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SUPREME COURT OF FLORIDA

FREDERICK CAVE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

Case No. 77,937

District Court of Appeal,
1ST District - No.89-01694

ON APPEAL FROM THE DISTRICT COURT OF
APPEAL FOR THE FIRST DISTRICT OF FLORIDA

INITIAL BRIEF OF PETITIONER

GEORGE F. ASCHAUER
FLORIDA BAR NO. 308870
15 S.E. SEVENTH STREET
GAINESVILLE, FLORIDA 32601
(904) 338-1111

ATTORNEY FOR PETITIONER

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I PRELIMINARY STATEMENT

Frederick Cave was the defendant in the trial court. He will be referred to in this brief as "petitioner," "defendant," or by his proper name. Reference to the record on appeal will be used by the symbol "R" followed by the appropriate page number in parentheses and reference to the transcript of the trial proceedings or sentencing hearing will be used by the symbol "T" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

An Alachua County jury found petitioner **Frederick** Cave guilty of the offenses of burglary of an occupied dwelling while armed, robbery with a deadly weapon, and aggravated battery (R-**58-59**). Petitioner Frederick Cave appealed his convictions and sentences to the District Court of Appeal, First District, of Florida. The First District Court of Appeal affirmed Mr. Cave's convictions and sentences in a ***per curiam*** opinion filed April **4**, 1991.

The First District Court of Appeal rejected Mr. Cave's double jeopardy argument but certified conflict with the Second and Fifth District Courts of Appeal. The First District Court of Appeal also found no merit to Mr. Cave's contention that his involuntary and coerced confession to the police that was admitted into evidence at the jury trial requires reversal of his convictions and affirmed "without discussion" of this issue. Finally, the First District Court of Appeal upheld the trial court's deviation from the sentencing guidelines, but also certified to this court a question of great importance. Petitioner Frederick Cave seeks discretionary review by this court of this opinion by the First District Court of Appeal.

A. DOUBLE JEOPARDY ISSUE

The evidence presented at Frederick Cave's jury trial showed that a man entered the apartment of Dee Ann Cox, without her

consent, and struck her so that she fell to the floor of the livingroom (T-49). The man proceeded to take an artist's knife that Ms. Cox had been using for a graphics project and held it to her throat (T-47-48; 51). The man told Ms. Cox that he would kill her if she did not "shut up" and asked Ms. Cox whether she had any money. Ms. Cox then gave the man her purse which contained $30.00 (T-55).

Ms. Cox noticed that the man was bleeding on his right forearm and she gave him a light colored towel (T-53; 55). The man dropped the knife on the way out of the apartment. Ms. Cox, who was not injured from the knife, discovered that the robber had left blood everywhere in the apartment (T-53-54).

A Gainesville police officer was dispatched to the victim's apartment to investigate the attack (T-65). Approximately two hours later the officer learned from a dispatcher that authorities had located an injured man found on a lady's porch approximately four blocks away from the victim's residence. (T-68; 82). The investigating officer then proceeded to this location and observed defendant Frederick Cave with a light pink facial towel wrapped around his arm that was soaked with blood (T-69). The investigating officer also noticed a cut under the right forearm (T-70). Frederick Cave was then taken to Alachua General Hospital for treatment (T-74).

The police did not conduct a photo line-up or a live line-up involving the defendant (T-63). Instead, the victim was taken

to Alachua General Hospital for a show-up with the defendant in which she identified the defendant as the robber (T-84).

An Alachua General Hospital nurse was permitted to testify over objection that a medical chart indicated that the defendant stabbed himself with an artist's knife around 7:30 P.M. **(T-115-117).** The nurse acknowledged that she had no recall of the defendant actually saying that but that is what she wrote in the chart (T-117). A serologist testified that **blood** found an the recovered artist's knife and at the victim's apartment was of the same type as the defendant's blood **(T-148-150).** The police were not able to locate the pink towel that the defendant was seen with when he was first found by the authorities despite a search (T-111). The parties also stipulated to the jury that an expert was unable to locate any latent fingerprints of any person on the knife (T-155).

The defendant's trial counsel during a motion for judgment of acquittal argued that Mr. Cave could not be convicted of both aggravated battery and **armed** robbery where there was only one weapon involved. The trial court judge denied the motion but added, "...the appellate court will have to straighten this out" (T-171). The First District Court of Appeal, for the reasons stated in its opinion, rejected Mr. Cave's argument on appeal that his convictions and sentences for both aggravated battery and armed robbery constitutes a double jeopardy violation.

B. INVOLUNTARY CONFESSION ISSUE

The state placed into evidence before the jury a 5" by 7" color photo of the defendant's arm (state's exhibit 2). During the course of the trial the parties were in agreement that petitioner Frederick Cave almost died from the injury to his arm. The prosecutor stated during his closing argument to the jury:

> In fact, he almost killed himself with this weapon by cutting himself so severely, and you can look at all the photographs. I know you have already, but you can take them back to the jury room and see the kind of wound that he inflicted on himself.

(T-187-188 . The trial court judge opined at sentencing the following:

> She [the victim] was a very fortunate girl because when Mr. Cave reached around and pulled the knife he sliced his own arm, almost killing himself.

(T-249).

A hearing was conducted outside the presence of the jury on the day of the defendant's jury trial for a determination by the trial court judge of the admissibility of the defendant's incriminating statements made at Alachua General Hospital (R-25). At this hearing the investigating officer testified that when the defendant was first located paramedics were unwrapping his arm to put gauze an it (T-11). It looked as though the defendant had been bleeding "quite a bit" (T-11). After Mr. Cave was taken to Alachua General Hospital, the investigating officer testified that he went to the emergency room of the hospital to talk to Mr. Cave (T-4). By that time the bleeding had stopped

(T-12). Further medical attention was given to Mr. Cave at this time which included the use of an oxygen tube around Mr. Cave's face and a saline solution (T-ll), The officer testified that he was told that Mr. Cave had been given a local medication but nothing else (T-12).[1]

The investigating officer testified that after Miranda was given the defendant did not refuse to answer questions and at no time did he request to talk to an attorney (T-14). He was asked where the purse was and he stated that the purse was no good anymore (T-6; T-77). The defendant stated that if they would give him some food he would tell them where the purse was (T-7). He advised that the purse was covered with blood (T-6). He was asked whether he knew whether the lady was in the house when he went inside the house and he responded, "Shit, what do you think?" (T-7; T-77). When he was asked how he got cut, he initially responded that he had fell down but when questianed further he stated that he did cut himself (T-7).

When the defendant was asked if the girl (referring to the victim) had cut him, he replied that that girl could not hurt him (T-7; T-77). The request for food was repeated at the jail when the defendant was later booked in after discharge from the

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[1] Medical personnel who actually treated Mr. Cave were not called to testify at this hearing as to the actual treatment Mr. Cave received in the emergency room including whether he had received any type of medication.

hospital (T-8; **T-80).** When the defendant was told he was being charged with burglary at the jail he stated, "You can charge me with that. I did the house." **(T-8;** T-80). The investigating officer testified that he felt the defendant was lucid and coherent when he made these statements (T-14; T-76).

The defendant during this hearing gave testimony which conflicted with the officer's testimony. **The defendant** testified among other things that he could not recall making statements to the police and that he had been cut during a drug transaction (T-15-16). The trial court judge did not find the defendant's testimony credible and further rejected defense counsel's arguments that the defendant's incriminating statements were not voluntary. The court ruled:

> ...I do find that his statement to the officer, to Officer Maresca [the investigating police officer] was intelligently and knowingly made. So, the statement will be admitted.

(T-22-23).

In the appeal to the First District Court of Appeal Frederick Cave unsuccessfully argued that the trial court committed reversible error by not making a specific finding that the confession was freely and voluntarily given and by permitting the involuntary confession to be admitted into evidence at the defendant's jury trial.

C. DEPARTURE SENTENCE ISSUE

Before Mr. Cave's sentencing for the burglary of an occupied dwelling while armed, robbery with a deadly weapon and aggravated

battery offenses, Mr. Cave's prior criminal record consisted of five misdemeanors and one third-degree felony: a burglary of a structure (R-68; T-243-244). During the sentencing hearing, defense counsel did not object to the trial prosecutor's reference to the presentence investigation (PSI) report which discussed the circumstances of the previous burglary. In that burglary Mr. Cave reportedly entered an occupied dwelling and strangled the victim for a full minute and a half before releasing him. Mr. Cave was allowed to plead to the lesser included offense of burglary of a structure because the victim moved (T-243-244). For this earlier burglary Mr. Cave was placed on probation and ultimately sentenced to thirty months for a violation of probation.

Mr. Cave fell within the five and one-half to seven year cell of the recommended range of the sentencing guidelines and the four and one-half to nine year cell of the permitted range of the sentencing guidelines (R-68). The trial court judge granted the prosecutor's request to depart from the guidelines because Mr. Cave had anly been released from the Department of Corrections nineteen days before the new offenses were committed. On the sentencing guidelines scoresheet, the court penned in the following reason for departure:

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

(R-68). No other reasons for departure were given. There was

no finding by the court as to whether the defendant's criminal record reflected an escalating pattern of criminal conduct. Mr. Cave was sentenced to two concurrent life sentences for the burglary and robbery offenses and fifteen years on the aggravated battery offense.

The First District Court of Appeal affirmed the departure sentence but certified the following question to this court to be of great public importance:

> DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT?

The State of Florida moved the First District Court of Appeal for rehearing and clarification. The state argued that the certified question is not grounded on the facts within the record and alleged "the underlying factual predicate for appellant's departure sentence establishes a pattern of escalating violence." Petitioner's counsel filed opposition to this motion and argued that the record did not show, and the trial court judge did not find, a pattern of escalating violence to justify the departure sentence. The First District Court of Appeal rejected the state's argument and denied the state's motion for rehearing and clarification on May 7, 1991.

This timely appeal follows. Petitioner invokes the discretionary jurisdiction of the Supreme Court of Florida to review the decision of the First District Court of Appeal.

III SUMMARY OF ARGUMENT

In Issue I, *infra*, it is argued that the First District Court of Appeal has committed reversible error in its interpretation of §775.021(4)(b)3, Fla. Stat., one of the exceptions to legislative intent of the so-called Carawan override. The First District Court of Appeal has found that the legislature now intends to allow a person to be convicted and sentenced of an offense and a permissive lesser included offense from the same act. Because this holding is certified to be in conflict with at least two other district courts of appeal, the right not to be placed in jeopardy twice for the same act is no longer uniform throughout the state. The interpretation advocated by the First District Court of Appeal is tantamount to holding that the legislature intended to abolish permissive lesser includeds. There is no evidence the legislature contemplated such a radical change in the law.

In Issue 11, *infra*, it is argued that the First District Court of Appeal committed reversible error in apparently finding the use of petitioner Frederick Cave's coerced confession harmless error. The harmless error doctrine does not apply under Article I, §9 of the Florida Constitution. The mere use of a coerced confession at a defendant's trial is repugnant to basic notions of fairness under the Florida Constitution. With respect to the Fourteenth Amendment, the harmless error doctrine does

apply, but the First District Court of Appeal misapplied that doctrine. The State of Florida failed to prove beyond a reasonable doubt that the confession by petitioner Frederick Cave at the emergency room did not contribute to the guilty verdicts by the jury.

In Issue III, *infra*, it is argued that the First District Court of Appeal erred in finding that temporal proximity **alone** is a sufficient reason to deviate from the sentencing guidelines. The First District Court of Appeal has certified this question to the Supreme Court of Florida as one of great public importance. Following the certification, the Supreme Court of Florida reaffirmed its previous holding in which it held that in addition to temporal proximity for deviation from the sentencing guidelines there must be a finding by the trial court that the defendant's criminal history reflects an escalating pattern. The First District Court of Appeal did not have the advantage of this holding, and it was too late for petitioner Frederick Cave to move the First District Court of Appeal for rehearing when this new Supreme Court of Florida decision was rendered. The certified question must be answered in the negative.

IV ARGUMENT

ISSUE I

THE DEFENDANT'S CONVICTIONS AND SENTENCES FOR BOTH AGGRAVATED BATTERY AND ARMED ROBBERY VIOLATE THE FEDERAL AND STATE PROHIBITIONS PLACING A DEFENDANT TWICE IN JEOPARDY FOR THE SAME ACT.

The defendant's convictions for armed robbery and aggravated battery are based on one act: placing a knife to the victim's person and while touching her with the knife demanding her money and purse (T-51-52). The First District Court of Appeal committed reversible error by finding that the dual convictions for armed robbery and aggravated battery based on this one act did not violate the double jeopardy bar of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §9 of the Florida Constitution. The First District Court of Appeal has misconstrued §775.021(4), Fla. Stat. which is the so-called. legislative override of the Supreme Court of Florida's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987).

In the Carawan case the Supreme Court of Florida held that where there is a reasonable basis for concluding that the legislature did not intend multiple punishments, the rule of lenity contained in §775.021(1) and Florida's common law require that the court find that multiple punishments are impermissible. Where the accused is charged under two statutory provisions that

manifestly address the same evil and no clear evidence of legislative intent exists, the Supreme Court of Florida heldthat the most reasonable conclusion usually is that the legislature did not intend to impose multiple punishments.

For example, an appellate court held under a Carawan analysis that when battery occurred contemporaneously with a robbery and formed one of its elements, the battery conviction and sentence constitutes double jeopardy. Hall v. State, 549 So.2d 758 (Fla. 3rd DCA 1989) citing McCloud v. State, 335 So.2d 257 (Fla. 1976); Montsdoca v. State, 93 So. 157 (1922).

The Florida legislature in response to the Carawan decision amended §775.021(4) to include a specific statement of legislative intent. The italicized language sets out the amendment to the statement of legislative intent.

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits ***an act*** or ***acts which constitute one or more*** separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> ***(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:***
>
> ***1. Offenses which require identical elements of proof.***

2. *Offenses which are degrees of the same offense as provided by statute.*

3. *Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.*

Ch. 88-131, §7, Laws of Fla.

The Supreme Court of Florida has interpreted this legislative amendment to indicate that the court's finding regarding legislative intent in Carawan was incorrect. For this reason Carawan has now been characterized as "merely an evolutionary refinement of decisional law...." State v. Glenn, ***558*** So.2d **4, 9** (Fla. 1990); ***see also*** Love v. State, **559 So.2d** 198 (Fla. **1990).** The Supreme Court of Florida in ***dicta*** in State v. Smith, **547 So.2d 613 (Fla. 1989)** concluded among other things that the legislature rejects the distinction that the court had drawn between act or acts and now requires that multiple punishment shall be imposed for separate offenses even if only one act is involved. The court also in ***dicta*** stated that **§775.021(4)**(a) should **be** strictly applied "without judicial gloss." **The** court went on to actually hold that the override of Carawan would not be retroactively applied because of **ex *post facto*** considerations. Justice Rosemary Barkett predicted in her dissenting opinion in smith that the lower courts would be "thrown helter-skelter back to the pre-Carawan muddle." State v. Smith, ***supra*** at 619.

Long before the Carawan decision and the later override by

the legislature, the Supreme Court of Florida agreed with a recommendation to consolidate two of the four categories of lesserincluded offenses establishedin Brown v. State, 206 So.2d 377 (Fla. 1968). The two separate categories mandated by the court consisted of:

> 1. Offenses necessarily included in the offense charged, which will include some lesser degrees of offenses; and
>
> 2. Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence, which will include all attempts and some lesser degrees of offenses.

In The Matter Of Use By The Trial Courts Of Standard Jury Instructions In Criminal Cases, 431 So.2d 594 (Fla. 1981). The legislature in its amendment to §775.021(4) did not clearly address what impact, if any, the change in the legislative intent should have for lesser included offenses.

With this background, the Fifth District Court of Appeal in Sheppard v. State, 549 So.2d 796 (Fla. 5th DCA 1989) was presented with facts virtually identical to the facts sub *judice*. The defendant in Sheppard pushed his victim to the ground, wrestled with her for her purse, pulled her purse from her grasp, and then fled. The appellate court characterized the force applied as one continuous act of force with one purpose--the theft of the victim's pocketbook. The court concluded that the

third exception to the legislature's new rule of construction applied to this scenario which reads:

> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

The language of this exception, the court held, covered the defendant's conviction for battery, a categorytwo lesser **offense** of robbery, which in turn required that the battery convictian be vacated on double jeopardy grounds.

The Second District Court of Appeal reached the same conclusion in Rowe **v.** State, 574 So.2d 1107 (Fla. 2d DCA 1990). The defendant in that case, who was charged with aggravated battery and robbery, was convicted of robbery and aggravated battery's lesser included offense of simple battery. The victim in Rowe had suffered a slight concussion, broken elbow and shoulder when she was pushed to the ground at the time her purse was snatched by the defendant.

The facts in petitioner Frederick Cave's case differ slightly from those in Sheppard and Rowe in that the threat used to obtain the purse from the victim was accomplished by use of the threat of a knife. Nevertheless, the First District Court of Appeal rejected the analysis in Rowe and Sheppard based on its interpretation of **§775.021(4)(b)3.** The First District Court of Appeal, in certifying conflict with Rowe and Sheppard, has misinterpreted **§775.021(4)(b)3** as applying only to necessarily lesser included offenses.

Such a holding is in conflict with one of the First District Court of Appeal's other decisions on the subject: Wright v. State, 573 So.2d 998 (Fla. 1st DCA 1991). In that case the court vacated the defendant's sentence for leaving the scene of an accident because of the defendant's conviction and sentence far vehicular homicide. The court found that the exception at §775.021(4)(b)3 applies even though the greater offense (vehicular homicide) consists; of additional elements not found in a lesser offense (leaving the scene of an accident). This inconsistency in holdings by the First District Court of Appeal in itself reflects uncertainty by the First District Court of Appeal about its understanding of the legislature's true intent an lesser included offenses and double jeopardy.

The uncertainty on legislative intent is not confined to the First District Court of Appeal. For instance, in Kurtz v. State, 564 So.2d 519 (Fla. 2d DCA 1990) the court rejected the state's claim that the Carawan override amendment permitted a defendant to be convicted and sentenced for both DUI manslaughter and manslaughter with culpable negligence for one death. The court conceded that these two crimes were not identical for purposes of a Blockburger analysis and were separate offenses under §775.021(4), Fla. Stat., but precedent before Carawan held that there could only be one conviction and sentence for one death.[2]

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[2]Houser v. State, 474 So.2d 1193 (Fla. 1985).

The court concluded that nothing in the legislative history of the amendment to the statement of legis ative intent suggested that the legislature intended to overrule this pre-Carawan precedent.

The Fourth District Court of Appeal in Murphy v. State, ___ So.2d ____, 16 FLW D1048 (Fla. 4th DCA, April 17, 1991) reached an opposite conclusion and found that the defendant could be convicted of both DUI manslaughter and vehicular homicide. The court reasoned that each of the offenses contain elements which the other did not while at the same time certifying the question to the Supreme Court of Florida as to the wisdom of its interpretation. In so holding the Fourth District Court of Appeal has overlooked its own precedent in which it has said the effect of the statutory amendment is to merely return the law of double jeopardy to its pre-Carawan state. Collins v. State, ___ So.2d ___, 16 FLW D871 (Fla. 4th DCA, April 3, 1991).

The Supreme Court of Florida in the companion cases of State v. McCloud, 577 So.2d 939 (Fla. 1991) and State v. V.A.A., 577 So.2d 941 (Fla. 1991) recently spoke to the application of §775.021(4)(b)3 in the context of narcotics cases. The court concluded that the legislature intended that a person could be convicted and sentenced for both the sale and possession of the same quantum af a drug. In *dicta* the court stated that in general §775.021(4), Fla. Stat., requires adherence to the Blockburser analysis.

It is respectfully submitted that this approach needs to be reexamined, at least in nondrug cases. Carried to an extreme the result would be a gross deprivation of the rights of Florida citizens to equal protection of the law under Article I, §2 of the Florida Constitution. In some cases a prosecutor will file an information charging the greater offense and the permissive lesser included offense, which is precisely what happened in the case sub *judice*. In other cases the jury will be instructed to follow the pattern jury instructions to find the defendant guilty only of the greater offense or the permissive lesser included offense, but not both. Citizens prosecuted in the first situation, such as petitioner Frederick Cave, suffer a disproportionate range of penalties compared to citizens in the latter situation. The extent to which a person is twice placed in jeopardy for the same act should not depend on a mere administrative or charging decision by the prosecutor. *Cf.* Spencer v. State, 545 So.2d 1352 (Fla. 1989).

More importantly, the legislature was presumably aware when it amended the legislative intent statute of the existence of lesser included offenses and permissive lesser included offenses. Had the legislature intended to so radically change the law as to permit a person to be convicted and sentenced far both the greater and the permissive lesser included offense, but not a necessarily lesser included offense, the legislature would have explicitly stated such intent. Far instance, the legislature

could have enacted the following exception to its mandate of multiple convictions and sentences for one criminal act, but chose not to do so:

> Offenses which are lesser offenses but only the statutory elements of which are necessarily subsumed by the greater offense.

It follows that the legislature did not intend to make such a radical change in the law.[3] The effect of the Carawan override amendment does not permit simultaneous convictions and sentence for an affense and its permissive or necessary lesser included offense. Rather, the Carawan override amendment merely returns the law to its pre-Carawan status. The First District Court of Appeal reversibly erred in finding a contrary legislative intent and should have ordered that petitioner Frederick Cave's aggravated battery conviction and sentence be vacated.

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[3] *But* see the concurring opinion of Justice Leander J. Shaw in State v. Barritt, 531 So.2d 338, 341 n.2 (Fla. 1988).

ISSUE II

THE APPELLATE COURT ERRED BY NOT REVERSING THE DEFENDANT'S CONVICTIONS AND SENTENCES SINCE AN INVOLUNTARY AND COERCED CONFESSION WAS ADMITTED AT THE DEFENDANT'S JURY TRIAL.

It is undisputed that petitioner Frederick Cave on the day that he was interrogated at his hospital bed at the emergency room almost bled to death. Both the prosecutor during his closing arguments and the trial court judge during sentencing concluded that Mr. Cave almost died from a self-inflicted knife wound (T-187-188; 249). The picture of Mr. Cave's sliced arm that was referred to by the prosecutor during his closing argument, state's exhibit 2, substantiates the conclusion that but for medical intervention Mr. Cave would have bled to death. Assuming that the defendant's medical chart was reliable and that he was cut at approximately 7:30 p.m., Mr. Cave had been bleeding for over two hours before he was rushed to the emergency room.

It is not just the fact that Mr. Cave almost died immediately before he was interragated in the emergency room that leads to the conclusion that Mr. Cave's confession was coerced and involuntary. Mr. Cave was so hungry that he was willing both at the hospital and at the jail to offer incriminating information in return for food. The investigating officer testified to the following at the trial:

Q While still at the hospital, what if anything else did he say about the purse?

A The defendant said he was hungry and he wanted to get some meat in him and, if I would run him by a restaurant, he would show me where the purse was.

Q To which you responded?

A I responded, "No problem. Tell me where the purse is at and we'll drive by a restaurant and get you something." Then we went back and forth. He kept insisting he wanted the food first and then he'd show me the purse.

Q Did you ever get him any food?

A No, I did not.

Q Did you ever get the purse back?

A Did not.

(T78-79).

The Supreme Court of Florida has held that the question of voluntariness of a confession is in the first instance a question to be determined by state law, subject to the minimum **require**-ments of the federal Fourteenth Amendment's due process clause. Thompson v. State, **548** So.2d 198, **204** (Fla. **1989)** citing Jackson v. Denno, **378** U.S. 368, **393, 84 S.Ct. 1774, 1789, 12** L.Ed.2d **908 (1964).** Accordingly, the First District Court of Appeal should have reviewed Mr. Cave's confession to determine whether the admission of that confession at his jury trial met the minimum requirements of the federal Fourteenth Amendment's due process clause and **also** met the minimum requirement of Article I, **§9** of the Florida Constitution's due process clause. It is apparent that the First District Court of Appeal failed to apply either due process test.

A. FOURTEENTH AMENDMENT DUE PROCESS

At one time in our nation's history, the citizens of Florida were afforded greater protection against the use of coerced confessions in criminal prosecutions under the federal constitution than under the state constitution. The case of Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940) is a sad reminder of that time in which Florida's state courts permitted the use of coerced confessions. In that case an elderly white man was robbed and murdered in Pompano, Florida. Florida law enforcement officials reacted with dragnet methods of arrest on suspicion without warrant. A group of young ignorant African-American Floridians who were arrestedwere imprisoned in a fourth floor jail room during a period of five days in which they refused to confess to the robbery and murder. Finally, after an all night examination some of the suspects made confessions which were used at their trial and resulted in convictions and death sentences.

After the Supreme Court of Florida ultimately affirmed the convictions and sentences, the United States Supreme Court in Chambers reversed. The court held that to permit the convictions to stand when based upon confessions obtained in this manner would make the constitutional requirement of due process of law "a meaningless symbol." *Id.* at 240; 60 S.Ct. at 479, 84 L.Ed. at 724. The court stated:

> We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.

309 U.S. at 240-241; 60 S.Ct. at 479; 84 L.Ed. at 724.

Five years later the United States Supreme Court in Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945) reaffirmed that a coerced or compelled confession may not be used ta convict a defendant. The court held that if a confession is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Id. at 404, 65 S.Ct. at 783, 89 L.Ed. at 1032 citing Lyons v. Oklahoma, 322 U.S. 596, 597, 64 S.Ct. 1208, 1210, 88 L.Ed. 1481, 1483 (1944). The court observed that constitutional rights may suffer as much from subtle intrusions as from direct disregard and that coerced confessions would find a way of "corrupting the trial" if their use was sanctioned. In Justice Felix Frankfurter's concurring opinion he warned:

> We must give no ear to the loose talk about society being "at war with the criminal" if by that it is implied that the decencies of procedure which have been

> enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people.

324 U.S. at 418-419; 65 S.Ct. at 790; 89 L.Ed. at 1040.

The Court in Pavne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) appears to hold that the use of a coerced confession at a defendant's trial automatically requires reversal because of the denial of due process of law guaranteed by the Fourteenth Amendment. The court reasoned that where a coerced Confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. The court concluded in Pavne that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence of the coerced confession over objection vitiates the judgment.

The court explained in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961) that the reason for forbidding involuntary confessions is not based on the fact that they may be untrustworthy. Our judicial system is an accusatorial and not an inquisitorial system. Consequently, the court held, the state must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. For this reason in applying the federal due process scrutiny of a confession a trial court should focus on whether the behavior of the state's law enforcement

officials were such as to overbear the defendant's will to resist and bring about confessions not freely self determined. This question is to be determined with complete disregard of whether the defendant in fact spoke the truth. Id. at **543-544**; 81 **S.Ct.** at **741, 5** L.Ed.2d at **768.**

From this case law the court pronounced in Jackson v. Denno, **378 U.S. 368, 376, 84** S.Ct. **1774, 1780,** 12 L.Ed.2d **908, 915 (1964):**

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession,...and even though there is ample evidence aside from the confession to support the conviction.

The court went on to mandate that where a defendant objects to a confession as being involuntary, the defendant is entitled to a hearing in which both the underlying factual issues and voluntariness of the confession are actually and reliably determined.

The Supreme Court of Florida in McDole v. State, 283 So.2d **553** (Fla. **1973)** has rigidly enforced the rule of Jackson v. **Denno** and its progeny which requires that a trial court's conclusion that a confession was freely and voluntarily given must appear from the record with "unmistakable clarity."[4] The Supreme Court

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[4]See **Simms** v. Georgia, **385** U.S. **538, 87** S.Ct. **639, 17 L.Ed.2d 593** (1967).

of Florida explained in the McDole case that a specific finding of voluntariness is necessary to insure that a judge has properly met the requirement that the judge has determined that a Confession was freely and voluntarily given. Without a specific finding, the appellate courts are unable to know if the trial judge properly based his ruling of admissibility on the issue of voluntariness.

The United States Supreme Court in Chapman v. California, 386 U.S. 18, 23 n.8, 87 S.Ct. 824, 828 n.8, 17 L.Ed.2d 705, 710 n.8 (1967) held that certain constitutional violations can be held harmless error, but also held that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. The court listed three such constitutional rights not subject to harmless error doctrine: (1) the use of a coerced confession; (2) the right to counsel; and (3) the right to an impartial judge. The court cited the case of Payne v. Arkansas, *supra* in support of its conclusion that the use of a coerced confession could not be treated as harmless error. In another footnote in the case of Rose v. Clark, 478 U.S. 570, 578 n.6, 106 S.Ct. 3101, 3106 n.6, 92 L.Ed.2d 460, 470 n.6 (1986) the court mentioned that the use of a coerced confession could never be harmless error because such an error aborts the basic trial process.

On December 27, 1989 Frederick Cave's court-appointed counsel served his initial brief that was filed with the First

District Court of Appeal. Based on the foregoing caselaw, it was anticipated that the First District Court of Appeal would reverse Mr. Cave's convictions and sentences because they were founded in part on his involuntary confession, even though there was arguably ample evidence aside from the confession to support the convictions. Reversal was also anticipated because the trial court judge had not stated with "unmistakable clarity" that the confession was voluntary, only that it was "intelligently and knowingly made" **(T-22-23).** The mere fact that **Mr. Cave** may **have** known what he was saying, and that it was truthful, was not a sufficient finding that the confession at the hospital was voluntary.

While Mr. Cave's appeal was pending, the United States Supreme Court rendered its opinion in Arizona v. Fulminante, **499** U.S. ___, **111** S.Ct. **1246, 113** L.Ed.2d 302 **(1991)** on March **26, 1991.** In Fulminante a bare majority of the court held that admission of an involuntary confession is subject to harmless error analysis. Four members of the court dissented and stated, "the majority offers no convincing reason for overturning our long line of decisions requiring exclusion of coerced confessions." **499** U.S. at ___; **111** S.Ct. at **1257,** 113 L.Ed.2d at 322 (1991).

Nine days after **the** Fulminante decision the First District Court of Appeal rendered its decision that Mr. Cave now appeals. Although the First District Court of Appeal did not discuss the

involuntary confession issue, the timing of its decision strongly suggests that the court found that the admission of the involuntary confession of Mr. Cave at his trial was harmless error. This conclusion is supported by the First District Court of Appeal's later holding in Guess v. State, ___ So.2d ___, 16 FLW D1361 (Fla. 1st DCA, May 13, 1991) in which that court found "compelling" the arguments that the application of the harmless error doctrine, in light of the Fulminante case, should be expanded to a situation where the defendant is denied his right to testify outside the presence of the jury as to the voluntariness of his confession. In the Guess case the First District Court of Appeal has actually certified that question to this court. The fact that the First District Court of Appeal now advocates expansion of the harmless error doctrine following Fulminante reinforces the conclusion that that court found the use of Mr. Cave's coerced confession to be harmless error.

The First District Court of Appeal misapplied the harmless error analysis in this case. It is apparent that the appellate court following the Fulminante decision merely substituted itself for the jury, examined the permissible evidence, excluded the impermissible evidence consisting of Mr. Cave's involuntary confession, and determined that the evidence of guilt against Mr. Cave was sufficient or even overwhelming based on the permissible evidence. The Supreme Court of Florida in State v. Lee, 531 So.2d 133 (Flu. 1988) rejected this approach when it was first

suggested by the First District Court of Appeal.

In the **Lee** case the court repeated that the harmless error analysis as set forth in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), which originated with Chapman, *supra* and its progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. Alternatively stated, the state must prove beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the conviction. This test requires that the appellate court examine the entire record which includes a close examination of the permissible evidence on which the jury could have legitimately relied and an even closer examination of the impermissible evidence which might have possibly influenced the jury's verdict.

Applying this test, the permissible evidence on which the jury would have legitimately relied in reaching its verdict is that Frederick Cave was found several hours after the robbery in the vicinity of the victim's home bleeding. His blood type matched the blood found at the victim's apartment. The victim identified him at the hospital and in court as the robber.

The state, as the beneficiary of the erroneously admitted involuntary confession, failed to prove beyond a reasonable doubt that there is no reasonable possibility that the admission of this caerced confession contributed to Mr. Cave's convictions. First, no fingerprints of anyone were recovered from the knife

used by the robber. Second, the identification was made under highly suggestive circumstances. The victim had been told that the police had a suspect who matched the description of the robber and she initially made her identification from fifty feet away before taking the time to carefully look at Mr. Cave. There was no photo line-up or live line-up before this suggestive show-up. Third, the police could not locate the towel that Mr. Cave had in his possession which would have given the victim an opportunity to confirm or deny that this was the same towel that she gave to the robber. And finally, Mr. Cave did not make any voluntary admissions at any time to the police.

B. ARTICLE I, §9 DUE PROCESS

The United States Supreme Court in Jackson v. Denno, ***supra*** listed the different reasons why the Fourteenth Amendment forbids the use of involuntary confessions. First, there is the probable unreliability of coercively obtained confessions. Second, there is the societal concern that "important human values are sacrificed" when government officials obtain a coerced confession. Third, there is the "deep-seated feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." 378 U.S. at 386; **84** S.Ct. at **785; 12** L.Ed.2d at 921 quoting Spano v. New York, 360 U.S. 315, **320-321, 79** S.Ct. **1202, 1205-1206, 3** L.Ed.2d **1265 (1959).**

The right to due process of law and the right against compelled self-incrimination under the Florida Constitution is found at Article I, §9:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the **same** offense, or be compelled in any criminal matter to be a witness against himself.

The citizens of Florida ratified the 1968 revision of the Constitution of the State of Florida on November 5, 1968. In Florida's 1885 Constitution the right to due process and right against compelled self-incrimination was found at Sectian 12 of the Declaration of Rights. The two due process provisions are substantially the same although the right against compelled self-incrimination was broadened to apply not only to a criminal "case" but to a criminal "matter." Talbot "Sandy" D'Alemberte, Commentary to Article I, §9, Florida Constitution.

In order to determine the extent of protection found at Article I, §9, it is therefore necessary to first discuss the interpretation that was given to that provision when it was earlier found at Section 12 of the Declaration of Rights in the Constitution of 1885. The case of Reddish v. State, 167 So.2d ***858*** (Fla. 1964) is an impartant starting point.

The facts in the Reddish case are almost indistinguishable from the facts sub *judice*. In Reddish the defendant was admitted into the hospital because of an almost fatal self-inflicted pistol wound. There was profuse bleeding. Hospital personnel were required to administer drugs to relieve the severe pain that

the defendant in that case experienced during the critical period of this hospitalization.

The Supreme Court of Florida in Reddish reversed the defendant's murder conviction. The totality of the circumstances--the defendant's physical condition, in combination with the impact of the drugs used for treatment, as well as a lack of clear cut testimony regarding his mental condition at the time he gave his confession--led the Supreme Court of Florida in Reddish to conclude that the defendant's confessions were not obtained in a manner consistent with constitutional standards against compulsive self-incrimination.

In interpreting Section 12 of the Declaration of Rights the Supreme Court of Florida held that it is clear that a conviction which results from either physical or psychological coercion cannot be permitted to stand. The court stated that whether the confession is true is not the determining element. It appears that in discussing federal case law that the Florida Supreme Court construed the Florida constitutional prohibition that one shall not be compelled in a criminal case to testify against himself to require reversal if a coerced confession is allowed as a "link in the chain of evidence" despite the fact that there is corroborating evidence pointing to guilt. Id. at 863.

Another interest in society protected by Florida's due process clause is that law enforcement officials do not engage in illegal methods for "practices which most citizens would con-

sider highly inappropriate" in obtaining a confession. State v. Cayward, 552 So.2d 971 (Fla. 2d DCA 1989), *review* dismissed, 562 So.2d 347 (Fla. 1990). In the Cayward case the appellate court found that the manufacturing of false documents by the police to induce a confession violates the due process of law under Article I, §9 of the Florida Constitution and the Fifth and Fourteen Amendments to the United States Constitution. The court based this due process violation holding on the fact that the public would greatly lessen its respect for the criminal justice system and those sworn to uphold and enforce the law if the court were to sanction the manufacture of false documents by the police.

It is clear that the due process protection found at Article I, §9 in some cases exceeds that which is found under the Fourteenth Amendment to the United States Constitution. For instance, in State v. Glosson, 462 So.2d 1082 (Fla. 1985) the Supreme Court of Florida held that a law enforcement agency's agreement to pay an informant a contingency fee based on his cooperation and testimony in criminal prosecutions generated by the informant violates Florida's due process clause, even though most federal decisions have rejected such an entrapment defense under federal law. In Haliburton v. State, 514 So.2d 1088 (Fla. 1987) the Florida Supreme Court held that the police's failure to comply with an attorney's telephonic request not to question a defendant until the attorney could arrive violates due process under the Florida Constitution eventhaugh the same conduct would

not violate federal due process.[5]

The Supreme Court of Florida has not completely delineated what protections are available to Floridians from coercive interrogations under Article I, §9 of the Florida Constitution that are not present under the United States Constitution. In Thompson v. State, 548 So.2d 198 (Fla. 1989) it is interesting to observe that the court referred only to Article I, §9, and not the Fourteenth Amendment, to support its conclusion that mental weakness of the accused is a factor in determining the voluntariness of a confession.

The most important Florida case on the parameters of the due process clause found at Article I, §9 with respect to confessions is the case of Walls v. State, ___ So.2d ___, 16 FLW S254 (Fla., April 11, 1991). Unfortunately, the First District Court of Appeal was without the benefit of this case when it rendered its decision in petitioner Cave's case. The court found that the due process provision of the Florida Constitution includes a "fundamental conception of fairness" which imposes a standard of conduct imposed on the government requiring both fairness and honesty. Due process, the court held, contemplates that the police and other state agents act in an accusatorial, not an inquisitorial, manner.

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[5]See Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

In the Walls case, the court reversed the defendant's convictions and sentences for murder because of deception used by a correctional officer to illegally gather information from the defendant that was later used by state expert psychiatrists in their psychiatric evaluations of the defendant. The court declared that the trial court order declaring the defendant competent based on the tainted psychiatric evaluations and "all that followed" the court's competency order could not be allowed to stand under Article I, §9 of the Florida Constitution. It is apparent, therefore, that the Supreme Court of Florida has implicitly embraced the notion that the mere use of coerced confessions or fraudulently obtained confessions and their fruits can never be harmless error under Article I, §9.

Accordingly, there is no reason to believe that despite the United State Supreme Court's holding in Fulminante that the Supreme Court of Florida will retreat from its earlier holding of Reddish v. State that requires reversal of a conviction where a coerced confession is used at a defendant's trial even though corroborating evidence points clearly to guilt.[6]

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[6]It should be noted that the Supreme Court of Florida in Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989) did take note that there was some uncertainty under federal law on whether the federal courts would continue to hold that the use of a coerced confession could never be harmless error. Nevertheless, the court has never hinted that its interpretation of Article I, §9 of the Florida constitution would depend on the United States Supreme Court's decision interpreting federal due process.

At least one intermediate appellate court in Florida has spoken on this issue. In Bennett v. State, 550 So.2d 107 (Fla. 4th DCA 1989) the court found a Miranda violation harmless error but went on to state:

> This is in contrast to an involuntary or coerced confession which is so violative of fundamental due process rights that it can never be constituted as harmless error.

Frederick Cave calls upon this court to reverse the First District Court of Appeal and hold that under Article I, §9 of the Florida Constitution the use of his coerced confession at his trial was so violative of fundamental due process that it could not be considered under any circumstances harmless error. This will vindicate the values that are protected under our Flarida constitution which include maintaining public confidence in our criminal justice system. The citizens of Florida should not have to witness their courts sanction the use of an involuntary confession taken from a suspect confined in a hospital emergency room bed who is just beginning to recover from almost bleeding to death. The Florida Constitution should not tolerate a return to the practices condemned in Chambers v. Florida, *supra*.

ISSUE III

THE TEMPORAL PROXIMITY OF CRIMES ALONE DOES NOT PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT.

The First District Court of Appeal in its per *curiam* opinion in this case has certified the following question to be of great public importance:

> **DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT?**

A careful review of precedent from the Supreme Court of Florida compels a negative answer to this question.

The Supreme Court of Florida in another Alachua County case, Williams v. State, 504 So.2d 392 (Fla. 1987), held that a departure sentence from the sentencing guidelines could be based on a defendant's pattern of criminal activity **and** the time sequence of the commission of each offense in relation to prior offenses **and** release from incarceration or supervision. In State v. Jones, 530 So.2d 53 (Fla. 1988) the court held that the temporal proximity of the commission of crimes is a valid ground upon which to base a departure from the presumptive guidelines sentence. The court qualified this holding by stating that before the temporal proximity of the crimes can be considered a valid reason for departure, it must be shown that the crimes committed demonstrate a defendant's involvement in a continuing

and persistent pattern of criminal activity. This persistent pattern of criminal activity can be established by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision. Applying this test, the court was not persuaded that the departure sentence imposed by the trial court in Jones was supported by the record. The defendant had committed burglary and grand theft offenses approximately ten months after his parole from concurrent sentences for burglary and grand theft and a trafficking in stolen property offense fifteen months after his parole. The court was unable to find from the time sequence of these crimes that a pattern of criminal activity had been established.

The following year the Supreme Court of Florida in Gibson v. State, 553 So.2d 701 (Fla. 1989) found that the commission of new crimes within fourteen months of release from incarceration for prior offenses is too long of a period to justify a departure from the sentencing guidelines. The court simultaneously affirmed a departure sentence in another case which was based on the fact that the defendant's new offense occurred eight days after being released from his third separate prison commitment and there was a finding that the defendant's behavior demonstrated a continuing escalating pattern of criminal conduct. Jones v. State, 553 So.2d **702** (Fla. 1989). Justice Rosemary Barkett dissented in Gibson and argued that the court should not permit timing alone to be an appropriate reason to depart from

the sentencing guidelines. Justice Barkett explained that the timing factor is not susceptible to articulable standards for guidance to trial judges.

The Supreme Court of Florida in State v. Simpson, 554 So.2d 506 (Fla. 1989) emphasized that although timing of offenses could be a valid reason for departure, it must be shown that the crimes committed demonstrated a defendant's involvement in a continuing and persistent pattern of criminal activity. The court in Simpson disallowed the timing of the defendant's various offenses as a reason for departure because most of the offenses consisted of unconvicted misconduct. The court applied Shull v. Dugger, 515 So.2d 748, 750 (Fla. 1987) and directed that on remand the trial court could not attempt to articulate new reasons to support timing as a reason for departure.

The Third District Court of Appeal, and initially the First District Court of Appeal, construed the Simpson case to mean that temporal proximity alone could not be a basis for departure. In Marion v. State, 559 So.2d 389 (Fla. 3rd DCA 1990) and Chanquet v. State, 570 So.2d 962 (Fla. 3rd DCA 1990) the sentencing judges based departure sentences on the fact that the defendants had reoffended within a short period of time; however, the trial judges failed to make specific findings that would establish a continuing pattern of criminal activity. For this reason the sentences were reversed with instructions that the defendants be resentenced within the guidelines.

The First District Court of Appeal's decision on this issue was rendered in Frederick v. State, 556 So.2d 471 (Fla. 1st DCA 1990). Defendant Frederick committed the offense of possession of cocaine in seventy-eight days after he was discharged from a four-month jail term for sale of cocaine. The trial court judge had departed from the sentencing guidelines on the basis that: (1) the defendant's recent release from custody; and (2) the defendant's continuing and persistent pattern of drug related crime. In reversing, the court held:

> Under this rule, in the state-conceded absence of Frederick's involvement in a "continuing and persistent pattern of criminal activity"--one which could not in any event arise when, as here, only two offenses are involved, Davis v. State, 534 So.2d 821 (Fla. 4th DCA 1988)--the allegedly short period between his release and the present crime cannot alone support a guideline deviation. In other words, proximity alone is no longer (if it ever were) enough; a sufficient pattern of criminal activity must also be demonstrated. Since it was not, we vacate the sentence and remand for resentencing within the guidelines.

Id. at 472-473.

The Fourth District Court of Appeal has repeatedly reached a different conclusion and has held that temporal proximity of crime alone is a valid reason for departure from the sentencing guidelines. Three times that court has certified to this court as a question of great public importance this issue. Gordon v. State, 573 So.2d 1072 (Fla. 4th DCA 1991); Forney v. State, 567 So.2d 60 (Fla. 4th DCA 1990); Barfield v. State, 564 So.2d 616 (Fla. 4th DCA 1990). See *also* Booker v. State, ___ So.2d ___, 16 FLW D1103 (Fla. 4th DCA, April 24, 1991).

The Fifth District Court of Appeal in Lipscomb v. State, 573 So.2d 429 (Fla. 5th DCA 1991) recognized that the law in this area remains in a "state of flux" and held that a new offense within six months of release from prison is of sufficient "temporal proximity" to justify departure. That court has implied in its certification to the Supreme Court of Florida of this issue as one of great public importance that there does not have to be an explicit finding of persistent pattern of criminal activity in addition to "temporal proximity" to justify departure. Rather, the court has held that timing is an appropriate reason for departure in nonviolation of probation cases if the timing of the new offense in relation to the prior offense or other supervision shows an escalating or persistent pattern of criminal behavior.

The most recent pronouncement from the Supreme Court of Florida can be found at Smith v. State, ___ So.2d ___, 16 FLW S283 (Fla., May 2, 1991). The court held that a trial judge may not impose a departure sentence based solely on a persistent pattern of criminal activity, closely related in time, when the pattern is not escalating towards more violent or serious crimes. Through citation to State v. Simpson, *supra* the court again underscored that before temporal proximity of crimes can be considered as a valid reason for departure, it must be shown that the crimes committed demonstrate a defendant's involvement in a continuing and persistent pattern of criminal activity as

evidenced by the timing of each **offense in** relation to prior offenses and the release from incarceration or other supervision. The court applied this rule to the facts in Smith and held that one successive criminal episode of no greater significance than the first, even though committed thirty days after release from incarceration, is not a sufficient reason to depart **from** the guidelines.

Cases from Florida's intermediate appellate courts since the Smith decision reinforce the conclusion that temporal proximity alone is never a valid reason for departure from the guidelines. In White v. State, ___ So.2d ___, 16 FLW D1338 (Fla. 2d **DCA,** May 15, **1991)** the court explicitly held that timing alone is an insufficient reason to justify departure. The court ordered resentencing within the guidelines because the trial court did not make any findings regarding the defendant's prior record in that case, other than the fact that he had three prior felony convictions. Without such a finding, the court held that it could not say that the record demonstrated an escalating pattern of criminality.

Likewise in Brown v. State, ___ So.2d ___, 16 FLW **D1528** (Fla. 2d **DCA,** June **7, 1991)** the same appellate court concluded that before temporal proximity can be a valid reason for departure there must also be a demonstration of a continuing and persistent pattern of criminal activity. The court reversed a departure sentence for manslaughter in which the defendant's only

prior felany offense was an attempted rape. The court reasoned that if two offenses establish a pattern of criminal activity, then two offenses closely related in time will support a departure. This would be the same as saying that temporal proximity alone will support a departure, which would be an invalid reason **under** Florida law to depart from the guidelines:

> However, the decisions of the Supreme Court as we interpret them, to this day, have not specifically authorized a departure sentence based on timing alone.

The Supreme Court of Florida's holding in Smith v. State, ***supra*** has also recently convinced the First District Court of Appeal that temporal proximity alone is an insufficient reason for departure of sentencing guidelines. Jones v. State, ___ So.2d ___, 16 FLW D1889 (Fla. 1st DCA, July 23, 1991).

When petitioner Frederick Cave was sentenced for the burglary, **robbery** and aggravated battery **offenses**, his **prior** criminal record was limited to five misdemeanors and a burglary of a structure (R-68; T-243-244). The trial court judge in his written reason for departure relied exclusively on the fact that Mr. Cave had only been released from the Department of Corrections for nineteen days before the new offenses occurred that he was ultimately found guilty of. There was **no** finding **by** the trial court of an escalating pattern of criminal conduct **as** required by the Williams case and its progeny. Indeed, there was not even any reference to the dates and nature **of** the previous convictions in the written reason for departure upon which it

could be inferred that there existed an escalating pattern of criminal activity.

The discussion by the prosecutor at petitioner **Cave's** sentencing of his prior felony further demonstrates that even if the court had wanted to depart on the basis of escalating pattern there would have been an insufficient basis to do **so.** Recall that the prosecutor claimed that in Mr. Cave's burglary of a structure case he went into an occupied dwelling and choked the victim for a minute and a half. In contrast, the robbery victim, Ma. Dee Ann Cox, did not suffer any pain or physical injury, but only the threat of violence. For this reason the new offenses arguably established a deescalating pattern of criminal conduct.

Petitioner Frederick **Cave** fell within the four and one-half to nine year cell of the permitted range of the sentencing guidelines, but the trial court using temporal proximity alone as a reason for departure imposed two life sentences and a fifteen year sentence. The First District Court of Appeal upheld these extraordinary departures from the sentencing guidelines at a time when the Supreme Court of Florida had not rendered its opinion in Smith v. State, *supra.* By the time that the Smith opinion was rendered, it was too late for petitioner Frederick Cave's court-appointed appellate counsel to file a motion for rehearing with the First District Court of Appeal.

Now that the Supreme Court of Florida has made it clear that temporal proximity alone is not a valid reason for departure from

the sentencing guidelines, the certified question from the First District Court of Appeal **should** be answered in the negative with instructions to the First District Court of Appeal to **quash** its opinion. If Mr. Cave's convictions are affirmed, petitioner Frederick Cave's case should be remandedwith instructions to the trial court to resentence Mr. Cave **within** the sentencing guidelines. State v. Simpson, ***supra*** citing Shull v. Dugger, ***supra.***

CONCLUSION

Based on the foregoing analysis, the defendant's three convictions and sentences for armed robbery, burglary of an occupied dwelling while armed and aggravated battery should be reversed because the mere use of petitioner Frederick Cave's confession against him requires automatic reversal under Article I, §9 of the Florida Constitution and was not harmless error under the Fourteenth Amendment to the United States Constitution. The First District Court of Appeal's decision should be quashed with instructions to remand the case to the trial court for a new trial.

If this court disagrees, then the First District Court of Appeal's decision should still be quashed with instructions that the case be remanded to the trial court so that petitioner Frederick Cave's aggravated battery conviction and sentence are vacated on double jeopardy grounds and he is resentenced within the permissible range of the sentencing guidelines on the remaining two offenses.

Respectfully submitted,

GEORGE F. SCHAEFER
Attorney at Law
Florida Bar Number 308870
15 S.E. Seventh Street
Gainesville, Florida 32601
(904) 338-1111

Attorney for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that a copy of this initial brief of petitioner has been furnished by mail delivery to Charlie McCoy, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050 this 31st day of July, 1991.

GEORGE F. SCHAEFER
Attorney at Law
Florida Bar Number 308870
15 S.E. Seventh Street
Gainesville, Florida 32601
(904) 338-1111

Attorney for Petitioner