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IN THE SUPREME COURT OF FLORIDA

FREDERICK CAVE,

Petitioner,

vs. Case No. 77,937

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

On Appeal from the Eighth Judicial
Circuit of Florida, in and for
Alachua County, Florida

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STATEMENT OF THE CASE AND FACTS

The State accepts Cave's statement of the procedural history of his case. It accepts his statement of the facts with the following clarifications and additions:

A. Double-Jeopardy Issue

1. Cave committed his offenses on September 19, 1988. (R 21-2).

2. Cave entered the victim's apartment and struck her so that she fell to the floor. He got on top of her and tried to strangle her. (T 49-54). He then grabbed her artist's knife and held it to her throat. (T 51). He threatened to kill her before demanding money and fleeing. (T 51-3).

B. Voluntariness of Confession

1. Cave entered the victim's apartment about 7:30 p.m. on September 19 (T 47-8), obviously during daylight hours. In response to a rustling sound, the victim went to her front (screen) door. Cave came through that door. (T 49). He knocked the victim, who struggled with him face-to-face (T 49-50), to the floor. The room was lit, so that the victim could clearly see his face. (T 50). Cave turned the victim on her stomach, then back over to threaten her with the knife. (T 51). He made the

victim give him her purse. (T 52). She noticed his right forearm was bleeding a lot (T 53), and gave him a towel. (T 53). Cave put the towel on his arm and dropped the knife. (T 53). The victim identified the knife, in court, as hers (T 55); then as "an" X-acto knife. (T 64). She described Cave's facial appearance that day in detail (T 55-6), and readily identified him in court. (T 56-7).

2. The police arrived in about ten minutes. They took photos and samples of the blood strewn about the apartment. (T 58). Within several hours, the police contacted the victim and took her to the hospital emergency room. (T 59). They asked only if she could "identify someone." (T 59). Within ten minutes she was shown a man in a cubicle. She had no doubt the man was Cave (T 60), and based her identification on his face. (T 62). On cross-examination, the victim stated that she did not recall police saying anything suggesting Cave was the person who attacked her. (T 62).

3. The first responding officer (Maresca) went to the victim's apartment and saw blood everywhere. (T 66). He left and continued routine patrol, until he was dispatched to an injured or sick black male lying on a porch about four blocks from the victim's apartment. This was shortly before 10:00 p.m. (T 68), or only 2½ hours after the crime. Maresca went to the

man, whose descriptian (T 69) matched that given earlier by the victim, A bloodstained towel was wrapped around his right arm. (T 69). Observing medical technicians at work, Maresca testified the man's right arm was cut on the underside of the forearm. (T 70). Maresca identified the man as Cave. (T 71-2).

4. Maresca returned to the victim's apartment and asked her if she would take a look at someone matching the description she had given, to see if he was the individual that committed the crime. (T 72). They went to the hospital.

5. When the victim first approached him, Cave turned his head away. When he faced the victim, he was immediately identified twice without hesitation. (T 75, 85, 88).

6. Officer Folks arrived at the victim's apartment after Officer Maresca. (T 102). He also observed blood everywhere, from which he collected samples. (T 102-3). Later, he took blood samples from Cave at the hospital. (T 108). These samples matched. (T 147-50).

7. Nurse Carrie entered notes onto Cave's emergency charts (T 122-4). Cave gave an explanation for his injury. He told the nurse that he stabbed himself with an artist's knife about 7:30 p.m. (T 124). That statement was entered on the charts as Cave said it. (T 125).

8. On recall, Officer Maresca testified that Cave had a gold tooth in front (T 156), which Maresca observed while talking to him at the jail and hospital. Earlier, the victim testified that during the assault, she noticed that Cave had "something metallic in his mouth." (T 64).

C. Departure Sentences

1. Cave pled to burglary of a structure in early 1986. (T 243-4). He was placed on probation, which he violated. In April 1988, he was sentenced to **30** months in jail, Released after only five months, he committed the instant crimes only 19 days after release. (T 244).

2. When told of his possible term of imprisonment by an arresting officer, Cave declared that he would return and "really fuck Gainesville up." (T 248).

SUMMARY OF "HE ARGUMENT

ISSUE I: Double Jeopardy

Armed robbery and aggravated assault are distinct crimes, each with statutory elements not found in the other. Aggravated battery is not necessarily included in the offense of armed robbery. Consequently, conviction for both offenses (rising from the same incident) is proper under **§775.021(4)(b),** Florida

Statutes (**Supp.** 1988). The exception for lesser offenses subsumed by greater offenses does not **apply.**

ISSUE 11: Voluntariness of Confession

Based on the totality of circumstances, Appellant's confession and other statements were voluntary, following a knowing and intelligent waiver of his Miranda rights. The uncontroverted testimony established his lucidity, which was further evidenced by his attempt to bargain information for food.

In a self-serving attempt to avoid more serious charges, Cave was sufficiently alert to confess only to robbing the victim's house. Moreover, the victim's strong identification and other evidence sender any involuntary statements harmless. In light of the properly admitted evidence, the verdict could not have been affected by any improper admission of Cave's statements and confession to the police.

ISSUE 111: Departure Sentences

The facts underlying Cave's departure sentences, nominally grounded only on temporal proximity, establish that the trial court was aware of his persistent pattern of increasingly violent crime. Cave's earlier offense was a plea to simple burglary. His current offenses are armed robbery, armed burglary, and aggravated battery. All are more serious than the

first offense. Cave escalated from a crime against property only, to violent crimes with a deadly weapan, against a person. His departure sentences are proper.

ARGUMENT

ISSUE I

WHETHER THE STATUTORY ELEMENTS OF AGGRAVATED BATTERY ARE **SUBSUMED** BY **THOSE OF ARMED ROBBERY (Restated)**

This court's jurisdiction on this issue is predicated on certified conflict with Rowe v. State, 574 So.2d 1107 (Fla. 2d DCA 1990).[1] Rowe snatched a purse from a woman as she left a supermarket. As she struggled to retain the purse, she fell or was pushed to the ground, and was injured. Charged with robbery and aggravated assault, Rowe was convicted for robbery and the lesser-included offense of simple battery. Id. at 1107.

The question in Rowe was whether the statutory elements of robbery subsume those of battery. That court announced a rule of law: that the statutory elements of robbery do subsume battery, when the "same force" (i.e., a single act) is used to

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[1] The decision below (slip op., p. **4)** declares: "The conclusion we reach conflicts with Rowe v. State [citation omitted]." Cave states (initial brief, p. 16) that the First District, "in certifying conflict with Rowe and Sheppard. . . ." He is wrong. The opinion below implicitly found Sheppard to be wrongly decided. (slip op., p. **4).** No conflict with Sheppard was certified.

perpetrate both crimes. Because Rowe was not appealed, the State must assume it was correctly decided until this court decides otherwise. However, robbery and battery each have a statutory element not common to the other. Battery requires a touching, which robbery does not. Robbery requires taking of property, which battery does not. Also, battery is a permissive, but not necessarily, lesser included offense of robbery. **Rowe**, based on the argument made below, is wrongly decided.

Here, **Cave** was convicted for burglary of an occupied dwelling with **a** dangerous weapon, robbery with a deadly weapon, and aggravated battery on September 19, 1988; all as charged. (R 58-9). He does not challenge the burglary conviction on double jeopardy grounds. **A** comparison of the relevant statutory elements of armed robbery and aggravated battery reveals:

ARMED ROBBERY (§812.13)		**AGGRAVATED BATTERY** (8784.045)	
1.	Taking of money or property	1.	Touching or striking someone
2.	from a person	**2.**	**against** that **person's will**
3.	use of force, violence or putting in fear	**3.**	use of a deadly weapon
4.	carrying a deadly weapon		

After he had entered the victim's house, Cave grabbed her artist's knife and held it to her throat. (T 51). As to that

weapon, he did more than necessary to commit armed robbery, which requires only that a deadly weapon be "carried." *See* §812.13(2)(a)("If . . . the offender carried a . . . deadly weapon" [e.s.]). However, in using that deadly weapon to take the victim's money, Cave did not satisfy all the elements of aggravated battery. He had already knocked the victim down onto the floor (T 49-50), thereby satisfying the distinct statutory element in aggravated battery not found in armed robbery.

Cave begins his argument with this statement: "[t]he defendant's convictions . . . are based on one **act** . . . [e.s.]." This is the terrific flaw in his argument. Assuming that the exception [§775.021(4)(b)3] for subsumed offenses applies, that exception states:

> Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. [e.s.]

The State does not agree that Cave's crimes were a single "act," Even if they were, the exception is facially inapplicable. To be invoked, the statutory elements of the lesser offense must be subsumed by the greater. The fact that two distinct offenses may be simultaneously proven is of no consequence. Armed robbery does not, statutorily, require a touching or striking of the victim; as does aggravated battery. Aggravated battery does not, statutorily, require taking of property; as does armed robbery.

Therefore, armed robbery can never subsume the statutory elements of battery. The decision below (slip op., p. 3) correctly declares such,

This leads directly to the State's next point. The exception for subsumed offenses does not apply to lesser offenses that are merely permissive, rather than necessary.[2] Other statutory provisions, enacted in the same law [i.e., §7 of ch. 88-131, Laws of Florida] compel this result:

> Whoever . . . [commits] one or more separate criminal offenses, . . . shall be sentenced separately for each criminal offense
>
> * * *
>
> [o]ffenses are separate if each offense requires proof of an element that the other does not, <u>without regard to</u> the accusatory pleading or <u>proof adduced at trial</u>. [e.s.]

The State agrees that "proof adduced at trial" shows that Cave's criminal endeavor began with breaking into the victim's apartment and ended when he fled due to a serious stab wound, apparently self-inflicted. That proof, however, is irrelevant to the operation of §775.021(4)(b)3, which here turns on whether the

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[2] Aggravated battery is a permissive (category 2), lesser included offense of robbery with a weapon. Curiously, the **Rowe**, *supra*, opinion did not seem concerned that simple battery is a permissive (category 2), lesser included offense of robbery.

statutory elements of aggravated battery are incorporated or subsumed by those for armed robbery. *See* Smith v. State, 547 So.2d 613 (Fla. 1989)(statute overriding Carawan must be applied by resort only to the "statutory element" test).

Moreover, the Legislature -- in the language quoted above -- has defined separate offenses only as those having at least one statutory "element that the other [offense] does not." Since necessarily lesser included offenses do not have distinct statutory elements, only permissive lesser offenses can be separate. By requiring conviction and punishment for each separate offense, the Legislature has effectively prohibited the "inclusion" of lesser, permissive offenses committed in a single act.

Cave's reliance on Sheppard v. State, 549 So.2d 796 (Fla. 5th DCA 1989), is misplaced, because that case is wrongly decided. Sheppard was convicted for robbery and battery; the Fifth District vacated the latter as subsumed and falling within the statutory exception at issue here. Sheppard is wrong because it turned, improperly, on the facts adduced at trial. Robbery and battery each have an element not found in the other. Therefore, they are separate; the latter cannot be subsumed by the former. The Fifth District erred when it agreed that Sheppard was "being twice punished for the same conduct by

separate convictions for strong armed robbery and battery." [e.s.] *Id.* at 796. There is no separate statutory offense for strong armed robbery -- only robbery; albeit enhanced for carrying weapons. By noting that the robbery was "strong armed," the **Sheppard** decision had to rely on facts adduced or the accusatory pleading; something not permitted under §775.021(4)(a). Again, the decision below did not certify conflict with Sheppard, but instead found that Sheppard's reliance on Rojas[3] was misplaced.

Wright v. State, 573 **So.2d 998** (Fla. 1st **DCA** 1991), supports the State's position. Wright found the lesser offense (§316.027, requiring persons involved in vehicular accidents involving injury or death to stop) was subsumed by the greater offense (§782.071, vehicular homicide enhanced by leaving the scene of the accident). Significantly, the enhancement of vehicular homicide is provided by statute, not merely facts adduced. Therefore, the statutory elements of the greater offense in Wright subsumed those of the lesser.

This court need do no more than return to its decision in State v. Gibson, 452 So.2d ***553*** (Fla. 1984). Discussing the test announced in Blockbusqer v. United States, 284 U.S. 299, **52** S.Ct. 180, **76 L.Ed.** 306 **(1932),** the Gibson court concluded that

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[3] Rojas v. State, 543 So.2d **415 (Fla.** 5th **DCA 1989).**

separate convictions for armed robbery **and** displaying a firearm during the commission of a felony were proper, as:

> Each offense has at least one statutory element that the other does not, the offenses were separate crimes even when based on the same act or factual event.

Id. at 555. Significantly, Gibson noted that the 1977 Legislature overrode the "judicially created [e.s.] 'single transaction rule"' when it enacted §775.021(4). Id. at ***555.*** Just as the 1977 Legislature overrode the judicially created single transaction rule, the 1988 Legislature overrode the judicially created single act rule in Carawan. In effect, the 1988 Legislature returned Florida law to its pre-Carawan status. Cave wants to go back to Carawan, by reading **§775.021(4)(b)3** incorrectly. He wants the exception to apply based on the facts adduced, rather than the statutory elements of the offenses involved.

A recent decision by this court, candidly cited by Cave, sounds the death knell for his double jeopardy claim. State v. McCloud, 577 So.2d **939** (Fla. 1991), upheld convictions for sale and possession with intent to sell when the same "quantum" of cocaine was involved. Rejecting McCloud's position, the court agreed that sale and possession each have an element not common to the other. Id. at **940.** Therefore, the possession offense was not subsumed by the sale offense; the exceptions in §775.021(4)(b)3 did not apply. ***Id.***

Most important, this court announced the rule of law implicitly followed by the First District:

> **An** offense is a lesser included offense for purposes of section 775.021(4) only if the greater offense necessarily includes the lesser offense." *Id.* at **941.**

As described above, aggravated battery is not necessarily included in armed robbery.

Finally, Cave's conviction for aggravated assault is harmless error. He was given departure sentences for counts I (burglary) and II (armed robbery) that do not depend on his conviction for Count **111,** the aggravated battery offense. Were the battery offense vacated, **Cave's** guidelines score for additional offenses at conviction would be reduced by only ten points, to 137. (R 68). He would still be in the 4% to 9 years sentence range. *See* Fla.R.Crim.P. 3.988(c)(permitted range of 4½ to ***9*** years includes guidelines score of 122 to 151 points).

ISSUE II

WHETHER CAVE'S **CONFESSION** WAS **VOLUNTARY**

The decision below is, in effect, a PCA as to this issue. By simply finding the issue to be of "no merit," the court did not reveal its rationale. Therefore, Cave's contention (initial

brief, p. 22) that "the First District Court of Appeal failed to **apply** either due process test" is highly misleading. Cave cannot say what that court did or did not do. This court must not be swayed by his misreading of the decision below.

The State does not accept Cave's pathetic self-portrait: that he "was so hungry" he would trade incriminating information for food. (initial brief, p. 21). Cave was sufficiently cogent to bargain for food, and ultimately refused to reveal the location of the incriminating evidence (the stolen purse). As will be noted below, he was able to manufacture an exculpatory confession at the jail. Under the total circumstances, his incriminating admissions and confession to a lesser crime were voluntary.

As a statement of black-letter law, the State agrees that a confession must be voluntary to be admissible. Beyond this principle, two others must be kept in mind. First, a ruling that a confession is admissible into evidence rests upon a determination of law and fact mixed. This determination is necessarily based on the totality of the circumstances. Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987). When the totality of circumstances indicates the confession is voluntary, it is admissible. Palmer v. State, 397 So.2d 648 (Fla.), *cert. denied,* 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981).

Second, as a ruling on admissibility of evidence, the court's determination that the confession is admissible will not be disturbed absent abuse of discretion. Blanco v. State, 452 So.2d 520, 523 (Fla. 1984)(defendant's speculative theory of innocence properly denied)(citations omitted). The lower court's ruling is presumptively correct. Wasko, *supra, citing* Stone v. State, 378 So.2d 765 (Fla. 1979), *cert. denied,* 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980)(ruling on voluntariness clothed with same presumption of correctness which attends jury verdicts and final judgments).

Turning to the totality of circumstances in this case, the State proved, at least by preponderance, that the confession was voluntary. *See* Cooper v. State, 336 So.2d 1133, 1137 (Fla. 1976)(state carried burden -- by a preponderance of the evidence -- to show circumstances were not inherently intimidating and that defendant was coherent and knowledgeable).

Pursuant to the State's motion (R 25-6), a hearing **was held** immediately before trial to determine the admissibility of Cave's confession. (T 2-25). Two witnesses, the police officer to whom the confession was given and Cave himself, testified.

Completing investigation of an earlier burglary, Officer Maresca went to a second location where the injured Cave was being treated by paramedics. (T 4). Cave was taken to the

emergency room of the hospital, where he received additional treatment. (T 3-4). Although later testimony indicated the injury was a substantial knife wound, and that Cave had bled a lot (T 11, 66, 77-8), Cave was responsive, lucid, and coherent during the whole time Officer Maresca talked with him. (T 13-14, 76). Cave's injury was not so severe[4] as to prevent Officer Maresca from questioning him, the victim from identifying him in the emergency room (T 5, 75, 85), or the prompt transport of Cave to jail. (T 8, 79).

After the victim's identification of Cave and before any questioning, Officer Maresca gave Cave his Miranda warnings.[5] (T 4-5, 75). Timely Miranda warnings may serve as one indicator of voluntariness of a confession. *See* Cave v. State, 476 So.2d 180, 185 (Fla. 1985)(defendant repeatedly received and acknowledged his Miranda rights before confession voluntarily).

Maresca, having read Cave his rights[6] and asked whether he understood them, also asked Cave if he wanted to talk. Cave

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4 Cave apparently was given intravenous fluids and antibiotics (T 115, 126); the wound had clotted by the time Officer Maresca spoke with him in the hospital. (T 12).

5 To the best of Maresca's knowledge, Cave was also given warnings on the porch where he was discovered lying injured. (T 3).

6 Cave's injury had stabilized and he was not being treated when his rights were read. (T 86). His treatment resumed later. (T 86).

replied "sure" or "yes." (T 5, 76). When asked where the victim's purse was, Cave said the purse was "no good" and "covered with blood." (T 6, 77). When asked if the victim cut him, he said: "That girl couldn't hurt me." (T 7, 77). Cave offered to reveal the purse's location if the police would get him food first. (T 7). His pitiful claim -- that he would incriminate himself for food (initial brief, p. 21) -- is belied by the fact that he adamantly refused to reveal the location of the purse before he was fed. (T 7-8).

Officer Maresca then transported Cave to the jail. (T 8, 79). After another futile attempt to learn the purse's location, he told Cave that he was being charged with a different robbery and the burglary of the victim's house. (T 8, 80). Cave got "real excited" (T 9) and responded: "You can charge me with that. I did the house."[7] (T 9, 80).

In response, Cave claimed he had been cut in a drug deal and wandered around for several hours. (T 16-19). Through loss of blood, he began crawling and came to rest on the porch. He denied making any statement to police. (T 16). He claimed

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[7] In actuality, Cave also denied the strong-armed robbery. By the parties' agreement, his response was given to the jury, omitted reference to the other offense. (T 23, 5). (*See* Cave's full response at T 9).

extensive memory loss except for what he did **not** say at the jail. (T 19). The trial court concluded Cave was lying. **(T 22).**

Only one conclusion emerges from these facts. At the jail and afraid of additional charges, Cave knowingly and voluntarily admitted to robbing the house. Interrogation was brief and conversational.

Earlier at the hospital, he volunteered that the purse was no good after being covered with blood. Although under treatment generally, he had stabilized and appeared **quite** lucid and coherent. He was carefully read his Miranda warnings and asked if he understood them. **The** questioning was brief, in a well-lit emergency room, and apparently in the vicinity of hospital personnel.

By any measure, Cave's confession was voluntary and admissible. ***See,*** for example, Cave v. State, ***supra,*** at 185 (repeated questioning after mere assertion of innocence not coercive). Here, Cave never maintained his innocence, requested a lawyer, or took any steps to exercise his Miranda rights. He voluntarily implicated himself by describing the victim's purse as blood-covered. He haggled over revealing its location. He implicitly described the victim when he said "that girl" couldn't hurt him. Finally, in immediate response to being told of charges against him, he confessed to "doing" the house in an

attempt to exculpate himself from robbery. Statements made to police officers after receipt and acknowledgment of Miranda rights are voluntary, unless surrounding circumstances indicate otherwise. Garcia v. State, 492 So.2d ***360***, 365 (Fla. 1986). Having attempted to benefit from this impulsive declaration, Cave should not be able to mischaracterize it as the product of coercion.

Cave remained sufficiently lucid to bargain information for food, assert that the "girl" could not hurt him, and attempt to exculpate himself from another more serious crime. He never asserted innocence as to the burglary. Perhaps falling sway to his own defense, Cave cannot distinguish himself from the defendant in Reddish v. State, 167 So.2d 858 (Fla. 1964). There, the defendant attempted suicide after committing murder; he inflicted a very serious injury near his heart. **Under** intensive treatment at the hospital, Reddish was given medicine intravenously for infection, blood clotting, and severe pain. The last **was** a combination of codeine and repeated doses of demerol, which finally cause Reddish to sleep. He confessed twice upon being aroused. ***Id.*** at 861, n.1. Under these circumstances, Reddish's confession was held involuntary. *Id.* at 863.

Cave's situation in no way approaches the conditions in Reddish. A bloody wound was stitched up. (T 117). Cave was given only a local painkiller, antibiotics (T 117), and saline fluid intravenously for blood loss. He always appeared lucid, and **spoke** coherently. He was obviously responsive, and could be moved to the jail after a couple hours' treatment. There is simply no reasonable comparison between **Cave** and Reddish. Moreover, the mere fact that Cave **was** under the influence of a local painkiller does not render his statements involuntary. ***See*** Thomas v. State, 456 So.2d 454 (Fla. 1984)(confession voluntary despite suspect's being under the influence of alcohol).

Cave's historical analysis under the heading "Fourteenth Amendment Due Process" (initial brief, **p.** 23-7) requires no response. He next has a problem with the specificity of the trial court's finding that the confession was voluntary. (initial brief, **p.** 28). This is remarkable in light of the court's response at the conclusion of the pretrial suppression hearing. Recognizing that the real issue was voluntariness, not whether the crucial events occurred, the court declared:

> **THE COURT:** . . . The issue as raised by Mr. Fischer [Cave's trial attorney, who just argued no knowing and intelligent waiver of Miranda rights could have occurred] is really the issue that has to be faced.

> Mr. Cave's testimony is inconsistent with itself. . . . I can't really believe that Mr. Cave is telling the truth here this morning, and I do find that his statement to the officer, to Officer Maresca **was** <u>intelligently and knowingly made.</u> So, the statement will be admitted. (T 22-3)(empahasis supplied).

Cave claims that the court's ruling "was not a sufficient finding that the confession was voluntary." (initial brief, p. 28). With the possible exception of using the word "voluntary," it is difficult to imagine how the court could have been more precise. Finally, the trial judge "need not recite a finding of voluntasiness if his having made such a finding is apparent from the record." <u>Hoffman v. State</u>, **474** So.2d 1178, 1181 (Fla. 1985); <u>Antone v. State</u>, 382 **So.2d** 1205 (Fla. 1980), *cert.* ***denied,*** **449 U.S. 913, 101** S.Ct. 287, 66 L.Ed.2d 141 (1980)(finding of voluntariness does not require specific words, but must be ascertainable from the record). Here, the finding of voluntariness is readily apparent.

The State took exception to Cave's self-portrait at the outset of this issue. The State takes greater exception to his misguided tactic on appeal. The First District declared that Cave's argument on this issue had "no merit." (slip op., **p.** 6). Ignoring the words in the opinion, Cave speculates that the First District found admission of the "involuntary confession . . . **was**

harmless error." (initial brief, p. *29).* This is completely wrong and misleading to this court. Nothing in the decision below indicates that admission of the confession was even error. Nothing indicates that the First District applied any harmless error analysis, much less that it "misapplied the harmless error analysis". (initial brief, p. 29-31).

If Cave wants to anticipate the State's harmless error argument, and point to **facts** that would weigh against harmlessness; such is his right. But to depict the opinion below as being grounded on an improper harmless error analysis -- when the opinion's only operative language is "no merit" -- is misleading at best. There is nothing to indicate the First District, as Cave imagines, "merely substituted itself for the jury." (initial brief, p. 29).

Cave next claims that a recent First District decision advocates expansion of the harmless error doctrine as applied to confessions, That case, Guess v. State, 16 F.L.W. D1361 (Fla. 1st **DCA** May 13, 1991), certified a question which cited Arizona v. Fulminate, 111 S.Ct. 1246, **59** U.S.L.W. **4235** (U.S. March 26, 1991)(coerced confession may be harmless error), The question in Guess is whether failure to allow a defendant to testify, outside the jury's presence, as to the voluntariness of a confession can be harmless error. ***Id.*** at 1362. Notably, the Guess court

reversed in light of that failure, declining to consider the error harmless.

Fulminate issued nine days before the opinion below, which preceded Guess by about five weeks. According to Cave, the relatively short time between each decision "reinforces" (initial brief, **p.** *29)* his conclusion that **the** decision below found his confession to be coerced but harmlessly admitted.

The State stresses that Cave's conclusion is no more than idle speculation, in light of the words actually used in the opinion below. Accordingly, the State cannot, and will not, argue whether the First District applied the correct harmless error analysis. The State does not accept Cave's unfounded speculation that the court even considered the admission to be erroneous.

However, the State will set forth why admission of the incriminating statements, if error, could properly be found to be harmless, The correct test is whether admission, beyond reasonable doubt, had no effect on the outcome of the verdict. Fulminate, *supra,* 5 F.L.W.Fed. S149 at 153 (state must show, beyond reasonable doubt, that admission of the confession did not contribute to the conviction); State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986)(harmless error test, as applied to comments on defendant's right against self-incrimination, requires the state

to prove "that there is no reasonable possibility that the error contributed to the conviction").

Turning to the evidence, far more is revealed than Cave acknowledges. He entered the victim's apartment about 7:30 p.m. on September 19 (T 47-8), obviously during daylight hours. In response to a rustling sound, the victim went to her front (screen) door. Cave came through that door. (T 49). He knocked the victim, who struggled with him face-to-face (T 49-50), to the floor. The room was lit, so that the victim could clearly see his face. (T 50). Cave turned the victim on her stomach, then back over to threaten her with the knife. (T 51). He made the victim give him her purse. (T 52). She notice his right forearm was bleeding a lot (T 53), and gave him a towel. (T 53). Cave put the towel on his arm and dropped the knife. (T 53). The victim identified the knife, in court, as hers (T 55); then as "an" X-acto knife. (T 64). She described Cave's facial appearance that day in detail (T 55-6), and readily identified him in court. (T 56-7).

The police arrived in abaut ten minutes. They took photos and samples of the blood strewn about the apartment. (T 58). Within several hours, the police contacted the victim and took her to the hospital emergency room. (T 59). They asked only if she could "identify someone." (T 59). Within ten

minutes she was shown a man in a cubicle. She had no doubt the man **was** Cave (T 60), and based her identification on his face. (T 62). On cross-examination, the victim stated that she did not recall police saying anything suggesting Cave was the person who attacked her. (T 62).

The first responding officer (Maresca) went to the victim's apartment and saw blood everywhere. (T 66). He left and continued routine patrol, until he was dispatched to an injured or sick black male lying on a porch about four blocks from the victim's apartment. This was shortly before 10:00 p.m. (T 68), or only 2½ hours after the crime. Maresca went to the man, whose description (T 69) matched that given earlier by the victim. A bloodstained towel was wrapped around his right arm. (T *69).* Observing medical technicians at work, Maresca testified the man's right arm was cut on the underside of the forearm. (T 70). Maresca identified **the** man as Cave, (T 71-2).

Maresca returned to the victim's apartment and asked her if she would take a look at someone matching the description she had given, to see if he was the individual that committed the crime. (T 72). They went to the hospital.

When the victim first approached him, Cave turned his head away, another circumstance indicating guilt. When he faced the victim, he was immediately identified twice without

hesitation. (T 75, 85, 88). Cave does not here, nor did he below, challenge the propriety of this show-up identification.[8]

Officer Folks arrived at the victim's apartment after Officer Maresca. (T 102). He also observed blood everywhere, from which he collected samples. (T 102-3). Later, he took blood samples from Cave at the hospital. (T 108). These samples matched. (T 147-50).

In addition to this evidence, these were Cave's statements to the emergency room nurse (Carrie). While objected to at trial and raised before the First District, admission of the nurse's testimony as to these statements is not challenged before this court.

Nurse Carrie entered notes onto Cave's emergency charts[9] (T 122-4). Cave gave an explanation for his injury; he told the nurse that he stabbed himself with an artist's knife about 7:30 p.m. (T 124). This statement is significant. It puts an "artist's knife" in Cave's hand about the time of his assault on

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8 The State takes exception to Cave's observation (initial brief, p. 31) that the victim's identification of Cave was made under "highly suggestive circumstances." This is an oblique attempt to challenge the identification, something not done at trial or on appeal to the First District.

9 Ultimately, the statement, and apparently the charts, were admitted, as the court overruled the defense objection based on predicate. (T 127).

the victim. It was entered on the charts as he said it. (T 125).

On recall, Officer Maresca testified that Cave had a gold tooth in front (T 156), which Masesca observed while talking to him at the jail and hospital. Earlier, the victim testified that during the assault, she noticed that Cave had "something metallic in his mouth." (T 64).

In contrast to Cave's extremely terse account of the evidence he deems "permissible" (initial brief, p. 30), the jurors heard all of the above, excluding the incriminating statements or confession at issue. Given the clarity and accuracy of the victim's testimony; her unchallenged identification of him only 2 to 3 hours later; the matching of the blood samples; the towel observed by Officer Maresca on Cave's right arm but not recovered; the gold tooth testimony compared to the victim's observation of "something metallic in his mouth"; that Cave was found only four blocks from the crime scene; that Cave admitted to a stab injury with an artist's knife; that Cave's injury was on the right forearm as observed by the victim at the time of the assault, and later by Officer Maresca; and that Cave turned his head to prevent his identification by the victim; the admission of the challenged statements was harmless. Beyond reasonable doubt, the statements

did not affect the verdict. If their admission were error, that error was harmless. Fulminate, DiGuilio; *supra.*

Superficially, Cave's most interesting point is whether the Florida Constitution, in Art. I, §9, confers a greater right to due process than does the United States Constitution. However, Cave overlooks the fact that the test for harmless error announced in DiGuilio, and applied to comments on a defendant's right to silence, is substantively identical to the test articulated in Fulminate. The state constitutional right against self-incrimination is found in Art. I, §9. Implicitly, §9 is satisfied by the DiGuilio test for harmlessness. If the two tests for harmless error are the same, it follows that the state and federal constitutional rights to due process are the same; at least as to self-incrimination.

Moreover, Florida's harmless error statute (§924.33) has remained unchanged since at least **1947.** See DiGuilio, *supra,* 491 So.2d at **1133-4** (discussing historic evolution of harmless error statutes). Section **924.33,** operative at the time of Reddish, played a crucial role in DiGuilio. Application of the DiGuilio test for harmless error satisfies the statute. Nothing relied upon by Cave suggests that the harmless error statute is deficient under the state constitution.

Reddish, *supra,* does not teach otherwise. That court held that reversal is required if a coerced confession was "allowed as a link in the chain of evidence." *Id.,* 167 So.2d at 863. Cited immediately are two United States Supreme Court cases: Rogers v. Richmond, 365 U.S. 534, 541, 81 S.Ct. 735, 5 L.Ed.2d 760 (1960); and Townsend v. Sain, 372 U.S. 293, **307,** 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). By relying upon federal authority, this court could hardly be implying that the state right to due process exceeds the federal.

State **v.** Cayward, ***552*** So.2d 971 (Fla. 2d **DCA** 1989), ***rev.*** *dismissed,* ***562*** So.2d **347** (Fla, 1990), is readily distinguishable. There, the police manufactured false documents to obtain a confession, The Second District found that production of false, official-looking reports was unacceptable, but relied on federal and state authority equally. In fact, the court **said** that police conduct offended "traditional notions of due process of law under both the federal and state constitutions." *Id.* at 974. Nothing in Cayward or the other **cases** cited by Cave indicates these notions are more stringent under Florida law.

Only Cave's discussion of Wells v. State, 580 So.2d 131 (Fla. 1991), needs further response. There, the defendant **--** awaiting trial for two murders **--** was under observation by a correctional officer. She told Wells that anything he said would

be confidential, and not to tell his attorney. Wells' ensuing statements and behavior were noted; these notes were relied upon by the State's experts to conclude Wells was competent to stand trial. *Id.* at 132. The court focused, by analogy to cases involving confessions, on the method of obtaining the statements; not whether they were voluntary. *Id.* at **133** ("due process requires an examination of the particular methods").

Here, there was no subterfuge at all. Cave was carefully given his Miranda warnings. Questioning by the police was not long or intensive. The methads were above-board and complied with routine practice. No deception has even been alleged.

Returning to Wells, this court **said:** "[t]he due process provision of the Florida Constitution embodies the principles of fundamental fairness elaborated by Justice Brennan in Perkins." *Id.* at **133,** *citing* Illinois v. Perkins, U.S. ___, **110 S.Ct. 2394, 110** L.Ed.2d 243 (1990). This statement is significant, as this court -- through the quoted part of Wells -- relied on federal cases and did not distinguish between federal and state constitutional rights to due process.

Cave relies on Wells to maintain his statements, not obtained by subterfuge, could not be admitted at trial. **He**

overlooks the fact that, in Wells, admissibility at trial[10] rested equally on federal and state grounds, which were not distinguished. Wells does not stand for the proposition that Cave's statements were barred by the Florida Constitution regardless of their admissibility under the federal.

To sum: Cave's statements were voluntary and properly admitted, If the statements were not voluntary, their admission was harmless error under the leading federal case (Fulminate) and Florida **case** (DiGuilio).

ISSUE III

WHETHER THE UNDERLYING FACTS ESTABLISH COMMISSION OF A SUCCESSIVE CRIMINAL EPISODE MORE SIGNIFICANT THAN THE FIRST (Restated)

The certified question speaks in terms of "the temporal proximity of crimes alone . . . without a finding of persistent pattern of criminal conduct." [e.s.] (slip op., p. 6). This question, taken literally, has been answered in the negative by Smith v. State, 579 So.2d 75 (Fla. 1991)(temporal proximity not departure basis when "successive" criminal episode of no greater "significance" than the first). There is no need for this court

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10 After this point, the Wells decision relies only on Art. I, §9 of the Florida Constitution to prevent use of the information for any purpose.

to exercise its jurisdiction to answer again a question so recently answered.

The problem is that the certified question is not based on the entire record. Unwritten observations of the trial judge indicate Cave's departure sentence is factually based on his escalating criminality. If the certified question is answered in the negative, this court will be ignoring the proper factual basis for life sentences necessary to protect Gainesville from a violent felon who has vowed to seek revenge. If the question is answered in the affirmative and Cave's sentences upheld, conflict arises with Smith.

Recognizing this dilemma, the State moved for rehearing and clarification of the First District's opinion. That motion specifically requested the certified question be deleted, or amended to reflect the record of Cave's increasingly violent crimes. The State's motion was denied.

If this court exercises its jurisdiction based on the certified question, the State respectfully suggests that the question be reworded to answer the real issue: whether the nominal reliance on temporal proximity alone supports departure

when the trial court expressly noted -- at sentencing -- the escalating " criminality of the defendant.

Cave's sentencing guidelines range was 4½ to 9 years. (R 68). He received departure sentences of life for count I (armed burglary) and count II (armed robbery), and 15 years for count III (aggravated battery). The trial court wrote its departure reasons on Cave's scoresheet (R 68):

> Released from DOC 19 days before this offense committed. State v. Williams, 504 So.2d 392 (Fla. 1987). F.S. 921.001.

That Cave was out of prison only 19 days when he committed the instant crimes is not disputed. When he was sentenced on August 7, 1989 (R 241), State v. Williams, 504 So.2d 392 (Fla. 1987), was good law. *See,* id., at 393 ("Neither the continuing and persistent pattern of criminal activity nor the time of each offense in relation to prior offenses . . . are factored in to arrive at a guidelines sentence. Therefore, there is no prohibition against basing a departure sentence on such factors").

Were the law now what it was then, Cave's sentence could be readily upheld. However, this court's recent decision in

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[11] The judge stated Cave was "extraordinarily dangerous and only believes he can survive in this life by means of crime." (T 249).

Smith v. State, *supra,* implicitly calls Williams into question. There, the defendant violated probation *30* days after release, committing similar theft-related offenses. Answering a certified question, this court **held** that a "successive criminal episode of no greater significance than the first" cannot justify departure. *Id.*

If this court were to confine its review literally to the departure reason, Cave's argument would have superficial appeal. However, review of a departure sentence is not so narrow. Regardless of the nomenclature employed by the trial court, the underlying facts control. Brown v. State, 569 So.2d 1223, 1224 (Fla. 1990)("We must therefore decide whether the underlying predicate far the conclusion is, by itself, a sufficient reason for departure."). *See* Wilson v. State, **567 So.2d 425,** 427 **(Fla.** 1990)("A departure sentence should be reviewed by looking at the reasons therefor individually and collectively.").

Here, the underlying facts mandate affirmance of Cave's sentences. At his sentencing, the prosecutor stated without objection that Cave pled to burglary of a structure in early 1986.[12] (T **243-4).** Placed on probation for three years, he violated and in April, 1988, was sentenced to **30** months in jail.

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12 He was allowed to **plead** to this offense, despite entering a home and attempting to strangle the occupant, as the victim could not be located for trial. (R **243).**

Released after only five months, he committed the instant crimes only 19 days later. (T 244).

Instead of a crime only against property (burglary) with unproven allegations of battery, Cave committed burglary of a residence, assaulted the occupant with a deadly weapon, and robbed her. This is clearly a criminal episode of much greater significance. Departure is justified under Smith, *supra.*

Several observations are particularly compelling. First, Cave is a classic example of the inadequacy of the guidelines, when a very dangerous felon has a "minimal" record (only one prior offense, which as pled was a crime only against property). Second, he waited only 19 days to commit three more serious felonies. ***See*** Haines v. State, 552 So.2d 320 (Fla. 1st **DCA** 1990)(departure proper when defendant committed capital sexual battery on child only 21 days after release from prison on earlier offense of lewd and lascivious assault upon a child). Third, it appears that were it not for his self-inflicted wound, the hapless victim would have been seriously injured or killed; a matter noted by the trial court at sentencing. (T 249). Fourth, Cave vowed to return to the community and "really **fuck** Gainesville up." (T **248).**

All of these aggravating circumstances were known to the trial court at sentencing. None are figured into the guidelines.

All are -- individually and collectively -- proper reasons for departure. While the better practice would have been for the trial court to have written such on the guidelines scoresheet, the facts underlying the 19-day interval between Cave's release and his new crimes establish an escalating pattern of criminal conduct. Such pattern is evident in the entire record, and is a proper departure reason. *See* State v. Vanhorn, 561 So.2d 584 (Fla. 1990)(examining the "record in its entirety," and upholding departure based on "escalating pattern of criminality").

Significantly, Cave was sentenced in early August, 1989, roughly two years before this court's decision in Smith, *supra.* Even Smith acknowledged earlier decisions indicating temporal proximity alone could support departure, if such proximity indicated a defendant's criminality was persistent. Therefore, Smith is obviously an evolutionary refinement in guidelines interpretation, a refinement that must not be applied mechanically to invalidate a sentence proper when imposed. In this vein, it should be noted that all cases cited by Cave (initial brief, **p. 38-46**) either uphold departure based on temporal proximity, or were decided after Cave was sentenced.

Equally important, Cave's pattern of criminality escalated in violence, and is not confined to two offenses. His earlier crime of burglary involved only one offense. However, he committed three distinct offenses in his second episode.

In sum, the trial court verbally found (T 248-9) that Cave committed armed felonies of violence against a person only 19 days after release. Having just been made aware of Cave's prior record (T 243), the court unavoidably knew Cave's crimes were of escalating severity.

One must wonder if Cave will wait even 19 days to return to Gainesville and commit more crimes. Unsuccessful in using a deadly weapon, Cave will likely use a firearm when he seeks his self-proclaimed vengeance.

CONCLUSION

Conflict jurisdiction should be exercised, the decision below approved, and the decision in Rowe disapproved. The certified question must be reworded to reflect the record in this case, and answered affirmatively. Cave's incriminating statements and confession must be held properly admitted, or their admission held to be harmless error. The trial court's judgment and sentence would, in effect, be upheld.

Respectfully submitted,

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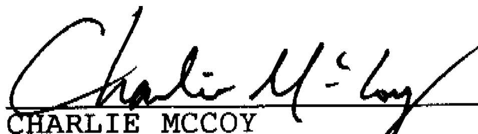

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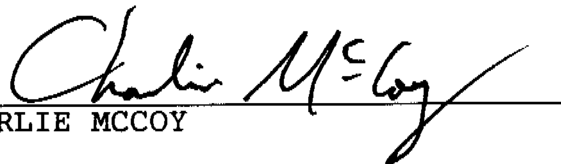
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief has been furnished by U.S. Mail to MR. GEORGE F. SCHAEFER, Esquire, 15 Southeast Seventh Street, Gainesville, Florida 32601, this 19th day of August, 1991.



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