IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

CASE NO. 90,493

JOHN WEBER,
Respondent.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

REPLY/ANSWER BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

State of Florida, was the prosecution in the trial court and will be referred to herein as "petitioner" or "state." John Weber was the defendant in the trial court and appellant in the fourth district court of appeal, and will be referred to herein as "Weber" or "respondent."

In this brief the letter "T" is used to denote transcript of the proceeding, and "SR" supplemental record on appeal..

STATEMENT OF THE CASE AND FACTS[1]

Petitioner accepts respondent's statement of the case and facts for purposes of this appeal, subject to the additions and clarifications set forth below, and in the argument portion of this brief, which are necessary to resolve the legal issues presented upon appeal:

Motion to Suppress Hearing:

State's Evidence

Detectives Ponce and Smith's Testimony:

Detective Ponce testified that he believed he did not have probable cause to arrest Respondent on the 23rd, the day the victim reported the crimes (T 54). Before Respondent left the station on the 23rd, Ponce asked Respondent if he would be willing to take a polygraph, and he agreed, without reluctance (T 22). Ponce asked him if would be alright to call him at work to let him know when the polygraph examiner was ready; Respondent gave Ponce his pager number for that purpose (T 22-3). On the 26th, Ponce reached Respondent, around 3:00 or 4:00 p.m., and the polygraph was arranged for 6:00 pm that evening, after Respondent finished work (T 23-5, 57). Ponce called him in the afternoon, because he wanted to give him sufficient time to make his arrangements to come in (T 25). Again, Respondent did not appear reluctant to come in (T 25). When Respondent did not arrive as expected, Ponce paged him; Respondent returned the call, and indicated that he was not finished working (T 25-6, 60). Respondent told Ponce he would call him back as to his availability; the two were cooperating to arrange a time for the polygraph (T 26-7).

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[1]Respondent raises new issues in his answer brief without invoking this Court's jurisdiction. Thus, petitioner's brief, which is longer than 15 pages, is a reply/ answer brief to respondent's additional claims.

A series of phone calls ensued; in one, someone called on Respondent's behalf and told Ponce that Respondent was having car trouble. (T 27, 58-9). Ponce requested that Respondent call back once his vehicle was operational (T 27). At some point, as it was getting late, Ponce *offered* to come and pick Respondent up, if he could not make arrangements to get there, although Ponce could not recall the precise wording he used (T 27, 58). He did not believe he was coercive, though (T 59). Ponce testified that he offered Respondent a ride because the polygraph examiner had been waiting a long time, and the next possible opportunity to conduct the polygraph was at least a week away (T 27-8). In response to the offer, Respondent stated that he would call Ponce back, that he was going to try once more (to fix the car) (T 27). During this series of discussions, Respondent did not seem reluctant to come in, and never indicated he did not want to come in, but Ponce began to get the impression that perhaps he was just making excuses (T 28, 56-7). Ponce, however, did not make any reference to the consequences of the polygraph not being conducted as planned, and did not indicate that he would send someone to get Respondent if he didn't come in on his own (T 29-30). Ultimately, Respondent showed up at the station, around 8:30, (two and a half hours late) (T 29). He seemed "fine", and was not reluctant to take the test (T 29-30).

Respondent was introduced to Sergeant Smith, the polygraph examiner, at 8:50 p.m., and Ponce left them alone to conduct the test (T 30, 89). Respondent was polite and cooperative, and was not reluctant to go forward with the test (T 90). Smith testified that he told him he could stop the test at any time[2] (T 180). Before the test, the two went over the questions to be asked, and, when they reached question fourteen, *Smith Mirandized him, Respondent signed the Miranda card,*

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[2]This was more than Miranda requires. Brown v. State, 565 So. 2d 304, 306 (Fla. 1990).

and Smith proceeded to go over what the remaining questions would be (T 91-2, 107-9). Respondent did not seem uneasy while his rights were being read, he just seemed in a hurry to get it over with (T 111). Respondent still denied the allegations at this point in time (T 109). Respondent understood the questions to be asked, and had no problem with them (T 112). Smith did not ask Respondent to sign a consent form for the examination, and did not recall any discussion with Respondent as to the test's admissibility or inadmissibility (T 164-6).

Smith then proceeded to explain the polygraph procedures to Respondent, and "hooked him up" (T 109, 112). Smith first conducted a "stem test" where Respondent was told to lie about a number which he had picked, between one and six, in order to establish how Respondent's lie would appear on the graph (T 113-4). Then the actual test began, and *Respondent indicated his readiness to proceed before each of three subtests* (T 114, 117). Respondent remained polite and cooperated "a hundred percent all the way through the examination." (T 114). *He never indicated at any time, that he wished to stop the test* (T 114-5). Ultimately, Smith concluded that there had been a large degree of deception in the test (T 119, 129-30, 167). He conceded at the hearing that there had been some irregularities with the equipment, but denied that this could have altered the results (T 154-61)[3]. After the test was concluded, Smith called Ponce and summoned him to the testing room (T 31-2, 60, 117).

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[3]Defense expert Robert Kranz, a certified polygraph examiner, testified about the problems with the polygraph equipment, and "totally disagree[d]" with Smith's conclusion that the test was still valid. (T 212-30, 236-43). He further testified that he did *not* believe Smith had purposely invalidated the tests; he felt "in his heart" that Smith had merely made a mistake. (T 233-5). He did not think Smith did it "just to get [Respondent]". (T 234). Of course, he did agree that the results of the test were used to induce Respondent's confession. (T 233). And he thought that Smith should have realized right away that the results were invalid, and done the test over. (T 233-4).

Smith asked Respondent how he thought he did, and Respondent replied "pretty good", or "good" (T 130-1, 174-5). In response, Smith told Respondent that he had failed the test (T 32-3, 130-1). As they went over the test question-by-question, Smith pointed out how the graph evidenced that he was lying (T 131-2). Smith admitted that he might have told Respondent that, if he were the supervising officer, he would place him under arrest (T 1701-1). Respondent seemed very concerned about "what was happening at the time." (T 33). Ponce testified that Respondent inquired "what happens in certain situations like this, as far as, I guess, being arrested or -- you know, that's what I assume he meant"; Respondent wanted to know what was going on, what would happen if he admitted his guilt (T 34, 169).

In response to Respondent's inquiry (T 82), Smith replied that "its up to a judge as to what could happen with him." (T 34, 61, 72-3). Smith testified that Ponce told Respondent that the case would go to the State Attorney's Office regardless of whether he confessed (T 169). Ponce testified that Smith talked about counseling, but Smith testified that he believed that Respondent brought up that topic first (T 34, 61, 72-3, 138). Respondent asked if they could guarantee that he would not lose the kids, and asked if he could get counseling (T 135). Smith "put [his] foot down" and replied, "I told you before, I told you after, we cannot promise anything." (T 136). Both told Respondent that only a judge could determine what would happen to him if he confessed, but they could say that he would have to serve some jail time if he were found guilty." (T 139). At some point, Respondent became emotional and began to cry (T 132). Respondent then admitted that he had lied on the exam, because he hadn't wanted to go to jail; both officers witnessed this statement (T 32-3, 130-1, 134-5). He elaborated that he did not want to lose his business (T 135).

No promises or deals were made with Respondent; in fact, he was told that if they did make

a deal with him, they would not be able to use his confession, because it would be illegal (R 32, 36-7, 172-6). When Ponce's discussions with Respondent approached a "gray area", Smith, being the more experienced officer, immediately cut off the discussion. (T 174-8). *Respondent did, around this time, mention that he could not afford an attorney, and Smith told him that one would be appointed for him if he so desired (not later on), but he never took him up on it, and never mentioned it again. (T 180-7). Of course, Smith had already told him this during* Miranda. (T 181). *According to Smith, there was no mention of a time frame with regard to providing counsel for Respondent.* (T 180-7). The issue of counsel came up in the context of Respondent's attempts to negotiate a deal, in that Smith told him he would need a lawyer to "handle something like that." (T 182). Smith told him that it was for his attorney to negotiate any deals with the State Attorney's Office, that it was not their place to do so. (T 182).

After he confessed that he had lied on the test, the officers encouraged Respondent to tell them more, noting that it was "eating" him, and "tearing" him up inside, and told him he would not be able to get on with his life until he "stopped denial", admitted what he had done, and discussed it "with someone." (T 135-6). At that point, Smith asked him if it would be easier to discuss it one-on-one, and he replied "yeah, maybe." (T 136). Smith told Respondent that it was obvious to him that he wanted to confess, since Respondent was attempting to bargain with them, and suggested that he go and speak with Ponce alone; Respondent agreed. (T 137). *There was no badgering, and Respondent admitted that he was hurting. (T 137). Respondent was reluctant to confess, however, because of the consequences he would have to face, but ultimately agreed to go with Ponce so that he could "start the healing process inside of himself, start looking for whatever he could look for himself, counseling or whatever." (T 138).*

Respondent then willingly signed a form indicating that he had not been abused, or asked any questions he thought improper during the test, upon which Respondent indicated the time was 10:12 p.m. (T 133, 166, 187-8). *The form also indicated that he realized he was free to leave at any time throughout the test.* (T 179). Smith testified that his own report reflected that Ponce and Respondent left the room at 10:48 p.m., contrary to what Respondent put on the form; Smith had never before thought to compare the time in his report to that on the form. (T 141, 188). Respondent then went with Ponce back to the interview room in which they had spoken on the 23rd. (T 37, 134, 137). If Respondent had asked to leave at this point, Ponce testified, he would have allowed him to go. (T 52). *Respondent never asked to cease questioning.* (T 140).

Respondent seemed quiet, but not reluctant to go with Smith to the interview room. (T 37). *He never indicated that he no longer wished to talk, either through words or actions.* (T 37, 39-40). They arrived in the room around 10:50 p.m., and *Ponce immediately began a tape recording, of which Respondent was aware and did not object, at any point.* (T 37, 41-2, 60). *The tape began with Respondent's affirmative reply to the question whether he had been there on the 23rd, and had been read his rights, and whether he recalled them. (T 37). He also indicated that he was there of his own free will.* (T 38). The tape was not turned off at any time. (T 39). The interview continued for about eighteen minutes, compared to the interview taken on the 23rd, which had lasted twenty-five minutes. (T 39). Ponce never offered anything (e.g., leniency or bargains) in return for Respondent's statement. (T 40, 68-9). Ponce had no explanation for why Respondent indicated, in his statement, that he would do anything he needed to do to get counseling for the family; it was not due to anything Ponce had suggested to him. (T 62-3). After the second statement, in which he confessed, Respondent was placed under arrest. (T 40).

Victim's Mother/Respondent's Girlfriend's Testimony:

R.S.' mother testified that Respondent called her *before* the polygraph, and *he did not indicate a reluctance to take the test.* (T 193, 198). She did, however, believe that he was making excuses when he told her his van was broken. (T 195-8, 202-3). Respondent had told her that he had no problem taking the polygraph, since he was innocent. (T 196). *She did not tell him that any promises would be made him if he were to take the polygraph.* (T 193). *Before the polygraph, Respondent admitted the crimes, and stated to her that he had done it because he loved the boys.*[4] (T 193, 203). She told him he had a sickness, that he needed help, and that she would stand by him as a friend. (T 193, 204). The next time she spoke with him was when he called her collect from the jail. (T 194, 204). He told her that Ponce had promised him he could get the family help if he admitted his crimes. (T 194, 204). She had previously been informed by Ponce that Respondent had failed the polygraph. (T 194). She could not recall whether she spoke to Ponce between the polygraph and the confession, but maintained that she had *not* spoken to Respondent during that interval (as he later testified). (T 195-8). She confirmed that Ponce did *not* ask her to influence Respondent. (T 195).

Defense Evidence

Respondent's Testimony:

Respondent confirmed that when he left the station on the 23rd, he was under the impression that Ponce would call him to return to the station for the polygraph, on Wednesday or Thursday (the 27th or 28th). (T 244-5). However, Ponce paged him instead on the 26th, at 6:00 p.m., and

[4]Respondent was originally charged with sexually abusing both of her children, but, at some point, the charges as to C.S. were dropped.

asked him if he could come to the station *right then (in contrast to Ponce's testimony that he gave him several hours notice)*. (T 245). Respondent replied that it was rather short notice, and that he had to be at work until 8:00 p.m. (T 246). Ponce indicated that it is difficult to arrange for a polygraph examiner, and that they become available on short notice, thus the exam had to be that night. (T 246). Respondent agreed, and after talking with his work crew, called Ponce back and told him he could come in an hour, at 7:00 p.m. (T 246). When Respondent later tried to leave for the station, he had trouble with his van, so he called Ponce and told him what had happened, and that he would try to get the van running. (T 246-7). According to Respondent, he asked Ponce if there was any way they could do the exam first thing the next morning, and Ponce said no, that that evening was the only time he could set it up. (T 247). So, Respondent told Ponce that, as soon as it stopped raining, he would get the van running, and be there. (T 247).

Pursuant to Ponce's request, Respondent called him with an update fifteen minutes later and told him the van still was not fixed, because it was still pouring rain out. (T 247). Respondent testified that he was trying to cooperate with Ponce. (T 248). He further testified that Ponce told him "well, if you are having a real problem with the van, why don't I come and get you?" (T 248). Respondent declined his offer because he could not leave his van at the job site, as it would be locked in for the night, and he was also concerned about theft. (T 248). Ponce then allegedly told him that he "better figure out something to get in here or I will have to come and get you." (T 248). Respondent replied that he thought it was voluntary, and *Ponce confirmed that it was voluntary, but that it had to be done that evening because he had to wrap up the case*. (T 248). So, Respondent replied "Oh, all right, I will do my best", then got the van running, and called Ponce to say that he was on his way. (T 248). He was under the impression that if he did not come on

his own, Ponce would come get him, that it was "like a mandatory thing", that "had to be done that night one way or the other." (T 249). He felt that Ponce was "threatening" him in emphasizing the importance of coming in that night. (T 282). *Respondent testified that there must have been at least a half-dozen phone calls between them, but admitted that he never told Ponce that he did not want to come to the station that night. (T 283-4). Respondent was concerned that Ponce and Smith were "sitting there waiting for [him]."* (T 283-4).

Respondent arrived at 8:30 or 8:45, and Ponce met him in the lobby. (T 249). *Respondent complained to Ponce that he had to "go through all this stuff to get here tonight for something (sic) to be a voluntary thing."* (T 250). Ponce reiterated that he had to get his paperwork done that night. (T 250). Respondent also told him he was tired, and that it was ridiculous for him to be there at that time of night; *he did not, however, tell him he did not want to take the polygraph.* (T 284). Ponce took him to the polygraph room, and left him with Smith. (T 250). *Respondent again complained, this time to Smith, that he believed it was a voluntary appearance on his part, but that Ponce had been insistent that it take place that night.* (T 283). Smith replied that Ponce was "not really trying to be mean or anything", it was just that due to Smith's work schedule, the exam had to be arranged when he was available. (T 283). Respondent was then under the impression that he would not be arrested that night regardless of whether he passed the polygraph. (T 290).

Respondent testified that Smith tried to put him at ease. (T 250). Respondent agreed with Smith's testimony that he had been cooperative with Smith. (T 285). *Respondent could not recall that Smith read him his rights before beginning the test, and he could not recall signing the rights card, although he admitted that it contained his signature.* (T 288-9). Smith explained the machine, went over the questions, hooked him up, and started the test. (T 251). After he finished

the test, Smith offered him a chance to take a break, and he sat in another room while Smith and Ponce scored the test. (T 253).

When he returned to the room, he told the officers that he thought he had done well on the test, in response to Smith's question. (T 253). Smith told him "I hate to tell you I found some deception." (T 253). Respondent replied that he didn't see how that could be, that he had told the truth, and had nothing to hide. (T 254). *Respondent testified that he further stated to them, "I came here voluntarily to take that polygraph examination, tried to prove my innocence here."*[5] (T 254). Smith showed him how the graph indicated he was lying, he again told them he was not lying, and Smith told him that he was under arrest because they had sufficient probable cause. (T 254, 290). Smith then "went off on a tangent yelling" at him about the graph. (T 255). Respondent believed that the polygraph results were admissible in evidence, although it was not discussed. (T 265-6, 291)[6]. Respondent's statement of October 23 reflects that *Detective Ponce did tell him that the polygraph was **not** admissible, when he asked him if he would take the exam.* (T 14). *Respondent himself testified that he did not think he was being restrained until **after** the polygraph, when they told him he was under arrest.* (T 266).

Respondent testified that Smith had him "so emotional, upset at that point I had tears in my eyes, said (sic), for God's sake you people got to believe I didn't do that." (T 256). Respondent denied ever telling Smith that he had lied on the test. (T 292). Smith then allegedly told him that

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[5]*On cross, Respondent reaffirmed this testimony, that he had come to the station voluntarily to take the polygraph and prove his innocence.* (T 282).

[6]Later, Respondent testified that Smith told him, after the test, that the results *were* admissible in court.

they could "work this out", that the whole family could go into counseling, if he were to admit his guilt. (T 257). Respondent responded that he could not admit to something he did not do, and asked why would he want to. (T 257). Smith allegedly replied, "that's what it takes, either that or you are going to be locked up. . .you are going to lose your livelihood, won't be able to support your family." (T 257-8). Respondent explained that he was low on funds, but had a good job. (T 258). According to Respondent, the officers told him that he would have to trust them, that they were there to help him. (T 264-5). Further, if he admitted the allegations, no "normal (sic) charge" would be made against him. (T 267). He stated that he actually believed that he could admit to having committed these types of offenses, and not be charged. (T 300).

Respondent testified that Smith was the one to raise the subject of an attorney. (T 261). He told him after he was placed under arrest that he "need[ed] to call his attorney"; Respondent replied that he had none. (T 258, 292-3). Smith told him he would have to hire one, and, when Respondent told him he had no money, Smith said he would have to get a public defender, to which Respondent replied "if that's what it takes . . ." (T 259). According to Respondent, Smith was not talking about getting an attorney right then, rather, he meant when he went to court the judge would appoint one. (T 259-60). Smith neither told him he could have an attorney that evening, nor that he was entitled to one that evening. (T 260-1). *Notwithstanding that Smith told him he could have a public defender, Respondent did not request that the interview cease until he had one.* (T 293). He contended that, when Ponce read him his rights on the 23rd, someone interrupted him and he *might* not have finished; he did not remember the "if you cannot afford a lawyer . . ." portion of the

rights being read to him, either on the 23rd or the 26th.[7] (T 294). *He admits he signed the waiver form before he left the room with Ponce, and knew that the form stated that he had not been pressured or mistreated.* (T 252, 262). Respondent admitted that Smith explained the form to him, albeit "real quickly," (T 288).

At that time, Respondent asked, and was permitted, to use the restroom; when he finished, Ponce informed him that R.S.' mother (his girlfriend) was on the phone for him (T 262-3). According to Respondent, Ponce had told already told her that he failed the polygraph, and she encouraged him to admit the allegations so that the family could be placed in counseling, and that Ponce would arrange for him to be released on his own recognizance so that he could continue to work (*this contradicts her testimony that she did not speak to him between the polygraph and the confession, and they did not speak of any "promises" to him until he called from the jail).* (T 263-6). Next, he and Ponce went to the "interrogation room." (T 270).

Respondent realized that he and Ponce were going to "talk this whole thing over", when they went to the interview room. (T 271). He claims "[i]t was never discussed" that he had the right to remain silent, and he did not know that he could confer with a lawyer before or during the "interrogation." (T 275). Ponce told him that, in order to be admitted into "the program", he had to admit to the allegations, he testified. (T 271). If he did, he would be taken to the jail overnight, be arraigned the next morning, and be released on his own recognizance. (T 274). Notwithstanding that he admitted that he knew he would be arraigned, even if he confessed, Respondent insisted, at the hearing, that his understanding was that he would not be charged; he also testified, in contrast,

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[7]He conceded that he had been represented by counsel in a prior, unrelated incident, but maintained that his girlfriend had called that attorney for him. (T 294-5).

that he never discussed his charges. (T 274). He further testified that he believed if he did not admit the charges, he would be arrested anyway. (T 275). Respondent allegedly asked Ponce whether he needed a public defender, at some point during this interview, and Ponce allegedly replied that he did not. (T 272, 296). Later, *Respondent testified that Ponce had told him that questioning could cease while they obtained a public defender for him, but that that would delay things, and would probably cause him to stay in jail longer and miss work.* (T 308). *In light of that, Respondent went forward with his statement.* (T 308). Ponce also told him that, even though he had failed the polygraph, just between them, Ponce didn't think he was guilty. (T 274, 299).

Next, Ponce allegedly made up an outline of what the two were going to talk about, from notes he had of R.S.' statement, and went over it with Respondent for fifteen or twenty minutes[8]. (T 272, 301). Ponce told him he need not be specific in his answers, and that he could just "ad-lib", and "go along" with what Ponce said (T 272-3, 298-9). At this time, Ponce turned on the recorder, and the began to "go[] over the confession." (T 273). Respondent did know that the statement was being taped. (T 297). First, *Ponce referred to the Miranda rights which he had read Respondent on the 23rd, and asked him if he recalled them; Respondent testified that, although he replied, on the tape, that he did, he actually did not recall his rights, at that time.* (T 276). His explanation for stating the opposite on tape was that he "was not even in [his] brain . . . just emotionally shaken . . . wasn't probably thinking straight." (T 276). *Later, he testified that Ponce "never mentioned*

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[8]As to the time periods involved, Smith testified that Ponce and Respondent left the polygraph room at 10:48, and Ponce's taped statement began at 10:50. Thus, if their testimony is to be believed, only two minutes intervened in which the events described in this and the preceding paragraph could have occurred. There is contrasting evidence: the written waiver form which Respondent signed lists the time he signed as 10:12; he testified that he signed that form as he was leaving the room with Ponce.

anything about rights" on the tape. (T 297). *He did recall agreeing, on the tape, that he was giving the confession of his own free will, although he maintained that it was not so given.* (T 298).

Respondent claimed he did not think he could refuse to proceed with questioning, since Ponce had told him that one way or the other he would be arrested, and this was the only way he could be released after arraignment. (T 277, 299). On cross, he conceded that in a prior, unrelated incident, he had been read his rights, and signed a rights card. (T 278-80). He testified that, *the next time he was read his rights on the 23rd, he "probably" didn't understand them, although he had signed the card indicating that he had, and had never indicated that he had not.* (T 281-2). *Respondent agreed that he was "an intelligent man, [who] can hold his own in communicating with other people."* (T 286). *He has operated his own business, and dealt one-on-one with homeowners, and suppliers, successfully for thirty years.* (T 286-7).

Respondent's Confession

Respondent gave a taped, sworn statement/confession, which lasted eighteen minutes, and covers ten pages of written transcript. At the outset, Respondent indicated that he understood his rights when read to him on the 23rd, and further indicated that he still understood them and was giving the statement of his own free will. (T 1). Respondent proceeded to admit to having touched R.S.' penis on a number of occasions, (T 2). He further admitted performing fellatio on Respondent, no more than a dozen times, which began approximately a year later. (T 2-3). Respondent also admitted that R.S. performed fellatio on him (T 3-4). He denied R.S.' allegation that they had engaged in this activity at Bryant Park or at John Prince Park. (T 5-6). He also denied that he had bought R.S. any stereo equipment, insisting that R.S. had paid for it himself. (T 6). He

placed the total number of incidents at about a dozen, over a period of eight or nine months. (T 7). He disputed R.S.' claim that it was he who removed R.S' underwear. (T 8). He also claimed, contrary to R.S' statement, that R.S. was always the instigator. (T 8). He denied that he had ever ejaculated with R.S. (T 9). When given an opportunity to speak, he added at the end of the statement that he would "do whatever it takes to keep my family together and get the necessary help." (T 10).

Trial Testimony:

The victim was asked by the defense about Respondent's disciplining of him. He testified that Respondent was the disciplinarian of their household (T 780). He testified that he frequently argued with Respondent over chores, curfew violations, and school brawls (T 782). He even testified that when he called police to report Respondent's molestation of him, they had just engaged in an altercation over household chores, and the fact that he believed his brother Chris was receiving preferential treatment (T 749, 843). He called police on that date "because of arguments -- when we got into, when I got angry, the feelings that got brought up . . . ." (T 749). He explained that "when [they] had repeated arguments, when these feelings were brought up inside [him]. It was almost like [he] wanted nothing to do with him, did not want him to be around." (T 852).

Respondent brought out during cross-examination of R.S. that Respondent and R.S.'s mother spent a lot more time with and devoted more attention to R.S.'s younger brother who had attention deficit disorder, as well as diabetes (T 777-9). R.S. also conceded that he had told others that he hated Respondent, and wanted him out of the house. (T 789-92). R.S. did not "agree with what -- how he was going about things and that I wanted him out of my life." (T 791). Respondent got R.S. to admit that when he called police, he was angry at Respondent over disciplinary actions,

chores, favoritism towards Chris, restrictions on social activities, and wanted him out of the house for all of those reasons, "plus the allegations that I made." (T 801-2).

Further, R.S. testified that he had been "involved" with a young girl named Nicole, but denied that Respondent had discouraged him from seeing her (T 784-85). He did admit that Respondent would occasionally limit his access to girls as a punishment for misbehavior (T 785).

Respondent's former live-in girlfriend of 11 years, also the mother of the victim R.S., testified that Respondent was the boys' "stepfather", so he disciplined them like he was their father. (T 860). Respondent exhibited concern over with whom R.S. was interacting. (T 903). Both she and Respondent spoke to R.S. about their concern over his "social interaction" with Nicole Jordatte, who was 3 years younger than he, and with Carrie Dooby (T 903-4). Nicole had been R.S.' girlfriend for awhile. (T 923). She indicated that her other son, Chris, was hyperactive, manic-depressive, and diabetic (T 863). R.S. often fought with his brother Chris. (T 902). R.S also had problems with school, and with staying out late (T 901-2). She confirmed that R.S. complained to Respondent that he was unfairly required to do chores, where his brother Chris "got to slack." (T 865). She also confirmed that, several weeks prior to the argument after which R.S. called the police and reported Respondent, R.S. had told her that Respondent was a "pervert." (T 867). Significantly, she testified that when Respondent called her subsequent to his arrest, he told her that he loved her, loved the boys, and that he "did it", but didn't know why he did "it". (T 873).

Patricia Cummins, a family friend, testified that, when Respondent phoned her after his arrest, the first question she asked him was whether he had touched her children. (T 957). Respondent replied that he hadn't, and that he "just had problems with [R.S.]." (T 957). He also said he was sorry about what he had done to R.S., and that he had a sickness, and he knew he had

to get help (T 957-8).

Adam Easter, a friend of R.S.', confirmed that R.S. and his brother Chris fought a great deal, and that R.S. disliked his brother Chris, and had threatened to call police on him. (T 1270-1). He also confirmed R.S.' hostility toward Respondent relating to household chores, and testified that Respondent had said "he wished him out of the house, he didn't like him." (T 1271). R.S. even told him that he *hated* Respondent, and his brother Chris, too. (T 1271).

Sonya Easter, a family friend with whom Respondent stayed after he was released from jail after his arrest in this case (T 1280), testified that R.S. had also lived at her house during one point. (T 1274). R.S. had been having problems at home, with curfews, grades, and his "associat[ion]" with Nicole Jordatte, "in which he didn't want to abide by the rules there at home." (T 1274). R.S. told Ms. Easter of his hatred for his brother Chris, and his jealousy over the time his mother and Respondent spent with Chris. (T 1275). R.S. also told her that he hated Respondent, wanted him out of the picture, and was jealous over Respondent's relationship with his mother. (T 1275). She also testified that Respondent placed restrictions on R.S. with regard to Nicole Jordatte, and that that was a source of difficulty as well. (T 1276). She also testified that R.S. had "not a good" reputation for truthfulness and honesty. (T 1276).

Edward Jordatte, father of R.S.' girlfriend Nicole, and family friend of Respondent and R.S.' mother, also testified that R.S. wanted to get Respondent out of his house. (T 1286). He indicated that R.S. complained about Respondent's rules regarding chores, restrictions on privileges, curfews, and school work. (T 1286-7). Significantly, R.S. complained about Respondent attempting to place the brakes upon the boyfriend-girlfriend relationship between R.S. and Nicole. (T 1287). Finally, he indicated that R.S' reputation for truthfulness and honesty was "[v]ery, very, very, very, very

bad." (T 1287).

Nancy Sherber, mother of R.S.' former girlfriend Carrie Dooby, testified that R.S. constantly made fun of, or said nasty things to his brother Chris. (T 1158-9). He expressed his dislike for Chris, and indicated that he wished he would be sent back to the hospital where he had stayed, and be kept there. (T 1159).

Detective Ponce testified that R.S. had told him that the argument between him and Respondent, which preceded Respondent's arrest, occurred in part because of his belief that Chris received "favorite treatment." (T 1018).

Closing Argument:

In closing, Respondent's counsel argued the following with regard to Respondent's family dynamics:

> Now, the facts show that this family had tremendous difficulties. They had tremendous difficulties. They had tremendous difficulties, and [R.S.] in particular, R.S. had particular jealousies towards his brother. He had dislikes towards [Respondent]. He had dislikes towards his mother, apparently, with the name calling and the things of that nature. He had tremendous problems in school. He had problems at home. He had problems in the neighborhood. He had problems all over. R.S. is clearly not the bedrock of the State's case.
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> * * *
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> Perhaps for all these reasons, *perhaps because [Respondent] was putting a crimp on his social life*; he gets angry one day and he picks up the phone and he makes a phone call. And on that day he receives -- this kid who is lonely, who feels alone, who doesn't feel supported, who feels alienated from his family, who feels alienated from the world, in that one day, this kid gets more attention than he's had in many, many moons.
>
> * * *
>
> The first thing that happens is all of a sudden this guy, who he hates is out of his house. That's good. That's good as far as R.S. is concerned. The guy's out of

the house. He comes back to his house and he does as he pleases. His mother gives him some attention. For a change, his mother gives him the attention, she does give it to Chris. All of a sudden the guy is permanently removed from the house. Still better.
(T 1370-3).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in precluding Respondent from cross-examining the victim as to the minor victim's prior sexual acts. Respondent's confrontation rights were not infringed because his cross-examination of the victim was more than adequate to expose the victim's bias. The additional cross-examination he desired to undertake would not have enlightened the jury any further as to the victim's bias; thus, its prejudicial effect outweighed its probative value.

Similarly, the trial court did not abuse its discretion in precluding the admission of an alleged prior inconsistent statement of the victim's mother. First, the statement was not inconsistent with her trial testimony, and thus not admissible for impeachment. Further, Respondent failed to lay the proper predicate to admit a prior inconsistent statement, had one been made. Finally, the mother's belief as to Respondent's guilt was properly excluded as irrelevant. Even if there were error in this instance it was harmless beyond a reasonable doubt.

The trial court did not abuse its discretion in refusing (three times) to permit Respondent to depose this minor sexual battery victim, for a third time. The prior depositions, as well as the victim's statement to police placed Respondent on sufficient notice of the evidence which would be offered by the State in support of the amended information, to satisfy due process. Respondent was not prejudiced by the trial court's ruling.

ARGUMENT

POINT I

WHETHER DAVIS APPLIES TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF TRAYLOR; THIS COURT HAS ANSWERED THIS CERTIFIED QUESTION IN THE AFFIRMATIVE.

Respondent argued in its initial brief that the question certified by the fourth district court of appeal has been answered by this Court in State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997), and thus is dispositive of this issue. It appears that respondent in his answer brief is trying incorrectly to reargue the question presented before this Court in Owen. Respondent argues that the "case at bar provides a good illustration of why the ambiguous response should be clarified. Respondent's statement that he couldn't afford a lawyer suggests very strongly that he did not understand his rights, and that remains part of the totality of the circumstances test for admissibility...." (AB 10). This argument appears to be merely an attempt by respondent to make this Court change its mind about its Owen decision.

Next, respondent argues in the alternative that because this Court should apply the holding in Owen prospectively, it does not apply to his case.[9] Respondent, wants this Court to ignore the pipeline concept and follow Traylor v. State, 596 So. 2d 957 (Fla. 1992). This argument is flawed for at least two reasons. First, this Court in Owen specifically stated that Owen did not change this

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[9]Respondent argues that this Court should decline to reinstate his conviction, because this Court "declined to do so in State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997)]." In Owen this Court declined to reinstate Own's convictions, and stated that those final decisions were not subject to rehearing. That part of the Owen opinion does not apply to this case. Only the admissibility of respondent's confession is at issue. This Court in Owen stated in unambiguous terms that the United States Supreme Court's decision in United States v. Davis, 512 U.S. 452 (1994) is the law in Florida, and applies to the admissibility of Owen's confession.

Court's view of the issue as outlined in Traylor.[10] In Owen this Court said:

> Owen cites *Traylor v. State,* 596 So. 2d 957 (Fla. 1992) in support of the argument that article I, section 9 provides an independent basis for requiring police to clarify a suspect equivocal request to terminate questioning. He relies specifically upon our statement in *Traylor* that "[u]nder section 9, if the suspect *indicates in any manner* that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop." *Id.* at 966. (Emphasis in original). In so doing he reads a meaning into these words that we never attributed to them
>
> ***
>
> ...Though our analysis in *Traylor* was grounded in the Florida Constitution, our conclusion were no different than those set forth in prior holdings of the United States Supreme Court. The words "indicates in any manner" manner added nothing to federal law, as they were identical to the words used in *Miranda* itself. [c.o.] Moreover, we did not construe these equivocal request because the defendant in *Traylor* made no request what so ever that he wished to invoke his *Miranda* rights. [c.o.] The words "in any manner" simply mean that there are no magic words that a suspect must use in order to invoke his or her rights.
>
> Therefore, *Traylor* does not control our decision in this case. It does, however, remind us that we have the authority to reaffirm *Owen* regardless of federal law. Upon consideration, we choose not do so. We find the reasoning in *Davis* persuasive....[e.s.]

22 Fla. L. Weekly at S247.

This case is a "pipeline case," and, therefore, the question of retroactivity is not implicated. A "pipeline case" is one in which a conviction is *not* final by trial or appeal at the time a controlling decision is issued by the supreme court. Reed v. State, 565 So. 2d 708 (Fla. 1990); Smith v. State, 496 So.2d 983 (Fla. 3d DCA 1986). The appellate process is not completed until a mandate is issued. Thibodeau v. Sarasota Memorial Hospital, 449 So.2d 297 (Fla. 1st DCA 1984). Here, the fourth district issued a mandate in this case. However, in response to the petitioner's motion to stay

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[10]This Court though did overrule several other cases.

or recall mandate, this Court issued on May 22, 1997, a stay on the proceeding.[11] Thus, since the time has not expired for issuance of a mandate in this case, and since petitioner is entitled to the benefit of the law at the time of appellate disposition, this Court is required to follow its own recent holding in Owen as the law.

Respondent's arguments that he was coerced to make the confession was a fact to be decided by the trial judge who was the fact finder during the motion to suppress. Thus, such arguments should not be reviewed by this Court in this appeal. A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness. Medina v. State, 466 So. 2d 1046, 1049-1050 (Fla. 1985). A reviewing court must defer to the fact-finding authority of the trial court and should not substitute its judgment for that of the trial court. Wasko v. State, 505 So. 2d 1314, 1316 (Fla. 1987); DeConingh v. State, 433 So. 2d 501, 504 (Fla. 1983), cert. denied, 465 U.S. 1005, 104 S. Ct. 995, 79 L. Ed. 2d 228 (1984). The totality of the circumstances considered by the lower tribunal in making its evidentiary ruling cannot be reweighed on appeal. State v. Franko, 681 So. 2d 834 (Fla. 1st DCA 1996). Although the appellate court might have ruled differently had it been sitting as the trier of fact, it cannot substitute its judgment for that of the able trial court on the question of witness credibility. Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), affirmed, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982).

Thus, because respondent's arguments in support of answering the certified question are flawed, this Court should quash the district court of appeal's decision below and affirm the trial

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[11]This Court issued a stay in which it stated in pertinent part that "proceedings in the district court of appeal, ... are hereby stayed pending disposition of the Petition for Review filed herein." (This Court's order issued May 22, 1997). Obviously this Court did not consider this case to be final.

court judgment and sentence.

POINT II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE OF THE VICTIM'S PRIOR SEXUAL ACTIVITY.

The State filed a motion in limine seeking to preclude reference to the victim's prior sexual activity (T 399-403). The State contended that this evidence was not relevant to the charge of sexual activity with a child, that any relevance was outweighed by the prejudice, and that the rape shield law barred admission of the evidence. At trial, petitioner contended that such evidence was relevant to the victim's motive to fabricate, since Respondent had attempted to interfere with the victim's (voluntary) sexual relations with others (T 720-21). The trial court granted the State's motion, and excluded the evidence (T 721, 725, 743-45)[12].

It is a well settled principle that the conduct of trial proceedings lies within the broad discretion of the trial judge and should not be interfered with lightly by an appellate court. Revels v. State, 59 So. 951 (Fla. 1912). Although wide latitude is permitted on cross-examination in a criminal proceeding, its scope and limitation lies with the sound discretion of the trial judge and is not subject to review except for clear abuse of discretion. Bailey v. State, 411 So. 2d 1377 (Fla. 4th DCA 1982); Medina v. State, 466 So. 2d 1046, 1050 (Fla. 1985); Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed. 2d 674 (1986). The Sixth Amendment guarantees that a defendant will have the right to cross-examine witnesses; however, this is not an unlimited right.

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[12]Ironically, the judge was of the opinion that this evidence would not assist Respondent's defense, but would harm it in that evidence that the victim was sexually abusing an 11-year-old child would tend to suggest that the victim himself had been abused, possibly by Respondent (T 744).

United States v. Alonso, 740 F. 2d 862, at 875 (11th Cir. 1984), cert. denied, 469 U.S. 1166, 105 S. Ct. 928, 83 L.Ed. 2d 939 (1985).

The Supreme Court has held that the Sixth Amendment "guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Kentucky v. Stincer, 482 U.S. 730, 739, 107 S. Ct. 2658, 2664, 96 L. Ed. 2d 631 (1987)(quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 294, 88 L.Ed. 2d 15 (1985))(per curiam)(emphasis in original). As long as a defendant is permitted sufficient cross-examination so that the jury may adequately assess a witness' credibility, the Sixth Amendment is satisfied. United States v. Burke, 738 F. 2d 1225, 1227 (11th Cir. 1984). Once cross-examination has been permitted to an extent sufficient to satisfy the defendant's Sixth Amendment rights, the trial judge's discretionary authority comes into play. Haber v. Wainwright, 756 F. 2d 1520, 1522 (11th Cir. 1985); United States v. Kopituk, 690 F. 2d 1289 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983). Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L.Ed. 2d 674 (1986).

Finally, the trial court's determination that the evidence's probative value would be outweighed by its potential prejudice (to Respondent), is entitled to great deference. Sims v. Brown, 574 So. 2d 131, 133 (Fla. 1991) (where trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion).

In this case, the trial court was within its discretionary authority in ruling that the evidence of the victim's prior sexual relations with other minor children was not admissible under the Rape Shield Law, or, alternatively, that its probative value was outweighed by its potential prejudice.

Although Respondent is correct that, in some cases, the Rape Shield Law must give way to a criminal defendant's confrontation rights, such was not the case below. Respondent was able to explore R.S.'s bias against him to a degree sufficient to inform the jury as to R.S.'s credibility or bias, thus the Sixth Amendment was satisfied[13]. Burke, supra. It becomes clear that the varied testimony adduced at trial with regard to R.S.' feelings toward Respondent was sufficient to allow Respondent to present his defense, from reference to Respondent's closing argument, which emphasized R.S.' numerous troubles, including his intense hatred of Respondent[14]. Once his cross-examination met the Sixth Amendment requirements, it was proper for the court to limit questioning of the minor child about his sexual relations with other minor children. Haber, Kapituk, Van Arsdall, supra.

This case is unlike Lewis v. State, 591 So. 2d 922 (Fla. 1991), upon which Respondent relies, because, in that case, the victim's motivation to fabricate the molestation charge (concealing her prior consensual sexual relations with her boyfriend, discovered in a gynecological exam),

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[13]R.S. testified about the variety of problems he had with Respondent over chores, school work, curfews, and preferential treatment of brother Chris. R.S. also testified that he was involved with Nicole Jordatte, and that Respondent would limit his access to girls as punishment. He further indicated that he wanted nothing to do with Respondent, and *did not want him around.* He even admitted that he hated him, and that when he called police on Respondent, it was due in part, to his desire to get him out of the house due to all of these other difficulties, in addition to his allegations of abuse.

R.S. mother, Respondent's girlfriend, testified that Respondent disciplined R.S., and that he had expressed concern over R.S.' social interactions with Nicole and Carrie, as well as with other problems relating to school, curfews and chores. She confirmed that R.S. was jealous of his brother Chris.

Three other witnesses testified to R.S.' hatred of Respondent, his hatred for his brother, and his desire to get Respondent out of his house. They also agreed that R.S. was upset over Respondent's limitations on his interaction with Nicole.

[14]See Statement of the Case and Facts.

simply could not have been explained to the jury without revealing the victim's prior sexual activity.

Instead, this case is like Marr v. State, 494 So. 2d 1139 (Fla. 1986), where the court rejected a claim that evidence of the victim's prior sexual relations with her boyfriend was necessary to support the defense of fabrication arising out of the victim's boyfriend's animosity toward the defendant. The court found that exclusion of the evidence that the victim and her boyfriend had a sexual relationship, did not violate the defendant's Sixth Amendment confrontation rights, because the depth of the couples' relationship, hence the victim's bias, was adequately demonstrated without delving into the sexual nature of the relationship. Id. at 1143. Any marginal relevance that additional evidence might have had was clearly overshadowed by the policy enunciated in section 794.022, and the trial court struck the proper balance in excluding the evidence of the sexual relationship. Id., see also Floyd v. State, 503 So. 2d 956 (Fla. 1st DCA 1990) (trial court correctly excluded evidence of victim's prior consensual sex with boyfriend, notwithstanding that she had been severely whipped by her father upon his learning of the sex, on the very day she reported the sexual battery to her at her father's hands; defense of fabrication could be adequately presented without reference to the particular behavior of the victim which warranted the whipping.)

Even if this court were to reach the conclusion that the alleged error was actually error, Appellee submits in light of the other cross-examination and the strength of the evidence against Respondent, such as his various admissions of guilt, any error would be deemed harmless. Wasko v. Singletary, 966 F.2d 1377 (11th Cir. 1992), Livingston v. State, 565 So. 2d 1288 (Fla. 1988); Baker v. State, 517 So. 2d 753 (Fla. 2d DCA 1987) (alleged error in preventing defendant from

exposing bias through cross-examination of key witness harmless error where the alleged bias was demonstrated elsewhere during trial). This conviction should be affirmed.

POINT III

WHETHER THE TRIAL COURT REVERSIBLY ERRED IN EXCLUDING A STATEMENT OF THE VICTIM'S MOTHER

The admissibility of evidence is within a trial court's discretion, and a reviewing court should not disturb a trial court's evidentiary ruling unless an abuse of that discretion has been demonstrated. E.g., Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L. Ed. 2d 1322 (1982).

Respondent sought to introduce testimony of various family friends that R.S.' mother did not tell them that Respondent had confessed to her over the phone, and that she expressed doubts as to whether the accusations made by her son were true. (T 1294-6, 1298). The mother was impeached at trial by her deposition in which she did not mention any admission by Respondent. (T 922). She was further impeached with the fact that she could not remember whether she had related this admission to Detective Ponce. (T 925).

Ms. Cummins testified that Respondent had admitted the crimes in a phone conversation with her, as well. (T 957). Ms. Cummins further testified that when she spoke to R.S.' mother, the mother told her about the arrest, the polygraph, and that police claimed Respondent had admitted the crimes to them, but the mother did not tell her that Respondent had admitted the crimes to her. (T 961-5, 969). After Respondent's counsel was repeatedly prevented from inquiring whether R.S.' mother had indicated whether she believed her son's accusations, the trial court pulled counsel aside and told him that she was not going to rule on that issue again, that he was not to ask that question again, and that it was unethical to do so (T 970). Ultimately, the court allowed Respondent to proffer Ms. Easter and Mr. Jordatte's testimony that the mother had expressed doubts as to

Respondent's guilt. (T 1293-8). The trial court maintained her ruling that the mother's belief as to the credibility of her son, or as to the guilt or innocence of Respondent was irrelevant. (T 1297).

On appeal, Respondent does not contend that the proffered evidence was improperly excluded because it was relevant to the victim's credibility. Even if such a claim were made, this court could reject it on the basis that such evidence would merely have been cumulative to all the other evidence in the record about R.S.' lack of credibility. Errors in the improper admission of evidence are harmless if that evidence is merely cumulative of other, properly admitted, evidence. E.g., Selver v. State, 568 So. 2d 1331 (Fla. 4th DCA 1990) (improper admission of hearsay which is cumulative of other evidence introduced is harmless error); Rogers v. State, 511 So. 2d 526 (Fla. 1987) (same); Hodges v. State, 595 So. 2d 929 (Fla.), vacated on other grounds, -- U.S. --, 113 S.Ct. 33. 121 L.Ed.2d 6 (1992).

As to the claim that the testimony was admissible as impeachment of the mother's trial testimony, as a prior inconsistent statement, this argument is misplaced. Impeachment by prior inconsistent statement can occur only after the proper predicate has been laid. See generally, Erhardt, Florida Evidence, §608.4, (1994 ed.); §90.614(2), Fla. Stat. Here, no such predicate was laid while R.S.' mother was on the stand. She testified at trial that Respondent had admitted to her, in a phone call from the jail, that he was guilty. (T 872-3). She further testified that he had admitted his guilt in other phone calls, and letters. (T 878-80). During her cross-examination, she reaffirmed her direct testimony that Respondent had admitted his guilt to her. (T 920). She was not asked whether she had ever made a statement inconsistent with that trial testimony. Nevertheless, defense counsel proceeded in his attempt to impeach her with her deposition testimony in which she testified that Respondent had told her that the allegations were false, and

that the victim had concocted the story from a movie they had watched together. (T 921). The mother testified, at trial, that Respondent had made that statement to her "somewhat later", than he made his admission (T 921-2). When asked why she had not mentioned Respondent's admission to her during her deposition, she testified that she could not remember what she had said in that regard. (T 922).

Later, counsel inquired whether, when Respondent was first arrested, she had "some question about whether these allegations had occurred." (T 924). The trial court sustained the State's objection, made on relevancy, as well as "improper" [presumably improper impeachment] grounds; Respondent had made no counter-argument. (T 925). Respondent never attempted to rephrase his question so that it would have been a proper predicate-laying question, e.g. ("Did you ever tell anyone that Respondent did *not* admit his guilt to you?"). Only if she had been asked that question, and had denied making such a statement, could she properly have been impeached by the admission of other witnesses' testimony to the contrary. Since no foundation was laid for the impeachment, the trial court properly excluded the proffered evidence. Snodderly v. State, 528 So. 2d 982 (Fla. 1st DCA 1988) (testimony as to prior inconsistent statement properly excluded where declarant was never asked if she had made the statement); Irons v. State, 498 So. 2d 958 (Fla. 2d DCA 1986) (same); Studstill v. State, 394 So. 2d 1040 (Fla. 5th DCA 1981) (same).

Moreover, there are other reasons why the evidence was properly excluded. It is clear that none of the proffered witnesses were to testify that the mother had made a statement that directly *contradicted* her trial testimony, i.e., no one testified that she had ever stated that Respondent had *not* admitted his guilt. What defense counsel wished to impeach her with was her prior statements that evidenced her own personal doubt as to Respondent's guilt. Those statements do not directly

contradict her trial testimony that Respondent admitted his guilt to her; the statements are not mutually exclusive[15]. While it might seem unusual that she would entertain doubts as to Respondent's guilt, notwithstanding his admission of guilt to her, unusualness is not an adequate basis for impeachment. Rather, she could only be impeached by a prior *inconsistent* statement, none of which were proffered by Respondent. Shere v. State, 579 So. 2d 86 (Fla. 1991) (for a prior statement to be inconsistent for impeachment purposes, prior statement must either directly contradict or materially differ from testimony at trial); State v. Smith, 573 So. 2d 306 (Fla. 1990) (same).

Finally, even if there were error in the exclusion of the proffered evidence it was harmless beyond a reasonable doubt since Patricia Cummins also testified that Respondent had admitted his crime to her, in a telephone conversation, and since Respondent confessed his crime to police. Errors in the improper admission of evidence are harmless if that evidence is merely cumulative of other, properly admitted, evidence. E.g., Selver v. State, 568 So. 2d 1331 (Fla. 4th DCA 1990) (improper admission of hearsay which is cumulative of other evidence introduced is harmless error); Rogers v. State, 511 So. 2d 526 (Fla. 1987) (same); Hodges v. State, 595 So. 2d 929 (Fla.), vacated on other grounds, -- U.S. --, 113 S.Ct. 33. 121 L.Ed.2d 6 (1992).

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[15]For example, she could have been unwilling to believe the admission of guilt, she may have believed it was a coerced statement, she may have believed he was kidding, or crazy.

POINT IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT RESPONDENT TO DEPOSE THE VICTIM A THIRD TIME.

Trial Court Proceedings

On September 26, 1994, after the State filed the amended information, Respondent moved for a continuance, which was granted, albeit begrudgingly. (T 362-9). On October 17, 1994, Respondent moved for leave to take a *third* deposition of R.S. (T 372). The motion alleged that eleven of the fourteen counts charged in the amended information covered periods of time (December 1991, through October 1992), which had not yet been charged at the time the first two depositions of the victim were taken. The prosecutor countered that the original information had been amended to conform with the evidence revealed in the depositions, as well as the police report, thus the defense had known all along that the crimes were alleged to have been committed during those time periods. (T 373). The trial court denied the motion to redepose the victim, indicating that the court had reviewed the victim's prior deposition (sic). (T 375).

A successor judge reconsidered the motion before trial and the judge refused to disturb the ruling on the motion, absent any changed circumstances. (T 414-20). The trial court did require, pursuant to Respondent's request, the State to substantiate, in writing, its prior representation to the predecessor judge that the prior depositions covered the new time periods alleged in the amended information. (T 414-20).

The original judge then resumed her role as presiding judge in this case, and the motion to redepose R.S. was again considered. (T 427-30). The defense contended that the stipulation filed by the State in support of its representation that the prior depositions had covered the newly alleged

time periods, did not, in fact, reflect the accuracy of that representation. (T 429-30). The trial court considered the matter again, thoroughly, and, notwithstanding that the court had already read the depositions at the time she made her initial ruling, she reserved ruling while she read the depositions and the police report again, overnight. (T 446-58). Ultimately, the trial court denied Respondent's second motion for rehearing of his original motion to redepose the victim. (T 385).

Statements and Testimony of Victim

The victim's sworn statement to police indicates that the abuse lasted for a two year period. (T 2)[16]. The first incident occurred approximately two months after his thirteenth birthday, the next two weeks later, the next two to four weeks later, and the next two or three weeks after that. (T 2-4). Another incident occurred two or three months later, and that incident was repeated five or six more times. (T 5). Then, three or four subsequent incidents occurred which were of a different nature. (T 6). The last incident occurred in December 1993. (T 9). The victim stated that, from the time the abuse began, until it ended, it occurred on a "steady weekly basis", sometimes as often as every other day, but at least weekly. (T 10-11). All in all, the victim estimated that there were probably sixty different instances. (T 11).

Detective Ponce testified that the victim's statement covered the following time periods: December 1991, January 1992, February 1992, March through May 1992, until February 1993. (T 1018-21).

Respondent's own (second) sworn statement to police stated that the incidents continued for

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[16]This transcript will likely reach the court subsequent to this brief, in that the State's motion to supplement the record with the statement was just granted.

eight or nine months, after they began in 1991. (T 6-7).

In his first deposition, R.S. testified that the molestation began when he was twelve (October 3, 1990, through October 2, 1991) approximately two years before the charges were made, which would be October, 1991. (SR 13-14). The second incident occurred a week later. (SR 17). He then testified, when asked when the next (third) incident occurred, "It happened repeatedly, like every week or --." (SR 22). He clarified that the third incident was more serious that the first two, which were just fondling, and that it occurred approximately three weeks after the first (late October). (SR 22).

When asked about later incidents, he testified " . . . these just went on -- the same [degree of] incident [as the third] went on for, I'd say, a good month or two, just the same thing every -- probably say at least twice a week it would happen. It went on for a good three months. Then it progressed further on." (SR 33). He further testified that the abuse went on for a period of two years, "constant at first and then, like, further through, probably about after a year, close to like a year and a half, it was just -- you figure, like once every two weeks or something." (SR 39).

A significant period of time was spent questioning R.S. about activities which occurred in the game room, approximately one year after the abuse began, roughly October 1992, a period of time not charged in the original information (SR 40-57). Then, questioning proceeded to non-date-specific questions, such as why he didn't tell anyone, how it came to pass that he called the police, and general circumstances of the family. (SR 57-74). R.S. did testify that he moved into Sonia Easter's home for two to three months sometime in the winter of 1992, over Christmas. (SR 61-2; 112-4).

In his second deposition, no information was elicited from the victim with regard to any

particular time period, in fact, the allegations of sexual abuse were barely touched upon, even generally. Only pages 12 through 23, of a 167 page transcript, were spent discussing allegations during the specific time frame which had, at that time, been charged in the information (October and November 1991); the remainder of the questions asked were either about other time periods, some unspecified, or were general questions.

Applicable Law

It is well settled that the State may amend an information without leave of court. State v. Stell, 407 So. 2d 642 (Fla. 4th DCA 1981). Respondent has not raised the propriety of the amendment to the information, nor could he claim prejudice by the lateness of the date at which the amendment occurred, since he was granted a continuance to further prepare for trial. Therefore the sole question presented in this point is whether the trial court's three well-considered denials of Respondent's motion to depose the child victim in this case for a *third* time, were abuses of discretion.

The purpose of discovery in a criminal case is to enforce a defendant's due process right to know in advance the nature of the evidence against him. Alfaro v. State, 471 So. 2d 1345 (Fla. 4th DCA 1985), review denied 484 So. 2d 9 (Fla. 1986). There is no constitutional right to discovery. Bartlett v. Hamwi, 626 So. 2d 1040, 1042 (Fla. 4th DCA 1993). A trial court's decision to grant, deny or limit discovery is a matter of discretion which should be set aside only upon a showing of gross abuse. Martin-Johnson v. Savage, 509 So. 2d 1097 (Fla. 1987); Gray v. State, 640 So. 2d 186 (Fla. 1st DCA 1994).

Rule 3.220(h), Florida Rules of Criminal Procedure, governs the taking of depositions in criminal cases. The rule provides in pertinent part:

> In any case, including multiple defendant or consolidated cases, *no person shall be deposed more than once except by consent of the parties, or by order of court issued upon good cause shown.*
>
> Fla. R. Crim. P. 3.220(h)(1).

Good cause exists to preclude an additional deposition of a witness where the subsequent deposition would be cumulative, or abusive. E.g., Medero v. Florida Power & Light Co., 658 So. 2d 566 (Fla. 3d DCA 1995). A finding of good cause to preclude a subsequent deposition is *not* demonstrated on the record where the trial court states merely "I think we have had enough discovery in this [case]", where a predecessor judge's ruling virtually invited the motion to redepose in an earlier hearing. Id.

The significant difference between the civil rule, Rule 1.280(c), Florida Rules of Civil Procedure, and Rule 3.220(h)(1), the criminal rule governing this issue, is that there is a presumption *against* subsequent depositions under the criminal rule, and the burden is on the *defendant* to demonstrate that "good cause" exists to *allow* the deposition. The civil rules place the burden on the party who wishes to prevent the deposition to demonstrate "good cause" to *preclude* the deposition.

Below, the only good cause asserted by the defense in support of its request to depose the child victim for the third time was that "there were no particular questions asked, or very few, if any, [in the prior depositions of the victim] about any of [the] time frames [in the amended information]". (T 283-4). Thus, Respondent contended, he needed "an opportunity to depose the alleged victim for these periods of time." (T 281). At the first hearing, he contended that the deposition was necessary in order to prepare to properly defend the case. (T 375). If it were true that Respondent could not have prepared a defense to this case without that third deposition, then

the State would have to agree that good cause had been demonstrated; such is not the case, however.

As early as the date that the charges were first made, the victim told police that the abuse was continuous, at least through February, 1993, long after the last period of time charged in the information (October 1992). Given that the victim's first deposition made clear that the incidents occurred "constantly" for the first year-and-a-half (roughly October 1991 through March 1993), and then less regularly, every other week, for the next six months, (roughly through September 1993), and that his sworn statement indicated that the abuse was "steady" through February of 1993, the trial court did not abuse its discretion in precluding the defense from taking yet another deposition of the minor child, alleged sexual battery victim, to delve further into the time periods charged in the amended information. The first deposition, in which counsel did not make a great effort to distinguish between charged and uncharged incidents, and did not limit or focus his questioning only on charged time periods, refutes Respondent's contention that his deposition strategy would have been any different had he had notice of all the charges before the first deposition. Thus, it is clear that Respondent was in no way prejudiced by the denial of his motion, and there was no abuse of discretion below, given his inability to demonstrate good cause.[17]

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[17]The trial court's observation that, since the defense was that the abuse did not occur, the specific details of each incident did not really affect the defense strategy, is correct. Since Respondent's defense was that R.S. was simply a lonely, jealous, incorrigible child, who was making up the allegations of abuse to get Respondent out of the house, it could not have assisted to delve deeply into the particular details of each alleged incident. The only possible benefit to the defense which Respondent claims he might have obtained in a third deposition, was evidence that R.S. was not living in the home when some incidents of abuse allegedly occurred. Obviously, if that were true, then R.S. could have been shown to be a liar. However, it was already established, in the first two depositions, that the only time R.S. left the home was around Christmas time, in 1992, subsequent to the last charges included in the amended information (October 1992). He testified at trial that it was right around Thanksgiving that he arrived, and that he remembered spending Christmas there. (T 786, 793)

As a final note, Respondent's contention that he "did very well" on the counts which had been contained in the original information, counts I (lewd assault on Oct. 31) and III (sexual activity w/ child over 12 while in familial relationship on Nov. 30), due to his ability to depose the victim regarding those specific counts, is belied by the record. The reason he "did so well" in obtaining judgments of acquittal on those counts, is that the victim's initial statement to police indicated that the time periods alleged in the information for those two offenses were incorrect (1018), and not because of any greater ability to depose the victim with regard to these dates. (T 1332-40). Accordingly, this "fact" does not establish that Respondent was prejudiced in his ability to defend his case. Quite the contrary, the record reveals that counsel did a splendid job, during his cross of R.S., of pointing out inconsistencies between R.S.' trial testimony, his two depositions, and his statement to police. (T 801-7, 817-35).

CONCLUSION

Based on the foregoing argument and authorities, the State respectfully requests that this Honorable Court answer the certified question in the affirmative based on State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997), and apply United States v. Davis, supra, to the instant case, reinstate Weber's confession, conviction and sentence, and uphold the fourth district court of appeal's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Charles W. Musgrove, Esquire, Congress Park, Suite 1D, West, West Palm Beach, Florida 33406, this 14th day of July, 1997.

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