IN THE SUPREME COURT OF FLORIDA

JUAN CARLOS CHAVEZ

Appellant,

vs. **CASE NO. SC94586**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

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PRELIMINARY STATEMENT

The record will be cited as volume number followed by the appropriate page number, i.e., R1, 00. The trial transcript will be cited as "T" followed by the appropriate page and volume numbers. The supplemental transcript will be cited as "S" followed by the appropriate page and volume numbers.

STATEMENT OF THE CASE AND FACTS

The State generally accepts appellant's statement of the case and facts but adds the following.

State's Case

Miami Dade Police Officer Fred Taylor was dispatched to the Ryce residence on the report of a missing child. (T43, 8577-80). He arrived at the Ryce residence at 6:25 p.m. and spoke to "Donald [Ted] Ryce, the older brother." (T43, 8581). As a result, he and other police units began searching the area from where Jimmy was dropped off at the bus stop. (T43, 8582). Four units were initially assigned to conduct the search but other units began arriving "if they didn't have calls, they would just come by and start looking." (T43, 8586). They searched both sides of the road and the woods along two primary streets along the route Jimmy would likely have walked from the bus stop.[1] (T43, 8587).

Metro Dade Police Aviation Officer Michael Mann testified that he received a missing person report at approximately 6:45 p.m. on September 11, 1995. (T43, 8590-91). He responded to the vicinity of "Southwest 232nd Street and 162nd Avenue regarding a missing nine-year-old white male." (T43, 8591). In conducting an aerial search for a child, Mann testified:

> This search, as in most other missing persons searches, I start at the location of dispatch and generally orbit that particular location in a larger, ever-increasing diameter of circle, paying particular attention to areas that I think are of special interest, that being playgrounds, rock pits, areas that a child might go to play, that type of thing.

(T43, 8592). He conducted the aerial search until 8:00 p.m. because it was getting

[1]Bus driver Valerie Collier testified that she took Jimmy home at approximately 3:07 p.m. on Septermber 11, 1995. She identified the bus stop on an aerial photograph and testified that she did not observe anything unusual happen to Jimmy after he left the bus. (T43, 8556-62).

dark. Id. Mann noted that his helicopter, like most helicopters, makes noise when in flight. (T43, 8594). Officer Mann identified his general flight path taken on September 11th in an aerial photograph. Id. This area included the general vicinity of the horse/avocado farm as reflected in State's Exhibit #4.

Susan Scheinhaus testified that appellant lived on her property in a trailer in rural Dade County, in an area known as the "Redlands." (T45, 8638-44). She lived in the main house on the property with her husband, her son and her daughter-in-law. (T45, 8644). Appellant was living on her property while he was helping another handy man, Frometa, put in a deck. (T45, 8647). Appellant also helped take care of the animals, and did electrical work and carpentry. (T45, 8648).

In August or September of 1995, Ms. Scheinhaus decided to report some items missing from her residence to the police. (T45, 8659-60). At that point, Ms. Sheinhaus had no evidence to present against the appellant and the police told her they could not do anything. (T45, 8660). In fact, Ms. Scheinhaus testified that she had gone to the police on three occassions, but each time she was turned away for lack of evidence. At that point, Ms. Scheinhaus decided to find evidence: "They needed evidence; I was going to get them the evidence they wanted." (T45, 8661). Sometime in November she decided to call a locksmith so she "could get into Juan Carlos's trailer." (T45, 8661).

The locksmith came to her property on December 5, 1995. On that day Ms. Scheinhaus made arrangements for her father to take appellant out for the day and she had her son available to go into the trailer with her. (T45, 8664). The locksmith unlocked the trailer door and Ms. Scheinhaus opened the door and entered the trailer. (T45, 8664). Her son, Edward, also entered the trailer at that time. (T45, 8665).

When she entered the trailer, Ms. Scheinhaus testified that she was looking for jewelry and a firearm. (T45, 8674). And, she did find jewelry and a firearm that belonged to her inside appellant's trailer. Id. Ms. Scheinhaus identified the gun found in appellant's trailer in court. (T45, 8683). This was a gun she purchased in April of 1989: "It's my handgun." (T45, 8702). On September 11, 1995, Ms. Scheinhaus did not know where this hand gun was located. (T45, 8706). The last time she observed the handgun was in her underwear drawer. (T45, 8748).

As she continued to look inside the trailer Ms. Sheinhaus discovered a book bag in the closet area of the trailer. (T45, 8684). The book bag was partially unzipped. Looking inside the bag, she observed papers and books. She looked at some of the work which appeared to be in a child's handwriting and noticed the name "Jimmy Ryce." (T45, 8690-91). She also observed this name "[o]n the book."[2] (T45, 8711). Ms. Scheinhaus did not recognize the name, but she thought it was strange that appellant would have an American child's book bag. She asked her son to look at it, he recognized the name, and as a result, she left the trailer and called the FBI. (T45, 8692). Ed entered the house shortly after she left the trailer and was present when she called the FBI. (T45, 8698). The FBI and then later Metro Dade Police Officers arrived at her residence after receiving her call. (T45, 8712).

Ms. Scheinhaus testified that appellant prepared planters with concrete in them that were on her property. She assumed, but had not been told, that this was done to keep the horses from eating the hedges. (T45, 8754-55).

After being approached at the Scheinhaus residence, appellant was asked to accompany the Metro-Dade officers for questioning. Appellant agrees and is

[2]Jimmy Ryce's name appeared on several notebooks and a science book found in the book bag. (T45, 8813-14).

questioned for a number of hours over a period of two days, broken up by repeated refreshment, food, and/or bathroom breaks. (T45, 8912, 8914, 8915, 8920, 8925-26). Details surrounding the timing and circumstances of appellant's various statements are included in the argument portion of this brief under Issue Two, *infra.*

Detective Juan Murias, was present to translate questions from English to Spanish for the appellant. (T45, 8889). However, Murias testified that it appeared that the appellant did understand "some English." (T45, 8892). Appellant was told that he was present at the station "due to the fact of stolen property and the book bag with some items with the name of Jimmy Ryce on them." (T45, 8896). Appellant provided general background information about his life, including the fact that he had completed the "twelfth grade in Cuba in school." (T45, 8897).

When asked about the revolver found in his trailer, appellant admitted that he removed the gun from a kitchen cabinet in the Scheinhaus residence. Appellant explained that he believed it was his duty not only to work on the property but also to protect it. (T45, 8902). He claimed he possessed the revolver with the permission of Ms. Scheinhaus. Id.

Detective Luis Estopian of the Homicide Division became involved in the interview of the appellant on December 7th. He was assisted by Detective Goldston who did not speak Spanish. (T46, 9099). When asked about the book bag found in his trailer, appellant told us that two days after the disappearance of Jimmy Ryce was reported in the news he found the book bag at the horse ranch where he used to care for animals owned by the Scheinhaus family. He picked up the bag, put it in his truck, and traveled to his trailer on the Scheinhaus property. (T46, 9105). Appellant initially claimed that he never opened the book bag. (T46, 9105). However, when

confronted with the detectives disbelief of his claim to have never looked inside the bag, appellant eventually acknowledged looking inside the bag.[3] (T46, 9107). Appellant claimed to have examined the books but denied knowing who the bag belonged to. (T46, 9107). Estopian testified that appellant's statement changed: "Eventually I told him it would only make sense if you opened the bookbag you would see the books inside, you would look at the books and see who the books belonged to. And at that point he acknowledged that the writings on the bookbag belonged to a boy. Then I asked him, how do you know it was a boy's writing. And at that point he acknowledged the bookbag belonged to Jimmy Ryce." (T46, 9107).

After making that statement, appellant got a strange look on his face and told Estopian, "give me a few minutes and I will tell you what happened." (T46, 9108). At that point, Estopian agreed to give him the time he wanted but before leaving asked if appellant wanted to use the restroom or if he needed something to drink. Appellant took him up on the offer and went to the restroom. Appellant received the time he needed and was given a Pepsi. (T46, 9108). Approximately ten minutes later, at "11:10 a.m.," Estopian and Goldston re-enter the interview room and appellant tells them what happened. (T46, 9109).

Appellant claimed that Jimmy had been to the horse farm on five or six occasions to play with the horses. Appellant also claimed to have given Jimmy a ride home on two occasions from the horse farm. On September 11th, Jimmy was at the horse farm in the early evening and asked appellant for a ride home. Appellant agreed and described how Jimmy was 'accidentally' killed as he stepped out to close the gate

[3]At approxmiately 6:30 a.m. appellant is told that the detectives did not believe his story. The jury is not told that the detectives disbelieve his story as a result of polygraph test results. (T45, 8919).

and was pinned between the truck and the fence. Estopian testified:

***

> He said he was concerned, he didn't know what he wanted to do. So what he did was he picked up Jimmy's – at that point he thought Jimmy was dead. He said he picked up Jimmy's body and placed Jimmy's body inside the passenger compartment of the pickup truck and he drove back inside the horse ranch. And then –- I'm sorry.

***

Appellant claimed that he put Jimmy's body in an empty feed barrel, sealed it, and placed the barrel in the bed of a Japanese pickup truck which was parked on the roadside near the horse farm. The following day appellant noticed the truck and the barrel containing Jimmy's body were missing. Appellant claimed that he cleaned bloodstains up from the truck and the gate where Jimmy had been crushed. (T46, 9109-13). After appellant provided the statement, he agreed to take the detectives out to the horse farm where Jimmy was killed. (T46, 9114).

At 2:15 p.m. appellant was taken to the horse farm. (T46, 9115). Once at the horse farm, appellant pointed out the gate where Jimmy was crushed and directed detectives to the location where he allegedly put Jimmy's body. (T46, 9118). During the drive back to the police station, Estopian asked appellant several times to tell him where Jimmy's body was so that the family could "conduct a proper burial." (T46, 9124). Appellant became teary eyed and told Estopian that they should go back to the "office because Jimmy's body no longer exists." (T46, 9124). They pulled the vehicle over on the side of the road: "He went on to tell me briefly that after the accident happened, he said he had burned and destroyed Jimmy's body and that his body no longer existed." (T46, 9124). He claimed he burned the body back at his home, the Scheinhaus residence. (T46, 9125). Then, Estopian asked appellant if he had been truthful in his previous statement; appellant stated he had with two

exceptions. Appellant now claimed that he was in the truck when Jimmy was closing the gate and accidently pushed on the accelerator, pinning Jimmy against the fence. (T46, 9126). The second change was his claim to have burned and destroyed Jimmy's body. (T46, 9126). As a result of this revelation, they turned and drove in the direction of the Scheinhaus property. (T46, 9126).

They arrived at the Scheinhaus residence at approximately 4:35 pm. Once there, Estopian testified:

> When we arrived he pointed to the stable area of the compound where Ms. Scheinhaus lives, and this is the stable where the horses were located. He mentioned that Jimmy's body was destroyed or burned in front of this area here which belongs to him; eventually Jimmy's remains were placed into feed bags and thrown into a canal right here behind the stable.

(T46, 9129). Estopian asked appellant for permission to search the van, the stable, and anywhere he had access to on the Scheinhaus property. Appellant provided consent and the written waiver form was introduced into evidence.[4] (T46, 9129-30). The form was also read to appellant in Spanish and was signed by the appellant. (T46, 9131-32). When asked about appellant's demeanor, Estopian testified: "He appeared alert." (T46, 9133). They returned to the homicide office, stopping along the way to get cigarettes for the appellant. (T46, 9133).

Once back at the office, they began interviewing the appellant. (T46, 9133). They discussed details of what occurred, including how appellant disposed of Jimmy's body. (T46, 9135). Appellant claimed it took him about five hours to dispose of Jimmy's body by burning it, stating that at one point the flames were so high that he had to douse the fire with a hose in order to control it. (T46, 9138). They finished

[4]About two days later, Ms. Scheinhaus saw the appellant again with police officers on her property. Appellant was not handcuffed and she did not observe the officers threaten, yell, or mistreat the appellant in any way. (T45, 8718).

this interview at approximately 8:00 pm. (T46, 9138). Appellant complained that he was suffering from heartburn and Estopian provided appellant two small cartons of milk. (T46, 9138-39).

The detectives re-entered the interview room at 8:15 p.m. and asked appellant if he would be willing to "write out in his own words in detail how it as that Jimmy, that Jimmy died." (T46, 9139). Appellant agreed and did, in fact, write out his own statement. The handwritten statement in Spanish was identified and introduced into evidence at trial. (T46, 9140-42). A true English translation of appellant's statement was also introduced into evidence. (T46, 9142-49; S7, 1734-39). In his written statement, appellant claimed he decided to hide and later destroy Jimmy's body because "I was afraid to call the police as I thought when they saw this, they would accuse me of having killed him intentionally. So I didn't do anything, just wait and tried to think." (T46, 9148). Appellant added: "I was aware that calling the police from the start would have been the solution, but now after having moved him, covered him with the sheet and taken him to the farm, I was sure they wouldn't believe what I'd say, so I felt even more scared and decided to make him disappear." (T46, 9149).

While making the statement, Estopian asked appellant to identify a photograph of Jimmy as the "same Jimmy he was referring to." Appellant signed and dated the photograph. (T46, 9156; S7, 1741-42). The writing on the back of the photograph states in the translation, "this is the Jimmy that I know." (T46. 9157). Again, Estopian testified that at this time appellant "appeared to be alert and he was very cooperative." (T46, 9158). During this period, appellant never claimed the book bag had not been in his trailer. And, appellant did not mention the name of Ed Scheinhaus. (T46, 9158).

Appellant told Estopian that he would be willing the next morning to take them back out to the horse ranch to point out specific locations. Estopian told appellant he wanted to photograph and check specific locations such as the gate where Jimmy was crushed. (T46, 9158). Appellant told Estopian that the gate was damaged when Jimmy was killed. Id.

The statement was concluded at 12:24 a.m. (T46, 9157). Estopian told appellant to rest and relax and that the detectives would return in the morning. (T46, 9159). Estopian went home, showered, and watched television before returning to the office sometime between "6:00 and 7:00 in the morning." (T46, 9159). They arrived at the horse farm at approximately 9:55 a.m. (T46, 9162). Appellant pointed out various locations at the horse farm. (T46, 9170). They remained at the horse farm until approximately 10:45 a.m. (T46, 9174). From the horse farm, the detectives took appellant back to the Scheinhaus residence. (T46, 9174).

At the Scheinhaus property, appellant again pointed out various locations for the detectives, including the area where he claimed to have burned Jimmy's body. (T46, 9198-99). At some point Estopian asked appellant about the concrete filled planters located on the property. Estopian testified: "And I asked the defendant, Mr. Chavez, what they were, and he told me that sometime ago he had found a broken batch of cement and through wear and tear he threw the bags – the cement itself into those containers, and with the weather they sealed in these planters. That was the explanation he gave me." (T46, 9197). They left the Scheinhaus property at approximately 11:35 a.m. and arrived at the station at 12:10 p.m. (T47, 9202).

Estopian re-entered the room and re-advised appellant of his Miranda rights. Estopian also advised appellant of the 24 hour first appearance rule. After advising

him of his rights and the 24 hour rule, Estopian and Detective Piderman began to question appellant about his previous statements. (T47, 9203). Estopian testified:

> ... We explained to him that the accident he claimed happened involving the gate and him pinning the boy against the fence was also not possible. I explained to him along with that we had investigators from our traffic homicide unit along with doctors from the medical examiner's office went out to the scene and they felt in their professional opinion that the way he –- [objection, response omitted] –- And I explained to him that his story was not believable about how it was that Jimmy died and we also explained to him that when he explained that Jimmy's body was totally burned and destroyed, that was also not possible based on the explanation of the experts.
> (T47, 9203-04).

Appellant attempted to explain how his version was in fact correct. (T47, 9204-05). At that point, the detectives left the interview room. (T47, 9205). Just after 3:30 p.m., appellant knocked on the door of the interview room. (T47, 9206). Appellant had been in the interview room by himself. Appellant was standing by the door crying "and said he wanted to talk to me." (T47, 9206). Appellant claimed he was ready to tell Estopian about everything and would help Estopian recover Jimmy's body if he was guaranteed the death penalty. (T47, 9206). Estopian agreed to talk with appellant and appellant repeated his desire for a guaranteed punishment of death. (T47, 9207). Estopian, however, told appellant that he could not guarantee that he would receive the death penalty. (T47, 9207). Appellant continued to talk and made a comment that this would not have happened if he had not been sexually abused by a relative in Cuba. (T47, 9207-10). In response, Estopian told appellant: "...I felt that it was time for him to be truthful and tell us what really happened to Jimmy, and I went back and began to ask him about Jimmy and where Jimmy was located. We wanted to find Jimmy." (T47, 9210). After reiterating his desire for the death penalty, appellant told Estopian another version of Jimmy's death.

Appellant now blamed the kidnapping upon his homosexual lover "Ivan" and claimed that he accidentally shot Jimmy:

> ...He said that when he met with Ivan, he exited the truck, he was driving with the handgun, and went up to meet Ivan and that's when he first saw Jimmy inside Ivan's vehicle and that's when he first saw Jimmy Ryce, that's what he was referring to. And he mentioned that Jimmy looked uneasy and it was obvious to him that Jimmy was there not by his own will. And he said that he then got into the vehicle with Ivan on the right front passenger's seat of Ivan's vehicle and Jimmy was sitting in between. And that when he entered Ivan's vehicle, he took the handgun that belongs to Ms. Schienhaus and was going to place it inside the glove compartment of the vehicle. When Ivan asked to see the handgun and when he was about to pass over this handgun to Ivan, he said the gun discharged and it struck Jimmy and killed him.

(T47, 9211-12). Appellant stated that he took Jimmy's body back to his home and placed it inside the van wrapped in plastic, and "he got rid of Jimmy's body." (T47, 9212). Appellant, however, would not tell Estopian where Jimmy's body was unless he "guaranteed him the death penalty." (T47, 9212). Estopian again told appellant he could not do that but did explain that "I felt that it was time for him be truthful, that he had given us a number of different scenarios, and it was time to come clean and help us recover Jimmy's body." (T47, 9212-13). At that point, Estopian ended his interview with the appellant. (T47, 9213). He had been in the interview room with appellant from 3:30 p.m. to 6:30 p.m. (T47, 9213)

Estopian briefed Detective Diaz and Sergeant Jimenez on the last scenario provided by the appellant. (T47, 9213). At approximately 7:00 pm, Sergeant Jimenez went in to talk to the appellant. Detective Felix Jimenez was asked by Estopian for advice regarding appellant's request for a death penalty guarantee before he would tell the detectives the location of Jimmy's body. Jimenez entered the interview room and told the appellant he did not believe any of the three stories he had provided to the detectives. Appellant insisted that his final version was true and that before he told

him the location of Jimmy's body, he wanted to be guaranteed the death penalty. (T48, 9413-14). Jimenez had appellant write out his request for the death penalty which was introduced into evidence as State's Exhibit 85. (T48, 9415). Appellant then told Jimenez of his story about the 'accidental' shooting of Jimmy in the truck with his homosexual lover "Ivan." (T48, 9416-18). Appellant then discussed with Jimenez his prior abuse and stated that he wished he could change some things in his life. (T48, 9419-20). Appellant went to the restroom and when they returned to the interview room, appellant asked Jimenez if he would be insulted if Luis–-referring to Detective Estopian, was allowed back into the interview room. Jimenez said no he would not, and asked appellant what version "were we going to hear now." (T48, 9421). Appellant replied that they were going to hear the truth.[5] (T48, 9421).

Sergeant Jimenez took appellant to the restroom and then returned to the interview room along with detective Estopian.[6] (T47, 9215). Appellant told Estopian that he owed him one and at that point said: "[W]hat do you want to know. I'll tell you what happened to Jimmy Ryce." (T47, 9215). Estopian testified that appellant then told them that he forcibly took Jimmy at gunpoint, traveled to the horse ranch, and sexually assaulted Jimmy before finally shooting him. (T47, 9216).
(T47, 9216). Estopian explained that they would need details from appellant and asked to take a sworn statement. (T47, 9216). Appellant agreed to continue the

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[5]Detective Jimenez testified that no one ever struck the appellant or made any promises to him. (T48, 9426). During his time with appellant on December 8th until the early morning of the 9th the appellant did not appear tired or fatigued. (T48, 9427).

[6]On December 8th, Estopian felt appellant was not free to leave at that point, but not yet under arrest for the kidnapping of Samuel James Ryce. (T47, 9357). Estopian testified that he suspected that Jimmy Ryce was dead but did not know that for sure when he was questioning the appellant. His goal was to obtain the truth from the appellant and find Jimmy Ryce. (T47, 9375).

questioning, and, with the stenographer and Sergeant Jimenez, they "began to get details" about what happened to Jimmy Ryce. (T47, 9217).

Estopian testified to the final version of the appellant's statement, that appellant observed young children playing in the water on his way home from Home Depot at approximately 3:00 p.m. which aroused his sexual interest. After observing the children, appellant drove off, but returned a short while later, Estopian testified:

> ... And he said at this time Jimmy is walking on the left side of the road, and what he did is driving on the opposite side, he begins to drive on the opposite side of the traffic and drives and stops right in front of Jimmy Ryce causing him to stop.
>
> The minute that Jimmy stops, he stops the truck, he gets out of the truck with the gun in his hand and tells Jimmy at gunpoint, do you want to die. And Jimmy made a comment to him, no. And he told Jimmy in English to get inside the truck. And Jimmy responds by getting into the truck via the driver's side door.
>
> Once Jimmy is inside the pickup truck, he tells him to – Jimmy removes his backpack and puts it between his legs and he Mr. Chavez gets into the truck with Jimmy, still holding the handgun. It's at that point he takes the revolver and he places it underneath his lap and tells Jimmy to put his head down so Jimmy wouldn't be seen by anyone. And at that pont he tells me that he drives back to the horse ranch where the trailer was located.
>
> ***
>
> He told me that Jimmy left his backpack inside the pickup truck. Once they both exit the pickup truck, both him and Jimmy at his direction they go inside the trailer that's located inside the horse ranch. He goes on to explain that once inside the trailer he tells Jimmy to sit down on the bed. Jimmy complies. And that he sits on a black office chair close to Jimmy by the entrance and he begins to talk to Jimmy, he notices that Jimmy is, he's nervous and he's scared and Jimmy begins sobbing. And while this is occurring, Jimmy began to ask him, why did you take me? And Chavez explains to him, what he does, he begins to ask, he wants Jimmy to answer his own questions, well, why do you think I took you, things to that effect. He wants Jimmy to answer his own questions. He goes on to explain that at this point he feels like doing something sexual and that he tells Jimmy to remove his clothing. He said Jimmy complied by removing his shirt, his shorts, his sneakers and he wasn't sure if Jimmy was wearing socks or not. And then Jimmy remains in his underwear only, his white underwear he believes. He goes on to tell me that at this point he gets up and he tells Jimmy to also go ahead and remove his underwear. Jimmy complies and removed his underwear. And then he tells Jimmy to lay on the bed in the trailer and Jimmy complies. Jimmy

> lays on his stomach on the bed. Chavez tells me that he went into the bathroom area of the trailer looking for something. And I asked him, what are you looking for. He said, I'll explain. And he told me I was looking for something like a lubricant. And then he goes into the bathroom and he finds a see through plastic container, he said, with some blue lettering on it. And then he took a sample of the contents of the container to see if it would burn, and when it didn't, he came back to where Jimmy was and he placed this, the substance or the lubricant on to Jimmy's rectum, he said, and as he was placing the lubricant on Jimmy's rectum, Jimmy is asking what are you doing. And he mentioned to Jimmy that what do you think is going to happen, things to that effect. He unzipped his pants, he exposed him penis and he inserted his penis into Jimmy's rectum.
>
> ***
>
> He told me right after he inserted his penis in Jimmy's rectum, he again has a mental picture of the young boys in their underwear which he had seen at the canal and he said that he quickly ejaculated, and once he ejaculated inside Jimmy, he said he removed himself.
> (T47, 9218-23).

He and Jimmy then dressed and left the trailer in his pickup truck, with the stated intention of leaving Jimmy in the area he was picked up. (T47, 9223). However, when he approached the area he abducted Jimmy from, appellant noticed that police cars were present. Appellant "believed that someone had reported Jimmy missing and they were looking for Jimmy." (T47, 9224). Appellant kept Jimmy's head low in the truck and, as the truck was running low on gasoline, decided to go back to the ranch and attempt to release Jimmy later. (T47, 9224).

Once they arrived at the horse farm, appellant enters the trailer with Jimmy. Estopian testified:

> He said once inside the trailer, Jimmy is trembling and crying. And Jimmy asked, what's going to happen to me. Are you going to kill me. He noticed that Jimmy was very frightened. And what he does, he begins to speak to Jimmy in order to calm him down.
> (T47, 9225).

He attempted to calm Jimmy down by asking him questions:

> He began to ask Jimmy about some personal questions about his family

> and Jimmy tells him that both of his parents are probably working at their business. Jimmy makes comments to him about his brother, that his brother owns a red car and his brother has some tapes inside the car. He also talked about his best friend. He said his best friend lives close by to where he lives.

(T47, 9225). Appellant then explained how he killed Jimmy:

> Well, the next thing Chavez mentions happened is he heard a helicopter fly over the horse ranch. It was his opinion he believed the helicopter belonged to the police, that the police were searching for Jimmy. When he heard the helicopter flying over him, he went ahead and held Jimmy close by to him so Jimmy wouldn't go anywhere, and eventually he heard the chopper several times flying over him, and at one pint he said he got up and began looking out the window to see if he could see the chopper, the helicopter that is.
>
> And while he was looking for the helicopter, Jimmy is still close to the front entrance of the trailer. He said that Jimmy made a dash for the door, Jimmy ran for the door trying to escape. He said that he tried to reach up to Jimmy, but he got tangled on the floor of the bathroom and at that point he said he took out the revolver belonging to Ms. Scheinhaus, he pointed the handgun in the direction of Jimmy, fired one time hitting him.
>
> He said that Jimmy collapsed right by the door and collapsed to the right by the door inside the trailer. He said after he shot Jimmy, he came up to Jimmy, he turned Jimmy around and held Jimmy in his arms and Jimmy took one last breath, he expressed it, and he said that was the last thing Jimmy did.
> (T47, 9225-26).

As appellant put it in his own words [transcribed statement]: "It was the only way that I had in order –- I'm sorry. It was the only way that I had in order to avoid –- to prevent him from going out." (T47, 9290). Appellant stated that Jimmy "screamed, apparently – or, well, certainly –- because of the impact of the bullet." (T47, 9290).

Appellant then explained to Estopian what he did with Jimmy's body. Appellant found a metal barrel inside the trailer at the horse farm and placed the body inside the barrel. He transported the body from the horse farm to where he lived at the Scheinhaus residence. (T47, 9227). Once back at the Scheinhaus residence appellant went back to the stable area removed the barrel and placed it in the van. Appellant

took Jimmy's book bag from the pickup and took it with him to his own trailer. (T47, 9227-28). That night appellant looked at some of the note pads inside Jimmy's book bag. (T47, 9228). Appellant noticed blood on his own clothing and eventually destroyed the clothes. During the night and into the next morning, "all he could think about was what he was going to do with Jimmy's body." (T47, 9228). Two to three days later, appellant was still thinking about what he was going to do with Jimmy's body. "He eventually began to smell the foul odor coming from the back of the van and he felt that eventually someone else would smell the foul odor and discover Jimmy's body inside the drum. So he decided that he wanted to find a way of disposing Jimmy's body." (T47, 9228). He thought he would bury the body and used a back hoe to begin digging a hole. However, the backhoe was not working properly and he did not complete the hole. (T47, 9228-29). Appellant remained concerned about the body, particularly when he noticed the lid of the barrel containing his body had come off –- "Jimmy was in terrible condition." (T47, 9229). He pulled Jimmy's body from the barrel onto a piece of plywood and from the plywood Jimmy's remains fell on the ground. "And he said at that point he went ahead and began to dismember Jimmy's body with the use of a tool." (T47, 9230). Appellant described the tool he used to dismember Jimmy's body and drew a picture of it for the detectives. (T47, 9232; S8, 1800). Appellant explained that it took him a while to dismember the body as he was becoming sick and vomiting. "[B]ut then he completes it and he places three of Jimmy's parts on to these three planters. And once he fills these planters with Jimmy's remains, he goes ahead, goes into the stable area of the stable where the building is located and he locates some cement bags. With those cement bags he seals the tops of the planters with cement." (T47, 9231-32).

The oral interview concluded at 10:50 p.m. and they decided to repeat the statement formally, with the use of a stenographer. (T47, 9233-34). The formal statement begins at 11:45 p.m. with Estopian, Sergeant Jimenez, the court reporter, and an interpreter present. (T47, 9235). After some preliminary questions, appellant is again advised of his Miranda rights. (T47, 9252-54). Appellant also confirmed that he agreed to voluntarily waive his first court appearance and gave the officers consent to conduct a search of his property. (T47, 9256-58). When the statement was completed, they sat down and reviewed each page of the statement. (T47, 9247). The appellant did, in fact, make corrections to his statement. (T47, 9247). In the transcribed statement, appellant stated that no one had threatened or coerced him into making the statement. Appellant acknowledged that he was making the statement voluntarily and that he was treated well. (T47, 9307). Estopian testified at the time he made his sworn statement appellant was "polite, cooperative and he was alert." (T47, 9316).

Marilu Balbis testified that she was the professional interpreter used during appellant's sworn statement. (T49, 9774-75). She is an independent contractor and has been an interpreter and translator for twelve years. (T49, 9775). Ms. Balbis testified that as a translator she does not take sides: "You know, I don't take sides. I can't be biased, because my job is just to translate, interpret, and repeat everything. So it's hard for me to say I work for this, for that. You know, I'm hired." (T49, 9778). She was contacted on December 8, 1995 by a translating agency, "Professional Translating Services" to go to the homicide section of the Miami Dade Police Department. (T49, 9781). Once there, she met Detective Pat Diaz who had worked with her before and he expressed that she was called to do the translating for

appellant's final sworn statement. (T49, 9781-83). Ms. Balbis testified: "The detective asks the questions, I translate the questions from English into Spanish, and propound the questions to the witness. I have to translate everything word by word, exactly, accurately. And then the witness answers in Spanish, and I retranslate everything word by word into English as the stenographer takes everything down." (T49, 9786).

The confession was unusually long and she had the opportunity to observe the appellant's demeanor. "He seemed – he seemed fine. He was calm. He spoke very clearly, very – he expressed himself very clearly. He spoke very clearly. He spoke –- he actually spoke very well. That's another thing that I always remembered. He expressed himself in very correct Spanish. He was calm. He spoke slowly." (T49, 9789). At no point did the detectives give appellant answers. (T50, 9808). Appellant did not appear sleepy and was alert. (T49, 9790). Once the confession was finished, she read each page word by word to the appellant to make sure that it was typed correctly. (T49, 9790). Appellant approved every page by initialing each page at the bottom. (T49, 9790-92). The police officers treated appellant with courtesy and she did not observe them threaten or even raise their voices toward the appellant.[7] (T49, 9793).

Officer Michael Byrd recovered the loaded handgun from appellant's trailer. (T45, 8824). Byrd also found a poster in appellant's trailer bearing the likeness of Jimmy Ryce and processed it as evidence. (T45, 8827). Also found in the trailer was a shell box which held live ammunition as well as one spent shell casing. (T45, 8833).

[7]FBI Special Agent Wayne Russell testified that he was present when Miami Dade Officers questioned the appellant. He asked to stay and observe and possibly help out. (T50, 9881). During the time he was in the office he did not observe the appellant mistreated in anyway. (T50, 9882).

Byrd identified a spent shell casing recovered from the trailer as Exhibit 36. (T45, 8844). One additional spent shell casing was found in the trailer. (T45, 8846).

Crime Scene Technician Elvey Melgarejo testified that on December 8, 1995, she helped search and process a trailer on a horse/avocado farm. She searched the trailer and found "a tube of JR water-based lubricant" found on a shelf inside the trailer. (T48, 9599-600). Ms. Melgarejo collected a sofa cushion and part of the wood floor of the trailer just inside the front door. (T49, 9602, 9611). These items were packaged for transmittal to serology for processing. (T49, 9613). Ms. Malgarejo noticed the three concrete filled planters when she was on the Scheinhaus property and she became suspicious. In fact, she felt that they might contain a cadaver. (T49, 9619).

Claudine Diane Ryce testified that she has three children, two children from her husband, Don's previous marriage, and one biological child, Jimmy. (T49, 9689). Jimmy, Samuel James Ryce was born on September 26, 1985. (T49, 9690). In September of 1995, Jimmy lived with them and another person, "Jen" a Rotary exchange student they were hosting from Thailand. (T49, 9690-91). The last time she saw her son was on September 10, 1995 as she was leaving for a two day business trip with her husband. (T49, 9691). Ms. Ryce testified that [s]he "backed him up in his law practice." (T49, 9691). While they were gone they hired a neighbor, Fred Minderman, to look after Jimmy. Jimmy was a creature of habit and always came straight home from school between "3:15 and 3:20 everyday." (T49, 9692). She described the sneakers Jimmy was wearing when he disappeared and book bag that Jimmy possessed and used for school. (T49, 9693-94). Ms. Ryce testified that prior to her son's disappearance she did not know Ed Scheinhaus, Susan Scheinhaus, or the

defendant. (T49, 9694).

Jimmy had several best friends and one of them lived very close to him, "maybe two-tenths of a mile" from their house. (T49, 9694-95). In September of 1995, her step son Ted owned a burgundy red Nissan sports car with a lot of stereo equipment in it. Ms. Ryce testified how Jimmy introduced himself: "If you asked him what his name was, he would say, '[m]y name is Samuel James Ryce.' If you asked him what he was called, he would say, 'I'm called Jimmy.'" (T49, 9695).

Fingerprint Technician William Miller identified appellant's fingerprint on the handgun recovered from his trailer. The handgun was placed in a super glue chamber and a fingerprint matching that of the appellant was found on the firearm. With "ten points of identification throughout this fingerprint, which is only common to Mr. Chavez. It's an absolute and positive identification that his left thumb print made on the weapon." (T49, 9753). On December 8, 1995, he also examined the books and notebooks found inside the book bag belonging to Jimmy Ryce.[8] (T49, 9754). The front of one notebook found in the book bag possessed the fingerprint of the appellant. (T49, 9755). The fingerprint located on the interior of the notebook cover was found to "have sixteen points of identification, a positive identification, based on the left thumb print of Mr. Juan Carlos Chavez against the print which was developed on the inside cover." (T49, 9760). Another print of value was located on the textbook titled "Journeys in Science." He found "this particular print of value from this area to be made by the right middle fingerprint of Mr. Chavez. I had nine points of identification." (T49, 9760). He did not find the fingerprints of Ed or Susan

[8]Detective McColum testified that he locked up the book bag in Sergeant Smith's desk for approximately two hours. (T48, 9529). However, the book bag and its contents were never together with or in the same room with the appellant. (T48, 9543).

Scheinhaus on any of the book bag contents. (T49, 9772).

Forensic Serologist Theresa Merrit of the Metro Dade Police Department, testified that she received some items for examination on December 8, 1995. (T50, 9812). She also was called out to the horse farm to assist crime scene personnel in trying to determine whether blood was present at this particular location. (T50, 9812). Ms. Merit tested a twin size mattress from the trailer, a cushion present on the bench in the trailer and a cut-out portion of the threshold area from the floor of the trailer. (T50, 9815). A scraping from the floor area produced a positive result for the presence of blood. (T50, 9818). Another sample from a cushion in the trailer, yielded blood scrapings. [State's Exhibit 135]

Ms. Merit tested Jimmy's shorts for the presence of semen but did not find any. However, the shorts were in an extremely bad condition, "they had a very bad odor, and they were very obviously biologically contaminated." (T50, 9829). "When an item is badly decomposed, the test we conduct for the presence of semen – we're looking for what is called an enzyme. This is a protein substance that doesn't last very long. And under circumstances like that, I would not really expect to find it." (T50, 9829).

Anita Mathews, Assistant Director of the forensic identity testing laboratory for "LabCorp" of North Carolina, testified that she is 'responsible for dong interpretation on the results of the testing that the technologists conduct." (T50, 9837). Ms. Mathews testified that they were not able to obtain a sufficient quantity or quality of genetic material from samples collected from the body of Jimmy Ryce for testing. (T50, 9849). However, the samples taken from the parents were compared to the blood found on the floor of the trailer. (T50, 9858). The comparison led to the

conclusion that the blood on the floor was extremely likely to have come from a child of Don and Claudine Ryce. Ms. Mathews testified:

> In the Caucasian population, the parentage index is 2,350,059,902 to 1. And basically what that number means is that it's just over two billion times more likely that the blood sample on the floor originated from a child of Don and Claudine Ryce than from some random couple in the population, in the Caucasian population.

(T50, 9858). Put another way, the probability of parentage is "99.99 percent." (T50, 9858). Consequently, it is "extremely likely that this blood sample on the floor came from a child of Don and Claudine Ryce. (T50, 9859). Two other blood samples taken from the floor of the trailer also carried the same genetic characteristics. (T50, 9860-61). Another blood sample, this one taken from the cushion found in the trailer, was also consistent with having originated from the biological child of Don and Claudine Ryce. (T50, 9861).

Dr. Roger Mittleman, Chief Medical Examiner for the Dade Medical Examiner's Department, testified that on December 7, 1995 at 10:00 in the evening he received a call from a homicide detective for assistance. (T50, 9921). He responded to a property in a rural area to determine if injuries to a body could have been caused by a pickup truck pinning a child's body against a fence. (T50, 9922). Jimmy was four feet and seven inches tall. After examining the fence and the pickup Dr. Mittleman testified he did not "believe [Jimmy] died in that fashion."[9] (T50, 9925).

Dr. Mittleman testified that while on the Scheinhaus property he observed three

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[9]Traffic homicide Detective John Buchanan testified that he attempted to reconstruct the accident based upon information disclosed by the appellant. He examined the scene on December 7th at approximately 11:30 pm. (T48, 9550). In his opinion, appellant's story about Jimmy being crushed against the horse farm gate was not possible based upon his examination of damage to the gate and the truck which was allegedly involved. (T48, 9560-61).

concrete filled planters. (T50, 9929-30). Later, he received a call from a detective, notifying him that appellant had confessed to shooting Jimmy and that the planters needed to be examined for the remains. Id. At 9:45 a.m. on December 9th, he arrived at the medical examiner's office and began to plan the best way to remove the concrete from the planters. (T50, 9930). The planters were marked "A", "B" and "C". Each planter contained the remains of what appeared to be a young boy. The skull, the remains of the left lower extremity and a left sneaker was found in container A. In the planter B the right lower extremity was found with attached pelvis and clothing. "There was also a portion of vertebral column and also portions of pelvis as detached from the body." (T50, 9931). In planter C they found "the chest with the arms attached and the chest was clad in a T-shirt." (T50, 9932). Inside at least one of the planters was the remnants of a cement bag. (T50, 9934-35).

Dr. Mittleman explained that Jimmy's body was found with the following clothes: "It was dressed in this T-shirt and had on jeans and underwear. There was one sneaker on; one sneaker was off. There were socks." (T50, 9950). The doctor then corrected himself, and stated that their was only one sock found on the body. (T50, 9953). The doctor testified that a body expands as it decomposes due to the breakdown of material and biological processes, causing gasses to expand. This process might cause a body placed in a barrel to expand to the point that a lid is forced off or open. (T50, 9954-58).

The remains were significantly decomposed.[10] (T50, 9934). An X-Ray of the body cavity revealed a flattened projectile jacket that lodged in the area of the heart

[10]Using dental records from Jimmy's family dentist, a forensic dentist testified that the comparison with the jaw and teeth of the body was so strong that the "skeletal remains" were "positively identified as that of Jimmy Ryce." (T49, 9719).

and "great vessels." (T50, 9944). The bullet entered right where the right sixth rib is located, went upward in the body, through the lung, through the heart and exited from the upper left chest. (T50, 9959-60). The gun would have been pointing slightly upward and below the individual that was shot. (T50, 9980). Answering a hypothetical question, the medical examiner testified that the gunshot pathway on Jimmy was consistent with a child 55 inches tall and an individual falling or who has fallen is shooting up toward the victim. (T50, 9983).

Dr. Mittleman was asked to examine an instrument known as a bush hook to see if this instrument was consistent with how Jimmy was dismembered.[11] (T50, 9963; S7, 1572). This type of instrument was a heavy chopping instrument, like an axe or machete, with a thicker blade. It causes a combination of sharp and blunt force injuries. (T50, 9964). The medical examiner noted a number of the injuries inflicted upon the body during dismemberment were consistent with having been inflicted by the bush hook. (T50, 9972-78). However, Dr. Mittleman also testified that it was possible there was more than one instrument of dismemberment. (T50, 9992).

Firearms Examiner Thomas Quirk of the Miami Dade Police Department Crime Laboratory (T51, 10025) testified that a .38 caliber Taurus model 85 revolver [State's Exhibit 23] was submitted for his examination after it had been processed by the fingerprint section. (T51, 10028). He also received one aluminum jacket from a projectile from the body of the victim and two .38 caliber casings. (T51, 10030). Exhibit 36, a projectile identified as having come from a red bullet box. (T51, 10032). Exhibit 35, was a casing that had been fired from a firearm. (T51, 10032). Quirk

[11] Detective James McColum transported a bush hook which had previously been impounded and transported it to the medical examiner's office on December 20, 1995. (T48, 9527).

testified the manufacture of the barrel and rifling process provide microscopic differences which are picked up during firing which "repeat" just like a "fingerprint." (T51, 10035). The two empty .38 caliber shell casings found in appellant's trailer were fired from the .38 recovered from appellant's trailer. (T51, 10035-36). Also, the projectile jacket recovered by the medical examiner and the lead core [the fatal bullet] were positively identified as having been fired by the gun recovered from appellant's trailer: "My conclusion is that this bullet was fired in this weapon to the exclusion of all other weapons in the world. This is the gun that fired this bullet." (T51, 10042-43).

The Defense Case

Appellant claims that he presented evidence to support his theory that Ed Scheinhaus killed Jimmy Ryce and that Ed and Susan Scheinhaus conspired to plant evidence, including the murder weapon and the book bag in appellant's trailer. (Appellant's Brief at 2). Aside from appellant's trial testimony which was contradicted by his previous statements to the police, the appellant did not present any direct evidence to support his theory.

Appellant did offer the testimony of Wilson Macado, the lock smith who was hired by Susan Scheinhaus and her son to pick the lock on appellant's trailer. (T51, 10066-71). The Scheinhaus' wanted the lock picked because "they were looking for guns and jewelry, that they were missing guns and jewelry in the house and they wanted to check the trailer and see if it was in there." (T51, 10072). He picked the lock on the trailer, opened the door, and looked inside. Mocado did not see a gun on the table. (T51, 10077). Macado did not enter the trailer but did recall observing a table with books on it. (T51, 10081).

Ms. Scheinhaus testified that when she entered the trailer with her son, she observed her gun which was covered by gardening books. (T51, 10094). She and her son entered the trailer and left the trailer at the same time. (T51, 10093).

Appellant attempted to show that Ed and Susan Scheinhaus made inconsistent statements regarding the concrete filled planters. On December 7, 1995, Detective Dangler arrived at the Scheinhaus property at about 4:30 pm. (T51, 10097). On a corner of the property he observed three tree pots that contained concrete and became suspicious: "I wondered why anybody would fill these pots up with concrete when I initially saw them and because they were very heavy and they couldn't be moved by hand." (T51, 1099-100). Dangler asked Susan Scheinhaus about the pots but could not remember exactly what was said. (T51, 10103). In his report, Dangler reported that she stated she had been out there three weeks prior and the pots were not there. However, this statement was not in quotes and Dangler emphasized that he could not remember exactly what was said. (T51, 10103). Dangler wrote the general gist of what was said but "did not write down verbatim was she told" him or his report would have placed the statement in quotation marks. (T51, 10104). Detective Dangler testified that when he initially arrived at the Scheinhaus property it was difficult to interview Ms. Scheinhaus, she was upset and crying during the entire interview. (T51, 10131). Ms. Scheinhaus, did, in fact, tell Agent Dangler that her son entered the trailer with her. (T51, 10131). Ed Scheinhaus was present and cooperated with the agents who arrived on the property. (T51, 10132).

In September of 1995, Ed Scheinhaus lived on the same property as his mother, his father, his wife, then his girlfriend, Danny, Jr., Danny , Sr. and the appellant. (T52, 10239). Ed Scheinhaus testified that a few days after the disappearance of

Jimmy Ryce he mentioned to his mother that he felt appellant might somehow have been involved. He had no evidence to the effect, but thought that appellant was taking an unusually strong interest in the boy's disappearance. Ed Scheinhaus also recalled that appellant told him he was going to the horse farm on September 11th, in the general vicinity of Redland Middle School. Appellant brought a poster of the missing child into the kitchen where he and his mother were talking. A news story then came on regarding the missing boy. Appellant stayed and watched the news cast despite the fact that he had a television in the trailer.[12] (T51, 10189-95).

Ed Scheinhaus testified that when he entered the trailer he observed the gun in plain view on the kitchen table: "You could see directly into the trailer and I had expressed to my mom. I said, look, there's your gun." (T51, 10203). Ed Scheinhaus testified that they entered the trailer to find things that were missing. (T51, 10205). His mother first noticed the book bag and it struck her as being odd. Ed looked inside the bag and was in shock after looking inside the book bag and observing the name. (T51, 10207-210). Ed told his mother that this was the book bag "of the boy that they've been looking for. My heart was in my throat." (T51, 10210). Ed left the trailer and did not remain in the trailer or re-enter the trailer after his mother left to call

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[12]Although not admitted for the jury over defense counsel's objection, Ed also explained:

> The fact that he was over interested in the case, the fact that he told me he was going to the horse farm that day and they could – that horse farm was within the general vicinity of Redland Middle School, and then third, that Danny Jr. had come to school – had come home from school one day. And after obviously seeing the case on TV I had asked him what was going on with the boy from the school had been warning him that there was a Hispanic man in a gray pickup truck asking kids for directions within that area. They just warned him to be careful.

(T52, 10258).

the police or the FBI. (T51, 10212).

Anthony Fernandez, coordinator of the K-9 Urban Search and Rescue Task Force, testified that in December of 1995 he was working with cadaver dogs. (T52, 10268-69). On December 7, 1995 at approximately 1:00 p.m. he went to the Scheinhaus property with four K-9 dogs. Two dogs alerted, showing basic interest in the cement planters located near the horse stables. (T52, 10274-75). A young male resident of the property [Ed Scheinhaus] told him that the planters had been placed there to prevent horses in the barn from going behind the container. (T52, 10276).

Appellant testified on his own behalf. As noted in appellant's brief, appellant related how he came upon Ed at the horse farm and that it appeared the child had been shot. (T52, 10313-14). Appellant helped Ed carry the body out of the trailer in sheets and testified that Ed drove off with the body in the pickup truck. (T52, 10315-16). Appellant denied that he helped Ed dispose of the child's body.[13] Appellant's testimony included explanations for how his fingerprint came to be found on the murder weapon and why his fingerprints would appear on the inside of Jimmy's book bag, despite his claim that those items were never in his trailer. (T52, 10336-37). Appellant explained that his fingerprints were found on the contents of the book bag because during the interrogation, one of the detectives, he believes Murias, asked him if he had seen items from the bag. Appellant checked a book, leafing through it with his hands. (T52, 1064-65). Appellant claimed that he picked up the handgun which he observed under the seat in Ed's Acura as he drove away from the horse farm after Jimmy had been shot. (T52, 10320)

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[13]Appellant drew a heavy tool for the detectives, testifying that it was the first tool that came to mind. (T52, 10386). However, appellant asserted that he did not in fact use that tool on Jimmy's body. (T52, 10386).

Appellant claimed that the detectives threatened him physically and with deportation to Cuba. (T52, 10359). Appellant acknowledged telling two false stories about Jimmy's death. (T52, 10382-10384). Ultimately, in order to avoid deportation, he confessed to the kidnapping, rape, and murder of Jimmy Ryce with detectives feeding him details through their questions and correcting him when he got something wrong. (T53, 10411-12).

On cross-examination, appellant admitted telling detectives a story about crushing the boy against a gate knowing there was damage to the gate that might corroborate his story rather than telling them about Ed. (T53, 10464-65). Appellant admitted showing police the damage to the gate at the horse farm. (T53, 10465-66). While appellant stated that the gun he had seen and previously used was not kept in his trailer, he admitted keeping ammunition that would fit that weapon in his trailer. (T53, 10467-68). In addition to keeping bullets for the gun he did not own or possess, appellant admitted he kept spent shell casings for the gun in his trailer. (T53, 10468).

Appellant admitted that he corrected a number of misspelled words, initialing the corrections to his handwritten statement. (T53, 10474). Never once in that statement did he claim he never had the book bag or that Ed was the real murderer. (T53, 10475). While appellant denied dismembering Jimmy's body, appellant acknowledged that during the interrogation he drew the tool allegedly used for chopping up Jimmy's body, State's Exhibit 84. (T53, 10476; S7, 1570).

Appellant claimed he was questioned by Cuban authorities about his "unit" but that he never told them about the other people in his revolutionary unit. However, appellant claimed he had a hard time in the United States with the detectives

questioning him.[14] (T53, 10485). Appellant claimed that they coerced him into saying things that he never did. (T53, 10485). Appellant claimed that he tried to tell Estopian about Ed Scheinhaus but that Estopian would not listen. Yet, appellant acknowledged that Estopian was the same detective he told about the accident and who listened to his story about "Ivan." (T53, 10485-86).

Appellant acknowledged that his written request for the death penalty did not contain the language rather than being sent back to Cuba. (T53, 10492). Nonetheless, appellant maintained in order to avoid Estopian calling the INS, he confessed to driving in the neighborhood where Jimmy was dropped off from the school bus, forcing him into his truck with a firearm, taking him to a remote location in Dade County, taking him into a trailer, forcing him to remove his clothes, putting lubricant on his penis, and placing his penis in his anus. Appellant also acknowledged stating that Jimmy was very upset, being concerned about what is going to happen to him, then shooting him, loading him into a feed barrel, storing the body in his van, and, when he was beginning to decompose, taking him out and dismembering the body using a weapon he described and drew for the detectives, placing the body parts in plastic tubs and covering it with cement. (T53, 10493-95). He claimed he told them this because the police threatened him in a "certain way." (T53, 10495).

State's Case In Rebuttal

Detective Diaz testified that he never told appellant "no more Mr. Nice Guy" nor did he ever bang his hand on the table, or otherwise threaten appellant. (T53, 10531-32). Detective Diaz never deprived the appellant of sleep. (T53, 10533). He

[14]Appellant admitted that when he was interviewed by INS he did not admit to being part of a dissident group in Cuba. (T53, 10470). And, when asked why he came to America on an INS form he said it is possible he said because of bad conditions in Cuba and he wanted better living conditions. (T53, 10482).

never took appellant into a conference room where the book bag was and did not ever ask him to touch the contents of the bag. (T53, 10532). Nor did he see any body do that. (T53, 10532). Detective Diaz never took appellant's wrist watch away from him. (T53, 10532-33).

Detective Juan Murias testified that he never threatened the defendant and, in particular, never threatened to send him back to Cuba. (T53, 10534). He did not take appellant into a room where the book bag was located and, never asked appellant to handle the contents of the book bag.[15] (T53, 10535).

Detective Estopian testified that he never threatened the appellant, never struck the appellant, and, never threatened to send him back to Cuba so that Castro could take care of him. (T53, 10537). Appellant never mentioned that he was a member of a counter revolutionary group in Cuba. (T53, 10537). Not once did appellant mention any concern about being sent back to Cuba. (T53, 10538). Appellant never told Estopian that the book bag was not inside of his trailer and he never mentioned that Ed Scheinhaus was involved in the disappearance of Jimmy Ryce. (T53, 10538). Estopian never suggested the answers to appellant contained in his sworn statement. (T53, 10538-39).

Any additional facts necessary for dispostion of the assigned errors will be discussed in the argument, *infra.*

[15]On direct examination, Detective Murias testified that he never observed any police officer present Jimmy's book bag to the appellant. (T46, 9046).

SUMMARY OF THE ARGUMENT

ISSUE I–The detectives had probable cause to hold appellant based upon the theft of Scheinhaus' property and reasonable suspicion to question appellant about the book bag of the missing child.

ISSUE II– There was no evidence introduced at the suppression hearing to suggest that appellant's free will was overcome by the detectives. Appellant was repeatedly Mirandized, given numerous breaks, fed, and even rested for a number of hours before making his final confession.

ISSUE III--Although appellant's waiver of his first appearance was made shortly after expiration of 24 hours, such delay did not render the confession involuntary where he ultimately provided a waiver and was repeatedly Mirandized by the investigating detectives.

ISSUE IV–The trial court did not err in removing a prior restraint against the media prohibiting publication of juror images.

ISSUE V–The blood stained mattress was relevant as it was located at the scene of Jimmy's murder and tended to contradict appellant's theory that his confession was essentially force fed to him by the detectives.

ISSUE VI–The physical evidence corroborated appellant's detailed confession to having committed a sexual battery against Jimmy Ryce.

ISSUE VII–Photographs of the child victim were relevant and therefore properly admitted over appellant's objection.

ISSUE VIII–Appellant's constitutional challenges to Florida's capital sentencing process have been repeatedly rejected. Sufficient evidence was presented to support the avoiding arrest and heinous, atrocious or cruel aggravators.

ARGUMENT

ISSUE I

WHETHER THE POLICE HAD PROBABLE CAUSE TO ARREST THE APPELLANT? (STATED BY APPELLEE)

Appellant argues that the trial court erred in denying his motion to suppress because he was arrested without probable cause. Further, since his arrest was without probable cause, appellant claims that his subsequent confessions to having kidnapped, raped, and murdered Jimmy Ryce must be suppressed. The State disagrees.

In denying the appellant's motion to suppress, the trial court stated:

> On December 6, 1995, Susan Scheinhaus notified the police that certain personal property that belonged to her had been stolen, and that her property, together with a book bag belonging to Jimmy Ryce, was found in a trailer where the defendant, Juan Carlos Chavez, lived. The trailer was located at 19960 S.W. 190 Street, in Dade County, Florida.
>
> Shortly thereafter, on December 6, 1995, at approximately 7:30 p.m., the defendant was detained by police for the crime of theft of Susan Scheinhaus' property. The defendant subsequently voluntarily agreed to go to the Metro Dade police station to discuss the accusations of Ms. Scheinhaus and the investigation as it pertained to the book bag.
>
> THE COURT finds that the police had probable cause to detain the defendant for the theft of Susan Scheinhaus' property, and that the defendant voluntarily consented to go to the police station to assist in the ongoing investigation. (R29, 3987).

In Almeida v. State, 737 So.2d 520, 529 (Fla. 1999), this Court stated: "'A trial court's ruling on a motion to suppress comes to this Court clothed with a presumption of correctness and, as the reviewing court, we must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling.'" (quoting San Martin v. State, 717 So.2d 462, 469 (Fla. 1998)). The trial court's ruling in this case finds ample support in the record on appeal.

"It is not disputed that the Constitution permits an officer to arrest a suspect

without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." Michigan v. DeFillippo, 443 U.S. 31, 36, (1979). With regard to probable cause, this Court has stated the following:

> Probable cause for arrest exists where an officer "has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." *Blanco v. State*, 452 So.2d 520, 523 (Fla. 1984). The question of probable cause is viewed from the perspective of a police officer with a specialized training and takes into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Schmitt v. State*, 563 So.2d 1095, 1098 (Fla. 4th DCA 1990).

Walker v. State, 707 So.2d 300, 312 (Fla. 1997). "Because sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment," *Hill v. California*, 401 U.S. 797, 804, (1971), "probable cause itself is a doctrine of reasonable probability and not certainty." (quoting United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir. 1995)).

When the police first approached the appellant at the property, they had probable cause to arrest appellant for the theft of property belonging to Susan Scheinhaus. Susan Scheinhaus observed a handgun and other property belonging to her in appellant's trailer. (R18, 4049). These items were taken by the appellant without her consent. (R18, 4048-49). Detective Pat Diaz personally interviewed Mrs. Scheinhaus regarding the items she observed in the trailer. Id. Mrs. Scheinhaus learned from another handyman, Frometa, that items belonging to her were kept in appellant's trailer. (R18, 4050-51). Mrs. Scheinhaus told Detective Diaz that she entered the trailer with her son and provided a detailed description of the property she observed in the trailer:

> She stated she found the keys to her mother's house, the jewelers loop, her son's rifle, scope, miscellaneous tools, a remote control from her TV,

> perfume, her calculator. What she took when (sic) left the trailer was a hand tape recorder, along with the cellular and a revolver.

(R18, 4052). Included among the items were her diamond earrings and missing videotapes. Again, all of these items were stolen. (R18, 4053).

While appellant now questions the detectives reliance upon Ms. Scheinhaus statements to find probable cause, the officers had no reason to disbelieve her statements. See Ortega v. Christian, 85 F.3d 1521, 1524 (11th Cir. 1996)("Probable cause does not require overwhelmingly convincing evidence, but only 'reasonably trustworthy information.'"). Appellant's rather cryptic attempt to discredit Ms. Scheinhaus ignores the fact that she was not an anonymous informant, but a known, citizen informant, the victim of appellant's larceny. In a similar situation, the Third District stated the following: "In the present case, we are not dealing with an anonymous tip. Instead, this case involves a report of crime by the citizen victim who called the police. Here, there is an identified caller, "and it is well settled that citizen information need not be independently verified." State v. Clark, 721 So.2d 1202, 1206 (Fla. 3d DCA 1998)(citing State v. Reyes, 680 So.2d 1092 (Fla. 3d DCA 1996); Persaud v. State, 659 So.2d 1191 (Fla. 3d DCA 1995)). Here, the information came from a known source with whom the detectives had personal contact with. There was no reason to question her information or her personal integrity.

In any case, assuming, *arguendo* some defect in the detectives initial assessment of probable cause, appellant's voluntary confession should not be suppressed. If probable cause only developed after appellant came to the station and admitted some culpability in the death of Jimmy Ryce, any earlier defect in the finding of probable cause did not render the confession involuntary. In this case, it is quite clear that appellant wanted to cooperate with the police, he voluntarily accompanied police to

the station, repeatedly waived his rights and continued to engage the detectives of his own volition.

Based upon this record, there was no defect in the detectives initial assessment of probable cause which rendered the subsequent questioning of the appellant and his voluntary confession inadmissible. There is simply no illegal police conduct to deter in this case through use of the exclusionary rule. As recognized by the United States Supreme Court, the burden upon a party urging the exclusion of evidence through use of the exclusionary rule is a heavy one:

> Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions. *See Stone v. Powell*, *supra,* at 490, 49 L.Ed.2d 1067, 96 S.Ct. 3037. Although we have held these costs to be worth bearing in certain circumstances,[] **our cases have repeatedly emphasized that the rules's "costly toll" upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule.** *United States v. Payner*, 447 U.S. 727, 734, 65 L.Ed.2d 468, 100 S.Ct. 2439 (1980).

Pennsylvania Bd. of Parole v. Scott, 524 U.S. 357, 141 L.Ed.2d 344, 352, (1998)(emphasis added). The trial court's ruling must be affirmed.

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS WHERE APPELLANT FREELY AND VOLUNTARILY CONFESSED TO THE KIDNAPPING, SEXUAL BATTERY, AND MURDER OF JIMMY RYCE.

Prior to trial, appellant unsuccessfully attempted to suppress his confession to the kidnapping, sexual battery and murder of Jimmy Ryce. As appellant candidly admits, a trial court's ruling concerning the voluntariness of a confession is presumptively correct and should not be disturbed unless it is clearly erroneous. See Escobar v. State, 699 So.2d 988, 993-994 (Fla. 1997), cert. den. 523 U.S. 1072 (1998).

In fact, where, as here, the trial court relied upon live testimony, rather than transcripts, depositions or other documents, the clearly erroneous standard applies with "full force." See State v. Sawyer, 561 So.2d 278, 281 (Fla. 2d DCA 1990)(citing Thompson v. State, 548 So.2d 198, 204 n. 5 (Fla. 1989)).

Additionally, a reviewing court should defer to the fact-finding authority of the trial court and not substitute its judgment for that of the trial court. See DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983)(citation omitted), cert. denied, 465 U.S. 1005 (1984). The appellate court must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. See Shapiro v. State, 390 So.2d 344, 346 (Fla. 1980)(citation omitted).

In view of the applicable standard of review, this Court must affirm the ruling of the lower court. The totality of circumstances surrounding appellant's confession demonstrate its voluntary nature and that it was given of appellant's free will. See Traylor v. State, 596 So.2d 957, 964 (Fla. 1992). As this Court stated in Traylor, "[w]e adhere to the principle that the state's authority to obtain freely given confessions is not an evil, but an unqualified good." Id. at 965.

A. Length Of Interrogation.

One factor to be considered in reviewing the totality of circumstances surrounding the confession is the length of time appellant spoke with the police prior to confessing. Initially, appellant mischaracterizes the manner in which appellant spent his time at the police station during the questioning process. Appellant was not subject to continuous around-the-clock interrogation by rotating teams of police officers, as appellant suggests. The transcript of the hearing on the motion to suppress

reveals that the evidence presented contradicts appellant's version of events.

Appellant did not testify at the suppression hearing.[16] The only facts admitted into evidence at the suppression hearing revealed an alert, intelligent, and cooperative appellant. Appellant was routinely given breaks for the restroom, food and drink, and multiple breaks throughout the interview process. He waived his rights no less than three times in this period. No facts to the contrary were ever presented to the trial court. Ignoring the factual evidence before the lower court, appellant now argues that the detectives' testimony is not to be believed. However, it should be reiterated that no evidence suggested that appellant's free will was overborne at any time by any of the detectives.[17]

Appellant arrived at the police station at approximately 8:20 p.m. on December 6, 1995. Detectives Diaz and Murias initiated their first interview with appellant at 8:50 p.m. (R18, 4070). During this first interview, appellant declined offers for the restroom and for food. (R18, 4071). Appellant was told he was there because missing items belonging to the Scheinhaus family and a book bag had been found in his trailer. Appellant revealed that he had a twelfth grade education and could read and write. He understood English, but did not speak it very well. (R18, 4075).

Detective Murias was present throughout this interview acting as a translator for appellant. Appellant signed a Miranda form presented in Spanish after Detective Murias went over it with him orally in Spanish. (R18, 4076-4077). Appellant had no problem reading the form, did not appear to be under the influence or tired, and was

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[16]Appellant later testified at trial that he was threatened and coerced into confessing. However, while appellant renewed his motion to suppress, he did not ask the trial court to reassess its earlier ruling in light of his testimony.

[17]Pictures of appellant at the Scheinhaus residence and horse farm show that appellant was not handcuffed and that he still possessed his watch. (S8, 1778, 1782, 1788).

alert. (R18, 4078-4079).

This first interview lasted just over an hour, ending at 10:00 p.m. (R18, 4081). Appellant agreed to take a polygraph test. During the break he was offered the restroom and given three slices of pizza and a coke. (R18, 4082-4083). While Detective Murias was in apellant's presence from 10:00 p.m. until 10:45 p.m., no testimony suggested that any questioning was taking place at this time. (R18, 4083).

In fact, appellant was not interviewed at all for three hours between 10:00 p.m. and 1:05 a.m. when the first polygraph was administered by Detective Mote. (R18, 4083-4085; R19, 4381). Appellant was re-Mirandized prior to the polygraph test with another Spanish form and signed the waiver at 1:10 a.m. (R18, 4087-88, 4254-55; R19, 4383-84). Prior to the polygraph, appellant did not appear tired or uncomfortable and never indicated that he did not want to continue. (R18, 4085; R19, 4388-89). Also, before the polygraph actually began, Detective Mote conducted a pre-test interview which lasted until 3:00 a.m. The twenty to thirty minute test was then given, after which Appellant signed another form indicating that he had taken the test voluntarily at 4:02 a.m. (R19, 4392-96).

A break then occurred at 4:20 a.m. Appellant was taken to the restroom and given a drink. Detective Diaz testified that appellant was not sleepy or uncomfortable at this time, but alert with no complaints. (R18, 4091). Appellant was then left in another room until the second polygraph began at 4:50 a.m. (R19, 4394-4395). Appellant was offered the opportunity to terminate the interview, but agreed to continue, and the second polygraph was administered. (R19, 4395; R18, 4259). Once again, appellant was read his rights, both before and after the polygraph, and both times he re-affirmed his consent to the test. (R18, 4261-64). The second

polygraph lasted from 5:00 a.m. until 5:45 a.m. (R19, 4396). After a determination that appellant had been deceptive during the polygraphs, appellant was again Mirandized at 5:50 a.m. (R19, 4398-99). Appellant was then informed of the results of his polygraphs. (R18, 4094-98).

The next break occurred at 8:25 a.m. Appellant was given Cuban pastries and a drink and was taken to the restroom. He never requested that questioning stop or indicated he was tired. (R18, 4100). Then, Detectives Goldston and Estopian took over because Detectives Diaz and Murias had other duties to perform related to the investigation. (R18, 4101-02).

Goldston and Estopian began an interview with Appellant at 8:30 a.m. on December 7, 1995. (R19, 4425-28). Although he initially denied knowing that the book bag found in his trailer belonged to Jimmy Ryce, appellant eventually admitted that he saw the writing of a young boy and knew the bag was Jimmy's. (R19, 4432-34). When he asked how he knew the writing was that of a young boy, appellant said, "give me a few moments and I will tell you what happened to Jimmy Ryce." (R19, 4435). Appellant was not sleepy, but alert at this time. (R19, 4437).

Then, appellant was given another break at 11:10 a.m. for the restroom and a coke. The interview resumed, and the next break was at 12:30 p.m. for the restroom and lunch. (R18, 4103-04). After an hour break for lunch, the interview resumed at 1:30 p.m. until 2:15p.m. (R18, 4107-08). In this period, appellant related that Jimmy Ryce was killed when he was accidentally pinned between a truck and the gate at the ranch. (R19, 4442-46).

Between 1:30 and 2:15 p.m., Appellant agreed to take the officers to the ranch to show them where the accident occurred and where he disposed of the body. (R19,

4447-48). At 2:30 p.m., they left for the ranch, and arrived at 3:20 p.m. (R19, 4445-47). From 3:20 p.m. until 6:00 p.m., appellant directed the officers to various sites relevant to his changing stories concerning the disappearance of Jimmy Ryce. (R18, 4112-18, R19, 4450-63). On the way back to the police station, the officers actually stopped at a convenience store to honor appellant's request for cigarettes. (R19, 4462).

At this point, Detective Diaz, who has also been awake since December 6, 1995 at 5:30 a.m., testified that Appellant was still alert, in no pain or discomfort. He was taken to the restroom and fed, again. (R18, 4118-19). The interview then resumed at 7:10 p.m. (R19, 4465). Appellant was given a break and a glass of milk per his request at 8:00 p.m. The interview continued between 8:15 p.m. and 8:50 p.m. (R18, 4122; R19, 4470-72). Appellant then agreed to provide a written statement which concluded at 12:40 a.m. on December 8, 1995. (R19, 4472-76). Throughout this time, appellant was alert, cooperative, and not emotional or upset. (R19, 4476). No request had been denied of appellant. Appellant never requested to speak to an attorney or any person. Also, no threats or promises were made to appellant. (R19, 4477).

Following this written statement, appellant used the restroom and was offered a pillow and blanket to rest, which he declined. (R18, 4130-31). The lights were off and appellant slept in the interview room until 7:30 a.m., December 8, 1995, when he was awakened, taken to the restroom, and fed breakfast. (R18, 4132).

Appellant had agreed the previous night to return to the horse farm. So, at 9:25 a.m., they returned to the horse farm. From there they went back to the Scheinhaus property where they stayed until 11:35 a.m. (R18, 4133-40, R19, 4480-86). They

arrived back at the police station at 12:10 p.m., and appellant was fed lunch. (R18, 4140; R19, 4487).

At 1:30 p.m., the detectives resumed their interview which lasted until 2:45 p.m. (R18, 4140; R19, 4490). The detectives explained to appellant that the medical examiner had discounted the credibility of his account that Jimmy Ryce was killed by being pinned between the truck and a gate. (R19, 4489). Then, appellant was left alone.

At 3:30 p.m., appellant, still alone in the interview room, knocked on the door and requested to speak to Detective Estopian. (R18, 4141). Detective Estopian entered the room alone, and appellant said that he would tell him where the body was located, if he was guaranteed the death penalty. (R19, 4492-93). Detective Estopian explained to appellant that he could not guarantee the death penalty. (R19, 4494). Appellant then proceeded to reveal that he was sexually battered by his older brother as a child, that he had a history of homosexual encounters, and that his lover, Ivan, abducted Jimmy Ryce. Appellant claimed that Jimmy Ryce was accidentally killed when a gun went off. Appellant then revealed that he had disposed of the body. (R19, 4495-98).

During this discussion between Estopian and appellant, Detective Piderman interrupted at 4:30 p.m. with an affidavit waiving appellant's first appearance. However, because appellant was emotional and talking about his abuse in Cuba, Estopian elected to let him finish talking before he discussed the waiver. (R19, 4500). This interview concluded at 6:30 p.m. (R18, 4142). Appellant then signed the waiver of first appearance at 6:50 p.m. (R18, 4143; R19, 4501-03).

At 6:55 p.m., appellant got a bathroom break and something to drink. (R18,

4144). Detective Jimenez then spoke to appellant from 7:00 p.m. until 8:00 p.m. Another bathroom break occurred at 8:05 p.m., after which appellant was shown his friend, Jorge Gonzalez. (R18, 4146). At that point, appellant again asked for Detective Estopian. In the presence of Estopian and Jimenez, appellant then confessed to the sexual battery and murder of Jimmy Ryce. (R19, 4505-09). His verbal statement concluded at 10:50 p.m. (R4509). Appellant then agreed to give a formal statement which lasted from 11:45 p.m. until 2:20 a.m. on December 9, 1995, including a review of each transcribed page by appellant. (R19, 4532-42).

Notably, the professional interpreter brought in to take appellant's formal statement, Marilu Balbis, testified at the suppression hearing. (R21, 4747-57). Balbis indicated that appellant was very calm and under control during the statement. She noted that he was better spoken that most people from whom she had taken statements. He expressed himself very clearly with a very good vocabulary. Moreover, he was alert throughout the formal statement proceedings. (R21, 4754-56).

Given the overwhelming evidence establishing that appellant was alert and cooperative during the interview process, the authority provided by appellant is inapplicable. For instance, in State v. Sawyer, 561 So.2d 278 (Fla. 2d DCA 1990), heavily relied upon by appellant, the facts are markedly distinguishable from the instant case. Initially, the actual length of Sawyer's interrogation cannot be compared to appellant's. Sawyer was interrogated *continuously* over a period of sixteen hours by several cadres of detectives. Sawyer, 561 So.2d 278, 280 (emphasis added).

In contrast, appellant was given repeated breaks to rest, use the restroom, and to eat and drink. Numerous detectives testified that none of appellant's requests were

ever denied throughout the entire interview process. Most importantly, no individual interview session lasted longer than four hours and twenty five minutes (that being the time it took for appellant to provide his handwritten statement). Additionally, only five detectives spoke to appellant during this time frame. And, they testified that they only changed detectives because other duties called them elsewhere.

Aside from the sixteen hour continuous interrogation, Sawyer also suffered numerous and egregious violations of his constitutional rights. To begin with, Sawyer did not receive his first Miranda rights until four hours into the interrogation. Thereafter, the police ignored two requests for counsel and refused to stop questioning when Sawyer insisted he no longer wanted to talk and said he needed sleep. Sawyer, 561 So.2d 278, 282. No such errors occurred in the instant case.

Appellant received a Miranda warning prior to his first interview session. He knowingly and voluntarily waived his rights at that time. Subsequently, throughout the interview process, appellant was re-Mirandized at least twice, and, again, waived his rights on both occasions. Furthermore, appellant never requested to speak to an attorney, or anyone for that matter. He never asked that questioning stop and never indicated that he was in need of rest. The only evidence in the record shows that he was alert, cooperative and awake during the entire process.

At Sawyer's suppression hearing, expert testimony from both the State and the defense established that he was an alcoholic suffering from "obsessive compulsive" personality disorder and acute anxiety. The defense experts unanimously agreed that Sawyer's confession was coerced by the cadre of detectives who worked for sixteen hours *nonstop*, successfully applying various psychological techniques to produce a confession. Sawyer, 561 So.2d 278, 286-287 (emphasis added). No such testimony,

expert or otherwise, was presented in the instant case.

Also, in Sawyer, the interrogation was available on tape for the trial court's review.

> The tapes reveal[ed] that Sawyer was harangued, yelled at, cajoled, urged approximately fifty-five times to confess to an accidental killing, promised assistance with the state attorney's office if he did "tell the truth," threatened with first degree murder and its attendant consequences if he did not cooperate, warned what happened to a fellow policeman in Clearwater who played games during his interrogation and got charged with first degree murder, threatened that he would return to alcohol from remorse if he did not admit the killing, and even threatened with eventual death from excess alcohol consumption.

Sawyer, at 288. No evidence of such tactics was presented at appellant's suppression hearing.

With regard to sleep deprivation, the tapes also revealed "loud sounds of yawning by Sawyer as the early morning hours arrived, his protestations of wanting to sleep, to rest, to lie down, all ignored and deliberately utilized by the detectives to taunt Sawyer into confessing so that he, and they, could get some needed rest." Sawyer, at 288. Again, the evidence in this case demonstrated that appellant was not suffering any ill effects from sleep deprivation. Appellant's unfounded assertions to the contrary, no facts were provided to the trial court which showed otherwise. In fact, the written statement provided by the appellant, although false, was coherent and logical. As the prosecutor observed below, appellant's written statement clearly contradicts any suggestion that he was not functioning because of sleep deprivation:

> ...Now, at this pont if there is ever, if you are ever going to be tired this is right before he goes to sleep. This is the peak of the allegation of the sleep deprivation. Taking first the actual Spanish statement, I am not going [to] read Spanish, I can't obviously, I will get to that but I think it is worth taking a look at, Judge, look at the handwriting. If you are exhausted you have no mental capacity, you are just surfacing (sic) to whatever you want, I suggest your handwriting isn't as neat. I suggest you don't have margins like you have on every page. I suggest you

> don't have paragraphs like you have on every page.
>
> Let's get to the substance of what he wrote. We know based upon the substance that this statement is completely false, yet what we have is a defendant, allegedly sleep deprived, is able to make up a twelve-page written statement which is inherently consistent. You would think he would have slipped up, because he was so out of it, he was so tired. He wrote this, forget what he said on pages two and page seven, maybe he would go back to the other story where he said he left the body int the truck, but no, he is entirely consistent. He basically gives an elaborate detailed explanation of the second accident story, how he killed Jimmy, how he disposed of the body.
>
> Judge, I really submit that anybody who reads what the defendant wrote, looks at it in Spanish and reads it in English, or translates it, that night he wrote that would know that he was mentally alert, and was exercising his free will and lack of sleep was not causing him to do anything that he did not want to do.

(R21, 4943-45).

While both Sawyer and appellant took polygraph tests, the results were remarkably different. The polygraph expert in Sawyer, Warren Homes, testified that the detectives should have recognized that they had taken a "false confession" from Sawyer. Sawyer, at 290. According to Holmes, Sawyer did not lie. However, the other detectives told Sawyer that the test proved he was a liar. Sawyer, at 290.

Here, Detective Motes, the polygraph expert, testified that appellant was unusually alert. Appellant's test results showed deception and appellant was accurately informed of said results. Thus, by comparison, the polygraph was not used as an improper tactic to coerce appellant's confession.

With regard to other evidence of guilt, no proof existed at the time of Sawyer's interrogation that he had killed the victim. Sawyer, at 289. In addition, police trickery led Sawyer to believe, falsely, that the scientific methods used by the police had exposed Sawyer's prints and hair to be in the victim's apartment. Sawyer, at 290. Again, appellant's situation differed greatly.

From the outset of appellant's discussions with law enforcement, everyone,

including appellant, knew that Jimmy Ryce's book bag had been found in appellant's trailer. Jimmy Ryce had been missing for three months at that time. Law enforcement had no idea what had happened to him when they began their interview of appellant. Thus, the detectives never used any evidence, scientific or otherwise, to trick a confession out of appellant. It was only after appellant's polygraph results showed deception that the detectives correctly informed appellant that they did not believe he knew nothing of Jimmy Ryce's disappearance. This procedure, as opposed to that employed in Sawyer, was entirely proper. Thus, appellant's reliance upon the Sawyer decision is misplaced.

Admittedly, length of interrogation is one factor to be considered in assessing the voluntariness of a confession. However, appellant cannot point to any case wherein length of time alone rendered a confession involuntary. See e.g., Spradley v. State, 442 So.2d 1039 (Fla. 2d DCA 1983)(confession extracted only after defendant placed in coercive atmosphere of station-house setting, subjected to barrage of questions during the pre-dawn hours, advised that her boyfriend of five years had died, not allowed to care for her confused and frightened children, not permitted to sleep or eat, and invocation of her right to remain silent was not scrupulously honored); Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979)(confession suppressed where defendant advised by counsel to make no statement and interrogating officer aware that she had retained counsel, repeatedly assured defendant he would assist in obtaining a bond, appealed to defendant's concern for her children telling her that her children were being interrogated, that it was hard on them and that giving a statement would eliminate need for further questioning of children, where defendant signed waiver of counsel and agreed to make statement after she had not

eaten for 24 hours, not slept for 36 hours and had been interviewed for two and one-half hours). Under the particular circumstances of this case, the evidence failed to show that appellant was unduly sleep deprived or that his confession was directly induced by sleep deprivation. As such, the mere length of time involved fails to establish that the trial court improperly denied the motion to suppress the confession.

B. Christian Burial Technique

Appellant argues that Detective Estopian coerced appellant's confession by twice mentioning that Jimmy Ryce deserved a proper burial.[18] However, as in Hudson and Roman, the reference to burial failed to render the confession involuntary. See Hudson v. State, 538 So.2d 829, 830 (Fla. 1989); and Roman v. State, 475 So.2d 1228, 1232 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986). See also Alston v. State, 723 So.2d 148, 155 (Fla. 1998)(otherwise voluntary confession is not rendered involuntary by police officer discussing the family's need for "closure" in an attempt to locate the victim's body).

In Hudson, 538 So.2d 829, 830, the defendant was read his rights at least twice, and indicated that he understood them before waiving them. The only promise made to Hudson was that he would be taken away from the body's location as soon as possible. See Hudson, 538 So.2d at 830. Under those circumstances, the appellate court agreed with the trial court that this promise did not coerce Hudson's confession. See Hudson, at 830. Moreover, no police overreaching or coercive police conduct rendered Hudson's confession involuntary. Id., at 830.

Similarly, in Roman, the use of this tactic did not directly result in the defendant's statement. See Roman, 475 So.2d at 1232. The record reflected that

[18]Jimmy Ryce, did, in fact, deserve a proper burial.

defendant was a forty-five year old man of intelligence within the normal range, albeit at the lower end. He did not appear intoxicated or mentally ill at the time of the confession. He was read Miranda warnings, was capable of understanding them, and indicated that he did in fact understand them. He was offered sustenance and not promised or threatened. He was not handcuffed, and despite vomiting and trembling seemed alert and perceptive. See Roman, 475 So.2d 1228, 1232-1233. Under those circumstances, the appellate court found that the deception was insufficient to make an otherwise voluntary statement inadmissible. Id. at 1233.

Likewise, the fact that Estopian mentioned the need for a burial to appellant did not render his confession involuntary. At no point did this tactic result in a confession as appellant attempts to argue on appeal. In response to Estopian's first mention of a burial, appellant simply stated, "Jimmy Ryce no longer exists." (R19-4454). Taken in context, this statement provides no additional information other than that already disclosed by appellant; i.e., that he had accidentally killed Jimmy with the truck and disposed of the body. With the second comment regarding burial, no statement was directly elicited. As appellant admits, he did not respond to this comment. It was not until a full two hours later that appellant finally confessed. (R19-4506).

Under these circumstances, appellant cannot argue that the mention of the need to bury Jimmy Ryce coerced the confession. In fact, appellant has failed to identify any case in which the use of the "Christian burial" ploy alone, or coupled with other factors, rendered a confession involuntary. Consequently, it cannot be argued that this technique affected the voluntariness of appellant's confession, especially where the additional arguments raised to challenge the confession are without merit.

C. Propriety Of Miranda Rights.

Next, appellant attempts to argue that the Miranda rights waiver form used in this case was defective. In support of this factually inaccurate argument, appellant cites to the testimony of Detective Murias wherein he was asked on the stand to translate the Miranda form.

After expressing that he was having difficulty translating the form on the spot, (R18, 4245), Detective Murias translated a portion of the Miranda form as follows, "If you wait for an attorney to be present during the interrogatories or at this time, or from here on, you have the right to have an attorney present, do you understand this right?" (R18-4246). Appellant now relies on this one instance of contemporaneous translation to argue that appellant was not properly informed of his right to consult with an attorney before questioning and to have an attorney present during questioning. This argument is wholly without merit.

First, the record reflects that Detective Murias did essentially provide an accurate translation of the Miranda form. Additionally, Appellant ignores the portion of Detective Murias' translation where appellant was told, "Knowing these rights, are you now ready to answer my questions without an attorney present?" (R18, 4247). See Cooper v. State, 739 So.2d 82, 84 n.8 (Fla. 1999). Most importantly, the Miranda form used by the Metro-Dade authorities has been specifically upheld. See Cooper v. State, 638 So.2d 200 (Fla. 3d DCA 1994)(citing California v. Prysock, 453 U.S. 355 (1981)). See also Cooper v. State, 739 So.2d 82, 84 n.8 (Fla. 1999)(approving of the third warning on the Metro Dade rights form: "'If you want a lawyer to be present during questioning, at this time or any time thereafter, you are entitled to have a lawyer present.'")(quoting the Metro Dade Rights Waiver).

D. Invocation Of The Right To Remain Silent

On December 8, 1995, at 3:30 p.m., appellant, alone in the interview room, knocked on the door and requested to speak to Detective Estopian. (R18, 4141). Detective Estopian entered the room alone, and appellant said that he would tell him where the body was located, if he was guaranteed the death penalty. (R20, 4492-93).

Detective Estopian explained to appellant that he could not guarantee the death penalty. (R19, 4494). Appellant then proceeded to reveal that he was sexually battered by his older brother as a child, that he had a history of homosexual encounters, and that his lover, Ivan, abducted Jimmy Ryce who was accidentally killed when a gun went off. Appellant then revealed that he had disposed of the body, and said he would tell Estopian where the body was located if he was guaranteed the death penalty. (R19, 4495-98). Detective Estopian then left the interview room at 6:30 p.m. (R19, 4498-99). At 8:05 p.m., appellant again requested to speak to Detective Estopian. Appellant then proceeded to give his final confession without any mention of the death penalty. (R19, 4505-4542).

Appellant now asserts that his request for the death penalty in exchange for revealing the location of the body constitutes an "unequivocal" invocation of his right to remain silent which was not scrupulously honored by the police. The State disagrees.

Appellant was not invoking his right to remain silent, equivocally or unequivocally. This statement was an attempt to bargain with the detectives in exchange for information about where the body was located. Appellant never even used the details of the actual murder in his bargaining ploys. More importantly, appellant never sought to suspend or stop the interview after being informed that Detective Estopian could not guarantee the death penalty. As such, appellant never

"clearly" invoked his right to cut off questioning as is required for an unequivocal invocation of the right to remain silent. See State v. Owen, 696 So.2d 715, 722 (Fla. 1997)(Shaw, J., concurring). See also Jones v. State, 748 So.2d 1012, 1021 (Fla. 1999)(request for attorney to see mother or for defendant to see mother not a request to cease questioning or to communicate only through counsel; rather, more directed towards securing the company of his mother).

Under the facts of this case it would be an incredible stretch to even contend that appellant equivocally invoked his right to remain silent. However, even in that circumstance, Detective Estopian had no duty to clarify appellant's intent, and properly proceeded with the interview. See Owen, 696 So.2d 715, 718. "Police in Florida need not ask clarifying questions if a defendant who has received proper Miranda warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her Miranda rights." Owen, 696 So.2d at 719. See Davis v. United States, 512 U.S. 452 (1994)(neither Miranda nor its progeny require the police to terminate questioning of a suspect who has made a voluntary waiver of his or her Miranda rights based upon a suspect's equivocal or ambiguous request for counsel). When appellant first asked for the death penalty he had received written Miranda warnings on at least three prior occasions. Thus, appellant's right to remain silent was not infringed upon at any point prior to his knowing and voluntary confession.

Alternatively, should this Court believe that appellant properly invoked his right to remain silent by asking to be guaranteed the death penalty, his subsequent voluntary actions rendered his final confession admissible. As stated above, Detective Estopian left the interview room upon appellant's second request for the death penalty.

Subsequently, at 8:05 p.m., appellant initiated a request to speak to Estopian again. At that point, he provided his final confession without any mention of the death penalty.

In view of appellant's initiation of his final conversation with Detective Estopian, along with his valid waiver of Miranda rights prior to the formal statement, the continuation of the interview must be deemed proper. See Jones, 748 So.2d 1012, 1018 (citations omitted). In fact, where a defendant voluntarily initiates a conversation with law enforcement officers in which a defendant provides information about that defendant's case, Miranda warnings are not even required. See Christmas v. State, 632 So.2d 1368, 1370 (Fla. 1994). Thus, even if appellant's argument is well taken, appellant's final confession was properly admitted.

E. Appellant's Alienage And Lack Of Experience With The United States Criminal Justice System.

Finally, while poor language skills and lack of knowledge of the American legal system can be relevant factors in determining the validity of a Miranda waiver, neither of these factors negatively impacted the voluntariness of appellant's confession. Clearly, appellant's language skills are not at issue where Detectives Murias, Estopian and Jimenez communicated with appellant in Spanish. Moreover, a professional translator was brought in for appellant's formal statement.

The facts further demonstrate that appellant, who was twenty-seven years old at the time of his confession, had a twelfth grade education, had been in the United States for four years, and made statements evincing an understanding of the American justice system relating to the inadmissibility of his polygraph results. The professional translator also testified at the suppression hearing that appellant was better spoken that most people from whom she had taken statements, expressing

himself very clearly with a very good vocabulary. Thus, all evidence indicated that appellant was fully capable of understanding, and did understand, his Miranda rights; and, appellant provided no proof to the contrary at the suppression hearing. Again, the cases relied upon by appellant are not dispositive. In Martinez v. State, 545 So.2d 466, 467 (Fla. 4th DCA 1989), the opinion mentions in passing that the defendant was an illegal alien with an extremely limited education. However, the confession was suppressed based upon law enforcement's improper use of coercion and intimidation. Specifically, the police ultimately elicited a confession from Martinez after telling him, among other things, that he "could wind up" in the electric chair if he was not truthful with the police. Martinez, 545 So.2d 466, 467. Martinez was also told that it was impossible he was being truthful, and that both the polygraph results and the State's witnesses would contradict defendant's story. Martinez, 545 So.2d at 467. No such coercion or intimidation occurred in the instant case.

In viewing the totality of circumstances surrounding appellant's confession, neither appellant's language skills nor his supposed lack of familiarity with the American legal system resulted in an improperly coerced confession. Cf. United States v. Fung, 780 F. Supp. 115 (E.D. NY 1992)(confession suppressed where Chinese defendant not properly advised of right to remain silent and questioned even though she had an attorney); United States v. Higareda-Santa Cruz, 826 F. Supp. 355 (D. Or. 1993)(confession suppressed where no officer spoke to Spanish speaking defendant in Spanish and defendant never shown Miranda card in Spanish). In fact, appellant indicated an unusual degree of knowledge about the American legal system. Appellant was aware that polygraph test results are not admissible in court, a point well made by the prosecutor below:

> I think this is the key, Judge, the defendant later says, when he thought he failed the polygraph, well, you can't use that against me. I know what the law is in the United States. This ignorant man, no evidence to show he is ignorant, but he knows a polygraph is not admitted in the State of Florida, in the United States, generally.

(R21, 4946-47).

While the overall interview process may have been lengthy, appellant was not continuously or unceasingly questioned. He was given food, drink, restroom breaks and plenty of rest throughout the process. The mention of the need to properly bury Jimmy Ryce never coerced a confession from appellant. Appellant was properly advised of his Miranda rights and knowingly and voluntarily waived those rights. Finally, in conclusion, none of the factors raised by Appellant negatively impacted the voluntariness of his confession, either individually or collectively. Thus, the trial court's ruling on the motion to suppress must stand.

F. Harmless Error And Inevitable Discovery

Assuming, arguendo, this Court finds that some or all of appellant's statements should have been suppressed, such a finding does not automatically require reversal of appellant's kidnapping and murder convictions. Even without his confession, significant evidence of appellant's guilt was being uncovered and would ultimately have been discovered in the normal course of the police investigation. See Nix v. Williams, 467 U.S. 431 (1984).

Mrs. Scheinhaus told Detective Pat Diaz of appellant's duties around her house and also the fact that appellant was responsible for feeding horses at another location. (R18, 4072). In relation to Jimmy's disappearance, Mrs. Scheinhaus told Detective Diaz that appellant was feeding horses at the farm at the time Jimmy disappeared. (R18, 4074).

At approximately 4:15 p.m. on December 7, 1995, Michael Mallott received a call to search a ten acre avocado [horse farm] field. (R20, 4722). His task was to search the avocado field and any structures on the property. (R20, 4723-24). The owner of the property was David Santana who provided consent to search the property. (R20, 4724). At that point, Mallot was not aware of any statements the defendant had made. (R20, 4725). Searching the property would specifically include a thorough search of the trailer on the property.[19] (R20, 4725). Blood in the trailer was immediately visible upon entry. (R20, 4728). Inside the trailer he noticed a couch area and on the wood surface of the couch there was also a spot that appeared to be blood. He directed crime scene units to collect the blood and took some "type of oil base lubricant and K.Y. Jelly." (R20, 4728).

Planters where Jimmy's body was discovered had already come to investigating officers' attention prior to appellant's statement. And, in fact, prior to appellant's confession, arrangements were made to have the planters examined.[20] (R18, 4150-51; R19, 4363; T45, 8981; T49, 9613, 9619). See Craig v. State, 510 So.2d 857, 863 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988)("the trial court was correct in admitting the bodies and related evidence, on the ground that although they were in fact found by means of appellant's statements, they would have been found independently even without the statements, by means of normal investigative measures that inevitably would have been set in motion as a matter of routine police

[19]At 10:30 the following morning morning Detective Pat Diaz called and told him that Jimmy Ryce had possibly been in the trailer he was about to search. (R20, 4727).

[20]The medical examiner, thought the concrete filled planters looked suspicious when he was on the Scheinhaus property on December 8th at about 12:00 noon. (T50, 9985-86). He expressed his concerns at that time that the planters might contain the remains of a body. (T50, 9986). In addition, a cadaver dog was taken out to the Scheinhaus property to search for Jimmy's remains. (T45, 8981).

procedure."). The murder weapon was already found in appellant's trailer. The handgun was linked to the appellant by a fingerprint found on the weapon and through ballistics it was positively identified as the murder weapon. Moreover, Jimmy's book bag was linked to the appellant not only by its presence in his trailer, but by his fingerprints on the bag contents. The items in the horse farm trailer, including Jimmy's blood would have been found absent appellant's confession. Consequently, the State's evidence was more than sufficient without the confession to show that appellant kidnapped and murdered Jimmy Ryce. Admission of the confession was harmless error as to appellant's kidnapping and murder convictions.[21]

ISSUE III

WHETHER THE DELAY IN THE FIRST APPEARANCE AND PROBABLE CAUSE DETERMINATION RENDERED APPELLANT'S OTHERWISE VOLUNTARY CONFESSION INADMISSIBLE? (STATED BY APPELLEE).

Appellant also challenges the denial of his motion to suppress based upon his right to a first appearance hearing. Again, it should be noted that a ruling on a motion to suppress is presumed to be correct and must be upheld if supported by the record. See Rhodes v. State, 638 So.2d 920, 925 (Fla. 1994). Here, the record demonstrates that the trial court properly denied Appellant's motion to suppress.

A. Any Delay In Presenting Appellant For His First Appearance Failed To Induce His Confession

Appellant simply states that the waiver of his right to first appearance was deficient without providing any explanation of specific deficiencies. In fact, appellant does not challenge the voluntariness of his execution of the waiver. Instead, appellant

[21]A harmless error argument with regard to sentencing is admittedly a more difficult proposition. As for sentencing, the only aggravator that must be stricken would be the heinous, atrocious and cruel aggravator. The remaining two aggravators, in the course of a felony (kidnapping) and avoiding arrest arguably have sufficient record support to survive without appellant's confession. Given the paucity of mitigation, this Court can affirm appellant's sentence even after the HAC aggravator is stricken.

argues that the timing of the waiver was "significant." However, where the waiver of first appearance did not induce appellant's otherwise voluntary confession, no error has been demonstrated. See Keen v. State, 504 So.2d 396, 400 (Fla. 1987),citing Headrick v. State, 366 So.2d 1190 (Fla. 1st DCA 1978). See also Williams v. State, 466 So.2d 1246 (Fla. 1st DCA), review denied, 475 So.2d 696 (Fla. 1985).

Even without a waiver of his first appearance, appellant was Mirandized and waived his rights in writing on at least three separate occasions before voluntarily giving his statement to the detectives. Under these circumstances, the delay in first appearance did not induce the otherwise voluntary confession. See Keen, 504 So.2d 396, 400 and People v. Beckham, 174 A.D. 2d 748, 571 N.Y.S.2d 775 (N.Y.2 Dept. 1991) (It is well settled that "delay in arraignment, without more, does not cause [an] accused's critical stage right to counsel to attach automatically, and absent extraordinary circumstances, a delay in arraignment is but [a] factor to be considered in assessing the voluntariness of a confession.").

The fact that appellant did execute the waiver, regardless of the timing, further demonstrates that the delay had no bearing on the voluntariness of the confession. Appellant orally agreed to waive his first appearance sometime after 4:00 p.m. on December 8th. Estopian told appellant of the right to appear before a judge within 24 hours, that during this hearing he would be advised of any charges against him, and that he would be entitled to speak with an attorney. (R19, 4488). And, again, prior to providing his final statement, at 6:50 p.m., appellant was informed, via the written waiver, that he had a right to a first appearance. (S7, 1645-46). The fact that appellant knowingly and voluntarily waived this right and still chose to confess confirms that the delay did not induce the confession. In the signed affidavit,

appellant acknowledged all of the rights he would have at the first appearance. Nonetheless, appellant acknowledged his desire to cooperate: "I wish to keep on cooperating with the investigators in order to explain what happened to Jimmy Ryce, including the way he died and what happened to his body." (S7, 1645).

B. Whether The Delay In Appellant's Probable Cause Determination Should Lead To The Suppression Of All Evidence Against The Appellant

(i) Delay in the hearing

Appellant suggests that the failure to conduct a probable cause determination within 48 hours of his detention mandates suppression of the evidence against him. See County of Riverside v. McLaughlin, 500 U.S. 44 (1991); and Gerstein v. Pugh, 420 U.S. 103 (1975). The state disagrees.

The reasonableness of police conduct in this case should be viewed from the lens of the police as it existed at the time of appellant's questioning. The police were operating under exigent circumstances in this case. Jimmy Ryce, a nine-year-old child was missing. Detective Estopian testified that he suspected that Jimmy Ryce was dead but did not know that for sure when he was questioning the appellant. His goal was to obtain the truth from the appellant and find Jimmy Ryce. (T47, 9375). Officer Michael Malott testified the detectives were concerned that appellant provided information regarding the death of Jimmy Ryce: "[M]y concerns were that he had made admissions to a crime that we had not been able to disprove, and my concerns were we wanted to continue our investigation in hopes of detectives looking for or actually finding Jimmy Ryce and getting truthful information." (R21, 4772). The investigating officers conduct was certainly reasonable under the circumstances presented in this case.

As the prosecutor noted below:

> "The police were entitled and we all wanted them to have that hope, that they could find little Jimmy alive, and they had that hope. They knew that the last and the best, but perhaps the last hope of finding Jimmy alive was the defendant, who they knew was involved with Jimmy. They knew this defendant knew what happened to Jimmy. They hoped that the defendant would say, enough with the lies, I will tell you the truth. It was that hope that motivated everything the detectives with the Metro Dade Police Department did with the police, as Sergeant Gary Smith testified yesterday. He was asked by defense counsel, wasn't it your goal in this entire investigation, your entire time with the defendant, wasn't it your goal to get a confession. Very calmly Sergeant Smith responded, no, our goal was to locate a missing person." (R21, 4916-17).

Nonetheless, even assuming a timing violation in this case, the question of the appropriate remedy for a McLaughlin violation has been left open. See Powell v. Nevada, 511 U.S. 79, 86 n.1 (1994)(stating that "[w]hether a suppression remedy applies ..." "remains an unresolved question," declining to answer the question where it was "not raised, argued, or decided below."). Moreover, the determination of the reasonableness of a detention is for the trier of fact. See Kanekoa v. City and County of Honolulu, 879 F.2d 607, 611-612 (9th Cir. 1989). The trial court properly ruled that the delay in this case was reasonable based upon appellant's voluntary cooperation with law enforcement. See e.g., People v. Cipriano, 429 N.W. 781 (1988)(96 hour delay between arrest and arraignment due to defendant's progression through four different explanations as to how he came to possess decedent's car and police correspondingly attempting to verify each statement appropriate); and People v. Wheeler, 123 A.D. 411, 506 N.Y.S. 474 (2d Dept. 1986). Suppression of appellant's final confession is not appropriate in this case.

Assuming *arguendo* that a constitutional violation occurred, the evidence against appellant would not automatically be suppressed. Instead, when examining whether a Fourth Amendment violation compels the suppression of seized evidence,

the United States Supreme Court has set forth the following test:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

See Voorhees v. State, 699 So.2d 602, 610 (Fla. 1997), quoting Wong Sun v. United States, 371 U.S. 471, 487-88 (1963), (quoting John MacArthur Maguire, Evidence of Guilt 221 (1959)); see also Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984).

In other words, a Fourth Amendment violation is not synonymous with application of the exclusionary rule. See Voorhees, 699 So.2d 602, 610 (citing Arizona v. Evans, 514 U.S. 1, 12 (1995)). Rather, an analysis must be undertaken to determine whether evidence obtained following an illegal detention must be suppressed. Voorhees, 699 So.2d at 611 (citing Brown v. Illinois, 422 U.S. 590 (1975)). Relevant factors include whether Miranda warnings were given, the temporal proximity of the arrest and confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of officer misconduct. Voorhees, at 611, citing Brown, 422 U.S. 590, 603-04. The voluntariness of the statement is a threshold requirement, and the burden of showing admissibility is on the state. Id. (citations omitted).

Notably, harmless error analysis applies to a McLaughlin violation. See U.S. v. Fullerton, 187 F.3d 587 (6th Cir. 1999)(citing Powell v. Nevada, 930 P.2d 1123, 1126 (1997), cert. den., 522 U.S. 954 (1997)). Consequently, where the lower court ruled that probable cause existed theft of the Scheinhaus property, any delay in the

probable cause hearing must be deemed harmless. See Illinois v. Williams, 230 Ill.App.3d 761, 595 N.E.2d 1115, 1126-27 (1992)(Where the court found a 63 hour delay in presentment for a probable cause determination was harmless where the record indicates that defendant was aware of his right to counsel and fifth amendment privilege and invoked neither during his detention. "Thus, despite a seemingly unreasonable delay in presentment, defendant has failed to show any prejudice resulting from it."); State v Carter, 16 S.W. 3d 762 (Tenn. 2000)(finding unreasonable delay in *McLaughlin* probable cause determination was a factor to be considered in determining the voluntary nature of the confession but that confession after 72 hours in custody was nonetheless voluntary where defendant was initially arrested with probable cause, read his rights, and had the opportunity to visit with family members before finally confessing).

As discussed above under Issue II, appellant's confession was voluntarily given following multiple Miranda warnings. Additionally, the delay in the probable cause determination was directly and solely related to appellant's willingness to cooperate with law enforcement officers in their attempt to locate a missing child. No evidence presented at the suppression hearing indicated any wrongdoing or coercion on the part of the detectives. Finally, it cannot be said that the delay in holding a probable cause determination induced appellant's confession. Appellant's oral confession to having kidnapped, raped, and murdered Jimmy Ryce was provided to Detective Estopian within just a few hours of the 48 hours generally considered reasonable under McLaughlin.[22] Under these circumstances, even if a Fourth Amendment violation

[22]At approximately 8:05 p.m. on December 8th, apellant asked for Detective Estopian (R18, 4146). In the presence of Estopian and Jimenez, appellant then confessed to the sexual battery and murder of Jimmy Ryce. (R19, 4505-4509). His verbal statement

occurred, appellant has not demonstrated that any of the evidence against him was collected as a result of the delayed probable cause hearing.

While the Supreme Court has declined to pass upon the question of the applicability of the exclusionary rule to McLaughlin violations, suppression would clearly be inappropriate under the facts of the instant case. In Nix v. Williams, 467 U.S. 431, 448 (1984), the Court adopted the inevitable discovery exception which provides that evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately be discovered by legal means. "The rationale underlying the doctrine is that the prosecution should not be put in a worse position in regard to the admissibility of probative evidence by police misconduct than it would have been if there had no error or misconduct." State v. McLaughlin, 454 So.2d 617, 622 (Fla. 5th DCA 1984). By seeking exclusion of his otherwise voluntary confession in this case, the appellant seeks to place the State in a much worse position than it would have been had it afforded appellant a prompt determination of probable cause for continued detention.[23]

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concluded at 10:50 p.m. (R19, 4509). Appellant then agreed to give a formal statement which lasted from 11:45 p.m. until 2:20 a.m. on December 9, 1995, including a review of each transcribed page by appellant. (R19, 4532-4542).

[23]The Supreme Court recognized in United States v. Montalvo-Murillo, 495 U.S. 711 (1990) that a violation of the time limits of the federal bail reform did not require the drastic remedy of release of an otherwise dangerous offender. While noting that the time limits in the act recognize a vital liberty interest is at stake, the Court stated:

> Whatever other remedies may exist for detention without a timely hearing or for conduct that is aggravated or intentional, a matter not before us here, we hold that once the Government discovers that the time limits have expired, it may ask for a prompt detention hearing and make its case to detain based upon the requirements set forth in the statute.
>
> An order of release in the face of the Government's ability to prove at once that detention is required by the law has neither causal nor

In order to be subject to suppression, evidence must be considered the direct product or "fruit" of the particular government conduct that invaded the Fourth Amendment. Murray v. United States, 487 U.S. 533, 537 (1988). To be sure, the final statement was possible, at least in part, because appellant was in custody at that time. But his custody was the product of probable cause, not the product of the delay in the magistrates probable cause finding. The time of the probable cause determination would have affected appellant's custody only if there had been no probable cause to hold him. Because there was probable cause to hold appellant from the outset, none of the circumstances that could have affected appellant's statement would have been changed if the probable cause determination had been accelerated in accordance with the Supreme Court's holding in McLaughlin. As noted under Issue One, the police had ample probable cause to hold appellant not only for theft of the Scheinhaus' property, but also to hold appellant for the death of Jimmy Ryce within 48 hours of his initial detention.[24] See Gerstein, 420 U.S. 103, 120 (the standard for a probable cause hearing is the same as that for an arrest). See also Wright v. State, 633 A.2d 329, 334 (Del. 1993) (rejecting defendant's contention that any delay in presentment to question "a person arrested for one crime about an unrelated crime is unreasonable.").

In New York v. Harris, 495 U.S. 14 (1990), the Supreme Court addressed a

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> proportional relation to any harm caused by the delay in holding the hearing. When a hearing is held, a defendant subject to detention already will have suffered whatever inconvenience and uncertainty a timely hearing would have spared him. Release would not restore these benefits to him. United States v. Morrison, 449 U.S. 361 (1981)(remedies should be tailored to the injury suffered).

[24]Within the 48 hour time frame appellant had provided officers with two stories implicating himself in the death of Jimmy Ryce and the destruction of his body–i.e., the 'accident' and 'Ivan' stories.

similar suppression argument based upon an allegedly unlawful arrest. The defendant in Harris was arrested in his home. The arresting officers had probable cause to arrest him, but they did not comply with Payton v. New York, 445 U.S. 573 (1980), which forbids a suspect's arrest in his home other than pursuant to a warrant. After being taken from his home, the defendant made an incriminating statement in the station house. The Court held that the station house statement was not a fruit of the Payton violation. The Court noted that the defendant was not "unlawfully in custody" while he was detained at the station house, because "the officers had probable cause to arrest [him] for a crime." 495 U.S. at 18. Because the defendant's statement was not "the fruit of having been arrested in the home rather than someplace else," it did not have to be excluded from evidence. Id. at 19.

A similar result was reached in United States v. Daniels, 64 F.3d 311, 314 (7th Cir. 1995), where a defendant argued that the probable cause determination was unreasonably delayed because "they were collecting evidence to justify his arrest." The court rejected this argument, stating that even if the police conducted a lineup after the defendant's arrest, the police did not do this to justify the initial arrest:

> ...Daniels argument seems to interpret *Riverside* to preclude law enforcement from bolstering its case against a defendant while he awaits his *Gerstein* hearing; that is a ludicrous position. ***Gerstein* and its progeny simply prohibit law enforcement from detaining a defendant to gather evidence to justify his arrest, which is a wholly different matter.** Probable cause to arrest Daniels already existed and that is what the Ewar's affidavit reported. We therefore reject Daniels contention that he did not receive a prompt *Gerstein* hearing.

Daniels, 64 F.3d at 314. (emphasis added).

Suppression might be an appropriate remedy in a case where the police had no legitimate reason to detain a defendant and the failure to afford the defendant a prompt probable cause determination enabled the police to gather additional evidence to

justify the defendant's continued detention. This is not such a case. As noted under Issue One above, the police had probable cause to hold the appellant for grand theft at the time he volunteered to come to the station for questioning. A probable cause hearing for which appellant has no right to be present, would not have resulted in either the termination of questioning or appellant's release.[25] Appellant cooperated with the police and his continued cooperation and police attempts to verify his statements regarding the missing child were objectively reasonable under the circumstances.

Finally, assuming, *arguendo,* this Court is inclined to apply the drastic remedy of suppression to appellant's final confession, such a ruling does not mandate reversal of appellant's murder and kidnapping convictions. All of the State's compelling physical evidence, including the murder weapon and Jimmy's book bag from appellant's trailer, as well as Jimmy's blood in the horse/avocado farm trailer would have been found without appellant's final statement..[26] This evidence was gathered through search warrants and/or appellant's valid consent to conduct the search. (S7, 1713; S8, 1809; R 4613). Appellant gave two inconsistent statements placing him with Jimmy at the time of his death as well as a claim that he disposed of Jimmy's body. Moreover, appellant's request for the death penalty constitutes a damaging

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[25]The Court in Gerstein made clear that the Fourth Amendment does not require that the determination of probable cause be made in a formal, adversarial proceeding where the defendant is accorded the right to counsel and the right to introduce evidence or confront evidence against him. After a warrantless arrest, the judicial officer is simply required to make the same judgement, under similar procedures, that he would make in deciding whether to authorize an arrest warrant; as the Court noted, 420 U.S. at 120, probable cause in that context "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony."

[26]Appellant's description of the bush hook which was made during the first 48 hours of questioning would also be admissible.

admission under the circumstances. All of these statements were voluntarily made within 48 hours of appellant's initial contact with the police. Consequently, admission of the final version of appellant's confession was harmless error as to appellant's kidnapping and murder convictions.

(ii) Constitutional Challenge

Appellant also raises a constitutional challenge to Florida Rules of Criminal Procedure 3.130 and 3.133(a) which, respectively, require a first appearance to occur within 24 hours of arrest, but allow a probable cause determination within 48 hours of arrest. According to appellant, this constitutes an unreasonable delay in the timing of a probable cause determination in violation of the dictates of the McLaughlin case and the Fourth Amendment. However, where appellant eventually received a probable cause determination and where appellant voluntarily confessed to the crime, the constitutional challenge is moot. Cf. McLaughlin, at 1667 (class certification avoided mootness); See also State v. Milwood, 430 So.2d 563, 564 (Fla. 3d DCA 1983)(Fifth amendment violation rendered moot where defendant consented to search).

Moreover, on its face, Florida's Rule complies with the dictates of McLaughlin, that is a probable cause determination must be made within 48 hours. It is incumbent upon an individual defendant to show that any shorter period of time was unreasonable under the circumstances. The fact that the Florida Rules allow for a bifurcated proceeding does not render the Florida Rule unconstitutional. In this case, in addition to theft of property, the police were aware that appellant was in possession of Jimmy Ryce's book bag. Appellant eventually told the detectives false stories of Jimmy's demise. Since it is clear appellant was involved in Jimmy's

disappearance, the detectives wanted to confirm the location of the nine year old child, alive or dead. The possibility, however remote, that Jimmy remained alive certainly motivated the police in this case. As the final confession was made within just a few hours of the 48 hours provided for by McLaughlin, appellant's voluntary confession should be admitted.

C. Whether The Delay In Appellant's First Appearance Interfered With His Right To Counsel

Appellant next claims that the delay in his first appearance resulted in a deprivation of his right to counsel. However, a probable cause determination is not a "critical stage" which requires appointment of counsel. See Gerstein, 95 S.Ct. 865, 867. Thus, the delay in first appearance had no bearing on appellant's right to counsel.

Appellant's reliance on Peoples v. State, 612 So.2d 555 (Fla. 1992), is misplaced under these circumstances. First, appellant did receive counsel as soon as was feasible after his custodial restraint. Thus, no infringement of appellant's right to counsel occurred. See Traylor v. State, 596 So.2d 957, 970 (Fla. 1992).

More importantly, appellant was properly Mirandized and knowingly waived his right to counsel on at least three separate occasions prior to voluntarily confessing. Consequently, the facts of the instant case are starkly contrasted from those in the Peoples case.

In Peoples, the defendant refused to answer questions after being read his rights.

> At booking, he was told of his right to counsel and, when asked if he would like to call a lawyer of his choice, responded affirmatively and called attorney Bruce Raticoff. The following day, he attended first appearance, was declared partially indigent, and was appointed the services of a public defender. On March 4, the court relieved the public defender of representation and recognized Raticoff as attorney of record. Peoples subsequently was released on bail, and Raticoff was replaced by

appointed counsel. Peoples, 612 So.2d 555, 556.

Following defendant's release and after the defendant clearly retained counsel, the police tape recorded several phone conversations between the defendant and his co-defendant.

Ultimately, this Court ruled that, by taping the conversations, law enforcement officials acted improperly by knowingly circumvented the defendant's right to counsel. Peoples, 612 So.2d at 557. This ruling simply does not apply to the instant case wherein appellant knowingly and voluntarily waived his right to counsel on multiple occasions prior to giving his voluntary confession.

Finally, as in Peoples, should any error relating to appellant's right to counsel be found, such error must be deemed harmless. Peoples, 612 So.2d at 557 (citing State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986)).

D. Whether The Failure To Allow The Public Defender To Speak To Appellant Violated His Sixth Amendment Right To Counsel.

Appellant maintains that his Sixth Amendment right to counsel was violated when Assistant Public Defender Georgi was denied her request to speak to the individual in custody relating to Jimmy Ryce's disappearance. However, once again, appellant repeatedly waived his right to counsel prior to confessing. Thus, appellant's statements were properly admitted. See Smith v. State, 699 So.2d 629 (Fla. 1997)(fact that the right to counsel had attached is not alone enough to invoke Sixth Amendment; accused must actually invoke right to counsel to receive protections). See also Harvey v. State, 529 So.2d 1083 (Fla. 1988)(where public defender took it on himself to go to police station to see if defendant, who had not requested an attorney, needed a lawyer, police had no duty to let public defender talk to defendant while he was making his statement to police, following waiver of rights).

ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REMOVING A PRIOR RESTRAINT AGAINST SHOWING VISUAL DEPICTIONS OF JURORS.

Appellant claims that the trial court's reversal of his prior restraint against the media on publishing or broadcasting the jurors' images violated his right to a fair trial. Appellant's argument lacks any merit.

A. The Issue Is Moot

To the extent appellant is simply arguing the trial court erred in refusing to prohibit the media from photographing jurors, the State submits that this question is moot. Appellant did not appeal this order.[27] The trial is over, the issue as presented to this Court is moot. See generally Vasilinda v. Lozano, 631 So.2d 1082, 1085 (Fla. 1994)(declining to address journalists appeal of an order prohibiting news media from photographing jurors where the trial had ended and the defendant had been acquitted); Sarasota Herald-Tribune Co. v. Talley, 523 So.2d 1163 (Fla. 2d DCA 1988)(finding that although a "gag" order issued at the time of trial may have departed from the essential requirements of the law, the issue was moot as the defendant was convicted as the petition for review was pending). Consequently, this Court should decline appellant's invitation to address this point on direct appeal.

B. The Trial Court Did Not Abuse Its Discretion In Removing The Prior Restraint Against The Media

In any case, assuming a merits review, it is clear the trial court did not abuse its discretion in refusing to impose a prior restraint upon the publication of juror images. And, appellant has utterly failed to establish any prejudice emanating from the trial

[27]Defense counsel argued against reconsideration of this issue below by pointing out that the media representatives did not appeal the order of the trial court. Thus, defense counsel was at least aware of the availability of an interlocutory appeal on this issue.

court's refusal to impose such a restraint upon the media in this case.

Appellant failed to show any particularized need for prohibiting the publication of prospective jurors images.[28] Although the case had generated a large amount of public interest, the case had changed venue from Miami to Orlando. And, the defense could cite only generalized concerns about the possibility of undue juror influence rather than well articulated, fact based allegations of juror influence or tampering. (T37, 7377-85). After hearing the argument of counsel, the trial court stated, that its change in venue warranted reconsideration of its earlier order:

> At this time the court Court does not believe that its order directing the news media not to photograph the jurors would withstand appellate review. The Court relies upon the recent case of Sunbeam TV versus the State of Florida and Roberto Hernandez, which is a third DCA case.
>
> It is therefore ordered that the Court's previous order prohibiting the media from photographing the jurors is vacated. The Court will revisit this issue if the facts and circumstances justify at a future date.

(T37, 7388-89).

In State v. Palm Beach Newspapers, 395 So.2d 544 (Fla. 1981) this Court considered the psychological impact of having cameras present on the trial participants. This Court disregarded general assumptions or fears engendered by such media coverage, noting: "The fact remains, however, that the assertions are but assumptions unsupported by any evidence. No respondent has been able to point to any instance during the pilot program period where these fears were substantiated. Such evidence as exists would appear to refute the assumptions." 395 So.2d at 775. Appellant has offered little more than assumptions about the potential impact of photographing the jurors in this case.

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[28]The media in this case protested against imposition of any prior restraint on publication in this case but advised the court that it was against their policy to publish or broadcast juror images during a trial. (R10, 1892, 1894).

In Times Pub. Co. v. State, 632 So.2d 1072, 1075 (Fla. 4th DCA 1994), the court determined that measures to prevent publication of juror photographs could not withstand constitutional scrutiny, particularly where the location of the trial had been removed from the area of extensive publicity:

> Furthermore, we do know that in response to the publicity and the thwarted voir dire in Hillsborough County, the judge moved the trial to Palm Beach County. There is nothing in the record to suggest that this relocation would not adequately mitigate any harmful effects of the media coverage in Tampa. There was no showing that the publicity of the trial in the Palm Beach area was so pervasive as to prevent a fair trial. Thus, the preventative measures adopted by the trial court do not withstand constitutional scrutiny in this case.

The court emphasized the public nature of a trial: "We reiterate that because a trial is a public event, '[t]hose who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire [in] proceedings before it.'" Times Pub. Co., 632 So.2d at 1075 (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

After the trial judge reconsidered his earlier ruling in this case, he nonetheless indicated that he was willing to revisit the issue later during the trial: "Again, the Court will readdress this issue if it's warranted in the future. So if the issues change and you need to bring something to the Court's attention, please notify the Court." (T37, 7390-91). Appellant's claim is highly speculative in that defense attorneys at trial did not allege that any of the jurors were actually shown in any prejudicial manner through any media. Consequently, appellant's claim that the trial court erred in lifting its restraint against the media in this case apparently had no impact; that is, we cannot assume in the absence of evidence to the contrary that the media, against their stated policy, actually published juror photographs during the trial. And, in fact,

there was no evidence to suggest that any undue influence was exerted upon the jurors as a result of media coverage. Thus, this point may be disposed of on appellant's complete failure to establish any prejudice emanating from the trial court's ruling in this case. See Sullivan v. State, 303 So.2d 632 (Fla. 1974)(reversible error cannot be predicated on mere conjecture).

While appellant makes much of the fact that apparently one of the defense attorneys in this case received death threats[29], there is no evidence to suggest that any jurors were contacted by the media, much less threatened or in any way harassed as a result of media coverage. Consequently, this case is distinguishable from Shepard v. Maxwell, 384 U.S. 333, 16 L.Ed.2d 600, 609 (1966), where the jurors names and addresses were published in local newspapers and all prospective jurors received phone calls and letters regarding the impending prosecution. In Shepard, the Supreme Court observed: "The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Shepard." 16 L.Ed.2d at 616. There is no similar indication of "bedlam" in this record. And, in fact, the trial court took precautions to ensure the photographer remained as unobtrusive as possible, stating: "The still photographer, if there is one going to be in court during the proceedings, will have to remain seated in one seat throughout the course of the proceedings while the jurors are in the courtroom." (T37, 7391). See Jent v. State, 408 So.2d 1024, 1029 (Fla. 1982), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982)("In order to have cameras excluded from a courtroom during trial, a defendant must show prejudice of constitutional dimensions.").

[29]Evidently the threat was received when the case was in Miami and no evidence of additional threats was presented when the case was moved to Orlando.

To insure the jurors' privacy, the trial court provided the jurors with numbers in order to protect their identity during trial. A step not taken during the Shepard trial. The trial court in this case advised the prospective jurors: "I want to advise you that cameras are allowed in the courtroom – they are here today – and the case will be covered by news media. However, I have instructed the news media not to publish the names of any of the jurors. Therefore, throughout the jury proceedings, you will be referred to by your juror ID number and not by your name. I am taking this step in order to ensure that you will be able to reach a verdict in this case free of any outside influences." (T38, 7401-02).

Appellant's claim that the trial court impermissibly prohibited individual voir dire on the presence of cameras in the court room is without merit. Of course, "[t]he determination of whether to grant individual or sequestered voir dire rests in the trial court's sound discretion." San Martin v. State, 717 So.2d 462, 467 (Fla.), cert. denied, 143 L.Ed.2d 553 (1998)(string cites omitted). The trial court's questions to the entire panel were sufficient to explore the possibility of prejudice emanating from the presence of cameras. See United States v. Brunty, 701 F.2d 1375, 1378-79 (11th Cir. 1983)(trial court did not abuse its discretion in refusing to allow individual voir dire where questions posed by the court to the entire panel "adequately covered those matters which the defendant had a legitimate interest in bringing out, and were clearly sufficient to assure that prejudice against the defendant due to his being charged with narcotic violations would be uncovered.").

When a juror expressed concern over being photographed, the trial court stated to the entire panel:

> Just so you know, ladies and gentlemen, cameras are allowed in the courtroom and they will be photographing what goes on in the courtroom

> and the Court has no control over that. Does it present a problem with you, sir, if you were on the jury?

(T41, 8055). Although prospective juror 1978 expressed some concern about being photographed because he has friends in Miami, he stated that this possibility would not have an impact upon his ability to serve as a juror. (T41, 8056). The trial court then expanded his inquiry to the entire panel, asking the jurors if anyone had a problem with cameras in the courtroom. (T41, 8056-57).

Since no juror indicated that they had a problem with the cameras, the trial court proceeded with jury selection without individual voir dire. Appellant has not offered on appeal or during jury selection below any additional questions which he believed were necessary to pose to the venire on an individual basis.

The issue came up again with regard to prospective juror 2038 who expressed reservation about being photographed. The trial court denied defense counsel's request for individual voir dire of the panel, but allowed individual voir dire of the jurors who expressed some reservation about being photographed. (T41, 8089-90, 8102-110). The trial judge later granted the defense cause challenges to both jurors who expressed concern over the possibility of being photographed.[30] (T41, 8117-18).

Fatal to appellant's claim is the fact that not a single juror who expressed concern over being photographed actually sat on appellant's jury. And, again, appellant cannot show that any juror was threatened or molested in this case. As for appellant's argument that the trial court refused to allow defense counsel to make a sufficient record, the trial court advised defense counsel that the media issue could be

[30]Juror 1978 said although he was uncomfortable with the possibility of his image being broadcast, it would not affect his ability to deliberate in this case: "I will say bottom line no." (T41, 8107). Despite this answer, the trial court granted the defense challenge for cause. (T41, 8118).

raised again if he had any additional evidence to present. (T37, 7390-91). The defense presented no additional evidence. No relief is warranted. See Heuss v. State, 687 So.2d 823, 824 (Fla. 1996)(affirming duty of appellate court to test for harmless error even when it is not argued by the State which is consistent with legislative directives "which prohibit reversal if the error does not result in a miscarriage of justice or injuriously affect a substantial right of the appellant.")(citing Florida Statutes 59.041 and 924.33 (1995))

ISSUE V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE A BLOOD STAINED MATTRESS INTO EVIDENCE.

Appellant claims the trial court reversibly erred in admitting into evidence a blood stained mattress found at the scene of the rape and murder of Jimmy Ryce. The State disagrees.

The first the State learned of appellant's rather interesting theory that Mrs. Scheinhaus and her son Ed conspired to frame him for the murder of Jimmy Ryce was during defense counsel's opening statement. The defendant's allegation that Ed was the one responsible for the murder of Jimmy Ryce and disposal of his body was never mentioned to the police during any of the several statements appellant provided to the police. Apparently, appellant maintains that his confession fit the physical evidence found by the detectives in this case so well because the detectives were simply force feeding him details that they coerced him into putting in his final statement. The State argued that the probative value of the mattress was as follows:

> Now, if the police were going to be making up a confession, feeding the facts to the defendant, it would be likely that they would have told the defendant to say that the body was laid on the mattress, because the blood on the mattress is very, very apparent.

> The defense is going to argue that the police officers knew all of the evidence before the defendant made his statement. Well, what's also important to show is that there were things that, had they been making up the statement, they would have included in the statement; for example, the blood on the mattress.
>
> The defense is going to say, but they knew that there was blood here. But the fact that there was blood here and here, and only in the defendant's statement does he mention blood here (indicating), this becomes very relevant; because we can say to the jury, but, wait, there was also blood on the mattress that's located over here. If the police were going to make up a statement, they would have included the blood that was on this mattress over here.
>
> That's why it's relevant. That's why it's admissible.
>
> (T48, 9583-84).

"A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed." San Martin, 717 So.2d at 471 (citing Welty v. State, 402 So.2d 1159, 1162-63 (Fla. 1981)). It is also within the trial court's discretion to determine whether the probative value of evidence sought to be admitted is substantially outweighed by the danger of unfair prejudice. State v. McClain, 525 So.2d 420, 421-422 (Fla. 1988). After hearing the argument of counsel, the trial court stated, that based upon the defense opening statement and cross-examination, the bloody mattress was relevant and admissible. (T48, 9586). The trial court's decision should be upheld on appeal. See Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980)("If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.").

In addition to the argument presented by the state below, it should be remembered that the mattress was part of the murder scene and was apparently reflected in photographs of the trailer introduced at trial. The fact that the mattress, which had visible blood on it, was tested, was also relevant to show that the police did not ignore an obvious piece of potential evidence. The prejudicial impact, if any of

this evidence, was minimal if nonexistent, as it was stipulated below that the blood found on the mattress did not belong to either the appellant or Jimmy Ryce. (T49, 9651). The trial court provided a cautionary instruction to the jury below, telling the jury that the mattress was not related to this case and that the source of the blood stain was not Jimmy Ryce or the appellant. (T50, 9859-60).

Appellant contends that the State's argument below was disingenuous because "it is hard to imagine veteran police officers making up a story about the bloody mattress until the source of the blood was confirmed." (Appellant's Brief at 69). Yet appellant's defense was essentially that these veteran police officers coerced a false confession out of the appellant, force feeding him details to put in his confession. See generally Morgan v. State, 603 So.2d 619 (Fla. 3d DCA 1992)(in light of defense counsel's opening statement attacking a witnesses credibility for not immediately reporting shooting, the State was allowed to illicit that the witness did not come forward out of fear for his own life). Any contention that veteran police officers force fed appellant a false confession, including details such as where the bloody body was placed after being shot, well prior to confirming the sources of blood found in the trailer is, indeed, ridiculous. Yet that was essentially appellant's argument below. If detectives were simply feeding appellant details to place in his confession, why not simply tell appellant to say Jimmy was murdered or laid down on the mattress in the trailer to match perhaps the most obvious blood stain in the trailer. The answer to that question, of course, is that the detectives did not simply tell appellant what to say. The fact that blood matching the blood of a child of Claudine Ryce was found in the exact locations mentioned in appellant's final confession, indicates just how far

fetched the defense theory was in this case.[31]

Assuming, *arguendo*, any error in admitting the evidence, the error was harmless in this case. There is no reason to believe the simple fact that a mattress in the trailer had unidentified blood on it had any negative impact upon the jury in this case. Far more damaging to the appellant was the evidence directly bearing on his guilt, including a voluntary, detailed, and corroborated confession. Simply because the State also presented evidence that a bloody mattress was found in the trailer was insignificant in light of the other compelling evidence of appellant's guilt. DiGuilio, 491 So.2d at 1139.

ISSUE VI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL FOR SEXUAL BATTERY WHERE THE PHYSICAL EVIDENCE CORROBORATED APPELLANT'S DETAILED CONFESSION TO THE CRIME.

Appellant maintains that the trial court erred in failing to grant his motion for a judgment of acquittal for the offense of sexual battery. Specifically, appellant argues that the State failed to present sufficient evidence to establish the corpus delicti to support the conviction. The State disagrees.

Since the State's evidence in this case included both direct and circumstantial evidence, the State is entitled to an extremely favorable standard of review. "'A court should not grant a motion for a judgement of acquittal unless here is no view of the evidence which the jury might take favorable to the opposite party.'" Deangelo v. State, 616 So.2d. 440, 442 (Fla. 1993)(quoting Taylor v. State, 583 So.2d. 323, 328 (Fla. 1991)). In moving for a judgement of acquittal, appellant admits "the facts in

[31]That is not to say a better defense theory existed, the evidence against the appellant was quite simply, overwhelming.

evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence." Taylor v. State, 583 So.2d. 323, 328 (Fla. 1991).

As to sexual battery, the State presented evidence that tended to corroborate appellant's detailed confession to having sexually battered Jimmy at the horse farm trailer. As the prosecutor argued below:

> ...Taking that in mind as the standard, the state submitted we have sufficient corpus delicti for sexual battery. Again, you have the fact that Jimmy Ryce, who was under the age of 11, is missing; that his blood is found in a remote trailer at the horse farm or avocado field' that a lubricant is found in the trailer' that when his body is recovered his pants are found.
>
> Judge, if you look at the pictures, they are unzipped and opened. What's even more interesting is that he obviously had been undressed because one of his socks is missing. His shoe was off one of his feet and one of his socks is missing. So clearly he had been undressed at one point circumstantially.
>
> It's the state's position that is sufficient corpus – even the cases cited by the defense –- basically when you have a situation where the victim's clothes are off the victim, that is sufficient corpus.
>
> (T51, 10059-61).

In proving corpus delicti "circumstantial evidence is sufficient." Sochor v. State, 619 So.2d 285, 289 (Fla. 1993)(citing Buenoano v. State, 527 So.2d 194 (Fla. 1988). "Proof beyond a reasonable doubt is not necessary." Id. (citing Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986)); Bassett v. State, 449 So.2d 803 (Fla. 1984). The State introduced evidence independent of appellant's confession that tended to show a sexual battery had been committed.

In addition to the evidence noted above by the prosecutor tending to establish a sexual battery, overall, appellant's confession was corroborated in every significant respect. 1) The body was found where appellant claimed he put it; 2) the condition

of the body matched appellant's description of the dismemberment; 3) the tool appellant described as the one he used to dismember Jimmy's body matched a tool found on the Scheinhaus property; 4) ballistics evidence confirmed that the handgun found in appellant's trailer was the murder weapon; 5) the path of the bullet through Jimmy's body was consistent with appellant's description of the fatal shooting; 6) the murder weapon had appellant's fingerprint on it; 7) blood of Jimmy Ryce was found at the horse farm trailer in the location where appellant claimed he shot Jimmy; 8) empty shell casings were found in appellant's trailer in accordance with appellant's confession; 9) Jimmy's school book bag was found in appellant's trailer and the contents had his fingerprints on them; 10) lubricant found at the horse farm matched the location and general description provided by appellant of the lubricant he used to sexually assault Jimmy; 11) appellant claimed Jimmy told him his brother had a red car: Jimmy's brother owned a red sports car.

This is not an exhaustive list of the circumstances establishing the general truthfulness of appellant's confession, but it clearly shows that appellant's detailed confession was well corroborated by physical evidence in this case. Beyond the general corroborating physical circumstances establishing that appellant's confession is truthful and reliable, particular facts do tend to corroborate a sexual battery conviction. In other words, the State presented some evidence independent of appellant's confession that "'tends to show that the crime was committed.'" Hamilton v. State, 703 So.2d 1038, 1045 (Fla. 1997)(quoting Myers v. State, 22 Fla.L.Weekly S129 (Fla. March 13, 1997)).

Significantly, as noted above, a bottle of lubricant was found in the location in the trailer that matched the location and type of lubricant appellant claimed he used

to anally rape Jimmy. Jimmy's body was found with one tennis shoe on and one tennis shoe off. In addition, one sock was on and one sock was missing. (T50, 9953). Moreover, as reflected in a photograph, Jimmy's pants were unbuttoned and the zipper was open. (S-9, 2081). This evidence corroborates the fact that Jimmy was unclothed at some point while in appellant's control. See Schwab v. State, 636 So.2d 3, 6 (Fla. 1994)(State presented sufficient evidence of corpus delicti for murder, kidnapping and sexual battery where the child victim's nude body and cut off clothing was found in a footlocker in a remote location). These facts, along with the other significant corroborating factors listed above establish that appellant's final statement was trustworthy and reliable. The State sufficiently provided corroboration of sexual abuse to support a sexual battery conviction based upon appellant's detailed account of the offense.

If additional proof of corpus delicti is missing, it is only because appellant seeks to gain the benefit of his having murdered Jimmy Ryce thereby eliminating him as a witness. Moreover, appellant seeks the benefit of having successfully hidden Jimmy's body so that the natural decay processes eliminate physical evidence of sexual abuse. The obvious corroboration lies in the fact that a grown man took a nine year old boy at gunpoint, not to steal items of value, but to sexually assault him. Jimmy's murder was the result of appellant's attempt to conceal his kidnapping and capital sexual battery offenses. See United States v. Abigando, 439 F.2d 827, 832 (11th cir. 1971)("Corroboration can be held sufficient if the accused by his confession demonstrates knowledge of the time, place or method of the offense.").

Assuming, *arguendo*, this Court finds some defect in the corpus delicti for sexual battery in this case, the State asks this Court to modify the existing strict corpus

delicti rule which has outlived its usefulness. Against this backdrop of cases requiring that relevant evidence be admitted unless excluded by a provision of the evidence code currently exists the archaic and much criticized doctrine of corpus delicti. This doctrine is not contained in the evidence code as a requirement for the admission of statements of a defendant nor is it based on specific constitutional requirements. Justice Shaw in his concurring and dissenting opinion in Burks v.State, 613 So.2d 441, 445 (Fla. 1993), stated the following:

> ...I agree with the supreme court of North Carolina [State v. Parker, 315 N.C. 222, 337 S.E.2d 487, 493 (1985)] that the most workable rule is the one laid down for federal courts--the evidence independent of defendant's statements need not prove the corpus delicti as long as the government introduces substantial independent evidence which would tend to establish the trustworthiness of the defendant's statements. Id. at 495. See State v. Paris, 76 N.M. 291, 414 P.2d 512, 515 (1966) ("It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth.") (quoting Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954)). See also State v. Yoshida, 44 Haw. 352, 354 P.2d 986 (1960) ("trustworthiness of confession" test adopted instead of corpus delicti); State v. George, 109 N.H. 531, 257 A.2d 19 (1969) ("sufficient independent evidence" test instead of corpus delicti).
>
> **The rule requiring that the corpus delicti be proved before a confession can be admitted is an anachronism. It is a technicality that impedes rather than fosters the search for truth.** I would therefore recede from cases requiring that the corpus delicti be proved before a confession can be admitted into evidence and adopt the "trustworthiness" test announced in the above cases.

Id. at 445-446. (emphasis added).

The State is not unmindful of this Court's recent decision in J.B. v. State, 705 So.2d 1376 (Fla. 1998), where this Court declined the State's invitation to abolish the *corpus delicti* rule. The State is not asking this Court to abolish the *corpus delicti* rule entirely in this case. However, the intermediate approach adopted by federal courts and an increasing number of other jurisdictions ensures that a conviction will not rest

on completely uncorroborated confessions but also ensures that the guilty will not go unpunished simply because the State may not establish an independent basis for every element of an offense.

While the doctrine had some viability in the era of common law crimes, it no longer performs its original function. This Court should at least restrict the doctrine to its original purpose. The doctrine originally was designed to ensure that confessions were obtained and used only in cases where a crime occurred.[32] Achieving this goal does not require that the State prove every element of the charged offense independent of the confession. It could be achieved by employing the federal test which requires corroboration of the confession or with a test which requires the showing that some offense was committed and allowing the confession to establish some elements of the charged offense.[33] See Opper v. United States, 348 U.S. 84 (1954)(Opting for the less stringent approach requiring only that there be extrinsic evidence of a corroborative nature establishing the credibility of the admission); See United States v. Davanzo, 699 F.2d 1097, 1101 (11th Cir. 1983)("It is well settled, however, that there need not be corroborative evidence proving every element of the offense before an admission can be received in evidence. All that is necessary is for 'the government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement.'" (quoting Opper v. United States, 348

[32]While the principle of *stare decisis* is very important, this Court has recognized that "*stare decisis* is not an ironclad and unwavering rule that the present always must bend to the voice of the past, however, outmoded or meaningless that voice may have become." Haag v. State, 591 So.2d 614, 616 (Fla. 1992). "It is a rule that precedent must be followed *except* when departure is necessary to vindicate other principles of law or to remedy continued injustice." Id. (citing McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 323 (1935)).

[33]Appellant's final confession was not simply made in front of the police, but neutral observers, a court reporter [stenographer] and an interpreter.

U.S. 84, 93 (1954)); Canet v. Turner, 606 F.2d 89, 91 (11th Cir. 1979)("A confession is admissible if there is *some* extrinsic evidence tending to support it, and some elements of the offense may be proved entirely on the basis of the corroborated confession.")(citations omitted).

As noted above, the State met its burden in this case, the physical circumstances of the circumstances surrounding the kidnaping, rape, murder, and disposal of Jimmy's body exactly match the details provided in appellant's confession. Application of a strict *corpus delicti* rule in a case such as this works only to a criminal's advantage. It simply benefits the appellant, who murdered the child victim and successfully disposed of the victim's body in such a manner which greatly limited the gathering of physical evidence to support a sexual battery conviction. To avoid an unjust result, the State urges that the corpus delicti rule be altered or clarified and the federal rule, which has not proved unworkable or unfair, be adopted.

Finally, even should this Court disapprove of appellant's conviction for capital sexual battery, reversal of appellant's conviction or sentence is unnecessary. The State presented overwhelming evidence to support appellant's kidnapping and premeditated and/or felony murder convictions. Moreover, neither the jury or trial court relied upon the in the course of sexual battery aggravator to support appellant's death sentence. (T56, 11032-33). Appellant's convictions and sentence should be affirmed.

ISSUE VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PHOTOGRAPHS OF THE CHILD VICTIM.

Appellant next claims that the trial court erred in admitting several gruesome photographs of Jimmy's dismembered body. The photographs were admitted during

the medical examiner's testimony and were used to depict the fatal wound and to exhibit the injuries caused to the body when it was dismembered. Since the photographs in this case were clearly relevant, the photographs were properly admitted over appellant's objection.

This Court has explained that "the admission of photographic evidence is within the trial judge's discretion and a trial judge's ruling on this issue will not be disturbed on appeal unless there is a clear showing of abuse." Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995); Wilson v. State, 436 So.2d 908, 910 (Fla. 1983). This Court has upheld the admission of photographs where they are relevant to "explain a medical examiner's testimony, to show the manner of death, the location of wounds, and the identity of the victim." Larkins v. State, 655 So.2d 95, 98 (Fla. 1995).

The photographs admitted in this case were relevant to several issues. They depicted the nature and extent of the victim's injuries. The photographs also shed light on the nature of the force and violence used by the appellant. A critical element in a first degree murder case because the State ordinarily establishes intent through circumstantial evidence. Moreover, the medical examiner's testimony was important to corroborate the appellant's confession[34], as to the location of the fatal wound and to corroborate that appellant dismembered the victim using the implement he sketched out during his confession. (T50, 9947-9952, 9959-60, 9980 [bullet path]; 9963-78

[34]The prosecutor observed below:

> ...the defendant says in his statement that he was across the room from the victim at the time he was shot. That at the time of the shooting, the victim was going toward the door. The defendant had in some fashion tripped and then where he was down on – actually I believe he says on the ground or down low, he fires at the victim which would indicate an upward angle towards the victim as he's going out the door. All this doctor is going to testify to is that that theory would be consistent with the defendant's statement. (T50, 9982).

[bush hook injuries]).

On appeal, appellant does not specifically identify which photographs were cumulative or so prejudicial that they should not have been admitted at trial. As for an objection to allegedly cumulative photographs showing the path of the bullet, the State proffered the medical examiner's testimony outside of the jury's presence. The medical examiner specifically testified that the photographs showing injury to the organs and specifically the heart were not cumulative. The medical examiner testified:

> Well, first of all, there are no photographs duplicative of 22 and there are no photographs duplicative of 24. In terms of 21, I can see some of the injuries in 24 as shown in 21; however, it's out of sequence in terms of my explanation that I've aligned in these slides. So it would be kind of out of sequence to take that out. It's also a much further distance as shown in 24.

(T50, 9899-900). The doctor also explained the difference between state's exhibits 22 and 29, refuting defense counsel's suggestion that these two photographs were cumulative. (T50, 9901-02).

Appellant essentially seeks to exclude the evidence of his homicidal violence against the victim. While the photographs are no doubt unpleasant; this is because appellant chose to sexually assault, murder, and then dismember a nine year-old child. See Henderson v. State, 463 So.2d 196, 200 (Fla. 1985)("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments."). The trial court did not abuse its broad discretion in admitting the photographs into evidence.[35]

ISSUE VIII

[35]Even assuming error in admission of some or all of the photographs, the error was harmless given the overwhelming evidence of appellant's guilt. See Peterka v. State, 640 So.2d 59, 69-70 (Fla. 1994), cert. denied, 130 L.Ed.2d 884 (1995).

THE CAPITAL SENTENCING PROCESS WAS FAIR, CONSTITUTIONAL, AND RENDERED A JUST RESULT IN THIS CASE.

A. Appellant's Argument Against Improper 'Doubling' Against Application Of The In The Course Of A Kidnapping Aggravator Has Repeatedly Been Rejected By This Court

Appellant contends that instructing the jury on in the course of a kidnapping aggravator and instructing the jury on felony murder may have resulted in an improper doubling of an element of the offense and an aggravator. (Appellant's Brief at 75). Similar challenges have been repeatedly rejected by this Court and federal courts. See e.g. Hudson v. State, 708 So.2d 256, 262 (Fla. 1998)(rejecting argument that murder in the course of a felony aggravator is an invalid, automatic aggravator); Blanco v. State, 706 So.2d 7, 11 (Fla. 1997), cert. denied, 142 L.Ed.2d 76 (1997)(rejecting constitutional challenge to commission during the course of an enumerated felony aggravator);[36] Johnson v. Singletary, 991 F.2d 663, 669 (11th Cir. 1993)("Nothing in *Stringer* indicates that there is any constitutional infirmity in the Florida statute which permits a defendant to be death eligible based upon a felony murder conviction, and to be sentenced to death based upon an aggravating circumstance that duplicates an element of the underlying conviction.")(discussing Stringer v. Black, 503 U.S. 527 (1992); Adams v. Wainwright, 709 F.2d 1443, 1446-47 (11th Cir. 1983), cert. denied, 104 S.Ct. 1432 (1983) (rejecting argument that Florida has impermissibly made the death penalty the "automatically preferred sentence" in any felony murder case because one of the statutory aggravating factors is the murder taking place during the

[36] In Blanco, Justice Wells noted the value of stare decisis and the value of precedent: "If the doctrine of stare decisis has any efficacy under our law, death penalty jurisprudence cries out for its application. Destabilizing the law in these cases has overwhelming consequences and clearly should not be done in respect to law which has been as fundamental as this and which has been previously given repeatedly thoughtful consideration by this Court." 706 So.2d 11 (Wells, J., concurring).

course of a felony).

B. The Trial Court Did Not Err In Finding Jimmy's Murder Was For The Purpose Of Avoiding Or Preventing A Lawful Arrest

Appellant next contends that the trial court erred in finding the avoiding arrest aggravator under the facts of this case. In the sentencing order, the trial court stated the following:

> ...The totality of the circumstances of this case would suggest that the sole or dominant motive for the murder of Samuel James Ryce was the elimination of this witness. The defendant stated in his confession that while he intended to release the victim in a remote area of the county he was unable to do so because a helicopter was conducting a search of the area. The defendant stated that he believed that if he released the victim at this time he would be caught. The defendant shot and murdered the victim when he attempted to escape from the trailer where he was being held captive. The evidence in this case clearly established that the defendant's sole motive for the murder fo the victim was to eliminate the only witness of the kidnaping and sexual battery.
>
> The Court finds that this aggravating circumstance has been proven beyond a reasonable doubt.
>
> (See Appendix)

(R41, 9075). The trial court's findings have support in the record and should be affirmed on appeal.

As this Court explained in Zack v. State, 753 So.2d 9, 20 (Fla. 2000):

> Application of the "avoiding lawful arrest" aggravator requires strong proof that the dominant motive for the murder was witness elimination. *See Mahn v. State*, 714 So.2d at 402. This aggravator has been applied to cases in which the evidence supported a finding that the victim would have summoned the authorities and in cases where the defendant had expressed an apprehension regarding arrest. *See, e.g., Sliney v. State*, 699 So.2d 662 (Fla. 1997) (aggravator justified where defendant testified that his accomplice told him that "Sliney would have to kill the victim because '[s]omebody will find out or something'"); *Peterka v. State*, 640 So.2d 59 (Fla. 1994) (aggravator applicable where defendant, who feared incarceration, had established a new identity which the victim threatened to expose).

The State notes that circumstantial evidence alone has been held sufficient to

establish this aggravator. See Preston v. State, 607 So.2d 404 (Fla. 1992)("The only reasonable inference to be drawn from the facts of this case is that Preston kidnapped Walker from the store and transported her to a more remote location in order to eliminate the sole witness to the crime."). The State had strong circumstantial evidence supporting this aggravator in the instant case. Appellant took Jimmy to an isolated location, murdered him, dismembered his body in another location, and placed the parts in concrete. These circumstances strongly suggest an attempt to conceal his offenses against the child victim. See Hall v. State, 614 So.2d 473, 477-478 (Fla. 1993) (circumstantial evidence can be used to prove this aggravator... Here, the evidence leaves no reasonable inference except that Hall and Ruffin killed the victim to eliminate the only witness to their having kidnapped and raped her and having stolen their car.); Knight v. State, 746 So.2d 423 (Fla. 1998) (evidence supported conclusion that the defendant executed victims in remote location to avoid arrest after kidnapping and robbing them).

When this circumstantial evidence is combined with appellant's confession, it becomes clear that the State presented overwhelming evidence to support the avoiding arrest aggravator. As appellant explained to a detective:

> And while he was looking for the helicopter, Jimmy is still close to the front entrance of the trailer. He said that Jimmy made a dash for the door, Jimmy ran for the door trying to escape. He said that he tried to reach up to Jimmy, but he got tangled p on the door of the bathroom and at that point he said he took out the revolver belonging to Ms. Scheinhaus, he pointed the handgun in the direction of Jimmy, fired one time hitting him...

(T47, 9225-26). And in his own words [transcribed statement]: "It was the only way that I had in order –- I'm sorry. It was the only way that I had in order to avoid –- to prevent him from going out." (T47, 9290).

According to appellant, the victim was only killed when he attempted to escape. With a police helicopter overhead, appellant clearly feared his crimes against the child victim would be discovered. Jimmy was killed for no other reasonable, discernible purpose than to stop his flight and his alerting the authorities to the criminal acts appellant committed against him. See Gore v. State, 475 So.2d 1205, 1210 (Fla. 1985)(avoiding arrest aggravator properly found where victim was killed in the process of escaping to prevent her from identifying the defendant as the perpetrator of the kidnapping).

C. The Trial Court Properly Found That The Murder Was Heinous, Atrocious Or Cruel: The Standard Instruction Is Not Unconstitutionally Vague

This Court has repeatedly rejected constitutional challenges to the standard instruction on heinous atrocious or cruel aggravator provided to the jury in this case. For example, in Monlyn v. State, 705 So.2d 1, 6 (Fla. 1997), this Court disposed of such a challenge, stating:

> In issue eleven, Monlyn argues that the instruction on heinous, atrocious, or cruel aggravating circumstance was unconstitutional. This argument is without merit. We have approved this instruction on numerous occassions. *See e.g. Geralds v. State*, 674 So.2d 96 (Fla.), cert. denied, _ U.S. _, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996); *Merck v. State*, 664 So.2d 939, 943 (Fla. 1995); *Hall v. State*, 614 So.2d 473, 478 (Fla. 1993).

And, as for appellant's invitation to recede from this precedent, this Court has specifically declined to do so. In Davis v. State, 698 So.2d 1182, 1194 (Fla. 1997), this Court stated:

> Finally, Davis attacks the heinous, atrocious, or cruel (HAC) aggravator and the adequacy of the instruction given to the jury. The instruction given in this case was identical to the one given in *Hall v. State*, 614 So.2d 473, 478 (Fla. 1993). We found that the instruction "define[d] the terms sufficiently to save both the instruction and the aggravator from vagueness challenges." Id. We see no reason to recede from Hall.

Appellant has offered no compelling reason to depart from the well settled precedent

of this Court approving of the standard jury instruction.

Appellant's cryptic argument against application of this factor based upon the facts of this case need not long detain this Court. Appellant simply alleges that the support for this aggravator comes from appellant's last confession. He does not argue which factual finding of the trial court has no evidentiary support. And, as a matter of assessing credibility and evidentiary weight, this was a matter within the province of the trial court below. The trial court found as follows:

> ...The evidence in this case established that the victim, Samuel James Ryce, was abducted at gunpoint by the defendant. The defendant approached the victim with a gun in his hand and asked him if he wanted to die. The victim became frightened and answered no and was then ordered by the defendant to get into his truck. The defendant then drove his vehicle to a trailer in a remote area of the county where he sexually battered Samuel James Ryce. After committing the sexual battery the defendant drove the victim to other locations before he finally returned the victim to the trailer. During this period of time the victim on at least two (2) occasions asked the defendant if he was going to be killed. The defendant, Juan Carlos Chavez, never told Samuel James Ryce that he was not going to die nor did he take any action to alleviate the victim's fear of death. In fact, the evidence revealed that the defendant played 'mind games' with the victim by asking him what he thought the defendant could do with him. The defendant also stated that throughout this period of time the victim was constantly sobbing.
>
> "For the purpose of this aggravator a common sense inference as to the victim's mental state may be inferred from the circumstances." *Swafford*, 533 So.2d at 277.[Swafford v. State, 533 So.2d 270 (Fla. 1988)] The victim was held captive by the defendant for over 3 ½ hours before he was killed. Based upon the evidence, there can be no doubt that Samuel James Ryce lived every minute of his last few hours of his life with the fear of death. This fear and emotional strain was willfully inflicted on this victim by the defendant and was unnecessarily tortuous in nature. (R41, 9075-77).

Jimmy Ryce was abducted by an adult stranger (appellant) at gunpoint, held against his will for an extended period of time in a remote location and anally raped. Jimmy was sobbing as he feared for his own fate before being fatally shot by the appellant in a valiant attempt to escape. See James v. State, 695 So.2d 1229, 1235

(Fla. 1997)(While this Court has explained that the HAC aggravator "does not apply to most instantaneous deaths or to deaths that occur fairly quickly, fear, emotional strain, and terror of the victim in events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.")(citing, Wyatt v. State, 641 So.2d 1336 (Fla. 1994); Preston v. State, 607 So.2d 404 (Fla. 1992)). Under these circumstances, there can be no question that the murder of Jimmy Ryce was heinous, atrocious, or cruel. See e.g. Preston, 607 So.2d at 409-10 (rejecting argument that since death was likely quick death HAC was inapplicable where defendant "forced the victim to drive to a remote location, made her walk at knifepoint through a dark field, forced her to disrobe, and then inflicted a wound certain to be fatal."); Power v. State, 605 So.2d 856, 863 (Fla. 1992).

D. The Prosecutor's Comments During Voir Dire And Sentencing Did Not Impermissibly Diminish The Jury's Role In This Case

During voir dire, juror 991 stated that he or she felt like a link in a chain and that following the oath would take responsibility off of him as a juror. (T39, 7666-67). In response, the prosecutor stated:

> Well, I'm not sure that I follow that. In a sense, you are correct. Ultimately, the Judge makes the decision. And as he has told you, he gives the jury's recommendation great weight. He looks to the jury for advice. You sit as an advisory board to the Court, if you will. Does that – I kind of get the drift, I guess, that that produces on you or places upon you some burden you feel uncomfortable with?

(T39, 7667-68). After prospective juror 991, stated in response that he felt like it takes a burden off of him, the trial court immediately advised the panel of the great weight placed upon their recommendation. The trial court instructed the jury:

> Ladies and gentlemen, I just want you to understand that whatever recommendation you make, I give great weight to that recommendation. And I must underline "great weight." So it's not a situation where you can sit here as jurors and say, well, it doesn't matter what we do, because

it's going to be the judge making the decision...

(T39, 7668). This instruction was not prompted by a defense objection, or apparently the prosecutor's questioning, but the juror's response which the trial court obviously believed warranted some clarification of the jury's role. The defense counsel did not in any way, however, object to the prosecutor's questions preceding the juror's response, nor did he state that the trial court's instruction was inadequate. (T39, 7668). The failure to preserve the point below precludes review on appeal. See Rhodes v. State, 638 So.2d 920 (Fla. 1994); Archer v. State, 673 So.2d 17, 21 (Fla. 1996); Peterka, 640 So.2d at 65.

As for the comments in closing that appellant alleges diminished the jury's role, the totality of circumstances show just the opposite, that the jury's role was emphasized.[37] The prosecutor did argue below that it was the trial court's duty alone to pass sentence in this case (T56, 11032), but before the prosecutor could even finish his line of argument, the defense objected. In response, the trial court immediately provided the following curative instruction: "Ladies and gentlemen, the Court will give great weight to any advisory sentence recommended by this jury." (T56, 11032). Moreover, the prosecutor continued his argument by emphasizing, not diminishing the jury's role: "The Court will weigh your recommendation very heavily before it comes to its own decision, so it is not something that you should take lightly." (T56, 11032). Based upon the above exchange, there is no reason to believe the jury's role was impermissibly diminished by the prosecutor's closing argument.

Defense counsel, in his own closing, also emphasized the jury's role. Defense counsel stated, in part:

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[37]Appellant did object to the prosecutor's comment in closing argument.

> I don't want you to in any way, shape, or form diminish in your mind the importance that your vote and that your recommendation have. The legal term is that the law –- this Court gives great weight to your recommendation, great weight. And that means that only under very rare circumstances would this Court not follow your recommendation. (T56, 11051-52).

If appellant is simply contending that instructing the jury on its advisory role is constitutionally impermissible, this argument has been rejected by this Court. Appellant's Caldwell[38] claim is without merit as a matter of law. Combs v. State, 525 So.2d 853 (Fla. 1988); Turner v. Dugger, 614 So.2d 1075 (Fla. 1992).

Under the totality of the circumstances presented in this case, the jury's role in the capital sentencing process was not undermined. The trial court properly ensured that the jury understood the great weight provided to its sentencing recommendation. See Davis v. Singletary, 119 F.3d 1471, 1484 (11th Cir. 1997)(considering all of the statements, remarks, and instructions, the court was convinced that "the jury's sense of responsibility for its advisory sentence recommendation was not undermined[].").

E. Imposition Of The Death Penalty Does Not Constitute Cruel And Unusual Punishment

Appellant's argument that the death penalty in general violates the prohibition against cruel and unusual punishment has repeatedly been rejected. Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982)("The death penalty in Florida as prescribed in section 921.141, Florida Statutes (1977), has been upheld repeatedly against arguments that it constitutes cruel and unusual punishment or violates the constitutional guarantees of equal protection.")(citing Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 40 L.Ed.2d 918 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978)). Appellant is in the

[38]Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)

untenable position of asking this Court to overrule a decision of the United States Supreme Court on an issue of constitutional law. The death penalty, in general and as applied, is neither cruel nor unusual. See Sims v. State, 25 Fla.L.Weekly S128 (Fla. February 16, 2000)(rejecting challenge to lethal injection). Further, punishment is generally a matter of legislative prerogative. Capital punishment represents the moral will of the people to punish severely those who commit murder under certain aggravated circumstances. This is clearly such a case.

F. The Introduction Of Victim Impact Evidence Under Section 921.141 (7) Of The Florida Statues Is Not Unconstitutional

Once again, appellant posits an argument before this Court which has repeatedly been rejected. This Court has consistently and repeatedly upheld the admission of victim impact evidence, as permitted by section 921.141(7) of the Florida Statutes and Payne v. Tennessee, 501 U.S. 808, 115 L.Ed.2d 720 (1991). See, e.g., Windom v. State, 656 So.2d 432, 438 (Fla. 1995); Bonifay v. State, 680 So.2d 413, 419-420 (Fla. 1996); Farina v. State, 680 So.2d 392, 399 (Fla. 1996); Damren v. State, 696 So.2d 709, 712-713, n 6 and 7 (Fla. 1997); Burns v. State, 699 So.2d 646, 652-654 (Fla. 1997); Moore v. State, 701 So.2d 545, 550-551 (Fla. 1997); Cole v. State, 701 So.2d 845, 851 (Fla. 1997). Jimmy Ryce was more than a name and a faceless victim. He was entitled to be remembered during the sentencing of his killer.[39]

[39]Any claim that allowing victim impact evidence violates Florida's separation of powers by articulating a new standard for admission of evidence is completely without merit. As noted by the Supreme Court in Payne, "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." 115 L.Ed.2d at 735. The legislature was certainly authorized

Moreover, in the unlikely event that this Court reversed the abundant precedent approving of the admission of victim impact evidence, admission of the victim impact evidence in this case would certainly be classified as harmless. The State presented a strong case in aggravation and the defense case in mitigation was, by comparison, weak. The jury's vote was unanimous in favor of death and the trial court did not consider the victim impact evidence in recommending death for the murder of Jimmy Ryce. (R41, 9077).

G. Appellant's Death Sentence Is Proportional

While not raised as an issue in this appeal, the State observes that the death penalty is appropriate and proportional in this case. The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). This Court has upheld death sentences for defendants committing similar offenses with fewer aggravators and/or more mitigation. See Geralds v. State, 674 So.2d 96 (Fla), cert. denied, 136 L.Ed.2d 161 (1996)(aggravating factors of HAC and murder in the course of a felony with some non-statutory mitigation justified imposition of the death penalty); Cardona v. State, 641 So.2d 361 (Fla. 1994)(single aggravating circumstance of HAC with statutory mitigation justified imposition of death penalty for the murder of a three year-old child); Reaves v. State, 639 So.2d 1 (Fla. 1994)(Two valid aggravators of avoid arrest and prior violent felony after HAC stricken with relatively weak mitigation).

This Court has recognized that heinous atrocious or cruel is one of the strongest aggravators to be considered in this Court's proportionality review. See e.g. Larkins v. State, 739 So.2d 90, 95 (Fla. 1999)(noting that "heinous, atrocious, or cruel" and

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to articulate a rule for admission of relevant evidence.

cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme...") Balanced against the strong case in aggravation presented for the kidnapping, and heinous, atrocious or cruel murder of nine year-old Jimmy Ryce, was an incredibly weak case in mitigation. See Appendix. Appellant's sentence is clearly proportionate and should be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State respectfully asks this Honorable Court to affirm the judgment of the jury and trial court below.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert Augustus Harper, Steven Brian Whittington and Jason Michael Savitz, Robert Augustus Harper Law Firm, P.A. 325 West Park Avenue, Tallahassee, Florida 32301-1413, this _____ day of November, 2000.

_____

COUNSEL FOR STATE OF FLORIDA

IN THE SUPREME COURT OF FLORIDA

JUAN CARLOS CHAVEZ

Appellant,

vs. **CASE NO. SC94586**

STATE OF FLORIDA,

Appellee.

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INDEX TO APPENDIX