ON APPEAL TO THE SUPREME COURT OF FLORIDA

ROBERT SAGER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CT. CR. **NO.** 92-102**CFAWS**

APPEAL NO. **84,539**

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

APPELLANT'S REPLY BRIEF

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REPLY TO APPELLEE'S ISSUE I

MR. SAGER'S DETENTION BY MISSISSIPPI LAW ENFORCEMENT OFFICERS RENDERS HIS CONVICTION INVALID

The Appellee's Answer Brief (cited Ans. Br. ___) quotes the trial court's reasoning based on which Mr. Sager's motion to suppress evidence obtained by the Mississippi authorities, or because of their actions, was denied:

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

(Ans. Br. 21, citing R. 165.)

As pointed out by Mr. Sager in his initial brief, the key question with respect to the voluntariness issue disposed of so cavalierly by the trial court 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, ___ U.S. ___, 111 S. Ct. 2382, 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). Mr. Sager repeats his argument that the armed officer's show of authority when he approached Mr. Sager and his co-defendant constituted a restraint of liberty made impermissible by the principles underlying those cases.

While the Appellee's Answer Brief is correct in asserting that: a trial court's ruling on a motion to suppress is clothed with a presumption of correctness (Ans. Br. 22), that presumption is nullified where a reasonable interpretation of the record convinces

the appellate court: of the trial court's error. Here, the evidence of coercion is manifest. Both when he was compelled to accompany the officer to **the** jail facility and later, **where** he poignantly asked for and was coldly refused psychiatric care, Mr. Sager's liberty rights were flagrantly breached.

In the Answer Brief, the state criticizes Mr. Sager for incorrectly invoking Schneckloth **v.** Bustamonte, **412 U.S.** 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) "for the proposition that an accused must be informed not to accompany the officer." (Ans. Br. 22.) That is not Mr. Sager's precise position. Rather, he cites Schneckloth, along with Bailey v. State, 319 So. **2d** 22 (Fla. 1975) and Acosta v. State, 519 So. 2d 658 (Fla. 1st DCA 1988) in support ***of*** the argument that Mr. Sager's ignorance ***of*** the fact that he was not required to **bow** to the officer's show of authority should have been scrutinized much more closely by the trial court.

The state is correct in its assertion that in Schneckloth, a consent to search case in which, like in the case at bar, there was no illegal arrest, Justice Stewart stated "that an accused need not be informed of his right to refuse consent." (Ans. Br. 23, citing Schneckloth, at 36 L.ED.2d 865). Justice Stewart cited several cases in support of that position, including a Second District opinion, (cited in Schneckloth, at 36 L.ED.2d 865, n. 14), State v. Custer, 251 *So.* 2d 287 (Fla. **2d** DCA 1971). Custer held that under § 924,071, which governs the state's right to appeal suppression **orders,** there is no ironclad requirement that a defendant **be** advised of his **right** of refusal in order in order to

prima facie establish voluntariness. Custer, at 251 So. 2d 288. But that is not tantamount to ignoring the importance, in a proper case, of a suspect's ignorance of his right to refuse.

As will be shown directly, subsequent Florida case law has upheld and clarified the importance of a suspect's knowledge that he may withhold his consent, even in the face of an officer's show of authority. Before leaving Schneckloth, however, it is worth noting that although Justice Stewart wrote with personal confidence that the subject of a search need not be advised of his right to withhold consent, all three dissenters disputed Justice Stewart on precisely that point.

As noted, Mr. Sager also relies on Florida opinions decided subsequent to the Custer decision, Bailey v. State, 319 So. 2d 22 (Fla. 1975) and Acosta v. State, 519 So. 2d 658 (Fla. 1st DCA 1988). A review of these cases and an application of their underlying principles to the facts at bar underscore the impropriety of the trial court's ruling on Mr. Sager's suppression motion.

In Bailey, an automobile search case, this Court made two points that are extremely helpful for a resolution of Mr. Sager's appeal. The first is that a high degree of certitude is required before a finding of informed consent may be upheld.

> Mere conclusion of an officer are insufficient to establish a valid consent. Officers are not qualified to make such a conclusion. To support a finding of consent, evidence of such consent to search of vehicle without warrant must be clear and convincing. Sagonias v. State, 89 So. 2d 252 (Fla. 1956).
>
> "A distinction is recognized . . . between submission to the apparent authority of an

> officer and unqualified consent. Mere acquiescence in a search is not necessarily a waiver of a valid search warrant. Rather, for an occupant to waive his rights, it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search . . ." Talavera v. State, 186 So. 2d 811 (Fla. 3d DCA 1986).
>
> It is our ruling that the circumstances in the case at issue fall far short of the standards set in the foregoing cases.

Bailey, at 319 So. 2d 27. Mr. Sager's position is that in his case, the circumstances fall short of the standards of Bailey and the decisions it relied on in ruling in the defendant's favor.

The second important point made by the Bailey Court - and in making it the Court: cited Schneckloth - is that it is error to ignore a defendant's lack of knowledge that consent may be withheld in the face of an officer's show of authority.

> Notwithstanding anything stated in those cases which might seem to require the State to prove knowledge of the right before a defendant could give valid consent, we do not find such to be a requirement in itself. On the other hand, knowledge or lack of knowledge is a factor which may not be ignored but should be considered along with all other factors. Othen v. State, 300 So. 2d 732 (Fla. 2d DCA 1974; Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Defendant was not under arrest in either of those cases.

Bailev, at 319 So. 2d 27. It is Mr. Sager's position that it was error for the court below to totally disregard Mr. Sager's ignorance of his legal capacity to resist the Mississippi officer's show of authority as a factor in arriving at its determination of whether a valid consent had taken place.

As noted, Acosta is another decision with important implications for the present appeal. An automobile search case involving a defendant: who had trouble understanding English, Acosta

emphasized the requirement that in determining whether **a** valid consent has been obtained, a court must take into account special circumstances that may make a defendant's putative consent questionable. In Acosta, the First District acknowledged that there is no *per se* requirement that a defendant be informed of his right to withhold consent. Yet relying on Bailey and Schneckloth, the court stressed the importance of weighing the officer's failure to inform a suspect that consent may be withheld along with all other relevant factors in reaching its decision on a suppression motion.

> When the state relies, as here, on consent to justify the lawfulness *of* a search, it has the burden of proving that the consent obtained was freely and voluntarily given. Norman v. **State**, 379 So. 2d 643 (Fla. 1980); **a** burden that can only be established by clear and convincing evidence. Bailey v. State, 319 So. 2d (Fla. 1975). In determining whether a defendant's consent to search was freely and voluntarily given, the trial court is required to assess the totality of all the circumstances surrounding the consent, including the defendant's youth, his lack of education, the level of his intelligence, the lack of any advice on his constitutional rights, the length of detention, and the repeated and prolonged nature of the questioning. Schneckloth v. Bustamonte, 412 U.S. **218,** 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). . . . (W)e consider that the failure ***of*** the interrogating officer to advise the defendant of his right to refuse to give consent to a search **compels** reversal of the order denying the motion to suppress, and its implicit finding that the state established **by** clear and convincing evidence that the defendant voluntarily consented to the search of his vehicle. . . . (T)he defendant had difficulty communicating in English.

Acosta, at 519 So. 2d 659-660.

It is important **to** note that the issue is whether a defendant actually consented. No good faith exception comes into play in deciding that issue. It would not have mattered if, in Acosta, the officer had been unaware of the defendant's language limitations.

And it matters not one whit here that the officer who took Mr. Sager to the jail facility may not have been aware of his psychiatric difficulties.

In light of the foregoing considerations, it must be concluded that Mr. Sager did not give his informed consent to being placed into a police cruiser by an armed policeman and transported to a jail cell. Mr. Sager did nothing more or less than to submit to the officer's show of authority, in circumstances in which his psychiatric condition and his ignorance of his constitutional rights played decisive roles. Mr. Sager's so-called consent "was far short of the knowing, free and voluntary consent: necessary to comply with Fourth Amendment protections." Palacios v. State, 434 So. 2d 1031, 1032-1033 (Fla. 1st DCA 1983). The trial court's failure *to* address the crucial factors in this case render its denial of Mr. Sager's suppression motion invalid, and his conviction should be reversed.

REPLY TO APPELLEE'S ISSUE II

THE TRIAL COURT'S RELIANCE ON CASE LAW TO ABSOLVE MISSISSIPPI OFFICERS FROM THEIR MISCONDUCT WAS MISPLACED, MANDATING REVERSAL

In the discussion of Appellee's Issue II, the state defends the trial court's reliance on three opinions for its denial of Mr. Sager's motion to suppress. Those opinions are Collins v. Beto, 348 F.2d 823 (5th Cir. 1965), People v. Gabbard, 398 N.E. 2d 574 (Ill. 1979), and People v. White, 512 N.E. 2d 677 (111. 1987). In its Order Denying Defendant's Motion to Suppress (R. 160-169), the trial court analyzed those cases in the following terms:

> 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 authorities. The decision of the Illinois Supreme Court in Peonle 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 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), citing Collins, at 348 F.2d 827, and White, at 512 N.E. 2d 689.

In the Initial Brief (cited In. Br. ___), Mr. Sager criticized the preceding expression *of* the trial court's analysis:

> The court misunderstands the point made **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.[1] 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** 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.

(In. Br. 24-25.)

The Appellee's Answer Brief offers the following remark in response to the immediately **preceding** quote from the Initial Brief:

> Appellee does not read the trial court's order to hold that evidence not specifically sought is necessarily admissible; rather that the exclusionary rule theory of deterrence operates, that: is, deters police from illegal conduct when they know that evidence they **seek** to obtain from conduct will **be** suppressed.

(Ans. Br. 26.)

The Initial Brief also argued that if, as the result of an illegal arrest or detention, evidence is obtained that has no other infirmities, it *may* ***be*** admissible, but only if it was not being specifically sought. (In. Br. 25.) In Mr. **Sager's** case, the evidence, while not being specifically sought, was obtained improperly, through the coercion of a young man experiencing a psychiatric crisis. Wayne County officers' flagrant misconduct while Mr. Sager **was** detained irredeemably taint *any* evidence obtained thereby, specifically sought or not, and whether or not by Mississippi or by Florida authorities.

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

The state's understanding of a detention that even the trial judge readily admitted was illegal is striking for its sanguinity:

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

(Ans. Br. 27.) This passage is followed by a footnote that attempts to discredit Mr. Sager's contention that he asked for and was denied psychiatric help, and that it was his illegal detention in the context of his condition that proximately coerced him into incriminating himself: "Sager mentioned to Farrior the morning of January 9th that he had a nervous condition and Farrior indicated they could check it out if they knew who he wa (R 280). Farrior went to Jackson, Mississippi and returned at around 5:00 p.m. Sager decided to talk *to* him about the Florida incident at 8:00 p.m. (R 281-282." (Ans. Br. 27, n. 1.)

The state thus paints a cheerful picture of friendly officers taking in lost unfortunates and providing them with free food and clothing. But the cheer dissipates upon reading between the lines. Mr. Sager was approached by an armed policeman, put into a police cruiser and locked in a jail cell. He was told that he would be given access to medical attention only upon submitting to the officers' insistence that he "clear up" a trifling matter: that of

his identity. He would receive needed help, that is, only if he would identify himself to officers who **had** no **right** to the information on the **basis** of the surrounding circumstances. It is doubtlessly proper for police to "clear up the fictitious name problem" by such means in a police state. But Florida is not a police state. Neither is Mississippi.

The discussion under Issue II of the Appellee's Answer Brief also takes issue with Mr. Sager's argument that the record is devoid of sufficient intervening circumstances to render irrelevant the connection between the police misconduct and the evidence that ultimately convicted him. The state agrees with the trial court that it was sufficient: that ". . . Voorhees and Sager (learned) that Pasco authorities wanted to talk to the about: the murder and Voorhees (told) Sager at 2:30 in the afternoon that he would take care of it and it would **be** all right plus Sager's self-initiated statement to Sheriff Farrior dissipated whatever prior taint there had been when Pasco detectives arrived hours later and received **their** voluntary confessions." (Ans. **Br.** 29-30.)

In response to this, Mr. Sager reiterates the position he took in the Initial Brief.

> (T)here 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. **340-3411,** combined with his forcible detention and the bogus **promise** of **medical** attention coerced him into making self-incriminating statements.

(In. Br. 28.) **Mr.** Sager **was forced to incriminate himself and** the **trial judge reversibly erred by failing to suppress the incriminating evidence.**

REPLY TO APPELLEE'S ISSUE III

EXCLUSION OF THE EXCULPATORY HEARSAY **STATEMENTS** MADE **BY MR. SAGER'S CO-DEFENDANT** WAS **REVERSIBLE** ERROR

According to the Appellee's Answer Brief, "Appellant does not identify with precision the witness or testimony he contends was improperly excluded." (Ans. Br. 31.) This statement is made by way of answering Argument **III** in the Initial Brief: "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." **(In.** Br. 34.)

As far as identifying with precision the witness whose testimony is at issue, Mr. Sager's sole co-defendant was Donald Voorhees. As to the precise testimony that was improperly excluded, it was identified in parts 3 and 4 of the Initial Brief's Statement of the Facts, reproduced here:

"(3) Proffered Testimony Regarding Statements Made by 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 Interrogation 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** was 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.)" (In. Br. 7-10.)

The discussion under Issue III **of** the **Appellee's** Answer Brief presents a clearly articulated position, one that agrees with the trial court's reasoning based on which this evidence was excluded. The court's position, and that **of** the state on appeal, is that the evidence was inadmissible because it was not 100% exculpatory with respect to Mr. Sager's involvement in the underlying homicide.[2] The state dismisses Mr. Sager's citation of two **opinions** in support of his argument that the trial court's interpretation of what constitutes exculpation is too narrow.

Those opinions **are** Walker v. State, 483 So. **2d** 791 (Fla. 1st **DCA 1986) and** Woodard v. State, 579 So. 2d 875 (Fla. 1st DCA 1991). The state argues that they are merely trustworthiness cases, whereas in the case at: bar, ". . . it is not even necessary to reach the trustworthiness issue since **Voorhees'** statement

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[2]The courts **expressed** its thinking along these lines: **"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.)

inculpates -- **not** exculpates -- Sager as participant in **the** robbery killing of (the victim)." (Ans. Br. 34.)

Two remarks are in order **regarding** this characterization. First, it **begs** the pivotal question of whether evidence that implicates a defendant: in a general pattern of wrongdoing may nonetheless **be** deemed exculpatory as to a specific crime associated with the wrongdoing, but not committed by the defendant. Second, the state need not have advised the Court that it is not "necessary to reach the trustworthiness issue" since Mr. **Sager** already did so, in his Initial Brief, which introduced the discussion of Walker and **Woodard** as follows:

> Opinions construing the standard set forth in the last sentence of Section 90.804(2)(c) concentrate on the corroboration of trustworthiness aspect, which is not an issue *sub judice.* Yet a careful review of the opinions supports the position that the trial court took an unreasonably narrow approach to the interpretation and application *of* the concept of "exculpatory" statements as presented in the statute.

(In. Br. 36-37.)

The Initial Brief discussed Walker and Woodard in some detail (In. Br. 37-39) and a technical reanalysis is not **called** for here. The gist of both opinions, for purposes of assisting the Court in deciding this appeal, is that in practice, courts have no difficulty recognizing **and** responding to particular exculpatory aspects **of** generally inculpatory **evidence**. This could not be so if the trial court's narrow interpretation of what constitutes exculpation were correct.

REPLY TO APPELLEE'S ISSUE IV

THE COURT ERRED BY **EXCLUDING** THE **STATEMENT MADE BY TRUSTEE BENNIE HUMPHREY**

In the Appellee's Answer Brief, the state makes light of Mr. Sager's claim that admission of trustee Bennie Humphrey's account of his conversation with co-defendant Donald Voorhees was vital to the defense because of the light it would have **shed** on the wounds suffered by the victim. **(Ans.** Br. **38.)** The part of the statement that the Initial Brief focused on follows:

> 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.) (In. Br. 10-11, 40.) The state provides a succinct précis *of* its view of the evidentiary status of the trustee's testimony

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

(Ans. Br. 39.) (Footnote omitted.)

If Mr. Sager assumes anything, it is not about the state's right to prosecute its case, but about his own right to vigorously put on a defense. In this respect he was certainly entitled to present evidence to the jury showing that he got into an unanticipated drunken fight with the victim, after which his co-defendant intervened and committed homicide on his own accord. Nothing in the statutory text referred to by the state contradicts this position:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such defense.

§ 777.011, Fla. Stat.

Another aspect of the trustee's testimony was that it formed one leg of a tripartite argument for reasonable doubt. It, along with Detective Lawless's interview of Donald Voorhees and the expert medical testimony heard at the guilt phase, might well have raised a reasonable doubt as to Mr. Sager's culpability. The trial court's decision not to admit the testimony at guilt phase knocked a key underpinning of Mr. Sager's argument for reasonable doubt. As noted in the Initial Brief, the court's actions "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."' (In. Br. 41.)

REPLY TO APPELLEE'S ISSUE V

DR. HANSEN'S EXPERT TESTIMONY ON CAUSE OF DEATH, IN CONJUNCTION WITH THE STATEMENTS OF MR. SAGER'S CO-DEFENDANT *AND* OF TRUSTEE Bennie **HUMPHREY,** WOULD HAVE ESTABLISHED **REASONABLE** DOUBT HAD THE **JURY** BE PERMITTED TO CONSIDER **THE** THOSE STATEMENTS

It was argued in the Initial Brief that **had** the jury **been able** to assess the medical evidence provided **by** Dr. Hansen (T.463-505) *in light of* the excluded exculpatory evidence originating from Donald Voorhees (Ct. Exh. #1) and trustee Bennie Eugene Humphrey (Ct.Exh. #3), a reasonable doubt might very well have been raised. It total, the testimony indicated that Mr. Sager did not tie up the victim, and that what may quite reasonably **be** viewed as the definitive attack - slashing the victim's throat - was done by Donald Voorhees alone. Because the guilt phase jury did not: have access to the out of court statements at issue, the doctor's expert testimony had little meaning for it other than to show that the victim was beaten and stabbed to death.

What occurred below was a systematic emasculation of major components of a rather complex defense. The relative complexity stems from the fact that Mr. Sager was involved in the incident resulting in the homicide and robbery. His defense relied on showing that in the precise sequence of what happened on the night of the crime, he never intended to commit homicide or knowingly participated in a murder. As will be shown below, he never intended to rob the victim, either, until after the victim's death.

Because **of** the trial court's hearsay rulings, based on a very narrow interpretation **of** the law governing admissibility **of** co-defendant statements, Mr. Sager was not **able to** construct a model

of innocence which might have led the jury to develop reasonable doubt. As will also be shown below, the lack of confidence on the part of Mr. Sager's attorney combined with all these other debilitating factors, virtually ensuring Mr. Sager's conviction.

REPLY *TO* APPELLEE'S ISSUE VI

THERE **WAS INSUFFICIENT** EVIDENCE INTRODUCED BY THE STATE TO SUPPORT A CONVICTION FOR PREMEDITATED MURDER

Mr. Sager continues to rely on the position that the **evidence** on the record simply does not support a premeditated murder conviction. According to an opinion cited in the Initial Brief, Hoefert v. State, 617 So. **2d** 1046 (Fla. 1993), where "the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be obtained." (In. Br. 45.)

The Initial Brief also cited Wilson v, State, 493 So. **2d 1019,** 1021 (Fla. **1986)** for the proposition that first degree murder requires "more than a mere intent to **kill;** it is a fully formed conscious purpose to kill." (In. 3r. 47.) The Initial **Brief** noted that in Tien Wanq 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 **Wanq,** at 426 So. **2d** 1006. (In. Br. 47.) **The** evidence on the record is patently consistent with an hypothesis of non-premeditation on Mr. Sager's part.

REPLY TO APPELLEE'S ISSUE VII

THE TRIAL COURT'S JURY INSTRUCTION AND ITS FINDING WITH RESPECT TO THE HOMICIDE BEING COMMITTED DURING A ROBBERY CONSTITUTED ERROR

The Appellee's Answer Brief presents two main arguments in its discussion under Issue VII: that Mr. Sager is procedurally barred from raising the "during a robbery" issues (Ans. Br. 48); and that the record conclusively shows that the killing in fact took place during the course of a robbery. (Ans.Br. 48 et *seq.*) The response to the first contention is straight-forward. Regardless *of* whether the issues were technically preserved for appellate review, the trial court's actions constituted fundamental error that requires the attention of this Court. Going as it does to the foundation of Mr. Sager's case, the trial court's error involves a due process interest that must be addressed. Hopkins v. State, 632 So. 2d 1372 (Fla. 1994).

The state's second contention requires somewhat more discussion, although the Initial Brief clearly set forth Mr. Sager's view. In the Initial Brief, Mr. Sager provided detailed analyses of case law that supports his position - that the record does not support the finding beyond a reasonable doubt that the property removed from the victim's dwelling was done so was anything more than an incidental afterthought to the killing.

The opinions in question are Clark v. State, 609 So. 2d 513 (Fla. 1992), Parker v. State, 458 So. 2d 750 (Fla. 1984), Knowles v, State, *632* So. 2d 62 (Fla. 1993), Scull v. State, 533 *So.* 2d 1137 (Fla. 1988), Peavy v. State, 442 So. 2d 200 (Fla. 1983), Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984), Simmons v. State, 419

So. 2d 316 (Fla. 1982), and Moody v. State, 418 So. 2d 989 (Fla. 1982). Mr. Sager stands on the Initial Brief's analysis of them and their relevance to this appeal. (In, Br. 49-61.)

In the Appellee's Answer Brief, the state, specifically referring to four of the eight analyzed decisions, grandly declares that "the cases cited by Appellant are plainly distinguishable," - then plainly neglects to distinguish them. (Ans. Br. 52.) As for marshalling its own case law in support of its position, the state turns to three recent decisions rendered by this Court which *are* distinguishable. (Ans. Br. 50.)

In Bruno v. State, 574 So. 2d 76, 80 (Fla. 1991), the Court rejected the defendant's claim that robbing stereo equipment from a murder victim was "nothing more than an afterthought" because, among other things, he borrowed a car just before going to the victim's house, telling the car owner that he needed the car to "get stereo equipment." The distinguishing point is that in the case at bar, there is no evidence on the record that Mr. Sager and his co-defendant went to the victim's dwelling to "get" anything other than drunker than they already were.

The state also cites Jones v. State, 652 So. 2d 346, 350 (Fla. 1995), where the Court rejected an "afterthought" claim by a defendant who stabbed two victims and immediately robbed their persons, as part of what the Court termed "a continuous series of acts or events as provided under (the robbery statute)." The Court reasoned that the "afterthought" contention was negated by a statement by the defendant that "he killed 'those people' because

they **'owed'** him money." This distinguishes Jones from the instant case in that there is no evidence here indicating that Mr. Sager went to the victim's dwelling in **order** to obtain something **owed** to him, or to rob the victim. There is simply no credible evidence on the record that an intent by Mr. Sager to take property from the premises was formed prior to or coincidentally with the homicide.

Finally, the state invokes Finney v. State, 660 So. **2d** 674, 680 (Fla. 1995), in which tho Court rejected an appellant's argument that taking **a** murder victim's VCR was an afterthought, even though the property was pawned soon after the homicide. Finney is distinguishable from the instant case in that the Court specifically determined, from the record, that "there is no **reasonable** hypothesis other than that Finney killed (the victim) in order to take her property." *Sub judice*, it is more than **reasonable** to hypothesize that a drunken altercation **led** to the victim's death at the hands of Donald Voorhees, which was then **followed by** Mr. Sager's afterthought of ransacking the dwelling **and** fleeing the scene in the victim's vehicle.

REPLY TO APPELLEE'S ISSUE VIII

THE TRIAL **COURT'S** JURY INSTRUCTION AND ITS FINDING **WITH** RESPECT TO HAC CONSTITUTED ERROR

In the Appellee's Answer Brief, the state claims to present the results of a "closer reading" of an opinion relied on by the trial court, Henry v. State, 328 So. **2d** 430 (Fla. 1976), than was reflected in the Initial **Brief.** (Ans. Br. 57.) That claim is justified, but in the final analysis, the trial court's reliance on Henry remains misplaced. The key distinction between the facts underlying the opinion and the facts on the instant record is that of motive. In the cited opinion, the Court concluded that the crime was committed "for pecuniary gain and for no other motive other than perhaps to eliminate a witness." Henrv, at 328 So. 2d 431. No such picture emerges from the facts at bar.

Other aspects of the case, including the defendant's lengthy violent history and callousness to human life demonstrated by repeatedly shooting the arresting officer, also distinguish Henrv. In sum, the Court characterized the defendant's crime as "atrocious, horrible and cruel almost beyond belief." Id. As tragic as the homicide committed by Mr. Sager's co-defendant was, it does not rise to this **level** of outrage.

The trial court's reliance on Mines v. State, 390 So. 2d 332 (Fla. 1980) is not: made any more comprehensible **by** the state's commentary on it in the **Appellee's** Answer Brief. (Ans. Br. *57-58.)* The trial court cited the decision for the proposition that knife wounds inflicted on a bound victim support an **HAC** finding. (R. 733-734.) That issue was not reached in Mines, where the death penalty

imposed (in part because of the trial court's finding of HAC) on other grounds.

In its reference to other cases relied on below, Perry v. State, 522 So. 2d 817 (Fla. 1988), Troedel v. State, 462 So, 2d 392 (Fla. 1982), and **Breedlove v.** State, 413 So. 2d 1 (Fla. 1982), the state seems to tacitly acknowledge that they do not clearly support the HAC finding at issue herein: "In any event, the issue really is not whether the lower court used the best-possible precedents in drafting its order unless the purpose of appellate review becomes an exercise in grading the trial judge's order." (Ans. Br. 58.) Well expressed and fair enough. Let us turn then to the real issue.

That issue is whether the facts surrounding the death in this case support a finding that the crime against the victim was especially heinous, atrocious and cruel. The crime, based on a fair reading of the record, was not an act of premeditated, callous fiendishness, as the trial court obviously viewed it. On the contrary, it resulted from a tragic escalation of unanticipated circumstances involving young men who were thoroughly intoxicated. The death neither took place in the course of a robbery, nor was motivated by the need to eliminate a witness. It was a spontaneous, drunken tragedy which must not be compounded by the State of Florida, from the aloof position of the crime's aftermath, deliberately putting Mr. Sager to death.

REPLY TO APPELLEE'S ISSUE IX

THE **TRIAL** COURT ERRED BY DENYING THE MOTION TO **SUPPRESS** EVIDENCE STEMMING FROM A SEARCH OF THE ROOM AT THE CHASCO INN

The discussion under Issue IX in the Appellee's Answer Brief is divided into two sections, The first may be dispensed with summarily. According to the state, "No tangible evidence was seized at the Chasco Inn that was introduced into evidence --" (Ans. Br. 64), implying that there is nothing to suppress. But the Initial Brief argued in detail in its Argument IX (In. Br. 69-76) that Pasco County law enforcement officers mislead the court as to what was discovered at the Chasco Inn. Accordingly, the specific relief sought was stated as follows: "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." (In. Br. 90-91.)

In the second part of the discussion under Issue IX, the state argues the merits of the search issue. (Ans. Br. 65-70.) Mr. Sager stands on **the** arguments set forth in the Initial Brief with respect to that issue. It should also be pointed out that the very deficiency that led to raising this issue - the reluctance or refusal to testify frankly about what the search of the Chasco Inn produced, plays a significant **role** in the **state's** argument **on** the merits **of** the search issue. The state contends that "unlike Paty [v. State, 276 So. 2d **195** (Fla. 1st DCA 1975)], where the defendant had left personal belongings in the room, **Sager** and his companion

had not left such items behind; clearly they had fled after the (victim's) murder." (Ans. Br. 68.) This reliance on a police-manufactured confusion cannot excuse the police's failure to follow proper procedure and apply for a search warrant prior to entering Room 4 at the Chasco Inn.

REPLY TO APPELLEE'S ISSUE X

THE "BRIGHT LINE" RULE WITH RESPECT TO REQUIRING A RECORD WAIVER OF THE RIGHT TO TESTIFY DURING PENALTY STAGE SHOULD BE ADOPTED BY THIS COURT

Mr. Sager reiterates his argument in favor of adoption of a bright line rule. He also notes that such a rule could hardly be complied with by the severely limited colloquy quoted in the Appellee's Answer Brief. (Ans. Br. 71.) It would require that the court with counsels' assistance ensure that a defendant at penalty phase completely understands not just that he still retains the right to testify, but how important his testimony might turn out to be. The negation of the presumption of innocence represented by a guilty verdict: introduces a completely new situation and *it* should be embarked on only after the defendant: fully understands the new context of his or her constitutional rights

REPLY TO APPELLEE'S ISSUE XI

DEFENSE **COUNSEL'S OBJECTION** THAT HE WAS **UNQUALIFIED** TO **TRY** A **FIRST DEGREE** MURDER **CASE RENDERS** MR. **SAGER'S CONVICTION AND SENTENCE INVALID**

The very fact that defense counsel felt insufficiently confident based on his experience to effectively represent Mr. **Sager** speaks for itself. The state tries to obfuscate the issue of counsel's lack of confidence by arguing that **this** Court should take it upon itself to nullify a Chief Circuit Judge's order governing procedures in her Circuit. What is at **stake** here is not an administrative order but a young man's life, which has itself been declared effectively null fallowing a questionable proceeding. Finally, one can only wonder at the state's inflated confidence in the uninformed opinion of Mr. Sager as to the psychological preparedness of appointed counsel.

REPLY TO APPELLEE'S ISSUE XII

THE TRIAL COURT ERRED BY REJECTING VARIOUS DEFENSE CHALLENGES TO FLORIDA STATUTES UNDER WHICH MR. SAGER WAS TRIED AND CONVICTED

Mr. Sager understands that the statutory challenges on constitutional grounds addressed in Issue XII have been rejected in earlier cases. He argues that this case is an apt occasion for reconsideration of the challenges.

CONCLUSION

For all the reasons set forth in his Initial Brief and this Reply Brief, 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.

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 10th day of June, 1996.

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