IN THE

Supreme Court of Florida

JUAN CARLOS CHAVEZ, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. 94,586 Death Penalty Appeal 9th Judicial Circuit on Change of Venue from the 11th Judicial Circuit

REVISED AMENDED INITIAL BRIEF OF APPELLANT

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1. The police arrested Juan Carlos Chavez without probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12, of the Florida Constitution, and the subsequent statements of the defendant should have been suppressed. 33

2. The Appellant's confession was involuntary and was obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Constitution of the State of Florida. 36

a. The extraordinary length of Mr. Chavez' interrogation (over 54 hours) is a significant factor the Court should consider in determining whether the statements made by Mr. Chavez were voluntary and not improperly coerced. 38

b. The police on at least two occasions subjected Mr. Chavez to the "Christian burial" ploy in order to induce a confession. 42

c. Law enforcement officers failed to properly advise the Appellant of his *Miranda* rights, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution. 43

d. The Appellant's confession was obtained in violation of *Miranda* because law enforcement officers failed to scrupulously honor the unequivocal invocation of the right to remain silent by the Appellant. 45

e. The Appellant's alienage, lack of prior experience with the United States criminal justice system, and limited understanding of English led to the involuntary confession. 47

3. The delay of the first appearance for Juan Carlos Chavez deprived the defendant of his constitutional right to counsel. 47

a. The delay in presenting Mr. Chavez to a magistrate was unconstitutional and was exploited by agents of the state to extend questioning without counsel in violation of Fla.R.Crim.P. 3.130. 49

b. The denial of a prompt judicial determination of probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Sections 9 and 12, of the Florida Constitution, and Florida Rule of Criminal Procedure 3.133. 51

c. The failure to provide Mr. Chavez a timely probable cause determination requires suppression of his confession. 56

d. The right to counsel enjoyed by all persons taken into custody was violated by keeping Mr. Chavez out of court so his right to counsel could affix and be asserted. 56

4. Permitting the media to photograph the jurors and jurors' faces deprived the defendant of his right to a fair trial. 59

a. The trial court erred when it reversed its earlier ruling, which prohibited photography of the jurors in the courtroom, without first affording defense counsel the opportunity to present evidence to support continuation of the initial court order. 64

b. The trial court abused its discretion and improperly restricted the questioning of defense counsel during jury selection voir dire, thus denying the Appellant his right to a fair and impartial jury. 67

5. The trial court erred in admitting over timely objection

a blood-stained mattress, which blood was from an unidentified source and was specifically neither from the Appellant nor Jimmy Ryce; the evidence was not relevant, and any probative value was far outweighed by its prejudicial impact. 69

6. The trial court erred in denying defendant's motion for judgment of acquittal as to the capital sexual battery charge, Count II. 71

7. The trial court erred by admitting, over defense objection, numerous cumulative gruesome photographs depicting the decomposed body of the victim re-assembled at the office of the medical examiner. 73

8. The capital sentencing process imposed on the Defendant was both flawed and unconstitutional. 75

a. The trial court erred in denying the defense requested instruction on "doubling" regarding the "in-the-course-of-a-kidnapping" aggravator, resulting in the reliance by the jury upon the same factual circumstances of the offense to double the aggravating circumstanced for the sentence. 75

b. The trial court erred in considering as an aggravating factor, and in instructing the jury that it could consider as an aggravating factor, that the murder was committed for the purpose of avoiding or preventing lawful arrest. 78

c. The trial court erred in giving the standard jury instruction, over timely defense objection, regarding the "heinous, atrocious, or cruel" aggravating circumstance because insufficient evidence was presented at trial to support its finding and the definition of the aggravating circumstance is unconstitutionally vague as applied to the case. 81

d. The prosecutor improperly diminished the role of the jury during the jury voir dire and the penalty phase of the Appellant's trial; as a result, the death sentence should be reversed and the case remanded for a new sentencing proceeding. 85

e. The imposition of the death penalty violates the prohibition against cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. 89

f. Section 921.141(7), Florida Statutes, which permits introduction of victim impact evidence in a capital sentencing proceeding, is unconstitutional. 90

(1) Section 921.141(7) is unconstitutional as it leaves judge and jury with unguided discretion allowing for imposition of the death penalty in an arbitrary and capricious manner. 90

(2) Section 921.141(7), Florida Statutes, is vague and overbroad and therefore violative of the due process guarantees of the Florida and United States constitutions. 92

(3) The Florida Constitution prohibits use of victim impact evidence. 95

(4) Section 921.141(7), Florida Statutes, infringes upon the exclusive right of the Florida Supreme Court to regulate practice and procedure pursuant to Article V, Section 2, Florida Constitution. 96

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3. Other Authority

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C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Preliminary Statement.

The record on appeal consists of more than 20,000 pages. The pleadings are organized by the clerk into four boxes, 41 volumes consisting of pages 1 through 9,126. The transcripts of proceedings are in five additional boxes, which are organized into 56 volumes and begin with an overlapping numbering system, pages 1 through 11,137. In an effort to simplify record references, the pleadings will be referred to by the letter "R" followed by the appropriate volume number (R1-R41), the transcripts will be referred to by the letter "T" followed by the appropriate volume numbers (T1-T56). Each volume number will be followed by the appropriate page number. By separate motion the documentary exhibits are being forwarded to the Court, and will be referred to as "E" followed by the volume and a page number.

2. Statement of the Case and Course of Proceedings Below

Juan Carlos Chavez was charged (R1-1-6), with three counts: murder in the first degree from a premeditated design and/or while engaged in a sexual battery and/or kidnapping offense against Samuel James Ryce; capital sexual battery; and kidnapping. (R1-1-2). The date of the offense was 11 September 1995. Between 10 December 1995 through the end of December 1997, the parties were involved in discovery and pretrial motions. (R1-7; R1-11). The most significant of the pretrial proceedings was the motion to suppress conducted on 03 November 1997 through 12 November 1997 at which time it was denied. (R1-29).

The case first came on for trial on 20 January 1998 in Miami (T10-1910). After more than three weeks of jury selection proceedings (T32-6567), the trial

was adjourned and a change of venue was granted on 17 February 1998. (R1- 8). The second trial began on 24 August 1998 in Orlando (R33-7606). Jury selection lasted through 27 August 1998. The trial of the facts began on 02 September 1998 before the Honorable Marc Schumacher, Circuit Judge. (R39-8571). On 18 September 1998, after a series of jury questions, the jury returned a verdict of guilty as charged on each count. (R39-8572-73).

The sentencing proceedings began on 26 October 1998. On 27 October 1998 the jury returned an advisory sentence recommending death. The trial court sentenced Mr. Chavez to death on 13 November 1998. (R41-9086-9108; T56-11134-11137).

3. Statement of the Facts

Juan Carlos Chavez was tried, convicted, and sentenced to death on charges that he kidnapped, sexually battered, and murdered Samuel James Ryce. The chief piece of evidence against him was a statement he gave after more than fifty-four hours of police interrogation. The defense unsuccessfully moved to suppress the confession. Mr. Chavez testified at trial that the confession was false, the product of police threats and coercion.

At trial, Mr. Chavez testified he did not kill Samuel James Ryce. The killer was Edward Scheinhaus, the son of Mr. Chavez's employers Jay and Susan Scheinhaus. (T52-10313-18). The defense presented evidence supporting this claim, including evidence that the Scheinhauses planted the murder weapon and Samuel James Ryce's book bag in Mr. Chavez's trailer.

Juan Carlos Chavez was born in Havana, Cuba. (T52-10292). Mr. Chavez testified that he was a member of an anti-communist group in Cuba that worked

to bring down the government of Fidel Castro.[1] (T52-10293-10295). He served time in a Cuban prison for stealing government property and attempting to leave the country. (T52-10301-03). Mr. Chavez escaped to the United States by raft. (T52-10306).

In 1995, Juan Carlos Chavez worked as a handyman for the Scheinhaus family. (T52-10307). The Scheinhauses lived on a large property in southern Miami-Dade County. Mr. Chavez lived in a trailer on the Scheinhaus property. (T44-8647). The Scheinhauses let him use a Ford pickup truck when he had to run errands or do other work for the family. (T51-10091-93). Among other duties, Mr. Chavez frequently cared for horses kept on property owned by David Santana. (T44-8652; T46-9103, 9120; T51-10146-47). That property had an avocado grove on it. There was also a trailer on this property, referred to throughout trial as the "avocado grove trailer" or the "horse-farm trailer." Both the state and the defense maintained that Samuel James Ryce died in that trailer, and the state introduced evidence that a spot of the child's blood was found on the floor of that trailer. (T50-9858-59).

Juan Carlos Chavez testified that on the day Samuel James Ryce disappeared, he went to the avocado-grove property to feed the horses. There he found a car parked outside the trailer. (T52-10310). He heard a sound from within the trailer like the closing of a door. (T53-10313). He opened the door of the trailer to find Eddie Scheinhaus standing over the body of a young boy. (T52-

[1]The state sought to impeach Mr. Chavez on this point with INS documents showing he never disclosed his political activities to authorities when he arrived in United States.

10313-14). Scheinhaus was nervous and started talking to him, half in English and half in Spanish, saying that it was an accident, that he didn't mean to do it. (T52-10314). Mr. Chavez knelt by the child and found that there was no heartbeat or breathing. (T52-10315). He turned the body over and could see a wound and a blood-stain on the floor. Ed Scheinhaus told Chavez to help him cover the body with some rags. (T52-10316). Mr. Chavez told Scheinhaus that they had to call for help. Ed Scheinhaus, however, brought the car closer to the trailer and opened the trunk. (T52-10318). Scheinhaus then changed his mind and told Mr. Chavez to bring the truck closer to the trailer. Scheinhaus directed Chavez to help him put the body on the floor in the cab of the truck. (T52-10318). Ed Scheinhaus drove away in the truck, instructing Chavez to follow in the car. (T52-10319).

When Mr. Chavez got into the car, he found he had to adjust the seat. In doing so, he touched a gun that was under the seat. (T52-10320). He recognized the gun as one belonging to the Scheinhaus family which he and another handyman had used for target practice. (T52-10321).

Ed Scheinhaus drove away quickly, and Mr. Chavez could not catch up with him. (T52-10321). Mr. Chavez drove the car back to the Scheinhaus property, where he found Ed Scheinhaus, the truck, and the body. (T52-10324-26). Mr. Chavez asked Ed Scheinhaus to explain what had happened, but Scheinhaus wouldn't say anything. (T52-10327). Chavez tried to convince Scheinhaus to call the police, but Scheinhaus remained silent. Mr. Chavez then said that he would do something if Scheinhaus wouldn't. (T52-10327). Ed Scheinhaus grew enraged and told Mr. Chavez that he would tell the police that Chavez helped him. (T52-

10327-28). Ed Scheinhaus told Chavez to help him move the body from the truck to a van Chavez had been working on. (T52-10328).

Mr. Chavez did not call the police. He knew that Scheinhaus would accuse him of being involved, and he feared he would be deported to Cuba. He feared that the Cuban government had learned of his anti-Castro activities, and that something worse than prison awaited him there. (T52-10329-30).

Mr. Chavez testified that sometime three to five days later, Ed Scheinhaus told him that the body was beginning to smell and that Scheinhaus needed him to help dispose of the body. Mr. Chavez refused. (T52-10331). The next day, Scheinhaus told Mr. Chavez that everything was taken care of, though he didn't say how. (T52-10332-33). The day after that, Juan Carlos Chavez noticed three large, plastic planters filled with cement which hadn't been there before. (T53-10407-08). Mr. Chavez realized that Ed Scheinhaus must have put the body in the planters. (T53-10407-08).

When Ed Scheinhaus said the body was taken care of, he also told Mr. Chavez to help him remove the carpet from the floor of the pickup truck. (T52-10333). While they were working on the truck, Mr. Chavez again asked Scheinhaus what had happened. (T52-10333). Ed Scheinhaus said that the boy had tried to run out of the trailer and Scheinhaus got tangled in the bathroom door and couldn't get to the child. (T52-10334). The only thing Scheinhaus could do was to raise his hand and fire. (T52-10334). Scheinhaus grew angry, and refused to say more. He never explained why the boy was there in the trailer. (T52-10335).

The disappearance of Samuel James Ryce went unresolved until 6

December 1995. On that day Ed's mother, Susan Scheinhaus, called the FBI to say that she had found the boy's book bag in Juan Carlos Chavez' trailer. (T44-8697). Ms. Scheinhaus testified that she and her son decided to break into Mr. Chavez' trailer because they believed he was stealing from them. (T44-8661-62). In particular, they were searching for some jewelry and a gun. (T44-8674).

On December 6th, Ms. Scheinhaus arranged to send Mr. Chavez on an errand to get him out of the way. (T44-8664). Once he was gone, she called in a locksmith to pick the lock to the trailer door. (T44-8664-65). Susan and Ed Scheinhaus testified that once the door was open they immediately saw the gun in plain view on a counter just opposite the door. (T44-8682-83; T52-10202-03). They went into the trailer and continued to search. Susan Scheinhaus located a book bag inside a closet. (T52-10204-05). Edward Scheinhaus testified that he did not suspect that the book bag was involved in any crime, he nevertheless used a piece of bathroom tissue to open the bag. (T52-10204-06, 10209-10). The Scheinhauses testified that inside the bag they could see notebooks with the name "Jimmy Ryce" on them. (T44-8691; T52-10209). Mrs. Scheinhaus then called the FBI.

Juan Carlos Chavez testified that neither the book bag nor the gun was in his trailer when he left on 6 December 1995. (T52-10336-37). The defense maintained that the Scheinhauses true purpose in breaking into the trailer was to plant this evidence. In support of this claim, the defense called Wilson Moncada, the locksmith who jimmied the lock of the Chavez trailer for the Scheinhauses. Locksmith Moncada testified that the Scheinhauses told him they were missing guns and jewelry and wanted to check the handyman's trailer to see if the items

were there. (T51-10072). Susan Scheinhaus stated Mr. Moncada never opened the trailer door (T44-8664); Moncada testified that he opened the trailer and looked inside. He testified there was no gun on the table where the Scheinhauses claimed to have found the gun. (T51-10077-78).

The defense also introduced evidence that the Scheinhauses gave contradictory statements to the police about the concrete-filled planters where the body was found. At trial, Ed Scheinhaus testified he knew nothing about the planters. He swore he had never seen them before Mr. Chavez's arrest, and maintained he did not know where on his family's property the planters were found. (T52-10201, 10247-48). But on 7 December 1995, he informed officers that Mr. Chavez placed the planters there to keep the horses out of the area. On 07 December Firefighter Anthony Fernandez searched the Scheinhaus property with "cadaver dogs," dogs trained to detect dead bodies. (T52-10268-73). Two dogs showed great interest in the planters, sniffing around the base of the planters, and even jumping up on top of them. (T52-10274-75). When Firefighter Fernandez asked Ed Scheinhaus about the planters, Scheinhaus stated that Juan Carlos Chavez had placed them there to keep horses out of the area. (T52-10276).

Susan Scheinhaus testified that she first noticed the planters in October, and that Juan Carlos Chavez had put them there in order to keep the horses out of the area. (T44-8736). But on 7 December 1995, Susan Scheinhaus told Metro-Dade Detective Chris Dangler that the planters had not been there approximately three weeks before Mr. Chavez' arrest in December. (T51-10103-04).

The defense maintained that Susan Scheinhaus also tried to protect her son

by not telling FBI agents that her son, Edward, was present when they went into Mr. Chavez' trailer. When FBI agents first came onto the Scheinhaus property on 6 December 1995, Susan Scheinhaus did not tell the agents that her son Ed accompanied her when she broke into the trailer. (T51-10137-38). Special Agent Richard Lunn testified that Susan Scheinhaus behaved like "a mother trying to keep her son out of something that she thought at the time wouldn't be a good situation to be in." (T51-10130).

Ed Scheinhaus claimed to have known that Mr. Chavez was guilty within two days of the disappearance of Jimmy Ryce. (T51-10177). Scheinhaus came to this conclusion because he could put Chavez "at that place at that time." (T51-10197). Scheinhaus said he knew this because he knew Mr. Chavez was at the horse farm/avocado grove at the time Samuel James Ryce disappeared. Ed Scheinhaus worked at night and usually slept between 9:00 a.m. and 2:00 or 3:00 p.m. (T51-10193). According to Scheinhaus, on the afternoon of 11 September 1995, Mr. Chavez came into his room, woke him up, and told him that he, Chavez, was going to the horse farm. (T51-10193-94). This was the only time Ed Scheinhaus could remember Mr. Chavez doing this. (T51-10193, 10196). Even though Mr. Chavez was free to take the truck to go on errands so long as Susan Scheinhaus did not need it (T51-10091-93), the only time Mr. Chavez ever allegedly asked for permission was this one occasion. Ed Scheinhaus never shared these suspicions with the police or FBI.

The defense also called Ed Scheinhaus as a defense witness. At trial, Ed Scheinhaus claimed to have an alibi for the afternoon of 11 September 1995. Scheinhaus denied ever having even gone to the avocado grove/horse farm

property. (T52-10214). He was impeached with prior sworn testimony in which he admitted to having been to the trailer two or three times. (T52-10214-15). He maintained that he was on house arrest for a DUI conviction, and that he could not have left the house outside of his nighttime working hours, 10:00 p.m. and 6:00 a.m. (T52-10216-17, 10221-22). When Mr. Scheinhaus was supposed to be home, he would receive phone calls at random times. (T52-10241-42, 10517-18). When this happened, he had to place an ankle bracelet he wore against a device attached to his phone in order to prove that he was home. (T52-10242). The records of Sergio Cabrer, the house arrest officer who supervised Scheinhaus (T53-10516-30), failed to show one way or another whether or not Ed Scheinhaus was at home on 11 September 1995. (T53-10527). Sergio Cabrer testified that he would allow Scheinhaus to go out during the day if it was on a work-related matter. Cabrer made no record of the occasions on which it happened. In fact, Ed Scheinhaus received a speeding ticket at 2:00 in the afternoon of 06 September 1995on the MacArthur Causeway. (T53-10527). Mr. Cabrer, who was supervising more than 90 people at the time, testified that the incident, "didn't generate any violation, so I am sure I let him out." (T53-10522-25). There was no record of this in the house-arrest file.

a. Motion to suppress.

After Susan Scheinhaus and her son went into Mr. Chavez's trailer on 6 December 1995, Ms. Scheinhaus telephoned the FBI and reported that she had found the missing child's book bag. (R18-4025). FBI agents and Metro-Dade Police officers came to the Scheinhaus property and interviewed her. (R18-4026-27). Based on what Susan Scheinhaus told them, law enforcement officers

decided to seize and question Mr. Chavez. (R18-4028). The legality of the arrest, detention and lengthy interrogation that followed was disputed both in a motion to suppress and at trial.[2] The police never made a video or audio recording of any part of the interrogation. The only verbatim record of any part of the investigation was a transcript of the final statement, which began at 11:45 p.m. on Friday 8 December 1995, and ended at 2:00 a.m. on Saturday, 9 December 1995. At the motion to suppress, the only evidence of what happened during Mr. Chavez's first 52 hours in custody was testimony from the various law enforcement officers involved in the interrogation, which established the following sequence of events.

Juan Carlos Chavez returned home on Wednesday, 6 December 1995 from a fictitious errand with Susan Scheinhaus' father at about 7:35 p.m. (R18-4030). Waiting for him were at least five FBI agents who had concealed themselves in order to surprise Mr. Chavez. (R18-4030-31, 4037). All were armed and wore bullet-proof vests and "raid" jackets. (R18-4029-30, 4037). When Mr. Chavez got out of the truck, they rushed him, weapons drawn, shouting "Police!" and "Freeze!" (R18-4031-32). They ordered Mr. Chavez to lie face-down on the ground and searched him. (R18-4032). The officers then turned him over to Metro-Dade detectives Pat Diaz and Juan Murias, who "asked" him to "voluntarily" accompany them to the homicide office. The detectives handcuffed Mr. Chavez and took him to the station. (R18-4033, 4063-64, 4155-56, 4232-4236).

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[2]The motion to suppress is located at R13-3028-48. Defense counsel filed a comprehensive, 54-page memorandum of law in support of the motion, found at R17-3878-3932.

At the police station, Mr. Chavez was kept in a locked interrogation room. (R19-4549-50). The interrogation room was a windowless chamber about ten feet by ten feet, with three chairs and a table in it. (R18-4288-89). Whenever Mr. Chavez left the room, he was accompanied by one or more police officers. (R18-4191, 4554-56). On bathroom breaks, the police accompanied Mr. Chavez inside the bathroom and observed what he did there. FBI Special Agents Hexter and Lunn attempted to attend the questioning of Mr. Chavez, but Detective Diaz refused to allow them into the interrogation room. (R18-4213-14).

After some "background" questioning, (R18-4071), the police had Mr. Chavez execute a *Miranda* waiver form (R18-4076). Detectives Diaz and Murias interrogated Mr. Chavez until 10:00 p.m., when they decided to have Detective Thomas Mote conduct a polygraph examination on Mr. Chavez. The polygraph examination began at 1:05 a.m. on Thursday, 7 December 1995, and continued until 6:00 a.m., ten-and-one-half hours after Mr. Chavez was arrested. Throughout this questioning, Mr. Chavez maintained that he had nothing to do with the disappearance of Samuel James Ryce. (R18-4081). According to the officers, when confronted with the book bag found in his trailer, Mr. Chavez stated that he found it in a bin where horse feed was kept. (R18-4080-81).

Detectives Diaz and Murias resumed the interrogation at 6:30 a.m. (R18-4095). They told Mr. Chavez he had failed a polygraph examination and was lying. (R18-4095, 4188). Mr. Chavez continued to deny any involvement in the disappearance of Samuel James Ryce. (R18-4095-98). This phase of the interrogation continued for approximately two more hours. (R18-4100).

At 9:15 a.m. on Wednesday, 7 December 1995, the police deployed a fresh

interrogation team: Detectives Terry Goldston and Luis Estopinan. (R18-4190). At this point Mr. Chavez had been in police custody for just under fourteen hours. Mr. Chavez continued to deny any involvement in the disappearance of Jimmy Ryce. (R19-4431-33). The detectives continued to reject this story. (R19-4431-35). According to Estopinan, after about two more hours of interrogation, Mr. Chavez said he would tell them what he knew about Samuel James Ryce. (R19-4435, 4438).

Estopinan testified that Mr. Chavez then told him that Jimmy Ryce had been killed in an accident at the horse farm/avocado grove. Mr. Chavez had seen the boy at the farm playing with the horses on several occasions. (R19-4040-41). On September 11, Mr. Chavez offered him a ride home. (R19-4041-42). As the boy was closing the gate behind the truck, the vehicle went into reverse and crushed him against the gate. (R19-4042-43). By the time Mr. Chavez pulled the truck away, Samuel James Ryce was dead. (R19-4043). The detectives decided to take Mr. Chavez to the horse farm to show them what happened. (R19-4446). After giving Mr. Chavez lunch, the detectives continued to interrogate Mr. Chavez until about 2:15 p.m. on Thursday, 7 December 1995. (R19-4448).

At 2:30 p.m., Detectives Estopinan, Goldston, Piderman, Diaz, and Murias took Mr. Chavez to the horse farm. (R19-4448-49). On the way back to the station Detective Estopinan began "pleading" with Mr. Chavez to help them find the body. (R19-4454). He told Mr. Chavez that the parents needed to give their child a proper burial. (R19-4454). Mr. Chavez tearfully replied that the boy no longer existed. (R19-4454). The detectives pulled the car over and questioned Mr. Chavez about this. (R19-4455-56). Mr. Chavez told the detectives he had

burned the body at the Scheinhaus property. (R19-4456, 4458). The police turned around and drove there. (R19-4458). They arrived to find the property surrounded by media crews. (R19-4458). The detectives and Mr. Chavez remained at the Scheinhaus property until around 5:05 p.m. (R19-4462).

Detective Estopinan, now accompanied by Detective Piderman, continued to interrogate Mr. Chavez throughout the evening of Thursday, 7 December 1995. (R19-4655). Mr. Chavez maintained that Samuel James Ryce had died in an accident, and that he had burned the body. (R19-4471). The detectives then had Mr. Chavez write out what had happened. (R19-4472-75). Both detectives remained in the interrogation room with Mr. Chavez as he wrote. (R19-4475). Mr. Chavez finished writing this statement at 12:40 a.m. on Friday, 8 December 1995, more than 29 hours after Mr. Chavez was first taken into custody on Wednesday, 06 December. (R19-4476). Detective Estopinan then told Mr. Chavez that they would go back to the horse farm the next day, where he would be photographed pointing out where the accident had occurred. (R19-4478).

At 1:30 a.m., the detectives gave Mr. Chavez an opportunity to rest. (R19-4130). Mr. Chavez was left in the interrogation room where the only furniture was a table and some chairs. Mr. Chavez rested by lying on the floor of the interrogation room. (R19-4131). At 1:30 a.m. on Friday 8 December 1995, Mr. Chavez had been in police custody for 30 hours; he had been awake for more than 41 hours. The rest period lasted for six hours. (R19-4132).

Detective Estopinan resumed the interrogation at 8:00 a.m. on Friday, 8 December 1995. (R19-4479). At 9:25 a.m., Estopinan and several other detectives took Mr. Chavez to the horse farm and took pictures. (R19-4480-81).

They then took Mr. Chavez to the Scheinhaus property and took more pictures. (R19-4485). While at the Scheinhaus residence, Detective Dangler told Estopinan to ask Mr. Chavez about the cement-filled planters. (R19-4486). Mr. Chavez said he had put some broken cement bags in the planters, and the bags had hardened over time. (R19-4486).

The detectives with Mr. Chavez returned to the homicide office at 11:35 a.m., and Detectives Estopinan and Piderman resumed the questioning. (R19-4487). During an interrogation session between 1:30 p.m. and approximately 2:45 p.m., the detectives pressed Mr. Chavez about his written statement. (R19-4489). They told Mr. Chavez that experts had proven that the accident could not have happened in the way that Chavez had described it. (R19-4489-90). At this same session the detectives also got Mr. Chavez to waive his right to a first appearance hearing – more than 42 hours after Mr. Chavez was arrested. (R19-4488). Detective Estopinan sought the waiver as the result of a discussion between detectives and Assistant State Attorney Catherine Vogel who was physically present. (R19-4576).

During this same interval, the public defender's office attempted to contact Mr. Chavez. Assistant Public Defender Edith Georgi testified that on Friday, 8 December 1995, she contacted the Metro-Dade homicide bureau and asked to speak to Mr. Chavez. She knew officers had been questioning someone in connection with the disappearance of Samuel James Ryce since Wednesday, December 6. (R21-4784). She placed the call at about 1:00 p.m. (R21-4788). The police refused to let Assistant Public Defender Georgi speak to Mr. Chavez. (R21-4788).

At around 3:30, Sergeant Felix Jimenez replaced Detective Piderman. (R19-4491). Estopinan was outside the interrogation room briefing Sergeant Jimenez when Mr. Chavez knocked on the door; sobbing, Mr. Chavez asked to speak to him. (R19-491-93). Mr. Chavez said that he would tell Estopinan what had happened to the body, but only if Estopinan could guarantee him the death penalty. (R19-4492).

Detective Estopinan began to interrogate Mr. Chavez one-on-one. Estopinan told Mr. Chavez he could not promise the death penalty. (R19-4494). Mr. Chavez continued to restate this condition, and Estopinan continued to reject it. (R19-4494). According to Estopinan, Mr. Chavez eventually volunteered that he had been sexually abused by his brother. (R19-4494-95). Mr. Chavez told him he was a homosexual. (R19-4495).

Estopinan testified that Mr. Chavez then told a new story about how Samuel James Ryce died. He said that there was a man named "Ivan," whose last name he did not know. (R19-4497). Mr. Chavez had met Ivan in the United States, and the two eventually became friends and lovers. (R19-4497). One day Mr. Chavez had arranged to meet Ivan. When Chavez got into Ivan's car, Samuel James Ryce and a gun were both in the front seat. (R19-4497). Mr. Chavez attempted to put the gun into the glove compartment, but it went off accidentally, killing the boy. (R19-4498).

Estopinan again begged Mr. Chavez to lead police to the body so the family could give the child a proper burial. (R19-4498). Mr. Chavez again said he would not talk unless Estopinan guaranteed the death penalty. (R19-4498). Detective Estopinan told Mr. Chavez that he had been very good to Mr. Chavez. (R19-

4498). Invoking the name of God, Estopinan said Mr. Chavez had to tell where the body was. Estopinan told Chavez that Chavez "owed him" and had to tell. (R19-4499). Chavez still refused, and Estopinan left at approximately 6:30 p.m. (R19-4499). Before he left, Detective Estopinan had Mr. Chavez sign a document titled, "Affidavit" purporting to waive Mr. Chavez's right to a first appearance hearing. (R19-4499-501). Before he left, Estopinan again told Chavez he had to do the right thing by helping the police recover the body. Estopinan also repeated to Chavez that he "owed him." (R19-4503). Detective Estopinan could not overcome Mr. Chavez's refusal to tell him where the body was. (R20-4672). Each time Estopinan asked, Mr. Chavez insisted he would only tell if he could be guaranteed a swift execution. (R20-4672). Detective Estopinan asked Sergeant Jimenez to try. (R19-4503-04; R20-4672).

Sergeant Jimenez told Mr. Chavez that the Ivan story was unbelievable. (R20-4676). He pointed out, for instance, that while Mr. Chavez said he used a beeper number to get hold of Ivan, Mr. Chavez could not remember Ivan's beeper number. (R20-4676). Mr. Chavez said he would leave a code on Ivan's beeper, but he could not tell Sergeant Jimenez what that code was. (R20-4676). Eventually Mr. Chavez stated once again that he did not wish to talk unless he could be guaranteed the death penalty. (R20-4677). Jimenez had Mr. Chavez write down this condition but persisted in his questioning. (R20-4677-80). Mr. Jimenez repeated that he did not believe the Ivan story. (R20-44682). Mr. Chavez then told Sergeant Jimenez that when he was a child his brother had sexually abused him. (R20-4683). Mr. Chavez again brought up his demand for the death penalty, Sergeant Jimenez said he would not discuss this demand

anymore, no matter how many times Chavez brought it up. (R20-4686). Mr. Chavez then requested Jimenez to bring Detective Estopinan back in. (R20-4687).

Detective Estopinan joined Jimenez in the interrogation room at around 8:00 p.m. (R19-4504-05). Mr. Chavez had now been in police custody for more than 48 hours. Chavez said he owed Estopinan one. (R19-4505, R20-4689). Detective Estopinan replied that Chavez did owe him. (R20-4689). Mr. Chavez then told the detectives a new story regarding the disappearance of Samuel James Ryce. In this version, Mr. Chavez stated that he had abducted the boy at gunpoint, took him to the horse farm trailer, and sexually battered him. (R19-4506-07). Mr. Chavez then tried to take the child back to where he found him, but did not release him because he saw police in the area. (R19-4508). He brought the boy back to the horse farm trailer. (R19-4508). While in the trailer they could hear helicopters overhead. Mr. Chavez he feared they were police helicopters. (R19-4508). The boy tried to run out the door. Chavez tripped and was unable to catch him and, in a panic, shot Samuel James Ryce. (R19-4508). Mr. Chavez disposed of the body by cutting it into three parts with a bush hook and putting it in the concrete-filled planters. (R19-4509). The police continued the interrogation, arriving at a more detailed version of the same story at about 10:50 p.m. (R19-4509, 4511-4531).

The detectives then decided to record this statement. They obtained a stenographer and interpreter, and had Mr. Chavez repeat the latest version of the story. (R19-4531-34). The detectives again gave Mr. Chavez *Miranda* warnings. (R19-4538-39). The stenographically recorded statement was completed at 2:00 a.m. on Saturday 9 December 1995, more than 54 hours after Mr. Chavez was

arrested at 7:30 p.m. on Wednesday, 6 December 1995. (R19-4542).

The trial court denied the defendant's motion to suppress as to all grounds. (R17-3937-43). The issues are more fully set forth below.

b. Jury Selection

The trial on the merits of the case began in Orlando on 24 August 1998 (T36-7063). On the second day of jury selection, members of the media moved to set aside a previous order entered by the trial judge which protected the jurors' identification. (T37-7369). Before venue was transferred to Orange County, the trial court had entered an order forbidding video and still photography of jurors. Representatives of the media were noticed for the hearing, and evidence was taken. (T37-7369; R10-1884-1909). The media represented that it was not their practice to photograph or broadcast images of jurors. (R10-1892-94).

Once in Orlando the media convinced the trial judge to reverse the earlier order based on *Sunbeam Television Corp. v. State of Florida and Humberto Hernandez*, 723 So.2d 275 (Fla. 3d DCA 1998). Over defense objection, the trial judge vacated his prior order and allowed photographers and the electronic media to photograph the jurors. (T37-7389-90). The court denied the Defendant's request to voir dire venire members on whether being photographed and broadcast might affect their ability to be fair and impartial (T37-7391), even after a prospective juror announced being affected by the cameras.

During voir dire, Juror 1978 became agitated, and volunteered that he was uncomfortable with having television cameras broadcasting his image. (T41-8055, 8117). The defense renewed its motion for leave to voir dire prospective jurors about the effect of the cameras on their ability to be fair and impartial.

(T41-8061-64). The court again denied the motion. (T41-8064). Shortly afterwards, Juror 2038 voiced similar concerns about the cameras. (T41-8068). Defense counsel again renewed the motion to voir dire jurors on this issue, and the court again denied the motion. (T41-8088-90).[3]

Also during voir dire, the prosecution informed jurors they would act as an "advisory board." The assistant state attorney told jurors that the judge usually makes the decision on a life or death sentence, though 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. To that–I kinda get the drift, I guess, that produces on you or places upon you some burden you feel uncomfortable with?

The juror being questioned, responded, "No, just the opposite. I feel like it takes the burden off me …." (T39-7668). The court then instructed the jury that that great weight meant that the jurors were going to have to consider themselves a very important part of the process.

After the jury were selected and before the panel was sworn, defense counsel renewed all objections and refused to accept the jury. (T43-8430-32). Counsel specifically renewed the objections to the court's prohibiting voir dire on the effect of the cameras on the jurors as well as the issue of the court rescinding its earlier protective order. (T43-8430).

c. The case in chief of the state.

The state began its case by recounting the disappearance of Samuel James Ryce. A Dade County school bus dropped the nine-year-old off near his home on

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[3]After further voir dire outside the presence of the other jurors, (T41-8110-11), Jurors 1978 and 2038 were struck for cause (T41-8116-18).

the afternoon on of 11 September 1995. (T43-8554-61). He never arrived at the house. (T43-8547). A search ensued, and the police were called. (T43-8548-49). Ground and aviation units were dispatched to the area. (T43-8578, 8590). Over the days that followed, the search grew to include numerous officers and members of the public. (T43-8551-53). The search went on for weeks, before the child was found.

Susan Scheinhaus testified that in February of 1995 Juan Carlos Chavez began feeding the horses at the avocado grove property for her. (T44-8652). He had keys to the gates and buildings of her residence property and the avocado/horse farm. Ms. Scheinhaus told the jury how she and her son went into Mr. Chavez's trailer in search of stolen property. (T44-8660-66). Susan Scheinhaus identified the gun she alleged was found inside the Chavez trailer. Ms. Scheinhaus had purchased a firearm from a third party, (T44-8703) and was able to identify the purchase form that she had filled out for the transfer. (T44-8704). Mrs. Scheinhaus testified that she and her son also found a book bag. (T44-8685). Inside the book bag, she could see in child's handwriting the name Jimmy Ryce. (T44-8691). Mrs. Scheinhaus showed it to her son, Edward, and they called the FBI. (T44-8692). Special Agent Vicky Schmeltz recounted the seizure and arrest of Mr. Chavez by armed FBI agents and police officers on 6 December 1995. (T44-8765-71). Metro-Dade Police crime scene investigator Michael Byrd impounded the firearm and was able to develop a latent print from it. (T45-8824). The print was submitted to the ID section for comparison. (T45-8827).

The major portion of the state's case consisted of the details of the

interrogation. The state introduced each of the various stories the police extracted from Mr. Chavez, and extensive testimony from detectives Diaz, Murias, Estopinan, and Jimenez. The testimony tracked that given at the hearing on the motion to suppress. [See pp. 9-17 above]. At trial, as in the motion to suppress, the officers maintained that Mr. Chavez appeared to be alert, well-rested, and cooperative throughout the 54-hour ordeal. (T46-9074-75). The defense timely and consistently objected to the fruits of the interrogation on the basis of the pretrial motion to suppress. (T45-8893; T46-9103; T46-9141). Defense counsel also objected to the statements on corpus delicti grounds. (T46-9075; T47-9208).

James McColman of the Metro-Dade Police Department arrived at the Scheinhaus residence at approximately 11:00 p.m. on 06 December 1995 to secure the premises while a search warrant was procured. (T48-9468). Among the items seized was the firearm (T48-9472), book bag (T48-9479), notebooks and books from inside the book bag (T48-9479). The trailer and contents were impounded.

Detective McColman removed the book bag from the trailer and put it in the trunk of his car. (T48-9536). He told Officer Mazzarella that he was taking the book bag to Donald and Claudine Ryce so that they could identify it. (T45-8815). He never did so. (T48-9541). Mr. McColman took the book bag to the homicide office, where Mr. Chavez was being interrogated (T48-9538), so the contents could be photographed. (T48-9538-40). He did not check the book bag into the property room; he put it in a drawer in Homicide Detective Smith's desk. (T48-9541).

Officer McColman also helped recover the three concrete-filled planters from the Scheinhaus property. (T48-9488-93). The containers were cut to allow

access. (T48-9500). Inside the containers were the parts of the body. (T48-9501). Photographs of the planters and contents were received into evidence and displayed to the jury. (State's Exhibits 103-107; T48-9521).

Over defense objection, the state introduced into evidence a bloodstained mattress found in the avocado grove trailer. (State's Exhibit 136). Testing showed that the blood did not belong to Samuel James Ryce or Juan Carlos Chavez. (T48-9585-86; T49-9649-50; T50-9860). The judge instructed the jury that the mattress was being admitted, "for the limited purpose of showing that the stain on that exhibit is *not related* to this case, and specifically that the source of that stain is unknown, and that Samuel James Ryce and Juan Carlos Chavez have been excluded as the source of that stain." (T50-9859) (emphasis added).

Theresa Merritt, a forensic serologist, was unable to find any blood on the book bag. She also testified that samples from the floor were tested and the presence of blood was detected. A bush hook was also examined, but no evidence of any blood or tissue was found on it. (T50-9827).

Dr. Roger Mittleman testified that human remains were retrieved from the cement-filled planters (T50-9931-33), which were placed on the medical examiner's table and assembled and photographed. (T50-9933). Dr. Mittleman testified that part of his job was to "take lots of photographs" (T50-9933), and to look at the bones, areas of injury, and find out what defects and injuries are present. (T50-9934). Dr. Mittleman was able to find a metallic, aluminum-jacketed projectile in the body which did not show up on x-ray (T50-9944), and after removing the projectile Dr. Mittleman exposed the heart to show the damage to the heart and the great vessels. (T50-9945). Dr. Mittleman was of the opinion

the bullet entered in an upward trajectory going to the left. (T50-9949). The bullet traveled from right to left and slightly upward and forward. (T50-9960).

The doctor testified that "whatever dismembered this part of the body" was a straight instrument going through the bone. (T50-9976). The doctor was unable to say the bush hook in evidence was the instrument used to dismember the body. (T50-9988). He did testify that the bush hook which had been admitted into evidence (State's Exhibit 184) was an instrument "consistent" with the sites of dismemberment. (T50-9963-64). There was no evidence on the body to show how far away the gun was when it was fired. (T50-9998).

Defense counsel objected to the gruesome medical examiner photographs as cumulative and unduly prejudicial (T50-9897). The doctor's photographs showed the heart exposed by the doctor (T50-9899), a metal probe which had been run through the body to demonstrate the actual path of the bullet (T50-9897), and pictures of the bush hook being along side severed body parts. (T50-9909).

Firearms expert Thomas Quirk testified that the imperfections on the aluminum jacket were caused by firing from the firearm seized from the defendant's residence to the exclusion of all other weapons in the world. (T51-10043).

After the state rested (T51-10043), Mr. Chavez moved for judgment of acquittal. Defense counsel specifically argued the state's failure to establish a corpus delicti for the crime of sexual battery. (T51-10045-51).

d. The case in chief of the defense.

Defense counsel presented the defense described above. Locksmith Wilson Moncada testified that there was no gun visible when he opened the trailer for the

Scheinhauses. Edward and Susan Scheinhaus testified as to their actions. Several law enforcement officers, including Detective Dangler and Firefighter Fernandez testified to the Scheinhauses' contradictory statements concerning the planters. FBI special agents Lund and Hexter testified about how Susan Scheinhaus protected her son. Special agents Lund and Hexter testified that they were excluded from the interrogation of Mr. Chavez by Metro-Dade police.

Juan Carlos Chavez testified that Ed Scheinhaus had killed Samuel James Ryce. Mr. Chavez described his arrest and interrogation. Mr. Chavez testified that on 6 December when he got out of the car, he heard people's voices yelling it was the police. (T52-10338). Mr. Chavez said that one of the people came up behind him and forced him to the ground and searched him. (T52-10338-39). Detective Murias handcuffed him and put him in a car. Murias told him "not to do anything stupid" or he would be shot. (T52-10340).

Mr. Chavez testified that at the police station Detective Murias asked him if he had anything like a handbag, a backpack or study materials. (T52-10344). When Mr. Chavez said he did not, Murias told him his memory wasn't so good, because they found a backpack or a book bag inside his trailer. (T52-10345). Mr. Chavez told them that they were probably looking in the wrong trailer (T52-10345), but they said no. The detectives told him that the horse ranch he went to each day was close to where the Ryce family lived. The police suggested that perhaps the child was attracted by the horses and had gone in and forgotten the bag. (T52-110346-47). The police would not listen to his answers and kept returning to the same subject over and over again. (T52-10347). Eventually, Mr. Chavez gave in and said okay, if that makes sense to you okay, fine, perfect.

(T52-10348). He told the officers that he had found the book bag, though this was not true. (T52-10349). He told the officers he was tired, but they just continued with another question. (T52-10356). He told them he did not know the child, but the officers accused him of lying. (T52-10357).

Mr. Chavez testified that he was taken from one windowless room to another (T52-10358) and felt like it was the same thing as being in Cuba with the police. At some point he sat on the floor and stretched out his legs, only to be aroused by Detective Diaz. Diaz slammed his jacket down and yelled at him to get up off the floor, saying "Put your ass on that fucking chair! No more Mr. Nice Guy!" (T52-10359). The police began banging on the table and threatening him. (T52-10359). The detectives showed Mr. Chavez the book bag, handing him the books and asking him to check and see if he recognized them. (T52-10363-64). Mr. Chavez had already told the officers that it was not his book, but they insisted that he check the book. He took the book and leafed through it. (T52-10365).

Mr. Chavez had no idea how long he had been interrogated at this point. (T52-10380). He told the officers that he was tired, but everything he told them they declared a lie. Chavez told them that he needed time to think and rest. (T52-10380-81). Then he told the officers a lie about an accident that occurred. He thought they would verify the story was false and the officers would realize that he knew nothing about the disappearance of the child. (T52-10381). The police had him write the story out. (T52-10381-82). As he wrote, the officers would correct him, and he would write it again. (T52-10383).

Mr. Chavez testified that he had been deprived of sleep and was only allowed to rest for brief periods while the officers were out of the room. (T52-

10390). Eventually the police told him that somebody had been sent to examine the gate and that they knew his story was not true. The officer was yelling, and Mr. Chavez was upset as well. (T52-10400). The officer told Chavez he had run out of patience and they would get the truth out of him by pulling his tongue out in pieces or squeezing his testicles or whatever, but they were not going to leave him on the street and would ship him back to Cuba. (T53-10401).

Mr. Chavez tried other false stories, still hoping that the police would realize he did not know anything. He told them the Ivan story. (T53-10402). He feared telling them the truth because Ed Scheinhaus would point the finger back at him. Above all, Mr. Chavez feared being sent back to Castro's Cuba. (T53-10403).

Finally, Mr. Chavez tried to tell the police about Ed Scheinhaus, but Detective Estopinan refused to listen. Estopinan slammed the table and said he was sick and tired of looking at Chavez' face. (T53-10404). The detectives told Mr. Chavez that if he stayed in the United States it would be to sit in the electric chair. He told them that he would prefer the electric chair to being sent back to Cuba. (T53-10404). The police then had him write the note about the death penalty. (T53-10405).

Another detective told Mr. Chavez that he had never seen Mr. Estopinan in such a bad mood. (T53-10405-06). He told Mr. Chavez that he would get Estopinan to forget about calling Immigration if Chavez would tell him where the body was. Mr. Chavez was not positive, but he was pretty sure it was in the planters. (T53-10407). Mr. Chavez testified that at this point in the interrogation process he had not slept at all, that he was feeling bad, and was sick to his

stomach. The last time he had seen daylight was when he was at the horse ranch. (T53-10409). He didn't even know what day it was, never mind what time it was. (T52-10377). Toward the end of the questioning the officers asked detailed questions. They would stop him and correct him or tell him to change parts of the story. (T53-10410-11, 10417).

The defense rested. The court denied the renewed motion for judgment of acquittal on the sexual battery count. (T53-10439-41). On rebuttal, the state called Sergio Cabrer, Ed Scheinhaus' house arrest officer. (T53-10516-30). The state also recalled detectives Diaz, (T53-10530), Murias, (T53-10533), and Estopinan, (T53-10536). Each denied that they had abused or coerced Mr. Chavez. They also denied showing Mr. Chavez the book bag or suggesting stories to him.

e. Closings, deliberation, and verdict.

During deliberations, the jury asked for the transcript of Detective Estopinan's testimony. (T54-10768). The jurors were particularly interested in Estopinan's testimony concerning Mr. Chavez' brother. (T54-10769). The relevant portions of the transcripts requested were published to the jury. (T54-10785). The jury returned a verdict of guilty as charged on all counts. (T54-10793-94).

f. Sentencing.

The court conducted a case management on 07 October 1998 (T55-10803) and again on 22 October 1998, issues of the Defendant's presence and witness coordination were discussed. (T55-10812). On 26 October 1998 the sentencing proceedings commenced. The defense timely objected to the heinous, atrocious,

and cruel aggravator (T55-10846, T55-10848), which was overruled. (T55-10854). The defense objected to the avoiding arrest aggravator (T55-10858), and the victim impact evidence (T55-10859). The state called the parents of the victim, Claudine Ryce (T55-10890) and Donald Ryce (T55-10913) and rested. (T55-10925). The defense called the mother of Juan Carlos Chavez, Mireya Garcia-Mendez, Pedro Carballo, a classmate of Chavez from eleven and twelve years old. The defense also called Lieutenant Quinoa of the Dade County Jail; Seberiana Matos, of Miami, who had rented a room to Juan Carlos Chavez; Delia Luco (T55-10973) who knew Juan Carlos Chavez from renting from her mother. Juan Carlos Chavez was personally addressed. The court determined Mr. Chavez did not wish to testify in this phase of the proceeding. (55-10980-81). The jury were released (T55-10984) and counsel went over the jury instructions with the court. (T55-10984-T56-11011).

On Tuesday, 27 October 1998, counsel for the state (T56-11026) and counsel for the defense (T56-11049) gave closing arguments. Counsel for the state reminded the jury they were "not asked to pass sentence," that responsibility was solely the burden of the court. (T65-11032). Counsel for the defense immediately objected, and the court responded by immediately giving a cautionary instruction. *Id.* At the conclusion of the argument, counsel for the defense moved for a mistrial (T56-11048) which was denied. *Id.* Counsel for the defense proceeded with closing argument (T56-11049) followed by a jury charge conference. (T56-11067). Counsel objected to the in-the-course-of-the-kidnapping aggravator, the heinous, atrocious, and cruel aggravator (T56-11061), as well as doubling. (T56-11062). The objections were overruled (T56-11063),

and the court then instructed the jury. (T56-11067-73). Counsel then renewed objections to the weighing process, the doubling (T56-11074), heinous, atrocious, and cruel (T56-11075), avoiding arrest (T56-11075), victim impact evidence, elimination of a witness (T56-11075-76). All objections were overruled. (T56-11076). The court then ordered that the names and other information of the jurors be made public. (T56-11080). The court went into recess at 11:22 a.m. At 12:43 p.m. the jury returned an advisory sentence verdict recommending the imposition of the death penalty by a vote of twelve to zero. (T56-11085). The jury were polled (T56-11086), and then excused at 12:54 p.m. (T56-11091).

A *Spencer*[4] hearing was set for 10 November 1998. (T56-11090). The state and the defense filed sentencing memoranda (R40-8956-72; R41-9086-9108; T56-11093-11123) and the case came on for sentencing on 23 November 1998, at which time the court imposed the sentence of death (T56-11124-37) in accordance with its order on file. (R41-9073-83).

D. SUMMARY OF ARGUMENT

1. The police arrested the Appellant without probable cause, and the subsequent statements of the Appellant should have been suppressed as the fruit of the poisonous tree. The trial court erred in finding that the Appellant was not arrested on 06 December 1995, when agents of the FBI and the Metro-Dade Police Department rushed him, with guns drawn, as Mr. Chavez got out of the truck. The agents ordered Mr. Chavez to get on the ground, face down, with his arms out to his side. Mr. Chavez was searched. Numerous law enforcement agents were present, many wearing bulletproof vests. Mr. Chavez' decision to

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[4] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

accompany the officers to the homicide department was nothing more than a reasonable acquiescence to authority. A person of reasonable caution would not have felt free to leave or to refuse the officers' requests to accompany them to the police department. The police lacked probable cause to arrest Mr. Chavez based solely on the statements of Susan Scheinhaus regarding finding the book bag in Mr. Chavez' trailer.

2. Mr. Chavez' subsequent incriminating statements should have been suppressed by the trial court as they were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Constitution of the State of Florida. The interrogation occurred over an extraordinary period of time, 54 hours. During the first 30 hours of the interrogation, Mr. Chavez was not allowed to sleep. When he was finally allowed to sleep, Mr. Chavez had been awake for more than 40 hours. During the interrogation, Mr. Chavez was given two polygraph exams in the early morning hours. Mr. Chavez was also subjected to the "Christian burial technique" on two occasions, and after each one, Mr. Chavez made an incriminating statement. Mr. Chavez' alienage, lack of experience with the United States criminal justice system, and his limited understanding of English, led to the involuntary statements.

3. The trial court erred in denying the motion to suppress evidence filed by the defense. Specifically, the trial court erred in finding that the oral and written waiver of the right to a first appearance hearing was knowing, intelligent, and voluntary. Additionally, the delay in bringing Mr. Chavez before a magistrate in a timely manner induced his subsequent incriminating statements, and

interfered with his right to the assistance of counsel guaranteed by the Fifth and Sixth Amendments to the United States Constitution and Article 1, Sections 9 and 16, of the Florida Constitution. Rule 3.130, Florida Rules of Criminal Procedure requires that an accused, in custody, be brought before a magistrate within 24 hours of arrest. Mr. Chavez was not brought before a magistrate until after his 50-plus hour interrogation was concluded. The delay was motivated by law enforcement to gather additional evidence to justify the arrest. The delay also prevented a timely appointment of counsel. An assistant public defender had, during Mr. Chavez' interrogation, attempted to contact Mr. Chavez but was denied contact.

4. The trial court erred when it reversed a previous decision that prohibited photographing jurors in the courtroom. The trial court did not afford defense counsel the opportunity to present evidence to support the court's previous order in that two prospective jurors expressed reservations during voir dire about being photographed during the trial. Defense counsel detailed the expansive publicity that surrounded the case, and that the public defender's office had received death threats concerning the case. The previous order entered by the trial court was not defective; the order did not act as a prior restraint because that ruling did not prohibit the media from publishing what it obtained. The trial court erroneously reversed itself based only on speculation and not the facts as they existed.

5. The trial court erred in admitting a blood-stained mattress. The blood on the mattress did not come from either the victim, Jimmy Ryce, or Mr. Chavez. The source of the blood could not be identified. The evidence was not relevant

to any material issue, and contrary to the state's argument, the mattress did not corroborate Mr. Chavez' statements. Furthermore, if the mattress had any probative value, it was far outweighed by its prejudicial impact. With the admission of the mattress, the jury was free to speculate that Mr. Chavez had murdered others unknown at the trailer.

6. The trial court erred in denying Mr. Chavez' motion for judgment of acquittal to the capital sexual battery charge. The motion was well-taken in that the state failed to establish the *corpus delicti* of the charge. The only evidence of sexual battery introduced by the state was the last of a string of conflicting statements made by Mr. Chavez to the police. *Corpus delicti* requires proof independent of a confession that the crime was committed.

7. The admission, over timely objection, of numerous cumulative and gruesome photographs of the decomposed body of the victim that the medical examiner had re-assembled, was in error. The photographs were irrelevant and too inflammatory in that it created undue prejudice in the minds of the jury.

8. The trial court erred as to several capital sentencing issues. First, the trial court erred in denying a defense requested jury instruction on "doubling" of the "in-the-course-of-a-kidnapping" aggravator. Doubling occurs when aggravating factors refer to the same aspect of the crime. Based on the jury instructions at the guilt phase of the trial, the jury based its conviction for first degree murder on the felony murder theory with kidnapping as the underlying felony. Therefore, the penalty phase instruction regarding kidnapping allowed the jury to improperly "double" the same aspect of the crime. Furthermore, the penalty phase instruction was unsupported by the record in that the evidence was

solely from Mr. Chavez' statements to the police.

Second, the trial court improperly instructed the jury, and in error considered as a factor in its sentence, the avoid-arrest aggravator. In order for the aggravator to apply, the state must prove beyond a reasonable doubt that the sole or dominant reason for the murder was the elimination of a witness. The evidence in this case falls far short of that standard. The only evidence again came from the contradictory statements of Mr. Chavez. In the statement relied upon by the trial court in giving the instruction, Mr. Chavez described the homicide as occurring in a spontaneous manner. No evidence was presented that Mr. Chavez planned to kill Jimmy Ryce solely for the purpose of witness elimination. The evidence instead established that Mr. Chavez planned on letting Jimmy Ryce go at some point. The shooting occurred when the victim tried to run out of the trailer when a possible police helicopter was flying overhead. The shooting then occurred instantaneously and was not a premeditated or calculated act.

Third, the trial court erred in giving the standard heinous, atrocious, or cruel aggravating circumstance jury instruction. Insufficient evidence was adduced to support the instruction outside of the incriminating statements made by Mr. Chavez. Additionally, the instruction is unconstitutionally vague and overbroad.

Fourth, the imposition of the death penalty violates the prohibition against cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Mr. Chavez, while acknowledging the position of the Court as to this issue previously, urges the Court to adopt the reasoning and position steadfastly advocated by the late Supreme Court justice Thurgood Marshall who believed that the imposition of the

death penalty in all cases violated the Eighth Amendment.

Lastly, Mr. Chavez challenges the constitutionality of Section 921.141(7), Florida Statutes, which permits the introduction of victim impact evidence in capital cases. The statute leaves both judge and jury with unguided discretion which may lead to the imposition of the death penalty in an arbitrary and capricious manner. The statute is vague and overbroad. Victim impact evidence also violates due process, and infringes upon the exclusive right of the Court to regulate practice and procedure pursuant to Article V, Section 2, Florida Constitution.

E. ARGUMENT AND CITATIONS OF AUTHORITY

1. The police arrested Juan Carlos Chavez without probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12, of the Florida Constitution, and the subsequent statements of the defendant should have been suppressed.

The Fourth Amendment protects the "right of the people to be secure in their persons …" Therefore, an illegal arrest or other unreasonable seizure of a person is a violation of the Fourth Amendment. In *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the court announced what would become the standard for an arrest, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *See also Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (officers held defendant's ticket, luggage and identification and thus as a practical matter, defendant was under arrest because he was not free to go.)

In *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), the Supreme Court further defined an arrest. The Court concluded that an arrest is "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence"and requires either physical force or, where that is absent, submission to the assertion of authority. *Id.*, at 624.

On the evening of 06 December 1995, armed FBI agents and Metro-Dade police officers ran up to Mr. Chavez as he exited his pick-up truck. (R18-4037). The law enforcement agents were wearing bullet-proof vests and Police/FBI jackets. (R18-4037). Weapons were drawn. (R18-4039-40). The agents loudly yelled "Police." (R18-4038). Mr. Chavez was ordered to get on the ground, face down, with his arms out from his sides. (R18-4038). Two officers approached and patted Mr. Chavez down. (R18-4039). After Mr. Chavez was searched, he was handcuffed. Det. Murias asked him if he would "voluntarily" accompany the officers to the homicide office. (R18-4064). Mr. Chavez "agreed" to accompany the officers; he was handcuffed and placed in the back seat of an unmarked police car. (R18-4066). The Appellant submits that these acts by the police clearly established an arrest and seizure for Fourth Amendment purposes. The trial court erred in finding that Mr. Chavez "voluntarily consented" to go to the police station. (R17-3937).[5]

Courts generally rely on several factors in countering consensual encounters. In finding a consensual encounter, courts emphasize that the police "did not display a badge or a gun, order the appellee to stop, handcuff him, use language or a tone of voice indicating that compliance would be compelled, nor

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[5]The issue was consistently preserved by timely objection of trial counsel.

was there any indication that the encounter became threatening in any manner." *State v. Livingston*, 681 So.2d 762, 764 (Fla. 2d DCA 1996); *Jones v. State*, 658 So.2d 178, 180 (Fla. 1st DCA 1995). Florida courts have emphasized the absence of handcuffing in finding a voluntary encounter. *See Voorhees v. State*, 699 So.2d 602 (Fla. 1997); *Brown v. State*, 565 So.2d 412 (Fla. 3d DCA 1990) (defendant sat in back seat of the officers' vehicle without restraint); *Smith v. State*, 592 So.2d 1239, 1240 (Fla. 2d DCA 1992) (consensual encounter ended when police required defendant to place hands on hood of car); *Savage v. State*, 588 So.2d 975 (Fla. 1991). Another critical factor to consider was the number of police officers involved. Mr. Chavez was faced with several members of the FBI and several officers of the Metro-Dade Police Department. There was an overwhelming police presence at the location when Mr. Chavez was arrested.

An arrest, because of its intrusive nature, must be predicated on probable cause. *Popple v. State*, 626 So.2d 185, 186 (Fla. 1983); *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); § 901.15, Fla. Stat. The test for probable cause is whether the facts and circumstances within an officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed. *Brinegar v. United States*, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 1310-11, 93 L.Ed. 1879 (1949); *Millets v. State*, 660 So.2d 789, 791 (Fla. 4th DCA 1995). In determining if probable cause exists, "the totality of the circumstances, i.e., the whole picture, must be taken into account." *State v. Ellison*, 455 So.2d 424, 427 (Fla. 2d DCA 1984). No person of reasonable caution would have felt free to leave. No reasonable person would have attempted to walk away. No reasonable man would have been able to decline Officer Murias'

"invitation" to accompany him to the homicide division of the Metro-Dade Police Department.

Having established that an arrest occurred, the Court must determine whether the law enforcement officers had probable cause to arrest Mr. Chavez. Law enforcement officers arrested Mr. Chavez based upon a tip from Susan Scheinhaus, the owner of the property where Mr. Chavez lived. (R18-4025). Ms. Scheinhaus related to the FBI that after she broke into Mr. Chavez' trailer, with the assistance of a locksmith, she had seen Jimmy Ryce's book bag. (R18-4025-51). Other items purportedly belonging to Ms. Scheinhaus, including jewelry and a handgun, were also present in Mr. Chavez' trailer. (R18-4050).

Ms. Scheinhaus' tip, however, was not enough to justify Mr. Chavez' arrest. The state below persisted that the defendant was not under arrest and was free to leave up until he made statements about accidentally killing Jimmy Ryce. At the time of Mr. Chavez' arrest, the police had yet to corroborate Ms. Scheinhaus' story. (R18-4055). Ms. Scheinhaus was not a disinterested "citizen informant" but instead personally knew and employed Mr. Chavez for approximately a year; she suspected him of thefts, and had just burglarized his trailer. Ms. Scheinhaus does not qualify as the citizen-informant whose information is at the high end of the tip-reliability scale. *See State v. Evans*, 692 So.2d 216, 219 (Fla. 4th DCA 1997).

Because the arrest was illegal, any subsequent statements by Mr. Chavez were the fruit of the poisonous tree and must be suppressed. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 484-87, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). A subsequent confession may only be used if intervening circumstances break the

chain of causation between the illegal arrest and confession. *Taylor v. Alabama*, 457 U.S. 687, 689-93, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); *Dunaway v. New York*, 442 U.S. 200, 216-19, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Brown v. Illinois*, 422 U.S. 590, 597-605, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). The state bears the burden of proving by clear and convincing evidence that the confession was the product of the illegal arrest. *Reynolds v. State*, 592 So.2d 1082 (Fla. 1992). In this case, there are no intervening circumstances, and the statements should have been suppressed.

2. The Appellant's confession was involuntary and was obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Constitution of the State of Florida.

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, 993-94 (Fla. 1997), *cert. denied*, 523 U.S. 1072, 118 S.Ct. 1512, 140 L.Ed.2d 666 (1998). When, as here, however, a defendant challenges the voluntariness of his confession, the burden is on the state to establish by a preponderance of the evidence that the confession was freely and voluntarily given. *See Deconnigh v. State*, 433 So.2d 501, 504 (Fla. 1983). The trial court below erred in finding that the incriminating statements made by Mr. Chavez were voluntarily made and admissible.

The test for voluntariness asks whether, under the totality of the circumstances, the confession was a product of coercive police conduct. *See Colorado v. Connelly*, 427 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *Traylor v. State*, 596 So.2d 957, 964 (Fla. 1992); *State v. Sawyer*, 561 So.2d 278,

281 (Fla. 2d DCA 1990). "Numerous factors should be weighed by the Court in conducting this analysis, such as the length of an interrogation, *see Chambers v. Florida* 309 U.S. 227, 239-40, 60 S.Ct. 472, 84 L.Ed. 716 (1940); *Snipes v. State*, 651 So.2d 108, 111 (Fla. 2d DCA 1995), whether the interrogation occurred at a police station in police-controlled areas, *see Drake v. State*, 441 So.2d 1079, 1081 (Fla. 1983), whether the defendant was contacted by the police or vice versa, *Orozco v. Texas*, 394 U.S. 324, 29 S.Ct. 1095, 22 L.Ed.2d 311 (1969); the defendant's familiarity with the American system of justice and U.S. constitutional rights, *United States v. Yunis*, 859 F.2d 953, 964-66 (D.C. Cir. 1988); and whether the defendant was properly and fully advised of his *Miranda* rights.

The court's inquiry into the voluntariness of the confession is separate from the inquiry into whether the waiver of *Miranda* rights was voluntary or not. *Yunis*, at 961; *Sawyer, supra*, at 284-85. The question of voluntariness is determined first by state law, subject to the mandatory minimum requirements of the federal constitution. *Thompson v. State*, 584 So.2d 198, 204 (Fla. 1989).

A confession is voluntary if: "at the time of making the confession the mind of the defendant [is] free to act uninfluenced by either hope or fear." *Brewer v. State*, 386 So.2d 232, 235 (Fla. 1980), *quoting Harrison v. State*, 152 Fla. 86, 91, 12 So.2d 307, 309 (Fla. 1942). Conversely, "[T]he confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession are calculated to delude the prisoner as to his true position or to exert improper and undue influence over his mind." *Id.; see also, Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Bram v. United States*, 168 U.S. 532, 542, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

"Determination of whether a statement is involuntary 'requires more than a mere color-matching of cases.' It requires careful evaluation of all the circumstances of the interrogation." *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *see also Gaspard v. State*, 387 So.2d 1016, 1021 (Fla. 1st DCA 1980). The totality of the circumstances test looks at both "the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *see also, Thompson v. State*, 548 So.2d 198, 204 (Fla. 1989). The state bears the burden of proving that Mr. Chavez' confession was knowing, voluntary, and intelligent. *Roman v. State*, 475 So.2d 1228, 1232 (Fla. 1985); *Brewer, supra*, 386 So.2d at 236.

a. The extraordinary length of Mr. Chavez' interrogation (over 54 hours) is a significant factor the Court should consider in determining whether the statements made by Mr. Chavez were voluntary and not improperly coerced.

The Appellant was taken into custody by agents of the FBI and the Metro Dade Police Department at approximately 7:35 p.m. on 06 December 1995.[6] Law enforcement agents rushed Mr. Chavez as he got out of his truck in front of his trailer. Guns were drawn and Mr. Chavez was ordered to get on the ground. (R18-4037-40). Mr. Chavez complied, and law enforcement agents searched Mr. Chavez for weapons. (R18-4039-40). Mr. Chavez then "voluntarily"[7] went with

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[6]The appellant's position is that he was arrested and taken into custody for purposes of the Fourth and Fifth Amendment to the United States Constitution when the police initially approached him on 06 December. It was not a consensual police/citizen contact. See issue 1, *supra*.

[7]The Appellant contends that a person of reasonable caution in his position would not have felt free to disregard the police officer's request that he

Metro Dade officers Murias and Diaz, while handcuffed, to homicide headquarters. (R18-4064). This began a period of continuous police custody for more than 54 hours, most of which was spent being interrogated by rotating groups of detectives, in a small room equipped only with a table and chairs.

From the time Mr. Chavez was taken into custody, he was not allowed to sleep or rest until approximately 30 hours later during the early morning of 08 December 1995.[8] (R18-4130). During the 30 previous hours, Mr. Chavez was interrogated by at least two different teams of officers: Detectives Murias and Diaz, and Estopinan and Goldston. Mr. Chavez was also subjected to two different polygraph tests administered by police officer Thomas Mote. (R18-4084). The polygraphs were given during the early morning hours of 07 December.

During approximately the first 18 hours, Mr. Chavez denied responsibility for the disappearance or death of Jimmy Ryce. After 18 hours of interrogation, Det. Estopinan said that Mr. Chavez admitted that he accidently killed Jimmy Ryce at the horse farm. (R18-4104). The final "confession" does not come until sometime after 8:05 p.m. on 08 December, some 48-plus hours after Mr. Chavez was originally detained. (R19-4505). In between those two time frames, the officers testified that Mr. Chavez gave at least two more versions of how Jimmy Ryce died.

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accompany them to headquarters. See issue 1, *supra*.

[8]Mr. Chavez had been working all day on 06 December. Testimony established that Mr. Chavez had been awake over 40 hours before he was allowed to sleep. (R19-4301).

The police officers who testified at the hearing on the Motion to Suppress testified that Mr. Chavez was cooperative, and in fact, some said he was very cooperative. (R18-4177, 4292; R19-4403, 4476). It is incredulous that a suspect who is “cooperating” requires 30 hours of sleep-deprived interrogation in order to gain a confession. The sheer length of the interrogation in this case combined with the equally extreme length of time Mr. Chavez was denied sleep, is strong proof of an involuntary and coerced confession. *See Chambers v. Florida*, *supra*, at 239-40 (defendant held in custody for one week culminating in all-night interrogation); *Binns v. State*, 344 S.W.2d 841, 843 (Ark. 1961) (quoting ABA report that provided “[i]t has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.”); *Spradley v. State*, 442 So.2d 1039, 1042-43 (Fla. 2d DCA 1983) (deprivation of sleep during one night of interrogation); *Hawthorne v. State*, 377 So.2d 780 (Fla. 1st DCA 1979) (deprivation of sleep for 36 hours).

In *State v. Sawyer*, 561 So.2d 278 (Fla. 2d DCA 1990), the court affirmed the granting of a motion to suppress a confession in which the interrogation lasted continuously over 16 hours, from approximately 4:10 p.m. until approximately 9:30 a.m. the following morning. *Id.,* at 283. Mr. Chavez’ interrogation, to the point he was allowed sleep, lasted twice that long. The court in *Sawyer* held that sleep deprivation is a factor that may lead to an involuntary confession. *Id.,* at 288. The *Sawyer* court also found that the defendant’s confession was the product of several cadres of police officers continuously interrogating Sawyer for 16 hours. *Id.,* at 290-291. Finally, the court found the use of the polygraph and the subsequent “failure” by the defendant contributed to the involuntary confession.

Id., at 290-91. The *Sawyer* opinion also noted that one of the officers involved advised a sergeant that Sawyer might be too tired from undergoing long hours of interview and accusation for a polygraph to be accurate and suggested the test be delayed for a day or two. *Id.,* at 290. Sawyer was given the test at 9:00 p.m., only 5 hours after his interrogation began. Mr. Chavez was given two polygraph tests beginning five hours after he was taken into custody, but the tests did not begin until after 1:00 a.m. (R18-4084).

The coercive elements faced by Mr. Chavez during his 54-hour interrogation were much more severe than those suffered by the defendant in *Sawyer*. The Court should cast a doubtful eye towards the officers' testimony that Mr. Chavez remained alert when he had not slept for 40 hours. The Court must question the candor of the officers who testified that Mr. Chavez was cooperative throughout the interrogation when those same officers admit it took 18 hours of nearly continuous interrogation before Mr. Chavez admitted involvement in Jimmy Ryce's death. The picture of an alert and cooperative witness who volunteered to answer questions that the officers attempted to paint at the suppression hearing is simply not supported by the facts.

b. The police on at least two occasions subjected Mr. Chavez to the "Christian burial" ploy in order to induce a confession.

The Court has previously held that the use of the "Christian burial technique" by law enforcement personnel is unquestionably a blatantly coercive and deceptive ploy. *Hudson v. State*, 538 So.2d 829, 830 (Fla. 1989); *Roman v. State*, 475 So.2d 1228, 1232 (Fla. 1985). Law enforcement in this case, on at least two different occasions, employed the "Christian burial technique," and both

times it precipitated an incriminatory statement from Mr. Chavez.

Firstly, on 07 December, shortly after 3:45 p.m. (R19-4453), while Mr. Chavez was riding in a car with Det. Estopinan and Piderman, Det. Estopinan pleaded with Mr. Chavez that the "family of Jimmy Ryce, meaning his mother and father, need to recover Jimmy Ryce. He needs to be properly buried. I was basically pleading with him so he needed to tell us, so we could recover the body." (R19-4454). At that point in time, Mr. Chavez had been in continuous custody and subject to nearly continuous interrogation for over 20 hours, including an all-night session when two polygraphs were administered. Mr. Chavez had only admitted, at that point, that he was responsible for the accidental death of Jimmy Ryce. (R18-4104). Mr. Chavez had told the police that he had left the body of Jimmy Ryce in a barrel in the back of a pick-up truck. However, in direct response to Det. Estopinan's Christian burial plea, Mr. Chavez told the officers that they all should go back to the homicide office because "Jimmy Ryce no longer exists." (R19-4454).

Det. Estopinan employed the "Christian burial technique" a second time. On 08 December, sometime between 3:30 p.m. and 6:30 p.m., Det. Estopinan again pleaded with Mr. Chavez to tell him where the body is in order "for the family to recover him to properly bury him, and I actually pleaded with him to tell me where he was." (R19-4498). At that point, Mr. Chavez had been in continuous police custody and subject to nearly continuous interrogation for approximately forty-four to forty-seven hours. Approximately two hours later, sometime after 8:05 p.m. (R19-4504-06), Mr. Chavez gave the final version of the confession. (R19-4506).

While in *Hudson, supra*, and *Roman, supra*, the Court found the use of the Christian burial technique insufficient to make an otherwise voluntary statement inadmissible, Mr. Chavez' case is distinguishable. The defendant in *Roman* was only interrogated for approximately 3½ hours prior to his confession, which occurred sometime after 10:00 p.m. *Id.*, at 1230. In *Hudson*, there was no apparent issue as to length of interrogation, the use of polygraphs, or any of the other coercive factors present in Mr. Chavez' case. When combined with the extraordinary length of the interrogation and the sleep deprivation, the two polygraph tests, Mr. Chavez' lack of experience with the United States system of justice and constitutional rights, his poor English, the interrogation occurring mostly in a small and confined room with only a table and chairs, the use of the Christian burial technique in this case is sufficient to make Mr. Chavez' confession involuntary.

c. Law enforcement officers failed to properly advise the Appellant of his *Miranda* rights, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution.

Before a defendant may make a proper, valid waiver of *Miranda* rights, the police must fully inform the defendant of the nature of the rights to be waived. Both the Federal and Florida constitutions require police to inform a suspect of his right to confer with counsel before submitting to interrogation. *See Miranda v. Arizona,* 384 U.S. 436, 470, 86 S.Ct. 1602, 16 L.Ed.2d 294 (1966); *Traylor v. State,* 596 So.2d 957, 970 (Fla. 1992). Law enforcement officers used a defective *Miranda* waiver form that neglected to inform the Appellant Chavez of his right to consult with counsel before submitting to questioning. Therefore, all

statements obtained as a result of the invalid waiver should have been suppressed.

The standard printed form used by law enforcement officers before the questioning of the Appellant was the Metro-Dade Warning form. Regarding the right to consult with counsel, the Metro-Dade form neglects to completely inform an interrogation target of his rights: "If you want a lawyer to be present during questioning at this time or any time hereafter, you're entitled to have a lawyer present." The Appellant was read the rights form in Spanish, and the provision regarding the right to have counsel present was translated for the Appellant by Det. Juan Carlos Murias: "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).

The *Miranda* warnings as administered to the Appellant are deficient because it failed to advise the Appellant that he had the right to consult with counsel before submitting to questioning. *Miranda* rights include the distinct rights to both consult with an attorney before questioning *and* to have counsel present during questioning. *See Duckworth v. Egan,* 492 U.S. 195, 204, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). The Florida Constitution independently requires that a defendant be advised of both the right to consult with an attorney before questioning, and the right to the presence of an attorney during questioning. In *Traylor, supra,* the Supreme Court of Florida held that Article I, Section 9, of the Florida Constitution requires that a defendant be advised of the right to "a lawyer's help" 596 So.2d at 957. The "right to a lawyer's help," the Court explained, "means that the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during the interrogation." *Id.,*

n.13.

The failure to completely and properly warn a defendant of the right to the presence of counsel is fatal. In *People v. Snaer,* 758 F.2d 1341 (9th Cir. 1985), the Ninth Circuit opined:

> The right to consult with an attorney before questioning is significant because counsel can advise the client whether to exercise his right to remain completely silent, or, if he chooses to speak, which questions to answer or how to answer them. Thus, it is extremely important that a defendant be adequately warned of this right.

In *Snaer,* the Ninth Circuit held that the written waiver form was inadequate, but that the defendant made a valid waiver because the police had properly explained the right to the presence of counsel orally. *Id.* The California Supreme Court reached the same result in *People v. Kelly,* 800 P.2d 516, 526 (Cal. 1990).

The Appellant was never properly advised of his right to consult with counsel before submitting to interrogation. Had the Appellant been properly advised, he may very well have elected to consult with counsel prior to submitting to questioning. The absence of a proper *Miranda* warnings nullifies the subsequent waiver, and thus, any statements obtained from the invalid waiver should have been suppressed.

d. The Appellant's confession was obtained in violation of *Miranda* because law enforcement officers failed to scrupulously honor the unequivocal invocation of the right to remain silent by the Appellant.

The right of a criminal defendant to cease custodial interrogation is absolute. Once a defendant has invoked his right to silence, the invocation must be scrupulously honored by the police. *Michigan v. Mosley,* 423 U.S. 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). The state bears a heavy burden of proving that the

police scrupulously honored the invocation of the right to remain silent, and to prove that the defendant subsequently initiated a different conversation with law enforcement to waive his invoked right. *State v. Belcher,* 520 So.2d 303 (Fla. 3d DCA 1988).

The critical factors in determining whether the police scrupulously honored the invocation of the right to remain silent include: (1) whether the police ceased the interrogation immediately upon request; (2) whether the questioning was resumed only after a significant amount of time had passed; (3) whether fresh *Miranda* warnings were provided; and (4) whether the later questioning was restricted to a crime that had not been the subject of the initial interrogation for which the right to silence was invoked. *Mosley,* 423 U.S. at 104, 96 S.Ct. at 326.

"[A] suspect 'clearly' invokes the right to cut off questioning when a reasonable person would conclude that the suspect has evinced a desire to stop the interview." *State v. Owen,* 696 So.2d 715, 722 (Fla. 1997) (SHAW, J., concurring). Justice Shaw continued:

> Given [Florida's rich cultural] diversity, it is unrealistic to expect each Floridian to invoke his or her constitutional rights with equal precision. Such an expectation might make sense in a homogeneous region of the country like the Midwest but is untenable here. Many Floridians have little formal schooling, speak broken–or no–English, or have emigrated from societies where the rules governing citizen/police encounters are vastly different from ours.

Id., at 721-722.

The Appellant further invoked his right to silence when he informed police that he did not want to make any further statements unless the police could guarantee that he would be executed within the next week. The police could not

lawfully meet the condition requested by the Appellant, and the interrogation should have ceased at that point. *See Smith v. Endell,* 860 F.2d 1528, 1531-1532 (9th Cir. 1988); *Connecticut v. Barrett,* 479 U.S. 523, 529, 107 S.Ct. 828, 93 L.Ed.2d 2920 (1987). The state cannot meet its heavy burden of showing that the police scrupulously honored the unequivocal requests of the Appellant to cease interrogation. Because the police disregarded the invocations without any attempts to clarify, the statements elicited subsequently to the invocations must be suppressed.

e. The Appellant's alienage, lack of prior experience with the United States criminal justice system, and limited understanding of English led to the involuntary confession.

Mr. Chavez' poor language skills and lack of knowledge of the American legal system are relevant factors in determining whether he validly waived his rights or understood *Miranda*. *See United States v. Fowler*, 476 F.2d 1091, 1093 (7th Cir. 1973) (defendant's young age and lack of experience in the criminal justice system relevant in determining whether a valid waiver); *United States v. Fung*, 780 F.Supp. 115, 116 (E. D. NY 1992) (defendant's poor language skills and lack of knowledge of the American legal system were sufficient to indicate that she did not understand her *Miranda* rights even though she read aloud those rights in her native language); *United States v. Yunis*, 859 F.Supp. at 964-66, (noting that "an individual's foreign background seems especially pertinent to the knowing quality of a waiver"); *United States v. Higareda-Santa Cruz*, 826 F.Supp. 355, 360 (D. Or. 1993) (granting motion to suppress based on involuntariness of waiver because of defendant's background, experience, conduct and language

difficulties); *United States v. Kim*, 803 F.Supp. 352, 357-58 (D. Haw. 1992) (suppressing statements of Korean defendant with limited understanding of English); *United States v. Nakhoul*, 596 F.Supp. 1398, 1402 (D. Mass. 1984) (suppressing due to an incomplete understanding of *Miranda* rights statements by a Lebanese national with a limited understanding of American law, customs and constitutional rights).

Mr. Chavez is from Cuba. He had only recently come to the United States at the time of his arrest in 1995, approximately four years. (R18-4071). A translator was necessary for Mr. Chavez' trial, and Det. Estopinan testified at the suppression hearing that he believed Mr. Chavez was more comfortable conversing in Spanish. (R19-4436). Specifically, because Mr. Chavez came from a communist and totalitarian dictatorship, his prior experience with a court system and the police would have been significantly different from that of someone from the United States or other democratic nation. Certainly, Mr. Chavez could not have possibly understood what the *Miranda* warnings meant to him and the rights to which he was entitled.

In *Martinez v. State*, 545 So.2d 466 (Fla. 4th DCA 1989), the court reversed the conviction and sentence of the defendant because the trial court erred in denying the defendant's motion to suppress incriminating statements. The court found the statements, a confession to a murder, were not voluntarily made but were the product of coercion and intimidation. *Id.*, at 467. Facts supporting the court's decision were Martinez' status as an illegal alien who had an extremely limited education. *Id.* Martinez was also given a polygraph exam, after which the polygraphist accused Martinez of having lied. *Id.* Despite this, Martinez held fast

to his denial of having committed the crime. *Id.* Nevertheless, the police persisted and eventually Martinez confessed. Similar tactics were used against Mr. Chavez with the same results. For all of the above reasons, the trial court erred in finding that the statements by Mr. Chavez were free and voluntary and without coercion.

3. The delay of the first appearance for Juan Carlos Chavez deprived the defendant of his constitutional right to counsel.

The Appellant maintains that the trial court committed reversible error by denying the motion to suppress evidence filed prior to trial on his behalf (R16-3535-54) and preserved consistently through trial. The trial court erred in finding that the oral and subsequent written waiver of the right to a first appearance hearing was knowing, intelligently, and voluntarily made. The waiver, produced under the direction of the state attorney, was not signed until well after the time periods under Rule 3.130, Fla.R.Crim.P., had expired. Additionally, the Appellant maintains that the delay in bringing him before a judicial officer within 24 hours of custodial restraint induced his subsequent confession and unconstitutionally interfered with his right to the assistance of counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16, of the Florida Constitution.

a. The delay in presenting Mr. Chavez to a magistrate was unconstitutional and was exploited by agents of the state to extend questioning without counsel in violation of Fla.R.Crim.P. 3.130.

Rule 3.130, Florida Rules of Criminal Procedure, states, in pertinent part that every arrested person shall be taken before a judicial officer, within 24 hours of arrest, at which time the magistrate shall inform the defendant of the charge and

provide the defendant with a copy of the complaint. The magistrate shall also advise the defendant that (1) the defendant is not required to say anything, and that anything the defendant says may be used against him or her; (2) that the defendant has a right to counsel, (3) the defendant has a right to communicate with counsel, and if necessary, will be provided reasonable means to do so. When the magistrate determines that the defendant is entitled to court-appointed counsel and desires counsel, the magistrate shall immediately appoint counsel.

Confessions that are improperly coerced through a deprivation of the right to a first court appearance within 24 hours of arrest may be a possible ground for suppression of the confession. *Johnson v. State,* 660 So.2d 648, 660 (Fla. 1995); *Keen v. State,* 504 So.2d 396, 399-400 (Fla. 1987). Statements or confessions given after 24 hours have elapsed since arrest are not *per se* inadmissible, however, as each case must be examined upon its own facts to determine whether a violation of Rule 3.130 has induced the subsequent confession. *Keen, supra; Headrick v. State,* 366 So.2d 1190, 1191 (Fla. 1st DCA 1978). Where a defendant is advised of his rights and makes an otherwise voluntary statement, the delay in following Rule 3.130 must be shown to have induced the confession before the confession is suppressed. *Id; Williams v. State,* 466 So.2d 1246, 1248 (Fla. 1st DCA 1985), *review denied,* 475 So.2d 696 (Fla. 1985).

Instead of complying with the mandate of the Supreme Court of Florida, by its enactment of the Florida Rules of Criminal Procedure, the state connived to circumvent the rules. The police officers, under the direction of the same assistant state attorney who prosecuted the defendant, drafted and presented to Mr. Chavez a waiver of rights. The form of the waiver was deficient, but more importantly,

the timing of the waiver is significant. The waiver was not drafted, was not presented, was not acknowledged, and not executed until after the expiration of the 24-hour period provided in the rules. This type of due process manipulation by the government is of the nature and kind intended to be deterred by the exclusionary rule.

b. The denial of a prompt judicial determination of probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Sections 9 and 12, of the Florida Constitution, and Florida Rule of Criminal Procedure 3.133.

The evidence against Mr. Chavez must be suppressed because the state deliberately denied him his right to a judicial determination of probable cause. Every criminal defendant arrested without a warrant has a constitutional right to a judicial determination of probable cause. U.S. Const. Amends. IV, XIV; Art. I, §§ 9, 12, Fla. Const.; *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). This requirement applies to Florida prosecutions. *Mapp v. Ohio*, 341 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951); *Gerstein*. The state violated this constitutional right by denying Mr. Chavez a judicial determination of probable cause for over 72 hours. This Court must suppress the evidence against the Defendant as the fruit of this constitutional violation. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Mapp*; *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996); *United States v. Leal*, 876 F.Supp. 190 (C.D. Ill. 1995); *Black v. State*, 871 P.2d 35 (Okla. 1994).

The state and federal constitutions forbid the state from making arrests

without a judicial determination of probable cause. The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ….

U.S. Const. Amend. IV. The Fourth Amendment requires that the probable cause determination be made by a neutral and detached magistrate. *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). An arrest pursuant to a valid warrant satisfies this requirement. When police officers make a warrantless arrest, they must seek a judicial determination of probable cause. *Gerstein v. Pugh*, 420 U.S. at 114, 125.

In *County of Riverside v. McLaughlin,* 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), the court was faced with a case where criminal defendants were deprived of their right to a probable cause determination within 48 hours of a warrantless arrest, as dictated by California law. Riverside County had enacted a policy by which the probable cause determination is combined with arraignment, both of which must be conducted within two days of arrest. The court began its analysis with a discussion of *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), which held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. *McLaughlin, supra,* 500 U.S. at 47, 111 S.Ct. at 1665. The Appellant respectfully directs the attention of the Court to the passage where the Supreme Court of the United States discussed what type of police conduct constitutes "unreasonable delay" in the context of a *Gerstein* violation:

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.

McLaughlin, supra, 500 U.S. at 56-57, 111 S.Ct. at 1670.

The state's arrest and detention of Juan Carlos Chavez violated *Gerstein*. The state did not obtain a warrant for the arrest. Consequently, the Defendant was entitled to a post-arrest determination of probable cause. The police never obtained a probable cause determination of any kind until the Defendant's first appearance hearing, more than 85 hours after they arrested him. Even at that hearing, the court never determined whether the police had probable cause to arrest the Defendant. Instead, the state submitted an affidavit based on evidence it obtained after the arrest by exploiting the *Gerstein* violation. [*See* R17-3931].

Police must obtain the judicial determination required by *Gerstein* without unnecessary delay. In *Gerstein*, the Supreme Court expressed a preference for arrests supported by a warrant, but recognized that this was not always practical. *Id.* at 113. Instead, the Court "established a 'practical compromise' between the rights of individuals and the realities of law enforcement." *McLaughlin*, 500 U.S. at 53. This compromise justifies only a limited delay.

> Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly.

Gerstein 420 U.S. at 114. The state must afford a "probable cause determination … promptly after arrest." *Id.* at 125.

The Supreme Court explained *Gerstein*'s "promptness" requirement in *County of Riverside v. McLaughlin*. Weighing the state's need for flexibility in structuring pretrial procedures against the Fourth Amendment rights of criminal suspects, the Court attempted to develop a standard that would provide guidance to judges evaluating *Gerstein* violations. *McLaughlin*, 500 U.S. at 56. Under the *McLaughlin* scheme, a *Gerstein* violation is presumed whenever the state delays a probable-cause determination for more than 48 hours. *Id.* at 57. If the delay is less than 48 hours, the defendant must show that the delay was not justified by a legitimate reason. *Id.* at 56.

The *McLaughlin* decision permits states to delay probable cause determinations for up to 48 hours for the purpose of combining those determinations with other pretrial proceedings. *McLaughlin*, 500 U.S. at 55-57. In Florida, those pretrial proceedings must be held within 24 hours of arrest. Fla.R.Crim.P. 3.130. Consequently, any delay beyond 24 hours is not constitutional under the rationale of *McLaughlin*. Probable cause determinations delayed even less than 48 hours may be unreasonable. *Id.* at 56. A defendant need only show that the delay was not for a legitimate purpose. *Id.* Any illegitimate delay may violate a defendant's constitutional rights, including "delay for delay's sake." *Id.*

McLaughlin balances "reasonable delay"with delay occasioned by a state's need for flexibility in arranging its post-arrest procedures, and the delay necessary to orchestrate those procedures. *Id.* at 55-57. *Gerstein* simply stated:

> Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.

Gerstein, 420 U.S. 124-25 (footnotes omitted). The Supreme Court of the United States recognized that probable cause determinations may be legitimately delayed by "practical realities" such as:

> often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, [and] obtaining the presence of an arresting officer ….

Id. at 57. The Court did not acknowledge any other factors that would legitimize delay.

Florida has taken advantage of *McLaughlin*'s scope for "flexibility and experimentation" and has chosen to incorporate the probable cause determination into first appearance hearings pursuant to Florida Rule of Criminal Procedure 3.130, wherever possible. Fla.R.Crim.P. 3.133(a). Florida does not seek to combine the probable cause determination with any other pretrial procedures. *Id.* Consequently, there is no legitimate reason under *McLaughlin* to delay a probable cause determination beyond 24 hours, unless that delay is caused by the "practical realities" of actually arranging for the hearing and determination. *McLaughlin*, 500 U.S. at 55-57; *see Willis v. Chicago*, 999 F. 2d 284 (7th Cir. 1992) (45-hour delay unreasonable where local system would have normally afforded probable cause determination within approximately 24 hours).

To the extent that Florida Rule of Criminal Procedure 3.133 authorizes probable cause determinations up to 48 hours after arrest, it is unconstitutional.

As the Supreme Court noted in *McLaughlin*, a probable cause determination does not pass "constitutional muster simply because it is provided within 48 hours." *McLaughlin*, 500 U.S. at 56. *McLaughlin* permits a delay of up to 48 hours in order to incorporate the probable cause determination with other procedures and in order to accommodate "practical realities." *Id.* at 55-57. Florida is not at liberty to schedule state post-arrest procedures within 24 hours and then delay probable cause determination another 24 hours simply because 48 hours is presumptively reasonable. To do so is to sanction "delay for delay's sake," in violation of *Gerstein*, *McLaughlin*, and the state and federal constitutions. The Court should exclude the evidence the State obtained by violating the Defendant's right to a prompt determination of probable cause.

c. The failure to provide Mr. Chavez a timely probable cause determination requires suppression of his confession.

The delay in providing Mr. Chavez a first appearance before a judicial officer within 24 hours of arrest was motivated by a desire of law enforcement officers to gather additional evidence to justify the arrest. The delay unconstitutionally interfered with the Defendant's right to counsel which would have attached by law at the first appearance. The unnecessary delay by law enforcement officers in bringing the Appellant before a judge for his first appearance resulted in the deprivation of the Appellant of his right to counsel. In *Peoples v. State,* 612 So.2d 555, 557 fn2 (Fla. 1992), the court opined that the knowing exploitation by the state of an opportunity to confront the accused without counsel present is as much a breach of the obligation of the state "not to circumvent the right to the assistance of counsel as is the intentional creation of

such an opportunity." *Id.* Well after 24 hours had passed after the Appellant was arrested and after the time by which counsel would have been appointed at a timely held first appearance, law enforcement officers induced an untimely waiver of first appearance and further prevented Assistant Public Defender Edith Georgi from seeing the Appellant and rendering assistance.

d. The right to counsel enjoyed by all persons taken into custody was violated by keeping Mr. Chavez separated from the public defender so his right to counsel could affix and be asserted.

Under the Sixth Amendment to the United States Constitution, the right to counsel for a criminal defendant attaches upon "the initiation of adversary judicial criminal proceedings–whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972). Courts have routinely held that the Florida Constitution offers greater protection than its federal counterpart. *State v. Douse,* 448 So.2d 1184, 1185 (Fla. 4th DCA 1984). Article I, Section 16, of the Florida Constitution guarantees the right to the assistance of counsel in all criminal prosecutions, and Fla.R.Crim.P. 3.130 states that the right to counsel attaches at least as early as the first appearance before a judicial officer, which should be held within 24 hours of arrest. *Douse, supra* at 1185. Under the Florida Constitution, the right to counsel attaches "at the earliest of the following points: when he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance." *Traylor v. State,* 596 So.2d 957, 970 (Fla. 1992) (footnotes omitted). Once the right to counsel attaches and is invoked on that particular charge, law enforcement

officers cannot deliberately elicit incriminating statements from a defendant in the absence of counsel. *Id; Owen v. State,* 596 So.2d 985, 989 (Fla. 1992). Any statement obtained in violation of the right to counsel violates the Florida Constitution and cannot be used by the state. *Traylor, supra* at 966.

The United States Supreme Court case *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986), addresses the scenario where an attorney goes to the police station seeking to confer with a client while an interrogation is in progress. In *Burbine* the defendant, like Chavez, eventually signed three inculpatory statements. The court commented that the defendant was unaware at all relevant times that his sister had retained counsel and that the attorney had contacted the police department. *Burbine, supra.* The court analyzed the scenario under the Fifth and Sixth Amendment, and found that no constitutional violations occurred.

The Supreme Court of Florida has since elaborated upon the holding of *Burbine.* In *Haliburton v. State,* 514 So.2d 1088, 1099 (Fla. 1987), the Court recognized that the holding in *Burbine* "does not disable the States from adopting different requirements for the conduct of its employees and officials as a matter of state law."

The Court again addressed the issue in *Harvey v. State,* 529 So.2d 1083 (Fla. 1988), which involved a public defender being denied access after voluntarily going to the jail to speak with the defendant prior to the first appearance before a judge. The Court held that since the public defender was not Harvey's lawyer, law enforcement officers were not obliged to allow the attorney confer with the defendant while he confessed. *Id.,* at 1085.

Smith v. State, 699 So.2d 629 (Fla. 1997), involved a scenario in which a judge appointed counsel for the defendant without his knowledge. Counsel was appointed for the defendant at the request of the public defender before the defendant was arrested and taken into custody. *Id.,* at 637. The Court held that the trial judge was required to establish the indigency of the defendant prior to appointing counsel, and absent an indigency determination, the appointment was a nullity. *Id.* The Court held that because Smith waived his *Miranda* rights before the interrogation, and Smith did not invoke his right to counsel, the statements subsequently made were voluntary and admissible. *Id.,* at 638. The relevant statements made by Smith occurred prior to his first appearance before a judge. *Id.*

The *Haliburton* progeny have established a line of case law which is contrary to federal constitutional standards. The constitution's Fourteenth Amendment guarantee of due process incorporates the Sixth Amendment assurance that the accused in a criminal prosecution has the right to counsel. This imposes a duty on the state to provide counsel to a person accused who, because of indigency, cannot afford a lawyer. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 427 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The rights and privileges asserted are fundamental in the constitutional underpinning of the American criminal justice system. *Dickerson v. United States*, — U.S. —, 2000 WL 807223 (2000). The Florida construction of *Burbine* denies equal protection to those similarly situated to Mr. Chavez who cannot afford to retain counsel and allows additional rights to those defendants with financial

resources.

4. Permitting the media to photograph the jurors and jurors' faces deprived the defendant of his right to a fair trial.

The Appellant maintains that the trial court erred when it reversed its earlier decision which prohibited cameras inside the courtroom from photographing jurors during court proceedings. The judge reversed himself and permitted the photographing of jurors during the voir dire and trial. The reconsideration of the matter of the earlier ruling (T43-8430) was erroneous because the trial judge failed to afford defense counsel the opportunity to present evidence to support continuation of the previous order prohibiting the photography of potential jurors, in the face of two prospective jurors expressing reservations during voir dire about being photographed during their participation in the trial proceedings. (T41-8088).

The trial court misplaced its reliance on *Hernandez.*[9] On 12 January 1998, defense counsel filed a Motion to Protect Juror Privacy with the trial court, in which defense counsel sought, *inter alia,* to prevent the photography of potential or seated jurors in the trial. (R23-5363). The state adopted no position on the photography issue in response. (R24-5409). Upon proper notice to the appropriate media representatives, the court held an evidentiary hearing on 15 January 1998. (T10-1884). Defense counsel Andrew Stanton detailed the expansive publicity surrounding the case, and related to the court that co-counsel Edward Koch was available to testify to his receiving numerous death threats

[9] *Sunbeam Television Corporation v. State and Hernandez*, 723 So.2d 275 (Fla. 3d DCA 1998)

related to the case. (T10-1890). The media representatives offered little in the way of formal objections to the original order prohibiting photography of jurors. [Channel 7: "We don't object to either of these conditions." (T10-1892)]. [Channel 6: "[I]t's my client's practice generally not to photograph jurors …" (T10-1892)]. [Miami Herald: "[I]t is the journalistic practice not to photograph the jurors …" (T10-1894)].

Following the presentation of the positions by the media representatives, defense counsel reminded the court that the order sought did not involve the prohibition against the publication of information gathered by the press. (T10-1894). Following argument from counsel, the court granted the defense motion in the Miami proceedings. (T10-1894-95)

But in Orlando on 24 August 1998, eight months after the trial court issued its order, WTVJ-TV Channel 6 from the Miami-Ft. Lauderdale region filed a "Motion to Intervene of Channel 6, WTVJ-TV and Memorandum of Law Opposing Court's Order to Prohibit Video Photography of Prospective or Seated Jurors." (R34-7599). In its motion, Channel 6 mischaracterized the previous order of the court as a prior restraint on dissemination of information. Channel 6 additionally equated the prior court order as one authorizing closure of trial proceedings, although the trial judge had expressly permitted the media in the courtroom during all proceedings and denied a defense motion for closure. (R30-6754-55; R34-7602). Channel 6 concluded its motion by citing *Hernandez, supra,* in support of its position, although counsel for Channel 6 neglected to inform the judge that the opinion itself indicates that such prohibitive orders are not *per se*

reversible error and may be appropriate in certain cases. (R34-7604).

The trial court held a second hearing on the issue during voir dire on 25 August 1998. (T37-7366). Counsel for Channel 6 speculated that the findings in support of the prohibition against photography of jurors were cured by a change of venue from Miami to Orlando, and his personal observation of jury selection proceedings indicated that "70 to 80 percent of the prospective jurors had never heard of this case before." (T37-7373). Again, counsel for Channel 6 characterized the order of the court as one authorizing closure, but by his specific words, he acknowledged that the order did not foreclose the presence of the media from the proceedings. (T37-7373). Counsel further speculated that the distance of 250 miles between Orlando and Miami cured the threat of danger to prospective jurors. (T37-7374). Counsel further misled the trial court by asserting that the *Hernandez* case required the defense to "come through with some evidence to show that" the right of the Appellant to a fair trial would be interfered with due to the photography of jurors. (T37-7376).

Defense counsel responded firstly by clarifying the misstatements made by counsel for Channel 6. Defense counsel reminded the court that its previous order did not constitute a prior restraint because the court had not prohibited the media from publishing what they obtained. (T37-7377). Defense counsel further argued that the court's previous order did not constitute a closure of the proceedings. (T37-7378). Counsel extensively argued that the motion filed by Channel 6 was untimely, and that the arguments presented at the hearing held on 12 January 1998 sufficiently established the propriety of the order of the court. (T37-7380). Since

Channel 6 failed to seek appellate review at that time, defense counsel argued that the issue was not preserved and time barred. (T37-7380).

Defense counsel then turned to the analysis in *Hernandez*, which Channel 6 offered in support of its motion:

> Now, addressing *Hernandez,* while it is certainly true that in that case the Court found that in that case, the Court's taking of judicial notice that there was great publicity attending the case was, while it could be a proper basis, was not a sufficient basis in that case.
>
> Counsel very properly acknowledges this Court under *Hernandez* perfectly well has the power to order what it has ordered, no photograph of jurors. *Hernandez* says in that case there wasn't enough of a record.
>
> *Hernandez* also points out, and I want this Court to be clear, that while the standard discussed is one of particularized concern for the participants, *Hernandez* itself cites *Times Publishing Company v. State* at 632 So.2d 1072, a Fourth District case decided in 1994, saying that they agree – the *Hernandez* court agrees that within the context of jury selection, it's not necessary to show particularized concern for each individual juror, but for jurors as a group.
>
> I think the Court needs to be very clear on that as to *Hernandez*, and the *Hernandez* court has emphasized, on the last page of its opinion, that this Court has the power to make the decision that it has already made.

(T37-7382-7383).

Following his argument, defense counsel suggested to the court that if it was inclined to grant the motion filed by Channel 6, the court "must give us an opportunity to make that record." (T37-7384). After a 15-minute break, the court issued the following ruling:

> Based upon the recent decision by the Third DCA in the case of

> *Sunbeam Television Corporation v. State of Florida and Humberto Hernandez* that has been published in 23 F.L.W. 1835, the Court at this time will readdress its previous order directing the media not to photograph the jurors.
>
> * * *
>
> At this time the 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 Television Corporation v. State of Florida and Humberto 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 the issue if the facts and circumstances justify it at a future date.

(T37-7388-89).

Defense counsel orally moved the court to permit voir dire of jurors regarding the effects of being photographed, which the court denied without comment. (T37-7391). Counsel argued that the defense had the right to voir dire jurors on anything bearing on their ability to be fair and impartial, but the court again denied the motion without comment. (T37-7391). Counsel filed a written motion to permit the establishment of a record in support of order prohibiting photographing jurors on 26 August 1998. (R34-7362).

On 27 August 1998, the issue arose again during voir dire. Defense counsel was questioning potential juror 2038, who volunteered his reservations about being photographed while serving on the jury. (T41-8068). Counsel addressed the court with the following argument:

> A second juror has now stated – referring to Juror 2038[10] – that that

[10] Counsel was unable to provide the exact number for the other juror who expressed reservations about being photographed by the media, but subsequently identified the juror as number 1978. (T-41-8090; 8116).

> juror has a problem with being photographed. I raise this for two reasons. One is because I would like to request an opportunity to individually voir dire that juror as to the effect of camera.
>
> * * *
>
> Second, this demonstrates the reason why we need to inquire as the injuries filmed by camera last time we discussed this just a few minutes ago the state said, hey, you asked the jurors and nobody raised their hands. Another one was sitting there with this attitude who didn't raise his hand. No one knows how many jurors there are unless we ask them individually.
>
> * * *
>
> Plus we need to know this about the jurors know whether it's appropriate or official record for an order precluding photography of all jurors or particular jurors.

(T41-8088-90).

The trial court denied the defense motion to individually voir dire the venire members regarding the effects of cameras in the courtroom. (T41-8090). The court again denied the motion for individual voir dire regarding the effects of cameras in the courtroom on juror members upon renewal of the defense motion. (T42-8305).

a. The trial court erred when it reversed its earlier ruling, which prohibited photography of the jurors in the courtroom, without first affording defense counsel the opportunity to present evidence to support continuation of the initial court order.

The leading case of television access to the courts is *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). The *Sheppard* case involved a murder prosecution in Cleveland where pretrial publicity was extensive and prejudicial to the defense. All three Cleveland newspapers printed the names and addresses of potential venire members, resulting in anonymous letters and phone

calls received by all prospective jurors. *Id.,* 384 U.S. at 342, 86 S.Ct. at 1512. A court order prohibited picture taking during court proceedings, but no restraints were imposed during recesses. Pictures of the defendant, the judge, witnesses and jurors "often accompanied the daily newspaper and television accounts" of the trial. *Id.,* 384 U.S. at 344-345, 86 S.Ct. at 1513. The trial court permitted photography of the jury in the box, and individual pictures of members of the jury were taken in the jury room. *Id.*

After the *Sheppard* decision, courts addressed different aspects of media access to judicial proceedings and protective measures necessary to preserve the right of the accused to a fair trial free from outside influences. In *Times Publishing Company v. State,* 632 So.2d 1072 (Fla. 4th DCA 1994), the court considered the validity of a trial court order restricting the dissemination of certain information obtained by the media during jury selection.

Media representatives challenged the order on the ground of prior restraint on publication. *Id.*, at 1074. The Fourth District Court of Appeal opined that "it is well settled that once a public hearing is held, the media is free to publish what transpired therein and cannot be subjected to prior restraint with respect thereto." *Id.; citing, Nebraska Press Association v. Stuart,* 427 U.S. 539, 569, 96 S.Ct. 2791, 2807, 49 L.Ed.2d 683 (1976) (additional citations omitted). The court recognized that orders preventing the disclosure by the clerk of names and addresses of jurors have been upheld in court, but if the information is obtained in a public trial no order may prohibit its dissemination. *Times Publishing Co., supra; citing, Gannett Company, Inc. v. State,* 571 A.2d 735 (Del. 1989), *cert. denied,* 495 U.S. 918, 110 S.Ct. 1947, 109 L.Ed.2d 310 (1990).

In *WFTV, Inc. v. State,* 704 So.2d 188 (Fla. 4th DCA 1997), the Fourth District court reviewed a *sua sponte* order from the trial court prohibiting still and video camera operators from photographing potential or seated jurors in the courtroom during a DUI manslaughter prosecution. *Id.,* at 189. The trial judge issued the order on the day the trial was scheduled to commence, with no prior motion by either party to restrict media coverage nor prior notice to any news organization. *Id.* Although the DUI trial had concluded by the time the petition reached the Fourth DCA, the court commented, "… we address the issue raised because it is capable of repetition by evading review." *Id.,* at 190 (*citing, Times Publishing, supra* at 1073).

In the case of Mr. Chavez, the trial court relied on *Sunbeam Television Corporation v. State and Hernandez,* 723 So.2d 275 (Fla. 3d DCA 1998) in reversing its prior order prohibiting photography of jurors during court proceedings. (R34-7620). In *Hernandez*, media representatives petitioned for a writ of certiorari quashing a trial court order prohibiting photography of potential or seated jurors in the criminal trial of former Miami Commissioner Humberto Hernandez. *Id.,* at 276. The Third DCA did not hold that orders prohibiting photography of jurors was *per se* invalid. To the contrary, the court opined:

> We emphasize that there are circumstances where a trial judge can successfully enter an order like the one in this case. Moreover, we do not foreclose the trial judge in this case from revisiting this issue if new facts requiring such measures should arise. Because the trial court's order fails to satisfy the standard set forth in *Post-Newsweek Stations,* [370 So.2d 764 (Fla. 1979)] we grant that portion of the Petition which seeks relief from the trial court's order prohibiting the video photographing of prospective jurors and seated jurors and quash same.

Id., at 278-279.

It is the position of the Appellant that the trial court erred by reversing its earlier protective order which prohibited photography of jurors during court proceedings.

b. The trial court abused its discretion and improperly restricted the questioning of defense counsel during jury selection voir dire, thus denying the Appellant his right to a fair and impartial jury.

The trial error created by the improper reversal of the order prohibiting photography of jurors was amplified during jury selection, when the trial court impermissibly restricted voir dire regarding the effects of cameras in the courtroom upon the participants in the jury pool. Once the trial court reversed its earlier order, the court was obliged to permit defense counsel to introduce evidence to establish a record in support of continuing the prohibition against juror photography. Despite the specific reservations expressed by two venire members, the trial court refused to allow defense counsel to explore the prejudicial nature of the presence of the media upon the ability of the Appellant to select a fair and impartial jury. In restricting the voir dire, the trial court abused its discretion, the Appellant was deprived of his right to a fair and impartial jury, and the defense was prohibited from introducing evidence to support continuation of the photography order.

Rule 3.300(b), Fla.R.Crim.P., provides for a reasonable voir dire examination of prospective jurors by counsel. Restrictions or limits imposed on voir dire questioning can result in the loss of the fundamental right to a fair and impartial jury. *Pineda v. State,* 571 So.2d 105, 106 (Fla. 3d DCA 1990); *Williams*

v. State, 424 So.2d 148 (Fla. 5th DCA 1982). The law is well settled that a trial judge possesses considerable discretion in determining the extent of voir dire examination of prospective jurors. *Williams, supra* at 149. However, an abuse of discretion may result through the limitation on voir dire where the nature of juror responses indicates that a subject matter is a substantial area of inquiry that has yet to be adequately explored. *Helton v. State,* 719 So.2d 928, 929 (Fla. 3d DCA 1998).

Although a trial judge has the discretion to limit repetitive or argumentative voir dire, the court must allow counsel the opportunity to explore latent or concealed prejudgments by the prospective jurors. *Stano v. State,* 473 So.2d 1282, 1285 (Fla. 1985). The scope of voir dire should be varied as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require. *Lavado v. State,* 469 So.2d 917, 919 (Fla. 3d DCA 1985) (PEARSON, J., dissenting), *reversed,* 492 So.2d 1322 (Fla. 1986).

The facts of the case clearly indicate that the defendant deserved the opportunity to explore the prejudicial effect of the presence of the media in the courtroom upon potential jurors. Defense counsel specifically requested the opportunity to develop the potential bias (T37-7384), and orally moved the court to expand voir dire to include questioning about the effects of jurors being photographed. (T37-7391). Despite two prospective jurors volunteering reservations about being photographed, the trial court denied the motion to individually voir dire regarding the photography. (T41-8088-8090). The limits on the defendant's voir dire created an unreasonable risk of bias or prejudice which infected the trial process and violated constitutional due process guarantees.

See Turner v. Murray, 476 U.S. 1, 106 S.Ct. 1683, 1687, 90 L.Ed.2d 27 (1986); *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).

5. The trial court erred in admitting over timely objection a blood-stained mattress, which blood was from an unidentified source and not from the Appellant and not from Jimmy Ryce; the evidence was not relevant, and any probative value was far outweighed by its prejudicial impact.

The state successfully sought the admission of a blood-stained mattress which was found at the avocado/horse farm trailer. (T48-9580-9607). The blood on the mattress did not come from Mr. Chavez or Jimmy Ryce. (T48-9585-9586). The source of the blood is still unknown. (T48-9585).

The state argued the mattress was relevant to counter the defense theory of the case that the police lied about the confession and fed the underlying facts of the confession to Mr. Chavez. (T48-9581). The state's theory is that because the blood was evident on the mattress, and known to the police at the time of the interrogation, the police–if they had in fact made up the confession–would have included it in their lie. (T48-9581-82). According to the state's theory, the bloody mattress was relevant because in the statement introduced at trial, Jimmy Ryce did not bleed on the mattress; therefore, because the blood on the mattress did not come from Jimmy Ryce, the mattress corroborates Mr. Chavez' statement. (T48-9582).

The state's argument is disingenuous. First, it is hard to imagine veteran police officers making up a story about the bloody mattress until the source of the blood was confirmed. Certainly, the officers would want to know for sure the blood could have come from Jimmy Ryce, or not, before they would make up a confession where Mr. Chavez would have admitted that Jimmy Ryce bled on the mattress. The credibility

ramifications to both sides are apparent.

Second, the mattress does not corroborate any statement made by Mr. Chavez because in none of the statements was the mattress even mentioned. If Mr. Chavez had refuted a police officer's suggestion that Jimmy Ryce bled on the mattress, perhaps then the mattress would have corroborated that statement. But because no such statements were made, the mattress is irrelevant. The judge instructed the jury that the mattress was being admitted to prove it was not relevant. Under the rules of evidence if the mattress is not relevant, it does not tend to prove or disprove a fact in issue. If the bloody mattress evidence goes to no fact in issue, it should have been excluded on relevancy grounds.

More importantly, however, the bloody mattress was extremely prejudicial. Even if the mattress had any probative value, it was clearly outweighed by its prejudicial impact. Section 90.403, Fla. Stat., provides that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence." Trial counsel correctly argued that the blood-stained mattress was more prejudicial than probative. (T49-9603).

Specifically, the defense raised the very real possibility that the jury would suspect Mr. Chavez had killed others unknown at the trailer. (T49-9603). It is hard to imagine what could be more prejudicial in a murder case than evidence that could lead a jury to conclude, or even suspect, that the defendant has killed others before. *See State v. Sawyer*, 561 So.2d 278, 284 (Fla. 2d DCA 1990) (holding that single hair cannot be positively identified as being from defendant not probative as to whether defendant was ever in victim's apartment; serious prejudice, however, would have

resulted if evidence presented to jury.)

6. The trial court erred in denying defendant's motion for judgment of acquittal as to the capital sexual battery charge, Count II.

The Appellant maintains that the trial court committed reversible error by denying the defense motions for judgment of acquittal made at the end of the case-in-chief of the state and at the conclusion of evidence as to the charge of capital sex battery because the state failed to establish the *corpus delicti* of the charge. The record is clear that the state offered no direct nor circumstantial evidence of the crime of sexual battery beyond the last of a string of conflicting statements made by Mr. Chavez to the police, and therefore, the conviction for capital sex battery should be reversed.

Corpus delicti requires the proof of two elements. First, the state must prove that a crime was, in fact, committed. Second, the state must prove that someone is criminally responsible for the act. *Jefferson v. State,* 128 So.2d 132, 135-136 (Fla. 1961). In order to establish *corpus delicti,* substantial evidence showing each element of the crime charged must be introduced by the state. *Justus v. State,* 438 So.2d 358, 367 (Fla. 1983); *see State v. Allen,* 335 So.2d 823 (Fla. 1976). In *Meyers v. State,* 704 So.2d 1368 (Fla. 1997), the Court stated that the phrase "*corpus delicti*" refers to proof independent of a confession that the crime was in fact committed. *Id.,* at 1369, *citing Bassett v. State,* 449 So.2d 803, 807 (Fla. 1984). The Court then set forth the guidelines for the admissibility of confessions and the related need for proof of *corpus delicti*.

In the context of a sexual battery prosecution, a confession made by a defendant "may be considered in connection with the other evidence," but the

corpus delicti cannot rest upon the confession or admission alone. *Schwab v. State,* 636 So.2d 3, 6 (Fla. 1994); *Cross v. State,* 96 Fla. 768, 781, 119 So. 380, 384 (Fla. 1928). In *Schwab,* the defendant telephoned his mother and informed her that he was forced by an accomplice to kidnap and rape the minor victim. The defendant subsequently confessed to a law enforcement officer, and directed the police to the body. *Schwab,* 636 So.2d at 4. The Court held that the proof adduced by the state was sufficient to establish the *corpus delicti* for the crime of sexual battery. In support of its conclusion, the Court opined that the body of the victim was found nude and the details in the statement made by the defendant corresponded with the physical evidence obtained. *Id.,* at 6.

The cases of *Hamilton v. State,* 703 So.2d 1038 (Fla. 1997), and *Wainwright v. State,* 704 So.2d 511 (Fla. 1997), co-defendants charged with the crimes of first-degree murder, robbery, kidnapping, and sexual battery, involve a fact pattern similar to that found in the case of the Appellant. Both defendants challenged their convictions for sexual battery based on lack of *corpus delicti*, claiming that only their confessions corroborated the charge, but the Court found no error:

> The record in the present case shows that, when found, the body of the victim was too badly decomposed to reveal physiological signs of sexual assault. Nevertheless, other proof was introduced: Semen was found on the rear seat cover of the Bronco; blood types A and O were found on the seat cover (Gayheart is A, Wainwright is O); Gayheart was found naked except for a pair of shorts; Wainwright's fingerprints were found in the Bronco. We note that aside from Wainwright's confession to police, he also confessed to the inmates who testified against him. We conclude that the State introduced proof of sexual assault independent of Wainwright's confession that "tends to show that the crime was committed." *Meyers,* 704 So.2d at 1370. We find no error.

Wainwright, supra, 704 So.2d 511 (Fla. 1997).

Regarding the co-defendant Hamilton, the Court opined that the semen found in the Bronco, the nude state of the body when found, and the confession of co-defendant Wainwright established the *corpus delicti* for the crime of sexual battery. *Hamilton, supra*, 703 So.2d at 1045.

The body of the victim, Samuel James Ryce, revealed no physical evidence of a crime of sexual battery. The only evidence introduced to support the charge of sexual battery was a statement of Mr. Chavez, the last of a series of statements made by Mr. Chavez to the police which statement was recanted during trial. Unlike the defendants in *Wainwright, Hamilton,* and *Schwab,* Mr. Chavez made no incriminating statements to anyone else, nor was any direct nor circumstantial evidence adduced at trial to corroborate the statement of the Appellant. Therefore, the trial court erred in denying the defense motions for judgment of acquittal as to the charge of sexual battery. Defense counsel timely objected at trial to preserve the *corpus delicti* issue at trial (T51-10045-47), *J.B. v. State,* 689 So.2d 360 (Fla. 1st DCA 1997). Because the state failed to establish the *corpus delicti* for the crime of sexual battery beyond a reasonable doubt, the conviction for sexual battery cannot be supported. *Meyers,* 704 So.2d at 1370; *Cross, supra.*

7. The trial court erred by admitting, over defense objection, numerous cumulative gruesome photographs depicting the decomposed body of the victim re-assembled at the office of the medical examiner.

The Supreme Court of Florida has routinely held that "gruesome and gory photographs may and should be admitted into evidence if they properly depict the factual conditions relating to the crime and if they are relevant in that they aid the

court and jury in finding the truth. Photographs serving only to create passion should be rejected." *Swan v. State,* 322 So.2d 485, 487 (Fla. 1975); *Bauldree v. State,* 284 So.2d 196 (Fla. 1973). In *Young v. State,* 234 So.2d 341 (Fla. 1970), the Court opined:

> The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs … must have some relevancy, either independently or as corroborative of other evidence. (Footnotes omitted).

The Court clarified its position on the relevancy of gruesome photographs in *State v. Wright,* 265 So.2d 361 (Fla. 1972):

> [T]he current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative," or "whether photographed away from the scene," are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

The admission into evidence of photographs of a deceased victim falls within the discretion of the trial court. *Zamora v. State,* 361 So.2d 776, 782 (Fla. 3d DCA 1978). In *Zamora,* the Third District Court of Appeal listed the cause of death, the location and characteristics of the wounds, and the position of the body in reference to the physical design of the room, as factors making such photos relevant. *Id; Pressley v. State,* 261 So.2d 522 (Fla. 3d DCA 1972). The Third DCA commented that the test for admissibility of gruesome photographs requires (1) the photos be relevant, and (2) not "so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the

evidence." *Zamora,* 361 So.2d at 783; *Leach v. State,* 132 So.2d 329, 332 (Fla. 1961).

In *Jackson v. State,* 359 So.2d 1190 (Fla. 1978), the Court reiterated its standard for the admissibility of gruesome photographs. The Court again held that the admission of such photos must have some relevancy, either independently or corroboratively of other evidence, to justify admitting the photos into evidence. The Court cautioned state prosecutors that gory and gruesome photographs admitted primarily to inflame the jury would result in reversal of conviction. *Id.,* at 1192-1193.

8. The capital sentencing process imposed on the Defendant was both flawed and unconstitutional.

a. The trial court erred in denying the defense requested instruction on "doubling" regarding the "in-the-course-of-a-kidnapping" aggravator, resulting in the reliance by the jury upon the same factual circumstances of the offense to double the aggravating circumstanced for the sentence.

The Appellant maintains that the trial court erred by denying the defense requested instruction on "doubling," resulting in the reliance by the jury upon the same aspect of the crime to establish more than one aggravating circumstance. Defense counsel orally moved the court to administer the standard instruction regarding doubling, which was denied by the court as untimely. (T56-11061-63). Additionally, the Appellant maintains that the finding by the trial court that the murder was committed "in the course of a kidnapping" was unsupported by the facts adduced at trial.

Improper doubling occurs when aggravating factors refer to the same aspect of the crime. *Foster v. State,* 679 So.2d 747, 754 (Fla. 1996); *Provence v. State,* 337 So.2d 783, 786 (Fla. 1976). The facts in a given case may support multiple

aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other, as in murder committed during a burglary or robbery and murder for pecuniary gain, or murder committed to avoid arrest and murder committed to hinder law enforcement. *Banks v. State,* 700 So.2d 363, 367 (Fla. 1997); *Echols v. State,* 484 So.2d 568, 575 (Fla. 1985).

The trial judge instructed the jury that "[t]he crime for which the defendant is to be sentenced was committed while he was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit the crime of kidnapping." (T56-11068). The instruction as administered against the Appellant was erroneous for two reasons. Firstly, the instruction improperly permitted the jury to utilize the same factors it used to return a guilty verdict on the murder charge to justify imposing the death sentence as an aggravating factor. The indictment charging the Appellant with first degree murder provided distinct theories upon which the jury was permitted to return a guilty verdict:

> …JUAN CARLOS CHAVEZ did unlawfully and feloniously kill a human being, to-wit: SAMUEL JAMES RYCE, and/or a human male, autopsied under Dade County Medical Examiner's Case Number 95-3228, from a premeditated design to effect the death of a person killed or any human being and/or while engaged in the perpetration of, or in an attempt to perpetrate any sexual battery and/or aggravated child abuse *and/or kidnapping,* by shooting SAMUEL JAMES RYCE, and/or a human male … with a firearm, to-wit: a handgun ….

(R1-1) (italics supplied).

Following the guilt phase of trial, the court instructed the jury regarding the elements of first-degree murder as follows:

> As to the elements of first degree murder, there are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.

> Before you can find the defendant guilty of first degree premeditated murder, the state must prove the following three elements beyond a reasonable doubt:
> *Number One*: That Samuel James Ryce is dead.
> *Number Two*: The death was caused by the criminal act of Juan Carlos Chavez.
> *Number Three*: There was a premeditated killing of Samuel James Ryce.
>
> * * *
>
> As to felony murder, first degree, before you can find the defendant guilty of first degree felony murder, the state must prove the following three elements beyond a reasonable doubt:
> *Number One*: That Samuel James Ryce is dead.
> *Number Two*: The death occurred as a consequence of and while Juan Carlos Chavez was engaged in the commission of a sexual battery and/or kidnapping; or the death occurred as a consequence of and while Juan Carlos Chavez was attempting to commit a sexual battery and/or kidnapping; or the death occurred as a consequence of and while Juan Carlos Chavez was escaping from the immediate scene of a sexual battery and/or kidnapping, and
> *Number Three*: That Juan Carlos Chavez was the person who killed Samuel James Ryce.
>
> In order to convict of first degree felony murder, it is not necessary for the state to prove that the defendant had a premeditated design or intent to kill.

(T54-10712-14).

Based on the jury instructions administered at the end of the guilt phase, the jury necessarily based its conviction for first-degree murder on the felony murder theory with kidnapping as its underlying felony. Therefore, the trial court erred in finding and instructing the jury that the murder "was committed while he was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit the crime of kidnapping," (T56-11068), as an aggravating circumstance because such a finding constitutes impermissible doubling of the same factor.

The penalty phase instruction was erroneous because it was entirely unsupported by the record. The only evidence that the murder was committed during the course of a kidnapping was adduced from the last in a line of contradictory and recanted statements made by the Appellant to law enforcement officers following 54 hours of continuous interrogation. The Appellant therefore maintains that he is entitled to a resentencing absent the erroneous jury instructions. The error was carried over to the trial court's sentencing order. (R41-9073-83).

b. The trial court erred in considering as an aggravating factor, and in instructing the jury that it could consider as an aggravating factor, that the murder was committed for the purpose of avoiding or preventing lawful arrest.

The trial court instructed the jury that an aggravating circumstance it could consider in determining a recommendation for a sentence was whether the "crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (T56-11068). Trial counsel below objected prior to the instruction being given in the form of a proposed instruction, and contemporaneously preserved the objection at time the instructions were given. (R40-8814; T-11075). The trial court specifically relied on the avoid arrest aggravator in sentencing Mr. Chavez to death. (R41-9075).

In *Riley v. State*, 366 So.2d 19 (Fla. 1978), the Court first extended application of the aggravator of a murder committed for the purpose of avoiding or preventing a lawful arrest beyond those involving law enforcement personnel, to include other capital murders specifically involving witness elimination. In so doing, the Court cautioned that "[p]roof of the requisite intent to avoid arrest and detection must be very strong," in such cases, *Id*., at 22, to sustain the avoid arrest aggravator as it

pertains to witness elimination. Shortly thereafter, the Court reaffirmed *Riley* and explained the requirements of the aggravator:

> An intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that *the dominant or only motive* for the murder was the elimination of witnesses.

Menendez v. State, 386 So.2d 1278, 1282 (Fla. 1979) (emphasis added).

The Court has reaffirmed that standard. *Zack v. State*, 753 So.2d 9 (Fla. 2000); *Urbin v. State*, 714 So.2d 411 (Fla. 1998); *Consalvo v. State*, 697 So.2d 805 (Fla. 1996); *Robertson v. State,* 611 So.2d 1228 (Fla. 1993); *Floyd v. State*, 497 So.2d 1211 (Fla. 1986). The state must show beyond a reasonable doubt that the defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness. *Robertson, supra*, 611 So.2d at 1232.

In *Pomeranz v. State*, 703 So.2d 465, 471 (Fla. 1997), the Court struck the avoid arrest aggravator because there was no evidence that the defendant and the victim were acquainted and where both eyewitnesses testified "that the shooting began because the victim grabbed the gun." *Id. See also Wike v. State*, 698 So.2d 817, 822 (Fla. 1997) (avoid arrest aggravator present where victims knew the defendant as a friend of their mother, and could identify him). In *Cook v. State*, 542 So.2d 964, 970 (Fla. 1989), the Court found that the facts indicated the defendant "shot instinctively, not with a calculated plan to eliminate [the victim] as a witness." *See also Livingston v. State*, 565 So.2d 1288, 1292 (Fla. 1988) (striking avoid arrest aggravator because defendant's statement after shooting first victim, "now I'm going to get the one in the back [of the store]," did not establish beyond a reasonable doubt that witness elimination was sole or dominant motive).

The only evidence introduced as to this issue was one of the Appellant's

statements. In the statement, the Appellant states that after he had sex with Jimmy Ryce, he was going to drop the boy off in the area where Jimmy Ryce had been picked up. (T47-9223). When the two got close to the area, Mr. Chavez noticed police cars in the area, which Mr. Chavez believed were a part of a search for the boy. (T47-9224). Mr. Chavez then took Jimmy Ryce back to the trailer at the ranch. (T47-9224). Once back at the trailer, the two have some conversations about Jimmy's family. (T47-9225). Soon thereafter, Mr. Chavez heard a helicopter flying overhead. (T47-9225). Mr. Chavez stated that he got out of the chair and walked towards the bedroom, checking the helicopter. He lost sight of the helicopter. He approached the bathroom of the trailer. The child got up quickly, heading towards the door. Mr. Chavez tried to go fast, but tripped or got caught in the bathroom door. He could only grab the revolver and shoot. "It was the only way that I had in order to avoid – to prevent him from going out." (T47-9289-92).[11]

Based on this statement, it is clear that the dominant or only reason for the killing was not the elimination of a witness, but was to prevent Jimmy Ryce from escaping the trailer during a time when a possible police helicopter circled overhead. The Appellant submits there is a distinct difference between this aggravator and the criteria for an avoid arrest aggravator. Mr. Chavez stated that he planned on letting Jimmy Ryce go, but he was not going to let Jimmy go in front of a police car. When the two returned to the trailer, Mr. Chavez was, according to this statement, "confused" and "nervous." (T47-9291, 9292). It is also reasonable to conclude that Mr. Chavez tried to revive Jimmy after the shooting. Mr. Chavez checked Jimmy's breathing and "hit his face several times to see if I could get some response." (T16-

[11] The entire statement was introduced at State's Exhibit # 77. (T47-9237).

9291).

The shooting was spontaneous. The shooting happened quickly as Jimmy tried to run out the door. No evidence was introduced that Mr. Chavez had planned to murder Jimmy Ryce for the express purpose of avoiding arrest, but instead the evidence was that Mr. Chavez "shot instinctively, not with a calculated plan to eliminate [the victim] as a witness." *Cook, supra,* 542 So.2d at 970. No evidence was presented that Jimmy Ryce and the Appellant knew each other or that Jimmy Ryce would be able to identify Mr. Chavez. *Pomeranz*, *supra,* 703 So.2d at 471. Consequently, the state did not carry its burden in demonstrating by proof beyond a reasonable doubt that witness elimination was the Appellant's dominant or sole motive in the killing.

c. The trial court erred in giving the standard jury instruction, over timely defense objection, regarding the "heinous, atrocious, or cruel" aggravating circumstance because insufficient evidence was presented at trial to support its finding and the definition of the aggravating circumstance is unconstitutionally vague as applied to the case.

The Appellant asserts that the trial court erred in giving the standard jury instruction regarding the "heinous, atrocious, or cruel" aggravating circumstance because insufficient evidence was introduced at trial to support its finding, and the instruction was unconstitutionally vague as applied to the case. Prior to the sentencing phase, defense counsel submitted a proposed instruction regarding the "heinous, atrocious, or cruel" aggravator, which reads as follows:

> To be heinous, atrocious, or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim,

> and the victim must have actually, consciously suffered such pain for a substantial period of time before death. (R39-8672).

The trial court rejected the proposed instruction, and defense counsel timely objected to the instruction as administered, thus preserving the issue for appellate review. (T56-11075). Counsel specifically asserted that the aggravating circumstance had no application to the facts adduced at trial, and was unsupported by the record. (T56-11075; R39-8672).

The Supreme Court of Florida, in *Hall v. State,* 614 So.2d 473 (Fla. 1993), declared the standard jury instruction, which reads as follows, defined sufficiently to survive a challenge based on vagueness:

> [T]he crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Id., at 478.

The United States Supreme Court ruled that where a sentencer weights aggravating and mitigating circumstances, the consideration of an invalid aggravating factor violates the Eighth Amendment. *Espinosa v. Florida,* 505 U.S. 1079, 1081, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992). If the description of an aggravating circumstance is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence thereto, the aggravating factor is invalid. *Id.* And in states where the authority over capital sentencing is placed in two actors rather than one, as is the case in Florida, neither

actor may consider an invalid aggravating factor. *Id.,* 505 U.S. at 1082, 112 S.Ct. at 2929.

In *Shell v. Mississippi,* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990), the Court held a jury instruction nearly identical to the instruction administered in Florida regarding "heinous, atrocious, and cruel" unconstitutionally vague. The Mississippi instruction read as follows:

> [T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others.

Id. (citations omitted).

In its brief opinion, the Court specifically held the instruction constitutionally insufficient, citing *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and *Cartwright v. Maynard,* 822 F.2d 1477, 1489-1491 (10th Cir. 1987) (en banc), *affirmed,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Because the Mississippi instruction in *Shell* is nearly identical to the standard instruction in Florida administered in the trial of the Appellant, it ordinally follows that the standard instruction in Florida regarding "heinous, atrocious, or cruel" is likewise constitutionally insufficient.

The remainder of the standard instruction as it was administered in the sentencing phase of the trial of the Appellant reads as follows:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and unnecessarily torturous to the victim.
>
> Actions taken after the victim dies or loses consciousness cannot be considered in determining whether the murder was especially

heinous, atrocious or cruel. (T56-11069).

The addition of this provision to the "heinous, atrocious, or cruel" standard instruction does not cure the constitutional deficiency. The instruction, in its entirety, is still unconstitutionally vague and overbroad. The definitions disapproved by the United States Supreme Court in *Shell* are still the focal point of the consideration of the jury, in clear violation of *Shell.* The modification of the instruction further advises the jury to consider the if the crime was "conscienceless" or "pitiless," which improperly instructs the jury to consider the lack of remorse displayed by a criminal defendant. The Supreme Court of Florida has opined that considering evidence of lack of remorse is improper in the penalty phase of capital cases. *Derrick v. State,* 581 So.2d 31 (Fla. 1991); *Pope v. State,* 441 So.2d 1073, 1077-1078 (Fla. 1983). Because the section of the jury instruction has been invalidated under *Shell,* and the remainder of the instruction encourages the jury to consider an invalid aggravating circumstances, the instruction in its entirety cannot withstand constitutional scrutiny.

The Appellant further maintains that even if the instruction is held to be valid under a vagueness analysis, insufficient evidence was adduced at trial upon which to support a finding of "heinous, atrocious, or cruel." As the trial judge correctly instructed the jury, "Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." (T56-11070). Not only does the standard instruction relieve the state of its burden of proof by encouraging the jury to consider invalid circumstances, but the sole evidence presented to the jury to support a finding of "heinous, atrocious, or cruel," was the last in a line of contradictory and recanted statements

made by the Appellant to law enforcement officers. No physical nor circumstantial evidence was presented to corroborate the definitions provided to the jury by the insufficient instruction. The "additional acts" referred to by the modified jury instruction were ostensibly provided by a confession made by the defendant. Therefore, the state provided insufficient evidence to prove the existence of the "heinous, atrocious, or cruel" aggravating circumstance beyond a reasonable doubt. Accordingly, the death sentence of the Appellant must be vacated.

d. The prosecutor improperly diminished the role of the jury during the jury voir dire and the penalty phase of the Appellant's trial; as a result, the death sentence should be reversed and the case remanded for a new sentencing proceeding.

During the jury voir dire, the prosecutor discussed the role the jury would have at the penalty phase of the case. The prosecutor explained:

> MR. BAND: 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?
>
> JUROR 991: No, just the opposite. I feel like it takes the burden off of me, because ultimately –

(T39 – 7667-7668).

Later, during the closing argument of the penalty phase, the prosecutor returned to the issue of the jury's role in sentencing. The prosecutor argued:

> But let me suggest to you that when you go back there to discuss mitigation, the mitigation must in some way lessen or reduce the enormity of this defendant's crime and convince you in some way that the defendant is deserving of some form of leniency.
>
> Remember, again, you are not asked to pass sentence. That is solely the burden of the Court, and this Court alone. The Court will weigh your recommendation –

(T56 – 11032).

In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Court overturned a capital sentence as constitutionally unreliable because of a similar statement made by the prosecutor in closing argument at the penalty phase of the trial. The *Caldwell* prosecutor told the jury: "[Y]our [sentencing] decision is not the final decision"; "the decision you render is automatically reviewable by the [State] Supreme Court." *Id*., 472 U.S. at 325-326, 105 S.Ct. at 2637-2638. Responding to the issue presented in *Caldwell*, the court observed that capital sentencing jurors, required to determine "whether a specific human being should die at the hands of the State," *id*., at 329, 105 S.Ct., at 2639, are "placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice." *id*., at 333, 105 S.Ct., at 2641. Such jurors, the court noted, might find "highly attractive" the prosecutor's suggestion that persons other than themselves would bear "responsibility for any ultimate determination of death." *Id*., at 332-333, 105 S.Ct., at 2641.

The possibility the jury might have embraced the prosecutor's suggestion, the court concluded, rendered the imposition of the death penalty inconsistent with the constitution's requirement of individualized and reliable capital sentencing

procedures. *See id*., at 323, 329-330, 340-341, 105 S.Ct., at 2636, 2639-2640, 2645-2646. Emphasizing the "truly awesome responsibility imposed upon capital sentencing juries," *id*., at 329, 105 S.Ct., at 2639, *quoting McGautha v. California*, 402 U.S. 183, 208, 91 S.Ct. 1454, 1467, 28 L.Ed.2d 711 (1971), the court held:

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

472 U.S., at 328-329, 105 S.Ct., at 2639.

In *Combs v. State*, 525 So.2d 853, 856 (Fla. 1988), the Court found *Caldwell* inapplicable. The court distinguished the capital sentencing procedure in Mississippi from that in Florida and found that because a jury recommendation in a Florida death penalty case is "advisory," the prosecutor and the standard jury instructions did not unconstitutionally minimize the jury's role during the penalty phase. The Court held that the trial judge is the final decision-maker and the sentencer–not the jury. *Id*. at 857. The jury's role, according to the *Combs* holding, is only "advisory;" therefore, it was not an error for the prosecutor, or the standard jury instructions, to state that the jury's role was advisory. *Id.*

In *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), the Eleventh Circuit found that a *Caldwell* violation could occur under the Florida sentencing scheme. *Id*. at 1454. In *Mann*, the court held that while the term "advisory" may mean in common parlance "nonbinding" or "advice," in Florida death penalty law the term means something more. A review of Florida case law shows that the sentencing jury plays a significant role in Florida capital sentencing. *Id*. at 1450. *See Messer v. State*, 330 So.2d 137, 142 (Fla. 1976) ("[T]he legislative intent that can be gleaned from Section

921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); *see also Riley v. Wainwright*, 517 So.2d 656, 657 (Fla. 1987) ("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."). Significantly, the Court held in *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), that a trial judge can override a life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person could differ."

Based on a review of Florida case law, the *Mann* court concluded that "a jury recommendation of death has a *sui generis* impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error." *Mann, supra,* 844 F.2d at 1454. A *Caldwell* error exists when a Florida sentencing jury is misled into believing that its role is unimportant. *Id*. If a jury was so misled, a death sentence would violate the Eighth Amendment requirement of reliability in capital sentencing. *Id*. at 1455.

The Eleventh Circuit further addressed the *Caldwell* issue in *Davis v. Singletary*, 119 F.3d 1471 (11th Cir. 1997). The *Davis* court held, in light if the Supreme Court's opinion in *Romano v. Oklahoma*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), that a *Caldwell* error can only exist if a defendant shows that the challenged remarks to the jury improperly described the role assigned to the jury by local law. *Id*. at 1482, *citing Romano*, at 9, 114 S.Ct. at 2010. A *Caldwell* error does not exist unless the jury was affirmatively misled regarding its role. *Id*.

In Mr. Chavez' case, the jury was affirmatively misled as to its role. During the closing argument of the state in the penalty phase of the case, the prosecutor told the jury

> Remember, again, you are not asked to pass sentence. That is solely the burden of the Court, and this Court alone. The Court will weigh you recommendation –

(T56 - 11032).

Defense counsel immediately objected, and the trial court informed the jury that it would give great weight to any advisory sentence recommended. (T56 - 11032). The comment must be looked at in combination with the discussions related above which occurred during jury voir dire. Juror 991 was misled as to the proper role of the jury due to the prosecutor's comments. The comment that the penalty phase scheme "takes the burden off of me" was said in front the jury panel. (T39 - 7668). The trial court's statement that the court will give "great weight" to a jury recommendation could not cure the error. (T39 - 7668; T56 - 11032).[12]

Deciding between a life and death sentence under Florida law is clearly not "solely the burden of the Court." A jury plays a significant and pivotal role in the sentencing decision. A jury that does not understand that it has a heavy burden in deciding a defendant's ultimate fate, due to argument or comment by the state, is a jury that does not properly understand its role. In this case, the jury was misled. While its role is "advisory," and the trial court ultimately pronounces sentence, the court's decision is largely impacted by the jury recommendation. Telling the jury that the sole burden is on the trial court was affirmatively misleading, and in violation of the principles of *Caldwell*.

e. The imposition of the death penalty violates the prohibition against

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[12] As the Fifth Circuit first noted in *Dunn v. United States*, 307 F.2d 883, 887 (5th Cir. 1962), "you can't throw a skunk in the jury box and instruct the jury not to smell it."

cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The Appellant maintains that the imposition of the death penalty against him violates the prohibition against cruel and unusual punishment found in the Eighth Amendment as applied to the states via the Fourteenth Amendment. The Appellant acknowledges that the position adopted by the Supreme Court of Florida has routinely supported the constitutionality of capital punishment statutes challenged based on the Eighth Amendment. *See Fotopolous v. State,* 608 So.2d 784, 794 n. 7 (Fla. 1992). Additionally, the Court recently held that the use of the electric chair by Florida officials did not violate the prohibition against cruel and unusual punishment, although Florida subsequently altered the methods for capital punishment to include the option of lethal injection. *See Provenzano v. Moore,* 744 So.2d 413, 415-416 (Fla. 1999).

The Appellant urges the Court to adopt the reasoning and position steadfastly advocated by the late Supreme Court Justice Thurgood Marshall, who unequivocally believed that capital punishment in all circumstances constituted cruel and unusual punishment. *Gregg v. Georgia,* 428 U.S. 153, 231, 96 S.Ct. 2909, 2973, 49 L.Ed.2d 859 (1976) (MARSHALL, J., dissenting). Accordingly, the Appellant respectfully suggests that the Court hold that the death penalty violates the prohibition against cruel and unusual punishment as set forth in the Eighth Amendment and guaranteed to the states by the Fourteenth Amendment.

f. Section 921.141(7), Florida Statutes, which permits introduction of victim impact evidence in a capital sentencing proceeding, is unconstitutional.

(1) Section 921.141(7) is unconstitutional as it leaves judge and jury with

unguided discretion allowing for imposition of the death penalty in an arbitrary and capricious manner.

Effective July 1, 1992, the Florida Legislature enacted section 921.141(7), part of the Florida capital sentencing statute. The statute was enacted in response to the United States Supreme Court's opinion in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). However, by enacting this statute, the Florida Legislature responded to *Payne* without giving full consideration to the statute's constitutional impact on the Florida capital sentencing procedure set forth in Chapter 921.141, Florida Statutes.

The sentencing scheme in Florida law is dissimilar to law reviewed by the Supreme Court of the United States in *Payne* in that Florida is a "weighing" state. The trial judge engaged in a weighing process in his sentence order. (R41-9073-83). In other words, the law requires a jury and the judge to weigh specifically enumerated and defined aggravating circumstances that have been proven beyond a reasonable doubt against mitigating circumstances in determining the appropriate sentence. § 921.141, Fla. Stat. The law reviewed by the court in *Payne* set no such limits. The Tennessee capital sentencing statute is very broad:

> In the sentencing proceeding, evidence may be presented as to any matter that the Court deems relevant to the punishment and may include *but not be limited to*, the nature and circumstances of the character, the crime; the defendant's background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated

T.C.A. 39-13-204(c) (l982) (emphasis added).[13]

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[13]Tennessee requires a unanimous verdict of the jury to recommend death; Florida requires only majority.

Section 921.141(5), Florida Statutes, specifically limits the prosecution to the aggravating circumstances listed in the statute: "Aggravating circumstances *shall be limited* to the following …" (emphasis added). *Accord Elledge v. State*, 346 So. 2d 998, 1002-10 (Fla. 1977). Allowing consideration of matters not relevant to aggravating factors renders a death sentence under Florida law violative of the Eighth Amendment. *Socher v. Florida*, 112 S.Ct. 2114, 117 L.Ed.2d 326 (1992); *Stringer v. Black*, 112 S.Ct. 1130, ll7 L.Ed.2d 367 (1992), and subject to randomness and arbitrary procedures which have been the underlying theme of the Supreme Court's death penalty decisions since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The very problem inherent in Florida's victim impact statute is that no standards are set as the evidential factors which go into the sentencing determination. Victim impact evidence puts into the sentencing process the same factors which have caused reversal of several death sentences. See *Burns v. State*, 609 So. 2d 600 (Fla. 1992). In *Burns*, the Court reversed the death sentence where evidence concerning the deceased's background and character as a law enforcement officer was introduced. The Court held that it was harmless error as it related to the guilt phase but found it to be reversible error as it related to the penalty phase. Specifically, this Court held it was not relevant to any material in issue. In *Taylor v. State*, 583 So. 2d 323, 329-30 (Fla. 1991), the Court reversed for a new penalty phase where the a prosecutor made an argument designed to invoke sympathy for the deceased. The Court relied on its prior opinion of *Jackson v. State*, 522 So. 2d 802, 809 (Fla. 1988), (argument improper "because

it urged consideration of factors outside the scope of the jury's deliberation"). The use of victim impact evidence allowed for imposition of the death penalty in an arbitrary and capricious manner.

(2) Section 921.141(7), Florida Statutes, is vague and overbroad and therefore violative of the due process guarantees of the Florida and United States constitutions.

The victim impact statute provides that "such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." The language contains no definition or limitations. A statute, especially a penal statute, must be definite to be valid. *Locklin v. Pridgeon*, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. *D'Alemberte v. Anderson*, 349 So.2d 164 (Fla. 1977).

The victim impact evidence fails under any standard of definiteness required by the United States and Florida Constitutions. The phrase "loss to the community" contains no definition of relevant community or limits on its membership. This could lead to anyone testifying or even to death sentencing by petition or public opinion poll.[14] The phrase "uniqueness as a human being" places no limit on the evidence.

The Supreme Court has frequently addressed the issue of vagueness of

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[14]The Florida Constitution provides "Victims of crime or their lawful representative including next-of-kin of homicide victims, are entitled … to be heard when relevant …, to the extent that these rights do not interfere with the constitutional rights of the accused." Art. I, § 16. The victim impact statute broadens these rights to the community at large.

legislatively defined aggravating circumstances. "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." *Maynard v. Cartwright*, 486 U.S. 356, 362-63, 108 S.Ct. 1853, 1957-59, 100 L.Ed.2d 372 (1988). Similarly, in *Espinosa v. Florida*, 505 U.S. 1079, ll2 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the court held "our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor."

Moreover, victim impact evidence leads to discrimination for or against victims, contrary to the guarantee contained in our constitution of equal protection of the laws. Article I, Section 2, Florida Constitution. If any such discrimination is present, the defendant's right to a fair trial is compromised. The Court has recognized that the victim's lack of social acceptability is not a proper basis for a jury recommendation of life. *See Bolender v. State*, 422 So.2d 833 (Fla. 1982), *cert. denied*, 461 U. S . 939, 103 S.Ct. 211, 77 L.Ed.2d 315 (1983); *Coleman v. State*, 610 So.2d 1283 (Fla. 1992), *cert. denied*, 510 U.S. 921, 114 S.Ct. 321, l26 L.Ed.2d 267 (1993). Nonetheless, victim impact evidence lends itself to comparing one individual's life against the value of another. One human being (victim), depending upon race, social standing, religion, or sexual orientation, triggers a death sentence, whereas a person of low economic standing (social

status) with no ties to the community will not trigger a death sentence.

Many reported decisions reveal examples of attempts to exploit a victim's piety. *See, e.g., South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989) (prosecutor recited prayers and argued victim's religiousness); *Daniels v. State*, 56l N.E.2d 487 (Ind. 1991) (prosecutor mounted life-size photo of victim in full military uniform and stressed that he had been army chaplain); *State v. Huertas*, 553 N.E.2d 1058 (Ohio 1990) (victim's mother mentioned son's church-going habits); *Vela v. Estelle*, 708 F.2d 954 (5th Cir. 1983) (witness testified that deceased was choir member at his church).

Victim impact evidence asks a jury to compare the value of a victim's life to the value of other victims' lives and to the value of a defendant's life. The inherent risk that prejudice on racial, religious, social, or economic grounds will infect this decision are unaccepted under the Florida and United States Constitutions. As such, the vagueness of the victim impact evidence renders this statute unconstitutional.

(3) The Florida Constitution prohibits use of victim impact evidence.

The admission of victim impact evidence and argument would also violate the due process clause of Article I, Section 9, of the Florida Constitution. In *Tillman v. State*, 591 So.2d 167 (Fla. 1991), the Court stated that Article I, Section 9, holds "that death is a uniquely irrevocable penalty requiring a more intensive level of judicial scrutiny or process than lesser penalties." *Id.*, at l69. The Florida Supreme Court's opinion in *Tillman* is clear indication that victim impact evidence violates Article I, Sections 9 and 17, in a capital case, even if it is permitted in other cases.

The admission of victim impact evidence and argument violates Article I, Sections 9 and 17, of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution for related reasons. First, such evidence introduces into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting a reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakingly achieved in this area. Fourth, the evidence invites the jury to impose the death sentence on the basis of race, class and other clearly impermissible grounds.

Victim impact evidence, whether considered a non-statutory aggravating circumstance or merely a factor to "consider" in the sentencing proceeding, encourages inconsistent, unprincipled and arbitrary application of the death penalty and therefore is violative of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 17, and 2l, of the Florida Constitution.

(4) Section 921.141(7), Florida Statutes, infringes upon the exclusive right of the Florida Supreme Court to regulate practice and procedure pursuant to Article V, Section 2, Florida Constitution.

Article V, Section 2, of the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts.

> Practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces

> substantive rights or obtains redress for their invasion 'practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." *In Re: Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (ADKINS, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. *Skinner v. City of Eustis*, l47 Fla. 22, 2 So. 2d 1l6 (Fla. 1941).

Haven Federal Sav. and Loan Ass'n v. Kirian, 579 So. 2d 730 (Fla. 1991).

The Court has relied on these principles to invalidate a wide variety of statutes, involving such topics as juvenile speedy trial, *R.J.A. v. Foster*, 603 So. 2d 1167 (Fla. 1992); severance of trials involving counterclaims against foreclosure mortgagee, *Haven*; waiver of jury trial in capital cases, *State v. Garcia*, 229 So. 2d 236 (Fla. 1969); and the regulation of voir dire examination. *In Re: Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204, 205 (Fla. 1973). The statute at issue here is an attempt to regulate "practice and procedure."

The statute unconstitutionally invades the province of the Supreme Court of Florida by providing an evidentiary presumption that victim impact evidence will be admissible at the penalty phase in a capital case, regardless of its relevance toward proving aggravating or mitigating circumstance. The statute also permits the prosecutor to argue in closing argument evidence that has previously been determined to be irrelevant in capital sentencing proceedings. *See Jackson v. State*, 522 So. 2d 802 Fla. 1988) (prohibiting argument that the victims could no longer read books, visit their families, or see the sun rise in the morning).

Through enactment of the victim impact statue, the legislature has tried to amend portions of the Evidence Code without first obtaining approval of this Court as required by Article V. *See In re Florida Evidence Code*, 638 So.2d 920

(Fla. 1993); *In re Florida Evidence Code*, 678 So.2d 584 (Fla. 1996); *Allen v. Butterworth*, 576 So.2d 52 (Fla. 2000).

The victim impact statute, if it is not an aggravating circumstance, is not substantive law. Rather, if the argument that it is merely evidence to be "considered" is accepted, then it must be legislatively determined relevant evidence. It is for the courts to determine relevancy, not the legislature.

F. CONCLUSION

The arguments concerning the improperly obtained confession of the Appellant would result in suppression of the confession, a reversal of the convictions obtained, and remand for new trial. The same remedies are requested regarding the issue of delay of the first appearance of the Appellant.

The trial court reversed its earlier appropriate order prohibiting the photography of jurors during the performance of their duties and prohibited counsel from inquiring and making an appropriate record. The Appellant requests reversal of the convictions and a new trial based on prejudice to his right to a fundamentally fair trial.

The Appellant likewise requests reversal and remand for new trial because of the improper admission into evidence of the blood-stained mattress and the numerous gruesome and prejudicial photographs of the decomposed victim. The mattress had no probative value. The limited value of the photographs was far outweighed by their prejudicial impact.

The argument for motion for judgment of acquittal on the sexual battery count, Count II, would have little practical effect, but would result in vacation of one of the two consecutive life sentences and vacation of the minimum three-year

mandatory firearm portion of the sentence. (R41-9113-14).

The arguments concerning the improper consideration of the “avoiding lawful arrest” and “heinous, atrocious, or cruel” aggravating factors during the sentencing phase of trial require reversal of the death sentence imposed and remand for re-sentencing absent the improper aggravating factors.

The arguments that the imposition of the death penalty constitutes cruel and unusual punishment and the unconstitutional consideration of victim impact evidence in sentencing proceedings also require vacation of the death sentence imposed and resentencing of the Appellant to life imprisonment without the possibility of parole.

The appropriate relief set out above is hereby requested.

G. CERTIFICATE OF TYPE, SIZE AND STYLE

Undersigned counsel does hereby certify the Initial Brief of Appellant is reproduced in the following point size and font: 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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by hand/mail delivery this ________ day of June, 2000.

Respectfully submitted,

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