IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 78,084

PHILLIP EUGENE GUESS, JR.,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner State of Florida, prosecuting authority in the trial court and appellee in the district court, will be referred to herein as "the State." Respondent Phillip Eugene Guess, Jr., the defendant in the trial court and appellant in the district court, will be referred to herein as "Guess" or "Respondent." Reference to the record will be made by use of the symbol "R" followed by the appropriate page number(s). Reference to the transcript of trial proceedings will be by use of the symbol "T" followed by the appropriate page number(s). Reference to the district court's opinion, attached herein as Appendix A, will be made by use of the abbreviation "App. A", followed by the appropriate page number.

STATEMENT OF THE CASE

The state on April 26, **1989 charged** respondent Guess with one count of burglary, in violation of section **810.02**, Florida Statutes, and one count of sexual battery upon a person **12** years of age or older, without consent, with threat of force or violence likely to cause serious personal injury, in violation of section 794.011(3), Florida Statutes.

The defense on the first day of trial submitted a motion to suppress a custodial statement made by Guess to Deputy Sheriff Archie Roberson. The motion alleged that Roberson did not properly advise Guess of his constitutional rights and that Guess may have made certain statements which were not freely, voluntarily and intelligently made after a proper appraisal of his constitutional rights. The motion, in addition, alleged that the statements made by Guess were the product of misunderstanding and miscommunication between Guess and Roberson and, as such, were irrelevant and inadmissible. (R 26)

The defense on the first day of trial also submitted a motion in limine, alleging that the victim stated that Guess had threatened serious personal injury to herself and her son, and that because Guess was not charged with sexual battery by threat of retaliation or retribution to the victim's son, or with sexual battery by threat of serious personal injury to the son, the victim's statement would be irrelevant and extremely prejudicial. (R 28)

In presenting the motion, the defense appeared to orally amend the allegations of the motion in limine, so as to conform to the allegations of the motion to suppress. (T 96)

The court initially did not rule on either motion, noting that the motion to suppress "is not exactly timely." (T 97) The state agreed to not mention the custodial statement in its opening statement. (T 98)

During trial the state proffered Roberson's testimony as to the custodial statement. (T 237-243) Roberson testified that, following Miranda warnings, he asked Guess "had he raped D. R.?" (T 237) Roberson stated Guess's response was, "no, that he had never had sex with D. R., period." (T 237) On cross-examination during the proffer, Roberson stated that at the time he questioned Guess about D. R., a warrant had been issued against Guess in another case involving a charge of sexual misconduct with a minor, P. B. (T 237, 239) Roberson questioned Guess about D. R. on March 20, 1989 after his arrest, but a sworn complaint was not filed for the sexual battery of R. until April 6, 1989. (T 238) Roberson stated that Guess was arrested on March 20, 1989 for both the D. R. and P. B. cases. (T 239) Roberson stated that he questioned Guess about the P. B. case on March 20, and that Guess "didn't say anything, other than he wasn't guilty of it." (T 242) When

Guess was brought to the jail on March 20, Roberson advised him of his Miranda rights, of the warrant outstanding in the P. B. case, and that there had been an accusation of sexual battery made against him by D. R. and a complaint filed on that charge. (T 243) Roberson said Guess then stated "that he had never had sex with D.R., period." (T 243) Roberson clarified that the complaint was actually not filed until April 6. (T 243 Roberson stated that his rendition of Guess's statement was the exact statement made by Guess to the best of his knowledge. (T 243-244) Roberson repeated that statement as: "I have not had sex with D. R., period." (T 244)

Defense counsel at this time requested that Guess be permitted to testify concerning the voluntariness and admissibility of the purported statement. (T 244) The court declined to permit Guess to testify, stating, in part, that "now you haven't really made a timely motion to suppress the statement." (T 244) The court stated that if it determined that the statement was voluntary, then Guess, if he chose to testify, could tell the jury that the statement was not freely and voluntarily given. (T 244-245) The court agreed to entertain additional argument about whether the statement was freely and voluntarily given. (T 245) Defense counsel stated that Guess would have proffered testimony that when he spoke with Roberson "he was confused and misled and misunderstood the thrust of the questioning, and did not accurately respond to the questions." (T 245)

The state and the defense then argued the voluntariness of the statements. (T 245-247) In part, defense counsel argued that the court was forcing Guess to testify by refusing to permit him to proffer his testimony on the voluntariness of the statement. (T 247) The court responded that the defense had had an opportunity to make a timely motion to suppress, and had not done so. (T 248) Following the argument, the court overruled the objection to the admissibility of the statement. (T 248)

The court did not rule on the motion in limine.

The jury returned a verdict of guilty on both counts as charged. (R 55) The trial court sentenced Guess within the guidelines to nine years incarceration to be followed by 6 years probation. (R 58,62)

Guess raised three issues on appeal. The district court, citing Land v. State, 293 So.2d 704 (Fla. 1974), McDonnell v. State, 336 So.2d 553 (Fla. 1976) and Kitchens v. State, 240 So.2d 321 (Fla. 1st DCA 1970), held that the trial court's refusal to permit Guess to testify out of the presence of the jury regarding the voluntariness of his statement required reversal of his convictions and remand for a new trial. (App. A at 5) The court noted, however, that reversal of the convictions seemed unduly harsh in this case under circumstances showing that

> 1) it is apparent the defendant's statement was voluntary; (2) the

> defendant's later testimony revealed that he really wasn't challenging the voluntariness of the confession, but only indicated that he misunderstood the question; (3) the statement in question was not a confession but an exculpatory statement; and (4) defense counsel was allowed to argue the substance of defendant's testimony prior to the determination of voluntariness.

(App. A at 5)

The court noted that the United States Supreme Court in Arizona v. Fulminante, 111 S.Ct. 1246, 5 F.L.W. Fed. S149, (U.S. March 26, 1991) indicated that the admission of a coerced confession may constitute harmless error. The court also noted that, in this case, where the statement clearly was not coerced and the error was only procedural, the argument for application of the harmless error rule was even more compelling than in Arizona v. Fulminante, and, therefore, certified the following two questions:

> I. WHETHER IN LIGHT OF THE SUPREME COURT OPINION IN ARIZONA V. FULMINANTE THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?
>
> 11. WHETHER UNDER THE CIRCUMSTANCES OF THIS OR SIMILAR CASES THE TRIAL, COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR.

The State filed a Motion for Stay of Mandate during the pendency of this petition. This court on July 9, 1991 granted the motion, thereby staying proceedings in the First District Court of Appeal and the Circuit Court of the Eighth Judicial Circuit in and for Baker County.

STATEMENT OF THE FACTS

The state presented the testimony of victim D. R., examining physician Dr. David Jone, R.'s former boyfriend, P.C., R.'s mother, M.M., Deputy Archie Roberson, and crime lab analyst Lethenia Meadows.

R. testified that on March 19, 1989, while she was working the 3 to 11 p.m. shift at a truck stop restaurant, she spoke with respondent Phillip Guess after another waitress showed her a photograph of her child, which Guess had handed to the waitress. (T 114) Phillip Guess was the younger brother of the child's father, Jim Guess, and, therefore, the child's uncle. (T 114, 128) R. said Guess asked her if he could come over to her house to see his nephew. (T 114) R. said she told Guess he could visit at a decent hour during the day since she worked evenings. (T 115) Guess left the truck stop before dark. (T 115) R. left work at 11 p.m.. (T 115) R.'s aunt, whose mother was baby-sitting R.'s 2-year-old child, rode with her, and they stopped to pick up a loaf of bread at a store. (T 115) R.'s former boyfriend, P.C., pulled up at the store and asked if he could pick up some stomach medicine he had left at her house. (T 115-116) R. told him he could. (T 116) C. followed R. to her aunt's house to pick up the child, and then followed her home in his truck. (T 116) When R. and C. pulled up to the house, Guess was there. (T 116) R. was surprised to see Guess. (T

117) Guess said he wanted to see her child, and since the child was awake, R. told him he could come in and see him. (T 117) Guess and the child were playing around on the couch. (T 117) Guess stayed until about 3 a.m. (T 117) R. did not ask Guess to spend the night with her. (T 118) Guess drank beer from a six-pack he brought to the house, but neither C. nor R. drank with Guess. (T 118) When R. asked Guess to leave, Guess went outside, and C. was still inside. (T 119) Guess asked R. if he could sleep in his car, and she told him he could. (T 119) R. changed into a long T-shirt, put her child to bed, and laid down with the child. (T 119) She told C. to turn the lights off and to lock the door when he left. (T 119) C. was the last one to leave. (T 119) Three or four days, or a week, earlier a doctor told R. she had had a miscarriage. (T 119) She was taken by ambulance to a hospital. (T 120) She did not know she was pregnant. (T 120) Later, she learned that she had not suffered a miscarriage at that time, but was still pregnant. (T 120) Because she had taken medication for the apparent miscarriage which could have affected the fetus, she decided to have an abortion. (T 121) The baby's father was C. (T 121) At about 5 to 5:30 a.m. on the morning of March 20, R. was awakened when Guess climbed on her bed. (T 122) R. told him to leave, and Guess pushed her down, saying that he hated to do this, but he had to. (T 122) R. told him she had just had a miscarriage, and was

bleeding. (T 122) R. was crying. (T 122) Guess pulled her clothes off. (T 122) R. child started crying and Guess told her to make the child be quiet. (T 123) Guess told her he had a knife, and R. would regret it if the child did not shut up. (T 123) R. said she tried to quiet her child. (T 123) Guess did not show her the knife. (T 123) R. fought Guess, but he was on top of her, and finally had intercourse with her. (T 123-124) R. was bleeding, and blood was all over the sheets. (T 124) R. did not consent to sex with Guess. (T 124) R. was in pain from what she then thought was a miscarriage. (T 124) After, Guess told her to take a shower. (T 124) Guess acted like he regretted what he had done. (T 124) R. took a shower with her shirt on, and Guess stayed in the bathroom. (T 125) She got her clothes back on, and checked on her child. (T 125) She asked Guess to leave, and he would not. (T 125) Guess finally left, and told R. he would return in an hour with his mother. (T 126) When Guess left, R. was crying and upset. (T 126) She went straight to her mother's house, and asked her mother to come back to her trailer. (T 126) She told her mother what happened. (T 126) She found her house keys on the floor of her child's bedroom. (T 126) R. did not give Guess consent to return. (T 126) After she told her mother, R. immediately went to the police station and made out a written statement. (T 127) On cross-examination, R. said that Guess's brother Jim was the father of her child, and

she dated and lived with Jim about 2 and one-half years. (T 128) She had met Respondent Guess two or three times while she was dating Jim. (T 128) She lived with C. a few months after the relationship with Jim. (T 129) Around March 1, 1989, R. and C. moved into a trailer about 10 feet away from R. mother's house. (T 129) R. began working in the truck stop in March 1989, after she and C. split up. (T 130) R. recognized the man who had a picture of her son as Guess. (T 130) She asked Guess how he got the picture. (T 130) R. was aware that her mother had met Guess in a bas in Baldwin, and that Guess had asked R. mother if he could see the child, but R. did not remember if her mother told her that she had given Guess a picture of the child. (T 131) R. talked with Guess at the truck stop about Jim's relationship with the child, his payment of child support and his visitation with the child. (T 132) Guess asked if he could come over, but he did not ask if he could come over that night. (T 132) R. did not tell Guess where she lived. (T 135) While Guess initially was at her house, there was a game of tossing R. house keys back and forth between Guess and the child. (T 138) Guess did not at any time come into R.'s bedroom to talk with her before he went outside at 3 a.m. (T 139) R. heard both C.'s and Guess's vehicle crank up outside, and she then went to sleep. (T 140) When Guess came back inside later, he pulled R.'s clothes off. (T 142) R. kicked Guess to try to get him away from her. (T 143)

Guess's pants were already unbuttoned and down, though not off. (T 144) After attacking R., and having her shower, Guess told her he was going to his mother's house, and gave her directions how to get there. (T 145-146) Guess told her that "the law and Jim Guess better be there within an hour," and, if not, he and his mother would be back. (T 146) After R. went to her mother's house, she called Jim, and then called the law. (T 146) R. told Jim where his brother was. (T 147) R. then called C. and told him that Guess had raped her. (T 147) (T 148) She did not tell C. details of the incident. (T 148) A deputy came to R. house, but took no evidence. (T 149) Roberson later told her to get the sheets off the bed. (T 149) R.'s written statement did not relate the details of how she met Guess the evening of March 19. (T 150) R. did not mention C. because she did not want to involve C. and C. was not there when Guess raped her. (T 151) When R. made out the written statement for police, she wrote that she asked Guess, not C., to lock the doors on his way out. (T 152-153) R. called C. that morning to find out if Guess had left when C. did. (T 152) R. did not want to call Jim, but feared Guess because he had threatened her with a knife. (T 153) R. said she asked C., not Guess, to lock the doors. (T 154) R. learned that Guess had asked her landlord which trailer was hers. (T 155) R. told her landlord that if she had known something like this was going to happen, she

would not have let Guess come over. (T 155) By stating that to her landlord, R. did not mean that she knew Guess was coming over that night, (T **156)** When R. went to the hospital for the apparent miscarriage on March 14, they told her not to engage in sex for one week. (T **160)** R. stated that she wasn't sure which day the apparent miscarriage occurred. (T **161)** R. found out later that she had not had a miscarriage on March 14, but was still pregnant. (T **163)** She had an abortion on April 14. (T 163) On May 24, **1989**, when R. was deposed, she did not disclose that she had learned that she did not have a miscarriage on March 14, and therefore was still pregnant when the crime occurred on March 20. (T 164)

Dr. David Jones testified that he examined **R.** on March 20, 1989 at the Sexual Assault Treatment Center. (T **179)** Jones found evidence of the presence of sperm. (T **181)** He observed a red creamy discharge, which could **have** been caused by infection, laceration, miscarriage or pregnancy related bleeding. (T 181, **184)** Jones opined that R. had had recent intercourse within **3** to **4** days. (T **184)** Jones would not necessary expect to find genital trauma in a woman who had been assaulted in Rowe's circumstances. (T **186)** R. was composed when Jones examined her. (T 189) Jones found no scratches or bruises on R.. (T **189)** Jones found no evidence either to support or to contradict an allegation of forced sexual activity. (T **193)**

C. testified that he saw R. at a jiffy mart after she left work on March 19. (T **196)** He followed R. to her house to pick up medication for his stomach. (T 196) When they arrived, Guess was there. (T 196) All of them went inside the house. (T 197) Guess played with the child. (T 197) R. asked C. to stay because of Guess's unexpected visit. (T 197) R. was surprised to see Guess. (T 198) R. made no amorous advances toward Guess. (T 198) R. seemed nervous about Guess's presence. (T 198) Guess asked C. whose keys were on the counter, and C. told him they were R.'s. (T **199)** C. locked both doors to the trailer himself, and left after Guess. (T 199) C. heard Guess ask R. if he could sleep in his car. (T **199)** C. told Guess it might be best if Guess left. (T 199) C. **left,** and stopped down the road, waiting for Guess to leave. (T 200) C. said he waited for Guess because R. was nervous about Guess **and** C. had concerns about the purpose of Guess's visit. (T 200) C. did not go back to R.'s home, but rather went to his home. (T 200) C. had not resumed a relationship with R., except for friendship. (T 204) Guess spent most of the time talking to R. rather than playing with the child. (T 205-206) Neither C. nor **R.** drank with Guess. (T 206) R. took the child to the child's bedroom to put him to bed. (T 208) C. then told Guess that he was going to leave. (T 208) Guess told C. he was going to *go* back toward either the bedroom or

bathroom. (T 208) Guess told C. he was going to say goodnight or talk to R. (T 210) C. did not see Guess come out of the bedroom. (T 208) C. did not hear any conversation between Guess and R. (T 209) Guess told C. he was going to sleep in the car. (T 210) C. went to talk to R., and made sure the doors were locked. (T 211) When he went outside, Guess was there. (T 211) The next morning R. called him. (T 213) R. told C. that Guess had come in the house when she was asleep and told her he had a knife. (T 214) R. told C. that the child was crying, that Guess slapped her and told her to make the child be quiet, and threw her on the floor. (T 218) During his deposition, C. clarified on redirect examination, he stated that R. had not had anything to drink from the time she got off work until C. left. (T 220)

M H. testified that she was R mother, and that R. lived about 15 feet in front of her home in a trailer. (T 227) Guess came to her home on the night of March 19. (T 228) H. identified Guess in court. (T 228) Guess asked her if R lived in the trailer in front of her, and she told him yes but that R. was not at home. (T 229) Between 7 and 8 a.m. the next morning, R. came to her home. (T 229) R. was crying and shaking all over. (T 229) R. asked her mother to come to her trailer. (T 229) R. was crying "real bad" and she said Guess had raped her. (T 230) H. had never seen her daughter

that upset. (T 230) H. had seen Guess at a bar in Baldwin in November 1988. (T 230) Guess asked her about R. child, and asked if he could go see the child. (T 231) Guess asked her for a photo. (T 231) Guess asked for directions to her home, then in Baldwin. (T 231) H. told R. she had seen Guess and that he had wanted to see the child and that she had given him a picture. (T 231-232) During the night H. did not hear any screaming or commotion. (T 232) H. had her air conditioning on in the trailer that night. (T 233)

The state proffered testimony of Archie Roberson for the purposes of determining its admissibility. (T 234-241) Roberson stated he placed Guess under arrest and read him his Miranda rights. (T 234-235) Guess appeared to understand his rights and did not appear to be under the influence of drugs or alcohol. (T 236) Roberson asked Guess if he understood his rights. (T 240) Roberson asked him if he had raped R , and Guess stated that he had never had sex with R , period. (T 237) When Roberson picked Guess up on March 20, there was a warrant for his arrest in another case involving another victim, P B (T 239) Guess was arrested in that case on March 20, as well as for the R incident. (T 239) Guess was advised of the P B charge. (T 239) The complaint in the R case was not prepared until April 6. (T 240) Guess said he didn't know anything about the B sexual misconduct charge, other than he wasn't guilt of it. (T 242) Defense

counsel objected to the court not permitting Guess to testify about the voluntariness of his statement to Roberson. (T 245) The court overruled the objection. (T 248)

On direct examination Roberson testified that he read Guess his Miranda rights, and that Guess indicated that he understood his rights. (T 250) Roberson asked him about the R incident. (T 250) Roberson told Guess an allegation had been made that he raped R., and Guess stated that he had never had sex with R., period, (T 251) Roberson said the R. brought him a sheet with blood all over it, and the explanation for that was that she had had a miscarriage three or four days before. (T 255) The printed rights waiver form was signed by neither Guess nor Roberson. (T 256-257) Roberson did not have Guess made a written statement or obtain a taped statement from him. (T 257) Roberson did make notes of Guess's statement. (T 258) Roberson did not recall showing Guess a photograph of a woman which had been found in Guess's car. (T 263) Guess told Roberson there was a photograph of a girl in his car, gave Roberson the keys and told him that he wanted his mother to have the car. (T 263) Roberson did not question Guess about the photograph or the girl in the photograph. (T 264) Roberson questioned Guess about his sexual activity with P. B., and arrested him for that activity with B. , age 14. (T 264)

Lab analyst Lethenia Meadows stated that she received a sealed rape kit collected from R.. (T 279) Her testing revealed that Guess was within 36 percent of the population that could have deposited the foreign matter collected from R. for the rape kit. (T 287)

The defense presented testimony of Diane Goldsmith, Guess's mother, Caroline Harris, and Guess.

Goldsmith testified that she was a waitress who worked with R. at the truck stop. (T 299) Goldsmith stated that R. told her that Guess asked if he could come over and see the little boy, and R. said no. (T 302) On cross examination, Goldsmith said that R. told Guess that he could not come over that night. (T 303)

Caroline Harris testified that she was Guess's mother and that Guess appeared at her home in the morning hours on March 20, 1989. (T 310) Harris stated that she and Guess had a conversation about activities Guess had engaged in during the hours prior to his appearance at her home. (T 311) Following the conversation, Harris prepared to get dressed to go over to Rowe's house to see her and the child. (T 311, 312) Guess arrived at her home about 7:30 a.m. (T 312) Harris said that she and D. were just going to talk, but were not going someplace. (T 313) They were going to talk at 7:30 a.m. (T 313) Harris stated that Guess did not live with her, and she did not remember the last time she had seen Guess prior to that morning. (T 313)

Harris did not go to R.'s house because her other son, Jim, showed up. (T 314) Jim was in a rage and looking for his brother, respondent Guess. (T 314)

Guess testified that he met R.'s mother, M H , at Janice's Bar around Christmas when she came up to him and asked if he was Jim's brother. (T 317) H said Jim wasn't making support payments, didn't claim the child and wasn't around, and that D was out "four wheeling" with some guy and drinking a lot. (T 317) Guess told H that there was no proof that the child was Jim's, and that their family had not seen the child. (T 318) When H pulled out a photograph of R child, she asked Guess if he wanted one. (T 318) H gave Guess a picture of the child, and told him the child's name and birthdate. (T 318) H asked why Guess and his brother or family did not come around, and if he wanted to see the child. (T 318) H told Guess where they lived. (T 318) Guess said he never went over to the house, but accepted the picture and showed it to his family. (T 319) None of the family wanted to bother with seeing the child. (T 319) Guess talked to R on March 19 at the truck stop. (T 319-320) He said that R told him she got off work at 11 p.m., and that he could come by her house if he wanted to. (T 321) R talked about Guess seeing the child. (T 321) Guess told her that night would be fine. (T 321) R gave him directions to her house. (T 321) R , the child and H had moved from the time

H. told Guess where they lived. (T 321) R. told him to bring beer to the house. (T 321) She said she had to go to the baby-sitter's and would be there anywhere from eleven thirty to eleven forty. (T 322) Guess got the beer, and arrived at Rowe's house about eleven thirty. (T 322) R. had told Guess she lived in a trailer in front, but he couldn't remember if she said a trailer. (T 322) He stopped at the landlord's house and asked if he'd seen D. around, and said he had not. (T 322) Guess already knew where R. lived and was just making sure, and wanted to let him know that he would be waiting for R.. (T 322) Guess knocked on R.'s mother's door, and asked if R. had been around yet. (T 323) Guess told her he would wait for R.. (T 323) Guess wanted to make sure somebody knew he was there. (T 323) When R. arrived and saw Guess, she said something like she wondered if he was going to make it to the house or not and that C. had tailed her. (T 324) R. handed Guess the child and opened the door. (T 324) C. stayed out by the kitchen sink the whole time and acted weird. (T 324) It didn't look to Guess like C. was worrying about any stomach medicine because C. was from a group of friends in Baldwin that are into crack cocaine. (T 325) Guess said he pulled out his own car keys and played with the child. (T 326) Guess and R. talked about Jim Guess, while C. got irritated and upset. (T 327) Guess and R. talked about why the Guess family wasn't around and who the father of the child was. (T 327)

After about an hour or hour and a half, C. left. (T 327) Guess stated that R. tried to hint to C. that she wanted to put the child to sleep. (T 327) Guess and C. didn't talk at all. (T 327) C. was jealous. (T 327) C. went out and got in his truck, and Guess did no more than escort C. to the front of the trailer. (T 328) C. drove off. (T 328) Guess and R. talked some more. (T 328) R. told him that she had had a baby by C., didn't want it and had gotten rid of it, something to that effect. (T 329) Guess and R. were both drinking. (T 329) R. then "got handsy" with Guess, began brushing his hair, and then when the child woke up, told Guess they were going to have to talk back in the child's bedroom. (T 330) Guess said R. changed into a "little teddy type thing" and laid dawn with her child. (T 330) They were talking, hugging and then had sex once. (T 331) They tried again, but R. said it bothered her. (T 331) They were still drinking beer. (T 331) They dozed and Rowe was mad that Guess's car was sitting in front because Guess wasn't supposed to spend the night there. (T 331) They had talked earlier about going to the zoo, shopping, getting some ice cream or going to the playground. (T 331) They talked about these things again when they woke up that morning and R. got up to go in the shower. (T 331) Guess suggested they go see his brother because he wanted to talk to him about a job. (T 331) Guess told R. that while they were going to the zoo, which was near the area where

Jim worked, they could stop by his brother's "to keep me from going to this other job that I was going to get.'' (T 331) Guess told R. that he needed to call Jim and tell Jim they were going to come by. (T 332) R. got upset. (T 332) Guess told R. that his mother would go with them, and that he was going to his mother's house since he spend a few nights with his mom every now and then. (T 332) R. got really upset when Guess said he was going to call Jim and that if Guess told Jim anything about what had happened that night, she would tell Jim that Guess took advantage of her while she was drinking. (T 332) Guess said he laughed that off and told R. he needed to check with Jim about a job and Jim wouldn't care about anything going on between R. and him. (T 332) Guess said he told R. he would be back in an hour or two depending on whether he went to the carwash, and that he would get his mother so she could go with them. (T 332) Guess left R. around six or seven. (T 332) Guess went to his mother's house and started talking to her about what was going on. (T 333) His mother did not believe the child was her grandson. (T 333) They talked for an hour or hour and one-half, and she started getting ready, and they were going to get ready to go. (T 333) Guess's brother Jim then showed up screaming. (T 333) Guess's mother said they should call the law. (T 333) Guess went to a neighbor and asked her to call the aw. (T 334) Guess waited just down the road from the neighbor's house, (T 334) Deputy Prevatt showed up, and Guess told

him he was the one who called. (T 334) Three patrol cars were at Guess's mother's house. (T 334) A deputy told Guess they were taking him downtown. (T 334) Police searched his car. (T 334) Guess's mother followed in Guess's car. (T 335) After Guess got to the jail, he said, the following occurred:

> So Archie took me in this little room, and I think he went out and got -- that's when he got the orange papers and all. Okay, so he took me in there and he started asking me questions. And he said he had gotten a complaint from D. R. that morning, and I told him -- I told him -- here we called the law on my brother and my brother is standing here totally screwed up, and they took me and put me in a car and took me dawn to the jail. So that's when he took me -- while I was in the room, in the little interrogation room they have, he started asking me questions about D. R.. But while he was daing it he started going at me from all sides. I mean, he was demanding that I tell him that I had done something. I told him that 1 hadn't done anything. And this is when -- I can *go* ahead and tell them about the picture and all.
>
> Okay, so my mother had brought the car down, it was sitting outside. This guy done went through my car, but Archie had taken my keys and he went out and got in my dash. He came back in and he had a picture of a lady with a banner across, Danielle down -- her name and all. So Archie is going at me from all sides saying -- he asked me if I raped her. He said, "Tell me about this," and he's asking me about this pregnant girl, this B girl. And I'm going -- as best as I can remember what I'm trying to say to him, because he is trying -- he's not listening to what I'm trying to tell him, and I'm going, "I've only known her less than a month, and she's five months

> pregnant. The father lives in Whitehouse, she lives with a twenty-three-year-old guy, she's seeing an ex-con in Jacksonville. I didn't rape D. R., and I didn't even know -- I didn't have sex with her at all." And he wouldn't believe what I was saying. I said, "If you're not going to believe me, just get me a lawyer."

(T 336)

Roberson then arrested Guess on the B. case. (T 336) Guess stated finally he was offered a plea bargain, and he refused. (T 339) Guess filed a lawsuit in federal court on April 4 after being held in a holding cell for seven and a half days, and the state dismissed the charge involving B. on April 6, and then put the R. charges on him. (T 339) The state offered Guess time-served on the R. charges, telling him he could go home if he pleaded guilty, and he refused. (T 339) Prosecutor Kelley objected, stating that no such plea bargain ever existed. (T 340) Guess then testified: "D. was not raped. There was nothing like that at all. This was just a night with me and her." (T 341) Guess said there was no burglary because R. invited him there. (T 341) When she agreed he could see the child, she gave him directions. (T 341) Guess did not know Diane [Teston] Goldsmith, and didn't know if he saw her the evening of March 19. (T 342) Guess said C. only stayed an hour or hour and a half at R.'s house the night of March 19. (T 345) C. and he did not leave the house tagether, and C. did not lock the doors. (T 347) He and R had sex in the child's bedroom because

they were "half lit'' and "she couldn't care less. ... She hadn't paid attention to the baby all night when I was there." (T 348) Guess said they were not "half lit" just on the six-pack because he had hot beer in the car. (T 349) Roberson lied when he said the sheet was covered with blood. (T 349) R. mentioned to Guess that she had had a kid with C. and had gotten rid of it. (T 350) R. didn't say the word miscarriage. (T 350) Guess said he carries a pocket knife sometimes. (T 350) He didn't remember what was in his pocket that night. (T 350) Guess said he was not jealous of his brother because Jim had a job and a woman who cared for him. (T 352) C. was jealous. (T 353) Guess explained that after R. and he had been up all night, and R. had worked that previous night, they were not going to the zoo at 7:30 a.m., but rather would have left around 9 a.m. (T 354)

SUMMARY OF ARGUMENT

This court should answer the two certified questions in the affirmative. During the pendency of this case on direct appeal, the United States Supreme Court in Arizona v. Fulminante, infra, held that admission of a coerced confession may constitute harmless error. In an earlier case, Crane v. Kentucky, infra, the Court held that a harmless error analysis was applicable to an erroneous trial court ruling which prohibited a defendant from testifying to the jury as to the voluntariness of his confession. In this case, the trial court improperly prohibited the respondent from testifying outside of the presence of the jury before determining that his exculpatory statement was voluntary and therefore admissible in evidence. Prior to Arizona v. Fulminante, Florida courts held that failure to conduct a separate hearing outside the presence of the jury to determine the voluntariness of a custodial statement constituted error of such proportions as to require reversal. McDonnell v. State; Land v. State; Kitchens v. State, infra. However, the most adverse consequence possible to respondent Guess as a result of the trial court's improper ruling was that evidence of a coerced confession was permitted to go to the jury. In its potential for prejudice, then, the trial error which occurred in this case was indistinguishable from that which occurred in Arizona v. Fulminate. Moreover, in this case, unlike Arizona v. Fulminante, the record unequivocally

establishes that the exculpatory statement was voluntarily obtained, and that respondent Guess did not ever claim he was coerced to make the statement by police. The circumstances warranting application of a harmless-error analysis in this case therefore are much stronger than those which existed in Arizona v. Fulminante.

The trial court's error must be viewed as harmless beyond a reasonable doubt in this case. While this case involved crimes to which only Guess and the victim were privy, the victim's detailed version of events was substantially and credibly corroborated by the testimony of other witnesses, including two defense witnesses, while no evidence corroborated the version of events related by respondent Guess. While the victim's credibility was damaged by evidence that she was not wholly accurate or truthful in her statement to police, the facts central to the occurrence of a sexual battery, including the victim's immediately voiced complaint that she was raped, were uncontroverted. The challenged statement was not a confession upon which the jury would have been tempted to alone rely in convicting Guess, but rather an exculpatory statement which had probative value only when linked to other evidence. Furthermore, no evidence that the statement was involuntary exists in the record. The challenged statement was directly inconsistent with Guess's claim of consent, but the record establishes that that defense was rendered implausible by Guess's own testimony, and that of

his two witnesses. Guess's credibility was clearly damaged by the inconsistent exculpatory statement, but abundant other evidence also damaged his credibility. Under these circumstances, it is clear beyond a reasonable doubt that the improper ruling in this case could not have contributed to the guilty verdict returned by the jury.

ARGUMENT

ISSUES

WHETHER IN LIGHT OF THE SUPREME COURT OPINION IN ARIZONA V. FULMINANTE, THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?

WHETHER UNDER THE CIRCUMSTANCES OF THIS OR SIMILAR CASES THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?

(A) A harmless error analysis is applicable to the trial court error which occurred in this case.

In Arizona v. Fulminante, 111 S.Ct. 1246, 59 U.S.L.W. 4235 (U.S. March 26, 1991)[1] a majority of the court comprised of Justices Scalia, O'Connor, Kennedy, Souter and Chief Justice Rehnquist, held that admission of a coerced confession may constitute harmless error, stating

> It is evident from a comparison of the constitutional violations which we have held subject to harmless error, and those which we have held not, that involuntary statements or confessions

[1] In that Arizona v. Fulminante issued during the pendency of Guess v. State, Case No. 90-92 (Fla. 1st DCA May 13, 1991) on direct appeal, the ruling in that case is applicable to this case. Griffith v. Kentucky, 107 S.Ct. 708, 93 L.Ed. 2d 649 (1987)(A new constitutional rule established by the United States Supreme Court for the conduct of criminal prosecutions is to be applied to all cases which were pending on direct review or not yet final, in state or federal courts, at the time the new rule was announced.).

> belong in the former category. The admission of an involuntary confession is a "trial error," similar in both degree and kind to the erroneous admission of other types of evidence. The evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth Amendment - of evidence seized in violation of the Fourth Amendment - or of a prosecutor's improper comment on a defendant's silence at trial in violation of the Fifth Amendment. When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.

Arizona v. Fulminante, 5 F.L.W. Fed. at S158.

The due process clause of the Fourteenth Amendment requires that a defendant have the right during trial to object to the use of an allegedly involuntary confession and to have a fair hearing and a reliable determination on the issue of voluntariness. Jackson v. Denno, **378 U.S. 368, 84** S.Ct. 1774, 12 L.Ed. **2d** 908 (1964); Sims v. Georgia, 385 **U.S. 538, 87 S.Ct. 639, 17** L.Ed. 2d 593 (1967); McDonnell v. State, **336** So.2d 553 (Fla. 1976); Land v. State, **293** So.2d 704 (Fla. 1974); McDole v. State, 283 So.2d 553 **(Fla. 1973);** Kitchens v. State, 240 So.2d 321 (Fla. 1970). In this case the trial court improperly determined the voluntariness and admissibility of a custodial statement in the absence of the defendant's testimony, outside of the presence of the jury, on the circumstances under which the statement was obtained.

Under Florida law to date, a trial court's failure to conduct a separate hearing on the voluntariness of a custodial statement or confession outside of the presence of the jury is "error of such proportions as to require a new trial." McDonnell, 336 So.2d at 555. See also Land v. State; Kitchens v. State.

However, under Fulminante, the trial court's failure to permit respondent Guess to testify regarding the voluntariness of his statement outside of the presence of the jury must be viewed as subject to harmless-error analysis.[2] The most adverse consequence possible as a result of the trial court error which occurred in this case was that evidence of an involuntary statement could have gone to the jury for consideration. Indeed, in Jackson v. Denno, the court characterized a New York procedural rule which, like the trial court ruling in this case, permitted evidence of a confession to *go* to the jury without a sufficient preliminary voluntariness determination as one "which did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession...." Id., 378 U.S. at 377, 12 L.Ed. 2d at 916. Thus, the ultimate impact af the trial error in this case is indistinguishable

[2] In Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed. 2d 636 (1986), a case factually closer to this case than Arizona v. Fulminante, the United States Supreme Court held on authority of Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed. 2d 674 (1986), that a trial court's failure to permit the defendant to testify to the jury regarding the voluntariness of his statement, after the court had made an initial voluntariness determination, was subject to harmless-error analysis.

from the admission into evidence of the coerced statement in Fulminante.

Moreover, as the district court noted, the argument or application of a harmless-error analysis to this case is much stronger than existed in Fulminante. The record unequivocally establishes the absence of any of the hallmarks of police coercion - actual physical violence, threats or promises - which would have cast doubt upon the voluntariness of respondent's statement by showing that his "will [was] overborne and his capacity for self-determination critically impaired." Fulminante, 5 F.L.W. at S156, quoting Columbe v. Connecticut, 367 U.S. 568, 602 (1961) and Schneckloth v. Bustamonte, 412 U.S. 218, 225-226 (1973). Both the written motion to suppress and the argument of defense counsel during the mid-trial voluntariness hearing referenced only respondent's asserted confusion during the interrogation, and miscommunication, apparently because Roberson questioned him about both D. R. and P. B. Specifically, defense counsel asserted that Guess "was confused and misled and misunderstood the thrust of the questioning, and did not accurately respond to the questions." (T 245) During his trial testimony, Guess fully brought before the jury the circumstances of the questioning session. (T 335-336) The most serious allegations Guess raised were that Roberson "started going at me from all sides" by "demanding that I tell him that I had done something," that Roberson was "mad

because I'm trying to explain all this to him," and that Roberson "wouldn't give up on me" and "kept trying to ask me questions and ask me questions." (T 336-337) There is no doubt on this record that the challenged statement was not the product of police coercion, and there is no possibility that had Guess been permitted the opportunity to testify outside the presence of the jury that the trial court would have found his statement to be involuntary and therefore inadmissible. Cf. Jackson v. Denno (where facts concerning the circumstances surrounding Jackson's full confession to a fatal shooting were in dispute, and Jackson asserted that he was wounded, gasping for breath, not allowed to drink water, and under the influence of drugs, court remanded case for an evidentiary hearing on the voluntariness af the confession.).

Moreover, the challenged statement in this case was not a confession in which Guess divulged his motive for the crime and the means by which he committed it, but rather was an exculpatory statement which had probative force only when linked to other evidence, specifically, Guess's testimony that the victim consented. When linked to this evidence, the statement had a significant potential for damaging Guess's credibility and his defense, if viewed in isolation from abundant other evidence which significantly damaged both Guess's credibility and the consent defense.

Guess asserted at both the trial court and appellate levels that the impact of the trial court's erroneous ruling

was to force him to choose between his right to testify regarding the voluntariness of his statements, and his right not to testify. This assertion is groundless. Under the circumstances of this case, Guess had no choice but to testify in order to counter the victim's highly detailed, credible and corroborated testimony regarding the attack, and to assert his defense of consent. The need for Guess to testify in order to challenge the victim's version of events escalated dramatically when the testimony of his only two defense witnesses failed to support his theory of defense, and instead gave rise to a further corroboration of the victim's testimony. Second, even if the trial court, by permitting Guess to proffer his testimony outside the presence of the jury, had properly made its inevitable determination that the statement was voluntary, it is unreasonable to suggest that Guess would not have sought to convince the jury that the statement was the product of confusion, and therefore not worthy of evidentiary weight, given that the exculpatory statement so directly contradicted his defense of consent. It is clear under these circumstances that the procedural error which occurred in this case did not effectively force Guess to testify.

Clearly, the error which occurred in this case was a "trial error," and thus "one which may ... be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Fulminante, 5 F.L.W. at S157. See also

State v, DiGuilio, **491** So.2d **1129,1135** (Fla. **1986)** ("The test of whether a given type of error can be properly categorized as per se reversible error is the harmless error test itself.... If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible.").

This court should answer the district court's certified question in the affirmative to find that a trial court's failure to permit a defendant to testify outside the presence of the jury as to the voluntariness of his statement, under the circumstances of this or any other **case**, is subject to harmless-error analysis under Arizona v. Fulminante, thereby receding from that portion of the court's prior decisions in McDonnell, Land and Kitchens which mandated reversal of a conviction when such error occurred.

(B) The trial court error in this **case** was harmless beyond a reasonable doubt.

In Chapman v. California, **386** U.S. 18,24 (1967), the court described the harmless error test as whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ~~See also~~ Delaware v. Van Arsdall, 475 U.S. 673,681 (1986) (Chapman excuses errors that were 'harmless' in terms of their effect on the fact-finding process at trial.); Arizona v. Fulminante (confession is harmless error if it did not contribute to [the defendant's] conviction.)

In Yates v. Evatt, 5 F.L.W. Fed S353 (U.S. May 28, 1991) Justice Souter explained application of the harmless test as follows:

> To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. . . . To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. . . . Before reaching such a judgment, a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict. . . . In answering this question, a court does not conduct a subjective enquiry into the jurors' minds. . . . Once a court has made the first enquiry into the evidence considered by the jury, it must then weigh the probative force of that evidence as against the probative force of the [erroneous ruling].

Yates at S357.

Facts central to establishing a sexual battery were corroborated by abundant evidence. After Guess left her trailer, R. immediately went to her mother, crying and shaking, saying that Guess had raped her. She then called Jim Guess, the police, and P. C.. R.s written statement to police was made at 9:35 a.m. on March 20. The report of the physical examination conducted by the sexual assault center was prepared at 12:45 p.m. that day. Jim Guess showed up at his mother's house in a rage within an hour or an hour and a half after respondent Guess left R. 's trailer. R. said Phillip Guess, apparently suffering from guilt after his attack on R., told her to call his brother Jim and tell Jim how to find him. R.'s assertion that she was suffering from the aftermath of an apparent miscarriage at the time of the sexual battery, was uncontroverted and supported by her medical records. This medical evidence clearly supported R.'s assertion that she would not have consented to sexual relations with Guess, and that he painfully raped her.

R.'s version of the events which preceded the attack were corroborated by C. and defense witness Goldsmith. Goldsmith testified that R. told her that Guess had asked if he could come over to R.'s trailer the night of March 19, and that R. told Guess no. C. corroborated R. testimony that she was surprised to see R. at her trailer when she arrived there. R. stated she had not told Guess he could visit her that night, and had not given

him directions to her trailer. R.'s mother stated that Guess came to her house, and asked if she was R.'s mother and if R lived in the trailer in front of her home. C. corroborated R.'s testimony that Guess had R.'s house keys when he was playing with the child. C. stated that Guess saw R.'s keys on the counter and asked whose keys they were. C. corroborated R.'s testimony that Guess asked R. if he could sleep in the car, and that C., after locking the doors to the trailer, was the last person to leave.

R.'s credibility was damaged by evidence that she did not mention Crowder's presence at the trailer in her statement to police, and wrote that Guess rather than C. had locked the doors. R. explained that she did not want to bring C. into the incident when she reported it. R. said she also did not want to bring Jim Guess into the incident, but had done so because Guess threatened her with a knife.

Respondent Guess's claim of consent was implausible even without evidence of his inconsistent statement to police. Defense witness Goldsmith contradicted his assertion that R. told him he could came over to the trailer when R. got off work that night, and that R. had given him directions to her place. Guess testified that he, R. and his mother were planning an outing March 20, starting with a visit to his brother Jim so Guess could find out about a job, and continuing with stops at the zoo or

playground, or for shopping or ice cream. R's mother testified that after talking with Guess the morning of March 20, she prepared to go over to R.'s house to talk to her and to see the child. She did not state that Guess was going with her, and she did not state that she, R. and Guess had plans of any kind for the day. Guess's mother testified that she did not know the last time she had seen Guess prior to the morning of March 20. Guess testified that he "kind of balanced his time" and spent a few nights with his mother at her home every now and then. Guess testified that he was offered time served if he pled guilty to the charges in this case. The prosecutor vehemently objected to that testimony on grounds that no plea bargain had ever existed. Guess's explanation for why he and R. decided to have sex in the child's bed, where the child was sleeping, as opposed to R.'s own bedroom, was that R. and he were "half lit" and she "could care less'' about the child, anyway. R. testified that she drank nothing that night, and C. corroborated that testimony. Guess's assertion that he, R. and her child, and his mother were going to engage in a day of trips to see his brother, the zoo or the playground, starting at somewhere between 7:30 and 9 a.m., was implausible after he and R. had been up most of the night. On cross-examination, Guess was evasive, refusing to answer questions about whether he saw Diane Goldsmith at the truck stop on March 19, whether C. was mistaken when he testified that he was the last to leave and

he locked the doors, or how he and R. could have gotten "half lit" on one six-pack of beer.

The procedural flaw which permitted respondent's exculpatory statement to go the jury without a sufficient voluntariness determination effectively violated respondent's right to be free of a conviction based on a coerced confession. See Jackson v. Denno. However, as noted above, the statement in this case was not a confession upon which the jury would have been tempted to alone rely in reaching its guilty verdicts, but rather an exculpatory statement which had probative force only when linked to other evidence. Furthermore, the record establishes the absence of any evidence that the statement was obtained by police coercion. Rather, Guess asserted only that he was confused when he answered Roberson's question because Roberson questioned him about two, or perhaps three, different victims. The record is devoid of evidence that Roberson deliberately attempted to confuse Guess in order to obtain an exculpatory statement inconsistent with Guess's claim of consent.

The exculpatory statement was directly inconsistent with Guess's claim of consent. However, the record clearly establishes that that claim was severely undermined by Guess's own testimony, and the testimony of his own witnesses. The inconsistency between the challenged statement and Guess's claim of consent clearly was damaging to his credibility, but, again, Guess's credibility was

severely undermined by the inconsistencies in his own testimony and the implausibility of his version of events when measured against the testimony of other witnesses, including his own witnesses. The credibility of the victim, while damaged by her inconsistent written statement to police, otherwise remained intact.

The jury was clearly aware of the inconsistency between Guess's statement to Roberson and his testimony that he engaged in only consensual sex with R.. But it is also clear that under the circumstances of this case, any error in admitting the statement was unimportant in relation to everything else the jury considered on the issue of consent. Under these circumstances, it is clear beyond a reasonable doubt that admission of the statement without a sufficient voluntariness determination could not have contributed to the guilty verdicts returned by the jury. This court therefore should find the error was harmless, and should answer the certified question in the affirmative.

CONCLUSION

Based on the foregoing argument and citations of authority, Petitioner requests this court to quash the decision of the district court on a finding that a harmless error analysis is applicable to this case, and that the error was harmless beyond a reasonable doubt.

Respectfully submitted,

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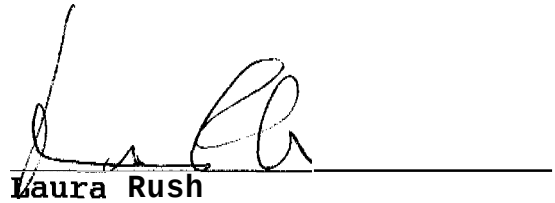
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Dennis B. Gunson, Esquire, Springfield & Gunson, P.A., 605 N.E. 1st Street, Suite G, Gainesville, FL 32601 this 15th day of July, 1991.



Laura Rush
Assistant Attorney General

APPENDIX

A. Guess v. State, Case No. 90-92 (Fla. 1st DCA May 13, 1991)

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IN THE **DISTRICT COURT OF APPEAL**

FIRST DISTRICT, STATE OF **FLORIDA**

PHILIP EUGENE GUESS, JR.,

Appellant,

v.

STATE OF **FLORIDA,**

Appellee.

* NOT **FINAL UNTIL TIME EXPIRES TO**
* FILE **MOTION FOR REHEARING AND**
* **DISPOSITION THEREOF IF FILED.**

* CASE NO. *90-92*

Opinion filed May 13, 1991.

Appeal from the Circuit Court for Baker County; Nath Doughtie, Judge.

F. Emory Springfield, Gainesville, for appellant.

Robert A. Butterworth, Attorney General; Laura Rush, Assistant Attorney General, Tallahassee, for appellee.

WOLF, J.

Guess appeals from his conviction and sentence for burglary with assault and sexual battery upon a person over 12 years of age. Guess raises three issues on appeal: (1) Whether the trial court erred in refusing to conduct a full proceeding to determine the voluntariness of defendant's custodial statement; (2) whether the trial court erred in allowing evidence of collateral crimes; and (3) whether the trial court erred in not

conducting a Richardson[1] hearing after learning of a potential discovery violation by the state. We affirm as to issues II and 111: The evidence of a collateral crime was offered in direct response to defense counsel's questioning, thus, introduction of this evidence did not constitute error. Coleman v. State, 485 So.2d 1342 (Fla. 1st DCA 1986). The right to a Richardson inquiry was waived when the defense failed to alert the court of the continued necessity for such an inquiry after the police failed to respond to the judge's order to produce notes which were taken during defendant's statement. See Brazell v. State, 570 So.2d 919 (Fla. 1990) (must alert trial judge of the need for Richardson hearing). These issues merit no further discussion. We must reverse issue I, however, in Light of existing law which holds that the failure of the trial court to permit a defendant to testify outside the presence of the jury concerning the voluntariness of custodial statement is error. Smothers v. State, 513 So.2d 776 (Fla. 1st DCA *1987);* *Kitchens* v. State, 240 So.2d 321 (Fla. 1st DCA 1970).

On the day of trial, Guess filed a motion to suppress and a motion in limine which were directed toward any statements he may have made while in police custody. The motions were not heard prior to trial. *At* trial, the state proffered the testimony of Officer Archie Robertson concerning the defendant's statement that he never had sex with the victim.[2] The statement was made

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[1] Richardson v. State, 246 So.2d 771 (Fla. 1971).

[2] This statement is important as it is inconsistent with the defense of consent which was asserted at trial.

while in police custody, **The defense objected to** the admission of the testimony and requested that the court allow the defendant to testify outside the presence of the jury regarding the voluntariness of the statement. The court refused the request because the defense had not filed a timely motion to suppress. The court did, however, entertain argument on whether the statement was freely and voluntarily given. Defense counsel represented during argument that defendant Guess would testify that "he was confused and misled and misunderstood the thrust of the questioning and did not accurately respond to the questions." After argument, the judge overruled the objection **as** to admissibility.

Officer Robertson testified before the jury as to the defendant's statement. Later in the trial, Guess himself testified that he misunderstood the officer's questions when he responded that he never had sex with the victim. Guess explained that he was referring to another case where he was charged with sexual battery on a 14 year old.

While the record before this court is devoid of evidence of coercion on the part of the police, the defendant still asserts that the trial court erred in failing to conduct a full proceeding outside the presence of the jury to determine the voluntariness of his confession. The state asserts that the defendant waived his right to the proceeding by not timely filing a motion to suppress.

Prior to admitting a custodial statement of a defendant, the trial court must conduct a proceeding to determine the

voluntariness of the statement. McDonnell v. State, 336 So.2d 553 (Fla. 1976); Kitchens v. State, 240 So.2d 321 (Fla. 1st DCA 1970). The obligation to conduct such a proceeding arises once the defendant raises an objection. It does not matter whether the defendant has filed or pursued a motion to suppress. Smothers v. State, 513 So.2d 776,777 (Fla. 1st DCA 1987). The requirement applies to all custodial statements, whether or not the statement is considered to be a confession or is exculpatory in nature. Id.

At a proceeding to determine voluntariness, the trial court must make a finding that the confession was voluntary. Simpson v. State, 562 So.2d 742 (Fla. 1st DCA 1990), rev. denied, 574 So.2d 143 (Fla. 1990). Such a finding by the court does not require that magic words be used, but it must be ascertainable from the record. Antone v. State, 382 So.2d 1205 (Fla. 1980), cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980):

> However due process is not offended when the issue of voluntariness is specifically before the judge and he determines that statements are admissible without using the magic word 'voluntary.'

Id. at 1213,

In the instant case, contrary to the appellant's assertion, the trial court did meet the requirements of Antone where it specifically said it was entertaining argument as to voluntariness, and overruled the objection. See also Hoffman v. State, 474 So.2d 1178 (Fla. 1985), reversed on other grounds, 571 So.2d 449 (Fla. 1990).

The trial court must also allow the defendant to testify on the issue of voluntariness outside the presence of the jury. See McDonnell v. State, 336 So.2d 553 (Fla. 1976); Kitchens v. State, 240 So.2d 321 (Fla. 1st DCA 1970). It further appears that the failure to allow the defendant to testify will mandate reversal and such failure will not be subject to a harmless error analysis. See Land v. State, 293 So.2d 704 (Fla. 1974); McDonnel, supra; Kitchens, supra. In light of these cases, we are required to reverse the conviction, since the trial judge failed to allow the defendant to testify outside the presence of the jury as to voluntariness of his confession.

Mandated reversal seems unduly harsh under the circumstances of the instant case: (1) It is apparent that the defendant's statement was voluntary; (2) the defendant's Later testimony revealed that he really wasn't challenging the voluntariness of the confession, but only indicated that he misunderstood the question; (3) the *statement* in question was not a confession but an exculpatory statement; and (4) defense counsel was allowed to argue the substance of defendant's testimony prior to the determination of voluntariness..

In addition, the United States Supreme Court in Arizona v. Fulminante, 111 S.Ct. 1246, 59 U.S.L.W. 4235 (U.S. March 26, 1991), indicated that admission of a coerced confession in certain circumstances may constitute harmless error. In the instant case where the statement is clearly not coerced and the error is only procedural, the argument for application of the harmless error doctrine is even more compelling. We, therefore, certify the following questions to be of great public importance:

WHETHER IN LIGHT OF THE SUPREME COURT OPINION IN ARIZONA V. FULMINATE, THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?

and

WHETHER UNDER THE CIRCUMSTANCES OF THIS OR SIMILAR CASES THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?

We reverse and remand for a new trial.

ZEHMER, J., concurs. BOOTH, J., dissents with written opinion.

BOOTH, J., DISSENTING:

I dissent from the majority's reversal on Issue I, on the ground that the error, if any, in not having defendant testify outside the jury's presence on the "voluntariness" of his exculpatory statement, was harmless. Arizona v. Fulminate, ____ U.S. ____, 111 Sup. Ct. 1246 (1991).