penalty statutes. Furman, a five to four decision, was followed immediately by the Court's unanimous opinion in Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). Oral arguments in Furman were heard one day prior to those in Moore; both cases were decided on the same day.

Following Furman and Moore, the United States Supreme Court invalidated over 100 death sentences imposed under the death penalty statutes of dozens of States, including Florida's. Consequently, this Court followed the United States Supreme Court's

unequivocal lead, and in 1972 vacated all the death sentences which came before it which were imposed under Florida's death sentence statute as it existed under Furman. See Anderson v. State, 267 So. 2d 8 (Fla. 1972); In re Baker, 267 So. 2d 331 (Fla. 1972); Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972).

The Florida Legislature acted with dispatch. Still in 1972, the lawmakers replaced the old death penalty statute which failed to pass muster under Purman. It was the task of this Court in Dixon, above, and its companion cases, to review the constitutionality of the post-Furman incarnation of Florida's death penalty statute.

Under the old statute, a guilty verdict in a capital case mandated the imposition of death unless a majority of the jury recommended mercy, with that recommendation mandating a life sentence. § 921.141, Fla. Stat. (1971). The new statute, which the Dixon Court approved, provided for a separate mini-trial on sentencing once a capital conviction is obtained, At the sentencing phase, the jury provides the trial judge with an advisory recommendation. The judge, who is not bound by the jury's advice, makes an independent determination of the proper sentence, utilizing mitigating and aggravating circumstances inserted into the new version of the statute by the Legislature. § 921.141, Fla. Stat. (Supp. 1972). The imposition of a death sentence must be accompanied by written reasons, and the defendant; has an automatic appeal to this Court, with respect both to the death sentence, and to the underlying conviction itself.

As noted, the Dixon Court gave its imprimatur to the new statute, including the aggravating factor of an "especially heinous, atrocious or cruel" offense. But it is misleading for the trial court *sub judice* to cite Dixon in support of its finding that the facts of Mr. Sager's case belong to that category, because absolutely no facts were reported in Dixon or its companion cases with which the facts of Mr. Sager's case could be compared. The opinion was essentially an abstract constitutional review of the new death sentence statute, and cannot properly be used, as the court below used it, to support a judge's finding of an especially heinous crime.

Reliance by the trial court on Henry v. State, 328 So. 2d 430 (Fla. 1976), is as misplaced as is the reliance on Dixon, but for different reasons. In Henry, as opposed to Mr. Sager's case, the defendant had a long history of criminal violence. Moreover, he killed a police officer with the officer's own weapon by repeatedly shooting the victim as he kneeled and sought mercy. Henry, at 328 So. 2d 431. The Henry Court agreed with the trial judge that "(t)he facts of this case in themselves are atrocious, horrible and cruel almost beyond belief. The defendant has clearly demonstrated that he cannot live in a civilized society in a trustworthy fashion and shortly after his release from prison committed the act charged in this case. The act herein was for pecuniary gain and for no other motive other than perhaps to eliminate a witness." Id.

The facts at bar are immediately and strikingly different from those in Henry. Herein, there is no history of Mr. Sager being

accused of or punished for violent offenses. The killing was not an act of premeditated, heartless cruelty. Rather, it resulted from a tragic escalation of an explosive situation among men who were drunk and under heavy stress including, in Mr. Sager's case, intense psychological strain. The death did not occur because of or in order to facilitate the alleged robbery, which happened spontaneously as the victim was allegedly being beaten. Far from trying to eliminate a witness, the defendants did not even know whether the victim was dead or alive when they fled the premises in what must reasonably be deemed a drunken panic.

The trial court's citation of and reliance on Mines v. State, 390 So. 2d 332 (Fla. 1980), is puzzling, to say the least. The question of whether the charged offense was "especially heinous, atrocious or cruel" was simply not an issue addressed by the Mines Court. On the contrary, Mines is an opinion primarily concerned with significantly diminished capacity as a mitigating factor.

Mines overturned the underlying death sentence, which had been imposed by a trial judge who ignored for mitigation purposes clear evidence that the defendant suffered from paranoid schizophrenia. This is the very same mental disorder suffered by Daniel M'Naghten, the 19th Century killer of Sir Robert Peel, whose acquittal on grounds of the presence of an "insane delusion" initiated the modern debate on diminished or negated psychiatric/psychological capacity. M'Naghten's Case, 10 C. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).

M'Naghten's Case established, inter *alia*, what might be called the "right from wrong" test. It exonerates a defendant who, at the time the crime was committed, was acting under the "partial delusion" of a person not otherwise insane, *i.e.*, controlled by such a "defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." 10 C. & F. 210, 8 Eng. Rep. 722 (H.L. 1843).

Neither the 19th Century seminal opinion on a defendant suffering from paranoid schizophrenia, however, nor the Miles decision which addressed the same general issue, is germane to the trial court's finding that Mr. Sager's alleged crime was "especially heinous, atrocious or cruel," and it was improper for the court to rely on Miles in making that finding.

What the trial court *should* have done with respect to the very significant mental disturbance evidence in this case was totally ignored or mishandled. Since the trial judge determined that Mr. Sager was hospitalized in a Kansas mental health facility for an unspecified mental disorder or problem (albeit assigning "very little weight" to that fact) (R. 737), the court was obliged to follow up by doing precisely what he failed to do: he should have intelligently related this factor to the jurors so that they could utilize his experience and assistance in their deliberation. As has been often recognized by this Court, there exists a highly significant relationship between a defendant's mental condition and his capacity for especially heinous, atrocious or cruel acts as

those terms apply to the conduct of a mentally sound person. See, Amazon v. State, **487 So.** 2d **8** (Fla. **1982);** Miller v. State, **373 So. 2d 882** (Fla. **1979);** Huckaby v. State, **343 So.** 2d 29 (Fla. **1977).**

The trial court is arguably on less shaky ground as far as its reliance on another case is concerned, Breedlove v. State, 413 So. 2d 1 (Fla. 1982), but that decision is nevertheless fatally distinguishable from Mr. Sager's case. The defendant in Breedlove, who unlike Mr. Sager had a record as a violent felon, killed the victim while he was asleep in bed. The Breedlove Court noted the difference between this circumstance and the situations in most felony murders "committed in, for example, a street, a store, or other public place." Breedlove, at 413 So. **2d 9.** Sub *judice*, while the killing took place in the victim's home, no one stealthily entered his home and attacked him in his sleep. Rather, the victim met his alleged assailants in a public bar and asked them to accompany him home, so that he would not have to drive while impaired.

Another circumstance assigned significant weight by the Breedlove Court is also absent in the case at bar. In Breedlove, "there was testimony that the victim suffered considerable pain and did not die immediately." Breedlove, at 413 **So.** 2d **9.** Similar evidence is wholly lacking in the case before this Court. *[See* subparagraph (3), below.]

Troedel v, State, 462 **So.** 2d **392** (Fla. **1984),** a double murder case, is distinguishable from the case at bar because Troedel provides an example of clear-cut torture. The Court upheld the

trial judge's findings that "the bullet wounds in (the first victim's) legs, together with other medial evidence, indicated that the victim was deliberately tormented before being killed," Moreover, "there was testimony that (the second victim) survived the first gunshot wound to his head and was living when shot the second time." Troedel, at 462 So. 2d 398.

Neither Mr. Sager nor his co-defendant have been accused of torturing the victim in this case. And, as opposed to the evidentiary picture in Troedel, the sequence of events leading to the victim's death, not to mention the cause of death itself, is very murky *sub judice.*

Perry v. State, **522 So.** 2d **817** (Fla. 1988), like Troedel, is distinguishable from the offense attributed to Mr. Sager on the basis of its devastating cruelty. "The evidence reflects that Johnny Perry tried and tried again to kill Kathryn Miller. She was brutally beaten in the head and face. She was choked and repeatedly stabbed in the chest and breasts as she attempted to ward off the knife, She died of strangulation associated with stab wounds, comparable, in the medical examiner's testimony, to drowning in her own blood." Perry, at 522 **So. 2d 821.**

The distinction between the horrible facts of Troedel, and those surrounding the tragic demise of the victim sub ***judice,*** is clear. The evidence certainly does not support the conclusion that Mr. Sager or his co-defendant tried repeatedly to murder the victim. There were no repeated stabbings, no strangulation. And there was no evidence of a horrible death such as "drowning in

one's own blood." There are cases which call out for the most severe penalty available, and Troedel is arguably one of those. The case at bar is not.

A brutal rape case, Reed v. State, 560 So. 2d 203 (Fla. 1990), also relied on by the trial judge to support his finding as to an especially heinous offense, provides on the contrary another example of how distinguishable the truly heinous cases are from the case at bar. The defendant in Reed stayed along with a female companion and two children, were homeless and were temporarily taken in by the victim and her husband, a Lutheran minister. The defendant was asked to leave after a week, when the minister discovered drug paraphernalia, although money and other aid was continued for some time. Reed, at 560 So. 2d 204. After relations had been broken, while the minister was out, the defendant returned to the victim's home, where he found her alone.

> Upon first encountering Mrs. Oermann, Reed slapped her and tied her up. He then severely beat her, leaving numerous bruises on her body. Following this, he choked the victim and then raped her. Finally he slashed her throat more than a dozen times. The medical examiner testified that because the stab wounds were made with a serrated-edge knife, they would have taken more time and effort to inflict. Likewise, Reed told (the cell-mate) that he cut the victim's throat 'to keep her from talking,' thus proving the aggravating circumstance of killing to avoid lawful arrest.

Reed, at *560 So.* 2d *207.*

There was, of course, no sexual assault in the case at bar. Nor were there multiple throat slashings with a serrated knife. While the "to keep her from talking" statement goes to a separate aggravating circumstance, it is fair to note that nothing like

silencing a witness was on the minds of Mr. Sager and his co-defendant in this case, as they left the scene in a panic without knowing whether the victim was dead or alive.

None of the cases cited by the trial court in support of the "especially heinous, atrocious or cruel" finding provides the requisite support. They all deal with calculated acts of extreme cruelty, including murders committed in conjunction with torture and rape. In addition, all exhibit a whole range of aggravating circumstances, while the trial court *sub judice* relied inordinately on the weakly substantiated conclusion that Mr. Sager's alleged actions exhibited especially heinous and atrocious cruelty.

(4) The Trial Court Failed to Follow Recent Precedent Established by this Court

The trial court **erred** by its finding that the aggravating factor especially heinous, atrocious or cruel applied to Mr. Sager's actions; it was also error to instruct the jury that such factors, if their existence were supported by the evidence, could be considered in its deliberation during the penalty phase. Analysis of the record in light of controlling precedent recently propounded by this Court establishes those errors as a matter of law.

Before a court may find that even a vile killing meets the Section 921.141 requirements for those aggravating factors, the defendant "must have intended to cause the victim unnecessary and prolonged suffering." Bonifay v. State, **626** So. 2d 1310, 1313 (Fla. 1993); Kearse v. State, 20 F.L.W. S300, 304 (Fla. June 22, 1995). In other words, there must have been a "pitiless or conscienceless

infliction of torture" upon the victim, Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). Moreover, finding the aggravating circumstances requires a specific *intent* to "inflict a high degree pain or otherwise torture" the victim. Stein v. State, *632* So. 2d 1321 (Fla. 1994).

None of these factors are met based on the record before this Court. Nothing in that record supports the contention that the means by which the homicide was effected were intentionally chosen with a mind to "cause unnecessary and prolonged suffering to the victim." Clark v. State, 609 *So,* 2d 513 (Fla. 1993). The facts on the instant record show that, at least after the initial blow or blows to the victim, everything that was done to him, with the possible exception of Donald Voorhees's incision of his throat, was done to keep him quiet, not to torture him. Indeed, in the trial court's order imposing the death sentence, the court surmises that: even the cutting of his throat was done in order to quiet the victim. In this case, as in Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990), the "record is consistent with the hypothesis that (this was) . . . not a crime that was *meant* to be deliberately and extraordinarily painful."

A number of points also need to be made with reference to the victim's *actual* suffering. The evidence showed that the victim was significantly intoxicated at the time of death. (T. 492-493.) Alcohol, a central nervous system depressant, can reasonably be assumed to have lessened the victim's susceptibility to pain. Moreover, as Dr. Hansen's death testimony suggests (T. 488-489),

the victim could have been rendered unconscious when the (probably) fatal throat incision was delivered, he may have been totally "incapable of suffering to the extent contemplated by this aggravating circumstance." Jackson v. State, 451 So. 2d 458, **463** (Fla. 1984).

(5) Enmund **Does** Not Support the Trial Court's Position

The trial court addressed the defense argument that under Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982), Mr. Sager could not be sentenced to death without violating his Eighth and Fourteenth Amendment rights. The trial court ruled to the contrary, finding: "In binding and beating the helpless victim in his own home and in inflicting 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.)

Mr. Saver respectfully submits that the trial court's findings and conclusion lack sufficient record or analytical support to warrant the imposition of death in this case. Specifically: in Enmund, there is not even a hint in the majority opinion of the consideration on which the trial court's application of that opinion relied, namely, the assertion that Mr. Sager "acted with reckless and brutal indifference to human life." (R. 738.)

The facts of Enmund are at first blush more favorable with respect to the defendant therein than are the facts *sub judice* to Mr. Sager. Yet a careful reading of Enmund, and a review of the facts of this case in comparison to that reading, indicate that the

Enmund holding favors Mr. Sager's position, not that of the trial court.

On the morning of April 1, 1975, Jeanette and Sampson Armstrong knocked at the back door of the farmhouse of an elderly couple, Thomas and Eunice Kersey. The Armstrongs asked for water for their supposedly overheated car. When Thomas Kersey exited the back door of his home, he was seized and a handgun was pulled on him. Eunice Kersey heard the commotion, came out of the house with a weapon and was able to fire one shot, wounding Jeanette Armstrong. Sampson Armstrong, and perhaps his wife as well, returned fire, killing both Thomas and Eunice Kersey. Enmund, at 102 S.Ct. 3369-3370. While this tragedy was unfolding, Earl Enmund was sitting in a getaway car approximately 200 yards from the Kersey farmhouse. Enmund, at 102 S.Ct. 3370.

After an investigation which focused on Jeanette Armstrong's mysterious gunshot wound, Both Sampson Armstrong and Earl Enmund were charged with and convicted of two counts of first degree murder and one count of robbery. At a separate sentencing hearing conducted pursuant to § 921.141, Fla. Stat., the jury recommended death for both defendants. The trial judge accepted the recommendation, and both men were sentenced to die. Id.

There were considerable discrepancies concerning the facts of the case among the trial court, the Florida Supreme Court majority opinion, and its minority opinion. For its part, the United States Supreme Court relied on the following reasoning of the Florida Supreme Court: majority, as far as Earl Enmund's knowledge and

participation in the homicides was concerned:

> [T]he only evidence of the degree of is participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet: away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.04(1) (a).

Enmund, at 102 S.Ct. 3371, quoting Enmund v. State, 399 **So. 2d 1362, 1370** (Fla. **1981).**

ARGUMENT IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO SUPPRESS THE TAINTED FRUITS OF THE WARRANTLESS NONCONSENSUAL SEARCH OF MR. SAGER'S DWELLING

(1) The Uncontroverted Testimony of the Chasco Inn Landlady Establishes that a PCSO Witness Misrepresented the Circumstances Surrounding the Search of Room 4

On May 27, 1993, the Public Defender's office filed a motion to suppress, inter *alia*, all evidence obtained pursuant to a search of the premises occupied by Mr, Sager and his co-defendant at the time of the victim's death. (R. 117.) The motion to suppress invoked Mr. Sager's rights and guarantees under the United States and Florida Constitutions, arguing that those constitutional protections were violated by virtue of the fact that the search was conducted without a warrant and without the consent of Mr. Sager or his co-defendant.

In his order denying the motion to suppress, (R. 160-169), the trial judge made the following findings with respect of the search of the Chasco Inn, in New Port Richey, Florida:

> Regarding another issue involved in this case, the search of the room occupied by the defendants at The Chasco Inn, this Court makes some additional findings. Based on information indicating that the defendants were the last individuals seen to be with the deceased prior to the discovery of his body, Pasco detectives went to the Chasco Inn in an effort to locate the defendant. The officer contacted Mrs. Margaret Weiskopf, the owner of the Chasco Inn. Initially, Mrs. Weiskopf looked only at a portion of her books and left the officers with the clear impression that the room in question had been rented for $50.00 per week and the rent was up on January 5, 1992. Acting upon this belief, Pasco detectives waited until January 6, 1992 and then obtained permission from Mrs. Weiskopf to search the room. Subsequently, upon examining her books more closely, Mrs. Weiskopf discovered that one or both of the defendants had actually paid $100.00 and that the room had been booked for two (2) weeks rather than one (1) week. This information was discovered after the officers had made their search of the room in question on January 6, 1992.

(R. **165.)**

On July 1, 1993, the trial court presided over a hearing at which the court considered, *inter alia,* the state's motion to suppress a statement made by Wayne County, Mississippi inmate Benny Eugene Humphrey, R. 315 et *seq.* Mr. Humprhey's statement was exculpatory with respect to Mr. Sager, in that as it reported a statement by Mr. Sager's co-defendant Mr. Voorhees that he, not Mr. Sager, slashed the victim's throat and stabbed him in the neck. (R. 317-318; R. 324-325.)

At the hearing, the court also entertained testimony by Detective William Lawless of the Pasco County Sheriff's Office that went to the heart: of the defense motion to suppress evidence obtained in the warrantless search of the Chasco Inn. The dates mentioned refer to January, 1992.

> Q. Now, up until you went to -- before you went to Mississippi, before you even heard of Wayne County,

Mississippi, did you ascertain who the last people seen while (sic) the victim was alive, who was the last person in the victim's presence while he was alive?

A. *Yes,* I did.

Q. When did learn that information?

A. That would have been on the 5th.

Q. And who did you learn that information from?

A. Dennis Carries (phonetic) and Roland Gibbs.

Q. What did Dennis Carries tell you?

A. He last saw the victim in Room Number 4 of the Chasco Inn with both the defendants.

Q. And did you learn whose room that was, Room 4 of the Chasco Inn?

A. It was listed on the register for the motel to being Robert Sager and James Densmore.

Q. And later on you learned James Densmore to be Voorhees (Mr. Sager's co-defendant)?

A. **Yes.**

. . . . . .

Q. What did Roland Gibbs tell you?

A. Roland said that he also saw the victim and both defendants in Room Number 4, and that he heard them discussing going out and partying afterwards.

Q. When did you get this information from Roland Gibbs?

A. That would have been the same time, on the 5th.

Q. Did you receive any information that there was an argument overheard by neighbors take place in Room 4 of the Chasco Inn (within) the time frame that the defendants and the victim were there?

A. Yes, I did.

Q. Who did you learn that from?

A. Mr. Philip Salori (phonetic).

Q. When did you learn that?

A. That was while I was at the scene, on the 4th.

(R. 342-344.)

Detective Lawless also provided testimony on direct examination by the prosecutor regarding the lack of a search warrant for the search of the Chasco Inn lodgings of Mr. Sager and his co-defendant. The state's questioning was patently designed to bolster the implication that the evidentiary fruits of the warrantless search were negligible. That this analysis is correct, *i.e.*, that the state's questioning followed a hidden agenda of obfuscating and minimizing the importance of the tainted evidentiary yield, is underscored by the detective's evasiveness even in answering the friendly questions lobbed by the prosecutor.

> Q. And you were aware on the 5th why that -- well, you were aware early on that Voorhees and Sager were staying in Room 4. Did you wait until the 6th to search the room?
>
> A. Yes, I did.
>
> Q. Had you contemplated a search warrant prior to getting consent to search on January 6th?
>
> A. Yes, I did.
>
> Q. And did you abandon that after you found out that the rent was up on the 5th, and the room was abandoned on the 6th?
>
> **a. Yes, I did.**
>
> Q. Now when you searched the room, I presume you or members of the sheriff's office found items inside the room?
>
> A. Correct.
>
> Q. Did it appear that the occupants had left those items in the room?

A. You'd have to ask Detective Powers.

Q. What was discovered inside the room?

A. There was some pieces of paper with writing on it.

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. Did you even search the room?

A. No, I didn't. It was searched by Detective Powers.

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?

R. *357-358.*

Later in his testimony, on cross examination by counsel for Mr. Sager's co-defendant, Donald Voorhees (AKADensmore), Detective Lawless repeated that he had not been involved in the warrantless search of the defendants' temporary residence at the Chasco Inn. Question: "Now you don't have any personal knowledge of the items found in the search of the room, do you?" Answer: "No, I don't." Question: "So you don't know if there were things like clothes or personal items found, *you weren't there?*" Answer: "*No, I wasn't there.*" R. 403. (Emphasis added.)

Yet the uncontroverted testimony on direct examination of the landlady at the Chasco Inn shows unequivocally that Detective Lawless was indeed "there." As a consequence, it is impossible to reasonably square his participation in the events of January 6, 1992 with his assertion that he was unfamiliar with the results of the warrantless search of Room 4 conducted on that day.

Q. (By Mr. Siar) Ms. Weiskopf, did you talk to a detective from the Pasco Sheriff's office named Lawless about Mr. Densmore and Mr. Sager?

A. Yes. They came in to interview me.

Q. And when they interviewed you, were they asking you questions?

MR. ATTRIDGE (the prosecutor): Judge, objection. Leading.

THE COURT: Okay. I'll sustain that.

Q. (By Mr. Siar) Was there any discussion about the room, Room 4?

A. Yes. They wanted to go up and look at it *so* I gave them a key. And I think they took fingerprints.

Q. Did they ask to see records?

A. Well, I showed them the registration and the receipt, yes.

Q. You showed them both documents?

A. Yes.

. . . . . .

Q. Now, what was the room rate back then?

A. Fifty dollars a week.

Q. And they paid you a hundred dollars?

A. Yes, for two weeks.

Q. That was paid on December 29th, is that right?

A. **That's right.**

(R. 437-438.)

Nor was it solely in response to defense counsel's questions that Mrs. Weiskopf's uncontroverted testimony discredited Detective Lawless's assertion that he knew nothing of the results of a search which he directed and in which he personally took part. On cross

examination the state focused on differentiating between the December 29, 1991 registration, which indicated that the weekly rate at the Chasco Inn was $50 and might arguably imply that Mr. Sager was properly registered at the Chasco Inn until January 5, 1992, and a receipt indicating that Mr. Sager had paid $100 and was registered for an additional week. Mrs. Weiskopf was steadfast in her testimony regarding the participation of Detective Lawless in the search of Room 4.

> Q. You didn't know on your registration that he paid a hundred dollars because all you have on here is fifty dollars, correct?
>
> A. Yes.
>
> Q. And then this is what you gave the detective, Exhibit 4. And after you gave that to the detective, do you remember talking to Detective Lawless and giving him permission to search Room 4?
>
> A. Wasn't that all right?
>
> Q. Yes. You're not in trouble, but you gave him permission to search?
>
> A. Yeah, I gave him the key.
>
> . . . . . .
>
> Q. But you also thought the rent had run on that room at the time you gave consent to Lawless to search the room, correct?
>
> A. What do you mean run? Continuing, yes.
>
> 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.

Q. They came and asked you permission to search the room, correct?

A. Yes.

Q. They didn't beak down the door?

A. No, they didn't break the door down. I gave them the keys.

(R. 441-442.)

(2) The Landlady at the Chasco Inn Lacked the Authority to Consent to a Search of Room 4

A hotel or motel proprietor/lessor such as Mrs. Weiskopf may not during the period of the lease give consent to a police search of a leased room which is effective against a lessee such as Mr. Sager. That proposition has been long recognized by this Court, and may be justified on both constitutional and real property grounds (see the immediately following paragraph). Sheff v. State, 329 So. 2d 270 (Fla. 1976) (upholding the arrest of a motel room lessee where a maid found marijuana when cleaning the room and reported it to the police *solely* on the basis that there were sufficient grounds for the arrest apart from the illegal search). The principle has also been recognized by federal and other State courts. United States v. Owens, 782 F.2d 146 (10th Cir. 1986); State v. Louden, 387 P.2d 240 (Utah 1963). See also Timothy E. Travers, "Admissibility of Evidence Discovered in Warrantless Search of Rental Property Authorized by Lessor of Such Property - State Cases," 2 A.L.R. 4th 1173 (1980).

Justification or lack thereof for third party consent does not depend on traditional concepts from real property law, but, rather, on constitutional principles. One respected commentary on search

and seizure issues has nevertheless found it "useful to categorize, for purposes of closer analysis, certain third party consent cases in terms of the property relationship which existed between the consenting party and the defendant." Wayne R. LaFave, ~~Search and~~ Seizure, § 8.5 (2d ed. 1987).

The most useful such category for purposes of analyzing the propriety of Pasco County authorities' entry into and search of Room 4 at the Chasco Inn is that of consent by a lessor to entry into a lessee's premises. The general proposition from the common law of real property been that "a lessor who enters into a lease granting the lessee exclusive possession over a certain area may not, during the period of the lease, give consent to a police search of that area which will be effective against the lessee." Ibid., § 8(5)(a), citing People v. Escudero, 592 P.2d 312 (Cal. 1979). In terms of the traditional common law rule, Mrs. Weiskopf had absolutely no authority to consent to a search of Room 4.

As to whether the common law rule applies specifically to the Chasco Inn, it does. A myriad of courts, State and federal, have found that it applies, for example, to a room in a rooming house [Dotson v. Somers, 402 A.2d 790 (Conn. 1978)]; hotel [~~Stoner v.~~ California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964)]; or motel [United States v. Owens, 782 F.2d 146 (10th Cir. 1986)]. However one categorizes the Chasco Inn, the common law principle applies and Mrs. Weiskopf lacked authority, real or apparent, to consent to a police search of Room 4.

There are exceptions, or at least apparent ones, to the

general common law rule concerning lack of authority by a lessor to consent to enter a lessee's room or dwelling. For example, a lessor may in normal circumstances permit maids and repair persons into rented premises. But this limited authority does not carry over to law enforcement officials who, like the officers in Mr. Sager's case, have not bothered to secure a search warrant. See, Stoner v. California, above.

(3) Room 4 Was Not "Abandoned" at the Time of the Warrantless Search, in the Sense that Abandonment is Understood in Florida Case Law

Notwithstanding the prosecutor's heavy-handed attempt to force the word "abandoned" out of the mouth of a nervous, elderly witness, Room 4 was still occupied at the time of the warrantless search. A perusal of Florida case law is dispositive on this point. In Paty v. State, 276 So. 2d 195 (Fla, 1st DCA 1973), for example, the Fourth District Court of Appeal reversed the conviction for possession of marijuana where the defendant had informed the manager of the motel where he was staying that he wished to rent the room for another day. The defendant had left personal belongings in the room, as well.

In the case at bar, he fact that Mr. Sager had paid the landlady in advance for an additional week is functionally equivalent to advising the owner of his intent to stay in, or return to, the premises. Drawing on factually distinguishable cases, the Paty court carefully delineated circumstances which, unlike those before that court, and unlike the circumstances *sub judice*, amounted to abandonment.

> Recognizing that the question of whether there has been an abandonment is primarily a factual determination to be made upon all of the relevant circumstances existing at the time, United States v. Manning, 440 F.2d 1105 (5th Cir. 1971), we nonetheless conclude that the circumstances in this case are not such as will sustain a finding that appellant had abandoned or "vacated" the motel room.
>
> In the leading case of Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), the defendant was arrested in his hotel room on an administrative writ in a deportation proceeding. He was allowed to pack his personal belongings, and go to the front desk of the hotel where he paid his bill and checked out. He then left in custody of immigration officers. It was held that under these circumstances the defendant had vacated the hotel room so that a subsequent search conducted with the consent of the hotel management was legal.

Paty, at 276 So. 2d 196-197.

In 1976, this Court decided two cases which clarified the parameters of a legal search based on the consent of the owner of leased premises. In Sheff v. State, 329 So. 2d 270 (Fla. 1976), supra, the defendant was convicted based a no contest plea of possession of marijuana. The First District Court of Appeal affirmed the conviction, Sheff v. State, 301 So. 2d 13 (Fla. 1st DCA 1974), and the case came before this Court on a petition for writ of certiorari.

While Thomas Sheff was temporarily out of his rented motel room, a maid entered the room to clean it, and noticed a quantity of marijuana. She told the owner and manager, who also entered the room, then called the sheriff. Mr. Sheff returned to the motel while the sheriff was present, and seeing law enforcement officers drove off without leaving his car. A detective pursued Mr. Sheff, stopped him and ordered him to return to the motel. When he drove

into the motel parking lot, Mr. Sheff threw a plastic bag out of the car, which turned out to contain marijuana. Another bag of contraband was found in plain view on the floor of Mr. Sheff's vehicle, and a search revealed still more marijuana. The officers then entered the room, without Mr. Sheff's permission, and seized still more evidence. The Court analyzed these facts in the following words:

> On these facts the district court held (one officer's) initial entry into the motel room, and (a second officer's) seizure of the suitcase, were illegal. In this the district court was eminently correct. While a motel guest impliedly consents to entries by employees for the performance of their customary duties, consent to an entry by the police must be express and none was given in this case. If these were the only facts giving rise to the suppression of evidence this would be a classic situation in which to apply the exclusionary rule of Mass v. Ohio, *367* U.S. 643, **81** S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and reverse the convictions, as a prod to the police to obtain a search warrant in like cases.

Sheff, at 329 So. 2d 272.

Although the Court unequivocally held that the initial entry by the police into Mr. Sheff's room was illegal, it nonetheless took seriously the state's position that "Sheff caused an independent intervening act when he threw a plastic bag from his car upon reentering the motel parking area." Id. See, Wong Sun v. United States, **371** U.S. 471, **83** S.Ct. 407, 9 L.Ed.2d 441 **(1963).** See also, Nardone v. United States, *308* U.S. *338, 60* S.Ct. *266,* 84 L.Ed.2d **307** (1939).

The Court's ruling turned, however, not on the intervening act concept, but rather on the fact that Mr. Sheff lacked any constitutional guarantee that persons who do not represent the

government will not enter his room.

> When (the officer) followed Sheff from the motel parking lot, he had already learned that responsible members of the community had personally observed what they believed to be marijuana in Sheff's motel room, and he had personally observed Sheff pause and drive away after having had time to observe police cars in the area near his room. If legally discovered, these facts alone would provide (the officer) with probable cause for an arrest. The federal courts have consistently held that a search warrant based upon evidence which was obtained by legal and illegal means is valid if evidence legally obtained would alone provide probable cause.

Sheff, at 329 So. 2d 272-273, citing, *inter alia*, Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

In the case at bar, neither Mr. Sager nor his co-defendant did anything which provided the police with justification for entering his room without a warrant. Moreover, the motel owner, Mrs. Weiskopf, a responsible member of the community to be sure, did not even enter the room with the officers, so she had no opportunity to personally observe any evidence in the room. All in all, the facts of this case fall woefully short of meeting the requirements of a legal search under Sheff.

A second important decision rendered by this Court in 1976 was Jones v. State, 332 So. 2d 615 (Fla. 1976). In Jones, the Court explicitly addressed the abandonment issue. Jimmy Lee Jones was convicted of the 1973 rape/murder of Estelle Berkowitz on the basis of physical and circumstantial evidence that this Court deemed overwhelming. The defendant appealed his first degree murder conviction and death sentence directly to this Court pursuant to Article V, Section 3(b)(1), Florida Constitution. The Court

approached the defendant's argument that having never abandoned his shack, rendering the owner's consent to the police to conduct a search non-binding on Mr, Jones illegal as "a matter of great concern." Jones, at 332 So. 2d 617.

> Three days following the murder and after borrowing money from his landlady, which was not repaid, Appellant, who had been previously convicted of felonies and has used two names other than his own, left town hurriedly on an obviously one-way trip north. Therefore, when police officers had traced the trail of blood to approximately 50 feet of the lot on which Appellant resided and, later, when the police had been informed that the man who had been living in the shack behind the Moorers had a seriously cut hand, it is our view that the consent given to the police by the landlady to examine the shack which she properly considered to be abandoned by Appellant was not a violation of the prohibition against unreasonable searches and seizures. He simply did not live there anymore and had joined his "common law wife" in Pennsylvania.

Jones, at 332 So. 2d **617-618.**

It would be difficult to choreograph a fact pattern that contrasted more sharply with the foregoing than the fact pattern underlying this case. There was no physical evidence leading law enforcement officers to Mrs. Weiskopf's motel. Nor is there any way of ascertaining whether Mr. Sager, who unlike Mr. Jones did not have prior felony convictions, would not have returned to the motel had he not been incarcerated in Mississippi. In sum, Mr. Sager's actions with respect to his paid-for motel room simply do not add up to abandonment of the premises as contemplated by this Court in **Jones**.

The district courts of appeal have followed this Court in holding consent searches of motels on grounds of abandonment to a strict standard. In Hackett v. State, 386 So. 2d 35 (Fla. 2d DCA

1980), the second district reversed the conviction for possession of contraband of a motel lessee whose room and luggage were searched during his temporary absence from the room. The district court's ruling turned on the fact that during his absence from the motel, Peter E. Hackett remained in touch with the motel owner, assuring her that he was trying to raise the money to cover his bill, and that he fully intended to come back to pay up and to retrieve his luggage. The court was explicit in distinguishing the case from Jones, *supra:* "The circumstances here are not analogous to the situation in Jones v. State, 332 So. 2d 615 (Fla. 1976), upon which the state relies. There the defendant had 'left town hurriedly on an obviously one-way trip north,' id. at 618, and had clearly abandoned the belongings he had left in the shack in which he had been living."

The salient distinction between the facts at bar and those of Hackett supports Mr. Sager's position. That is, not only did Mr. Sager show every indication of being willing to settle his motel rent and maintain residence in the room, he had *already* ***paid*** *a* week's *rent* in advance.

In addition to abandonment, Hackett dealt with another issue which has relevance sub *judice.* When the police located Mr. Hackett, they took him to the police station, in a custodial setting, then asked for his consent to search his luggage, neglecting to inform him that they had already done so and had located contraband. Mr. Hackett consented to the search, and the state argued that "even if appellant possessed a reasonable

expectation of privacy in the contents of the suitcases, he waived that expectation by consenting to the search" at the station. Hackett, at *386* So. 2d 37. The district court gave appropriately short shrift to that argument.

> Not *so.* Our supreme court in Norman v. State, 379 So. **2d** 643 (Fla. 1980), stated that although consent obtained after illegal police activity positively taints and renders involuntary any consent to search, voluntary consent will purge the taint of illegality and overcome the presumption of inadmissibility when (1) there is an absence of coercive tactics in securing the consent and (2) there are present significant intervening occurrences between the illegality and the evidence sought to be used. Appellant was being investigated for defrauding an innkeeper, an offense for which he was never arrested or charged. He was at the police station during his interrogation and was not free to leave. In our view he was in a coercive setting. The state failed to meet its required burden of proof that the consent was voluntary.

Hackett, at 386 So. **2d** 37, citing Sheff, *supra,* and Bailey v. State, 319 So. 2d 22 (Fla. 1975). The court concluded that there being no exigent circumstances necessitating the warrantless search, under Wong Sun and Mapp v. Ohio, *supra,* "(t)he seizure of the contraband was the fruit of an unlawful search, and the evidence should have been suppressed." Hackett, at 386 So. 2d 37.

This aspect of Hackett's holding is pertinent *sub judice* because it demonstrates that nothing that was said by Mr. Sager to law enforcement officials in Mississippi (see Argument __) serves to cure the defect inhering in the illegal warrantless search of **Room** 4.

(4) Illinois v. *Rodriquez* Does Not Cure the Illegality of the State's Warrantless, Non-Consensual Search of Room 4

In Illinois v. Rodrisuez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), Justice Scalia, writing for a seven to two

United States Supreme Court majority,[5] refused to invalidate, on the specific facts before the Court, a warrantless entry onto a suspect's premises, where the police reasonably but incorrectly believed that a third party who ostensibly consented to the entry had authority to do so consent. Rodriquez is distinguishable from the case at bar, and does not serve to validate the officers' search of Room 4.

In Rodriquez, police were dispatched to a house in Chicago, where a female visitor, Gail Fischer, reported that she had been severely beaten earlier by Edward Rodriguez at an apartment at another Chicago location. Rodriguez, at 110 S.Ct. 2796. Fischer accompanied police to the apartment, several times referring to the premises as "our" apartment. The officers sought neither an arrest warrant nor a search warrant, and when they arrived at the apartment, Fischer unlocked the door with a key in her possession and gave them permission to enter. Entering the premises, the officers found drug paraphernalia and containers of white powder in plain view, as well as Rodriguez asleep in a bedroom. Rodrisuez, at 110 S.Ct. 2797.

Rodriguez moved to suppress based on the contention that Fischer vacated the apartment several weeks before the arrest, and that she had no common authority over it. Her name was not on the lease, she did not contribute to the rent, and she had no authority to invite people into the apartment. The trial court granted the

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'Justice Marshall dissented, joined by Justices Brennan and Stevens.

motion, rejecting, *inter alia*, the state's argument that there was no Fourth Amendment violation because "the police *reasonably believed* at the time of their entry that Fischer possessed the authority to consent." Id. The trial court's ruling survived all the way through the Illinois appellate system, and the United States Supreme Court granted certiorari.

The Supreme Court reviewed the relevant history of Fourth Amendment decisions, emphasizing its basis in a standard of reasonableness, then noted that if a warrant had been issued, a factual mistake on the part of the issuing authority would not have been fatal to the validity of the search.

> If a magistrate, based upon seemingly reliable but factually inaccurate information, issues a warrant for the search of a house in which the sought-after felon is not present, has never been present and was never likely to have been present, the owner of that house suffers one of the inconveniences we all expose ourselves to as the cost of living in a safe society; he does not suffer a violation of the Fourth Amendment:.

Rodriguez, at 110 S.Ct. 2799.

So a magistrate may be factually in error, so long as he or she is reasonable, without running afoul of the Fourth Amendment. The Court then stated that the same standard applies to law enforcement officers acting without a warrant. Thus, the ~~Rodrisuez~~ Court quoted Brinegar v. United States, 338 U.S. 160, **176,** 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949): "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part, But the mistakes must be those of reasonable men, acting

facts leading sensibly to their conclusions of probability." Quoted at 110 S.Ct. 2800.

The Rodriguez Court called the immediately preceding quote from Brinegar a "general rule" **and** determined not to depart from it "with respect to facts bearing upon the authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual question to which law enforcment officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably." Rodriguez, at 110 S.Ct. 2800.

Rodriguez's holding was dependent on a distinction with an earlier case that might be seemed to be in conflict, Stoner v. California, **376** U.S. **483, 84** S.Ct. **889, 11** L.Ed.2d **856 (1964).** It is by analyzing the distinction in Rodriguez with its own holding and that of Stoner that we can most easily see why Rodriguez does not lend its support to the trial court's ruling with respect to the consensual search issue before this Court.

Like the case at bar, Stoner involved the permission ostensibly given to police by the person in charge of a hotel to enter a guest's room without a warrant, The Court was, in reference to that situation - which is Mr. Sager's situation - that "the rights of the Fourth Amendment are not to be eroded . . . by unrealistic doctrines of 'apparent authority.'" Stoner, at 84 S.Ct. *892,* The Rodriguez majority, through Justice Scalia, took a close look at that expression: "It is ambiguous, of course, whether the word 'unrealistic' is descriptive or limiting - that is, whether we

(the Supreme Court) were condemning as unrealistic all reliance upon apparent authority, or whether we were condemning only such reliance upon apparent authority as is unrealistic." Rodriquez, at 110 S.Ct. 2800-2801.

It is clear, at least since Rodrisuez, that the current United States Supreme Court position is that the word 'unrealistic' as employed in Stoner is to be taken in the "limiting" sense that it condemns not all apparent authority in cases of consensual searches, but only such apparent authority as is, as a matter of fact disclosed by analysis, unrealistic.

There are passages in Stoner (discussed in Rodriquez) that make this, the Court's latter-day interpretation of Stoner problematical, but they need not delay us at this juncture. There is certainly ample support for the Rodriquez interpretation in other Stoner passages, one of which is crucial to the instant appeal: "It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room." Stoner, at 84 S.Ct. 893.

Once again, the Rodriquez majority (once again, speaking through Justice Scalia), looked closely at a Stoner passage, especially at the phrase within the passage indicating that the record lacked any indication "that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's

room." Justice Scalia ruminated that the phrase "should have been deleted, of course, if the statement two sentences earlier[6] meant that an appearance of authority could never validate a search."

Justice Scalia concluded his reading of Stoner, along with the application of the "general rule" (of Brinegar) to the facts of Rodriguez:

> It is at least a reasonable reading of (Stoner), and perhaps a preferable one, that the police could not rely upon the obtained consent because they knew it came from a hotel clerk, knew that the room was rented and exclusively occupied by the defendant, and could not reasonably have believed that the former had general access to or control over the latter. . . .
>
> In the present case, the Appellate Court found it unnecessary to determine whether the officers reasonably believed that Fischer had the authority to consent, because it ruled as a matter of law that a reasonable belief could not validate the entry. Since we find that ruling in error, we remand for consideration of that question.

Rodriguez, at 2801.

Let us recall for a moment the testimony provided by the landlady of the Chasco Inn when questioned by defense counsel:

> Q. (By Mr. Siar) Was there any discussion about the room, Room 4?
>
> A. Yes. They wanted to go up and look at it so I gave them a key. And I think they took fingerprints.
>
> Q. Did they ask to see records?
>
> A. Well, I showed them the registration and the receipt, *yes.*
>
> Q. You showed them both documents?

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[6]Referring to the defendant/petitioner's Fourth Amendment right to be free from unreasonable searches and seizures: "It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent." Stoner, at 84 S.Ct. 893.

A. Yes.

. . . . . * . . . . . * . * . . . . * . .

Q. Now, what was the room rate back then?

A. Fifty dollars a week.

Q. And they paid you a hundred dollars?

A. Yes, for two weeks.

Q. That was paid on December 29th, is that right?

A. That's right,

(R. **437-438.**)

The conduct of the police as reflected in this colloquy dismally fails to meet the requirements of Rodriquez. That is, no reasonable officer would have relied on the obtained consent from Mrs. Weiskopf. She was playing the same role in the case at bar as was the hotel clerk in Stoner. The officers, according to the uncontroverted testimony of Mrs. Weiskopf, knew or should have known that Room 4 was rented and exclusively occupied by Mr. Sager and his co-defendant, and could not reasonably have believed that Mrs. Weiskopf had general access to or control over the premises.

Thus, reliance on Rodriquez and its interpretation of Stoner fail to extricate the state from the embarrassments occasioned by its agents' failure to obtain a search warrant prior to entering Room 4 at the Chasco Inn. All direct and indirect evidentiary fruits of the poisonous tree represented by that warrantless, illegal search should have been suppressed. The proper remedy at this point is to reverse Mr. Sager's conviction, remand with instructions the trial court to hold a hearing to determine what

evidence directly and vicariously resulted from the search of Room 4, with further directs to the court to suppress all of that evidence for purposes of Mr. Sager's new trial.

ARGUMENT X

THE COURT SHOULD ESTABLISH A "BRIGHT LINE" RULE REQUIRING A RECORD WAIVER OF THE RIGHT TO TESTIFY DURING THE PENALTY PHASE IN DEATH SENTENCE CASES

The record is devoid of any indication that, during the penalty phase of the trial, Mr. Sager was informed by the trial court that Lhe right to testify, which he had waived during the guilt phase, could still be asserted during the penalty phase. The Court is respectfully asked to establish the requirement that sentencing courts notify defendants who have been found guilty and who face the death penalty, that they are still protected by the same constitutional rights as they were during the trial proper, even thought the presumption of innocence has been nullified by the guilty verdict.

Mr. Sager realizes that the position he urges on the Court is not the prevailing law in Florida at this time. It is a position, however, that the Court should progress to, based on considerations that inhere in existing law, in the context of the especially vulnerable circumstance of a defendant in the penalty phase of a murder trial, who has just been found guilty of the crime.

In Torres-Arboledo v. State, 524 So. 2d 403, 409-411 (Fla.), cert, denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988), this Court reviewed differing precedent from foreign jurisdictions on the question of whether it should be required in *all* cases that

a criminal defendant states on the record that he or she understands the right to testify and is knowingly and voluntarily waiving it for purposes of trial tactics. The Colorado Supreme Court, in People v. Curtis, 681 P.2d 504 (Colo. 1984), held that because a defendant's due process right to testify in his or her own defense is so fundamental, the validity of waiving it should be tested by the same standard used to test the waiver of the right to counsel.

That standard, established in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461 (1938), calls, inter *alia*, for an on-the-record waiver of the right to counsel. According to the Colorado high court in Curtis, "waiver of the right to testify must be voluntary, knowing and intentional, and the existence of effective waiver should be ascertained by the trial court on the record." Curtis, at 681 P.2d 515.

This Court contrasted the position taken in Curtis with what it deemed the majority view in the States, and by the Second District in Cutter v. State, 460 So. 2d 538 (Fla. 2d DCA 1984). That position is that although the right to testify is firmly grounded in the State and federal constitutions, it is not so "fundamental" that it can be only be waived if done so explicitly by the defendant in open court. The Torres-Arboledo Court determined that the Cutter holding was preferable to the rule established in Curtis.

The Torres-Arboledo Court went on, however, to state in dicta that while a trial court is not required to do *so*, it would

nevertheless be the better practice to follow Zerbst in cases where the defendant chooses not to testify.

> Although we expressly hold that a trial court does not have an affirmative duty to make a record inquiry concerning a defendant's waiver of the right to testify, we note that it would be advisable for the trial court, immediately prior to the close of the defense's case, to make a record inquiry as to whether the defendant understands he has a right to testify that it is his personal decision, after consultation with counsel, not to take the stand. Such an inquiry will, in many cases, avoid post-conviction claims of ineffective assistance of counsel based on allegations that counsel failed to adequately explain the right or actively refused to allow the defendant to take the stand.

Torres-Arboledo, at 403 So. 2d 411, n. 2.

In a recent decision, the First District declined to establish the "bright 1ine" approach advocated here. **In** Wilson v. State, *659* So, 2d 1253 (Fla. 1st DCA 1995), the district court ruled against an appellant appealing from a denial of his ineffective assistance of counsel claim brought under Fla. R. Crim. P. 3.850. In addition to finding ample evidence on the record supporting the trial court's conclusion that trial counsel had advised the appellant of the right to counsel (thereby vitiating the ineffective assistance of counsel argument), the court ruled: "(F)or the reasons stated by the Florida Supreme Court in (Torres-Arboledo), we decline Wilson's invitation to establish a bright-line rule requiring a record waiver of the right to testify." Wilson, at 659 So. 2d 1254.

Wilson was, in the context of the facts and procedural posture of the case, as well as the prevailing general precedent *(i*.e., Torres-Arboledo), correctly decided. Nevertheless, Mr. Sager asks the Court to advance beyond the prevailing reasoning in the limited

special ***situation*** *where a death penalty case has passed beyond the* ***guilt phase of*** *the trial.*

One a guilty verdict has been returned, the psychological complexion of the courtroom is dramatically altered. No longer is the jury dealing with a defendant, cloaked in the mantle of a presumed innocence, who may, indeed, not be guilty. In potential death penalty cases, this usually means the jury is now dealing not with a presumptively innocent defendant: but with a convicted murderer. With his or her life in the balance, the defendant enters into the most harrowing and personally devastating portion of the entire proceedings.

Much the same may said of defense counsel who has just lost the attempt to show that the defendant is not guilty beyond a reasonable doubt. At this stage, the Court should progress by transforming the preferred practice set forth in Torres-Arboledo for defendants in general into a requirement where a defendant facing a possible death sentence has gone into the penalty phase.

ARGUMENT XI

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

On January 21, 1992, the trial court denied a defense Motion to Reconsider Appointment of Counsel. (R. 15.) In the motion, counsel informed the trial court: that counsel "does not meet the strict and specific criteria for court appointment to represent individuals so charged (with first degree murder)." (R. 16.)

The above-described scenario is equivalent to the fact pattern underlying a defendant's request for discharge of his or her court appointed counsel for incompetence. In both instances, it devolves upon the trial judge to make sure the defendant's right to effective representation is protected. See, Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

The basis of counsel's motion was that he did not qualify as a competent legal representative of a defendant, such as Mr. Sager, facing a first degree murder charge, and a possible punishment of death. While the court held a hearing on the motion, the record does not indicate that in addition to reviewing counsel's experience, the court inquired into the underlying policy for requiring attorneys so situated to meet the criteria not met by defense counsel *sub judice*.

Consequently, the trial court failed to fully determine whether there was reasonable cause to accept the claim of incompetence, and as a result, the conviction must be reversed, Davenport v. State, 596 So. 2d 92 (Fla. 1st DCA 1992).

ARGUMENT XII

THE TRIAL COURT ERRED BY PROCEEDING ON THE BASIS OF STATUTES THAT VIOLATE THE UNITED STATES CONSTITUTION, AND BY COMMITTING A PROFUSION OF CONSTITUTIONAL ERRORS - BOTH STATE AND FEDERAL - DURING THE COURSE OF THE PROCEEDINGS

By way of several pre-trial motions, Mr. Sager attacked the validity of various statutes under which he was convicted and sentenced, on constitutional grounds. All of the motions referenced below were filed on May 27, 1993.

(1) Defendant's First Motion to Declare Section 921.141(5) Florida Statutes Unconstitutional (R. 85-86)

This motion alleges violations of Article 1, Sections 2, 9, 16, 17 and 23 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The statutory provision is unconstitutional for imposing a death sentence without providing for the necessity that the defendant intended to cause a death, for example in a case of felony murder, or when the aggravating factors of pecuniary gain and prior violent crime apply.

The lack of carefully drawn qualification with regard to intent violates the requirements of controlling United States Supreme Court precedent. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); see, Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982).

The fact that the intent factor is not adequately taken into account either at the advisor verdict stage, the imposition of death stage, or on appellate review, violates the doctrine of proportionality that is binding on this Court. See, Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982).

(2) Defendant's Second Motion to Declare Section 921.141 Florida Statutes Unconstitutional (R. 54-55)

Violations of Article 1, Sections 2, 9, and 23 of the Florida Constitution and of the Eighth and Fourteenth Amendments to the United States Constitution are alleged in this motion.

The indictment brought under the challenged statute fails to specify the theory undergirding the prosecutor's case-in-chief, Accordingly, the prosecution might be based on a theory of felony murder, or of premeditated murder. This ambiguity subjected the defense to an uncertainty translating into a tactical handicap, in violation of Mr. Sager's right to due process of law.

The underlying felony aggravating circumstances section of the statute fails to adequately manifest the possibility that mitigating factors could be found to overcome the underlying felony considerations, resulting in a possibility that the propriety of the death sentence would be presumed, in violation of precedent emanating from this Court and other Florida appellate tribunals. Demps v. State, 395 So. 2d 501 (Fla. 1981); State v. Dixon, 283 So. 2d 1 (Fla. 1st DCA 1973).

The impermissible result: of this is to make possible the automatic imposition of the ultimate sentence on a mere accomplice who never intended to commit murder, or directly participated in the act of killing, The sentence under such circumstances violates the Eighth and Fourteenth Amendments, as well as Sections 2, 9, 17 and 23, Article I, Florida Constitution. In addition, the procedure constitutionally aggrieves Mr. Sager under United States Supreme Court precedent. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

(3) Motion to Declare Sections 782.04 and 921.141 Florida Statutes Unconstitutional (R. 56-58)

This motion alleges that the statutory provisions, on their faces and as applied, violate, inter alia, Article 1, Sections 2,

9 and 17 of the Florida Constitution, as well as Amendments Five and Fourteen of the United Stats Constitution. All these constitutional provisions are so breached by the insufficiency in number and insubstantiality of coverage of the designated mitigating factors. Moreover, Section 921.141 contains on its face mitigation language that is impermissibly restrictive in scope.

In addition, Section 921.141, Florida Statutes, provides for cruel and unusual punishment inconsistently with the Eighth and Fourteenth Amendments, United States Constitution, and Article I, Section 17, Florida Constitution.

Both the statute, Section 921,141, and the related jury instruction, Florida Standard Jury Instruction at 80, by listing only certain mitigating factors and minimizing the importance of others by neglecting them, run afoul of United States Supreme Court precedent established by Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

(4) Motion to Declare Sections 921.141 and 922.10 Florida Statutes Unconstitutional (R. 67-73)

These constitutional provisions conjoin to sanction death by electrocution in statutorily "appropriate" cases. The motion challenges the death statutes, on their faces and as applied to Mr. Sager, as calling for a sentence that constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 17 and 23, Florida Constitution.

The device used to effect electrocution in Florida has been subject to widely publicized malfunctions in recent instances in

which it has been employed. This constitutes cruel and unusual punishment as addressed in Louisiana ex rel. Francis v. Resyweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947).

(5) Motion to Declare Section 921.141(5)(d) Florida Statutes Unconstitutional (R. 87-98)

The challenged provision, on its face and as applied to Mr. Sager, violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 9 and 16 of the Florida Constitution. The statute is constitutionally infirm for its failure to assemble aggravating factors that "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

In sum, Mr. Sager rights under the United States Constitution's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment, were violated, as were his parallel rights under the Florida Constitution.

CONCLUSION

For all the reasons set forth above, Mr. Sager's conviction and sentence should be reversed and his case remanded with appropriate curative instructions to the trial court. Mr. Sager should be accorded a new trial, a hearing to determine precisely what evidence was obtained as a result of the illegal search of Room 4 for purposes of suppression, reduction of sentence to life, and/or a new sentencing proceeding.

Had Mr. Sager and Donald Voorhees been tried together, it is virtually certain that Mr. Sager would not be facing death by electrocution. The decision to sever was made initially by the

defense, for what are no doubt sound tactical reasons. Nevertheless, the fact remains - and it is a fact within the knowledge of the prosecution, the trial court and this Court - that readily available exculpatory evidence strongly indicates that Mr. Sager did not commit a heinous, premeditated murder, and that he does not deserve to die ostensibly for doing so.

It is conceivable that this Court might adopt the trial court's radical interpretation of Denny v. State, 617 *So.* 2d 323 (Fla. 4th DCA 1993). It is conceivable that the Court would decline to transform the dicta in Torres-Arboledo v. State, 524 So. 2d 403, 409-411 (Fla.), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988), into a bright line requirement in the penalty phase of death sentence cases. But it is inconceivable that this Court would permit the execution of Mr. Sager in the face of so much credible, persuasive exculpatory evidence with respect to his degree of involvement with the crime.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the Office of the Attorney General, Westwood Center, Suite 700, 2002 N. Lois Avenue, Tampa, FL 33607, this 2nd day of January, 1996.

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