APPENDIX B

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2174

HARREL BRADDY,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

AMENDED INITIAL BRIEF OF APPELLANT

INTRODUCTION

This is a direct appeal from judgments of conviction and sentence of death, imposed by the Honorable Leonard Glick, Judge of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R.," and the transcript of the proceedings as "T." References to non-sequentially paginated transcripts are indicated by the volume number followed by the page number. "SR1" denotes the supplemental record filed October 30, 2009, and "SR2" indicates the supplemental record filed contemporaneously with the initial brief. Unless noted otherwise, all emphasis is supplied.

ARGUMENT

I. THE POLICE DISREGARDED THE DEFENDANT'S REPEATED INVOCATIONS OF HIS RIGHT TO SILENCE, RESORTED TO PHYSICAL FORCE TO COERCE INCRIMINATING STATEMENTS, AND USED AN INADEQUATE *MIRANDA* FORM, INVIOLATION OF THE FIFTH, EIGTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.

Detective Suco read Mr. Braddy his rights at 9:35 p.m. on November 7, and he agreed to talk to the detectives. (R. 1802). This was the first and only time the detectives warned him of his rights. They never refreshed the *Miranda* rights warning. From the 9:35 warning onward, Mr. Braddy maintained his innocence in the face of the detectives' accusations.

At 12:15 a.m. on November 8, Mr. Braddy stopped talking. Having been told that he had a right to remain silent, he asserted that right by putting his head down and refusing to say another word. (V. 30 pp. 76, 88). The detectives did not acknowledge this invocation of rights, and continued the interrogation. (V. 30 pp. 77, 87).

At 7:45 a.m. on November 8, Mr. Braddy asked to speak to Detective Chambers alone, and told him he did not want to incriminate himself. (V. 30 p. 85; V. 52 pp. 232, 238-39). Chambers briefly left the room, but he and Detective Suco resumed the interrogation within 15 minutes. (V. 30 p. 85; V. 52 p. 232). After

this second failed attempt to invoke his rights, Mr. Braddy made his first inculpatory statement, saying that he last saw Quatisha Maycock where he had left her mother. (V. 30 pp. 48, 89).

Then at 9:00 a.m., Mr. Braddy told the detectives he did not want to talk to them any more. (V. 30 pp. 75,78-79). They left him, but returned at 11:30 a.m. (V. 30 p. 90). According to the detectives, Mr. Braddy offered to take them to where he had left Quatisha. (V. 30 p. 49). They did not remind him of the rights he had invoked.

At noon, the detectives drove Mr. Braddy to the site in Palm Beach County where Shandelle Maycock had been found, arriving thirty minutes later. (V. 30 p. 51). Mr. Braddy sat in the car in handcuffs and shackles and wearing an immobilizing brace as the search continued. (V. 30 pp. 50, 52; V. 52 pp. 218-20).

At around 2:30 p.m., Detective Greg Smith seized Mr. Braddy by his shirt, dragged him from the rear seat, and threw him up against the car. (V. 30 pp. 112, 118, 133). Smith pressed his forearm against Harrel Braddy's throat, repeatedly demanding where Quatisha was. (V 30. p. 133). He then told Mr. Braddy, "Let's go. Walk goddamn it. Get your ass down the road," and continued to question him, without refreshing the *Miranda* warnings. (V. 30 p. 99). During Smith's questioning, Mr. Braddy asked how long it takes a body to surface. (V. 30 p. 117).

After being questioned by Detectives Smith and Diaz, Mr. Braddy told them to search near I-75 in Broward county. They departed at around 4:00 p.m. (V. 30 p. 55, 118). Mr. Braddy made further incriminating statements to the two detectives, again asking them how long it would take a body to surface, and stating that an autopsy would show that he did not abuse the girl. (V. 30 pp. 124-25, 154). The detectives returned Mr. Braddy to homicide headquarters, where they resumed interrogation and Mr. Braddy made a final statement to Detectives Hoadley and Diaz. (V. 52 p. 283). Again, no one re-read the *Miranda* warnings.

The police extracted Mr. Braddy's statements by disregarding his rights, and by resort to violence. The use of these statements to win his conviction and execution is repugnant to our constitutions, and violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as well as Article I, sections 9 and 17 of the Florida Constitution.[2]

A. The State Failed to Scrupulously Honor The Defendant's Right to Remain Silent.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court of the United States recognized that custodial interrogation is inherently coercive. The

[2] On review of a motion to suppress, the Court accords a presumption of correctness to a trial court's findings of historical of fact, but reviews mixed questions of law and fact *de novo*. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001).

Court held that police must warn a suspect of his or her rights to silence and counsel. Thereafter:

> If the individual **indicates in any manner**, at any time prior to or during questioning, **that he wishes to remain silent**, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Id. at 473-74 (footnote omitted). The Florida Constitution likewise requires that, "if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop." *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992).

In *Davis v. United States*, 512 U.S. 452 (1994), the Court held that an ambiguous request *for counsel* does not prohibit further questioning under *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1994), and interrogators need not pause to clarify an equivocal request. In *State v. Owen*, 696 So. 2d 715 (Fla. 1997), this Court extended *Davis* to invocations of the core Fifth-Amendment right to remain silent. The Court determined that police need only cease interrogation where an invocation of the right to silence is unambiguous. To determine whether a defendant's invocation is "unambiguous," the Court asks whether "a reasonable

police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." *Id.* at 718.

Three times Mr. Braddy unambiguously invoked his right to silence, and twice his interrogators simply ignored him. The third time, the detectives admittedly knew that Mr. Braddy wanted to cease questioning, and they halted the interrogation. They nevertheless failed to scrupulously honor this invocation, and improperly renewed the interrogation in violation of *Welch v. State*, 992 So. 2d 206, 214 (Fla. 2008) and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). (V. 30 p. 75).

1. Mr. Braddy Repeatedly Invoked His Right to Remain Silent

First Invocation

Mr. Braddy first exercised his right to silence by literally exercising that right: He remained silent and refused to answer questions. *See Pierre v. State*, 22 So. 3d 759 (Fla. 4th DCA 2009) (defendant said he was not saying any more and remained silent for "nearly a minute"); *State v. Hodges*, 77 P.3d 375 (Wash. App. 2003).[3] Starting at about 12:15 a.m. on November 8, Mr. Braddy "wouldn't talk to

[3] *See also People v. Jaramillo*, 2004 WL 68651 (Cal. App. 2004) (unpublished opinion); *United States v. Montana*, 958 F.2d 516 (2d Cir. 1992); *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988).

us." (V. 30 p. 87). He put his head down, and "did not say another word" for thirty to forty minutes, while the detectives continued to question him. (V. 30 pp. 76, 88). According to Detective Suco, Mr. Braddy said:

> "I can't tell you. Even if I am found innocent, my family will not talk to me again."
>
> We kept talking to him. He put his head down. We kept talking to him and he didn't say a word after that.
>
> * * *
>
> We kept talking to him saying, "We need to find her, we need to find her," and **he wouldn't talk to us.**

(V. 30 pp. 77, 87).

Harrel Braddy had the right to cease interrogation, and he exercised that right. The detectives could not reasonably have understood otherwise. This is particularly clear in light of the words the detectives used to advise Mr. Braddy of his *Miranda* rights. With respect to the right to counsel, they told him he had the right to have a lawyer present if he wanted one. (R. 1802). This told Mr. Braddy he could exercise the right to counsel by requesting an attorney. As to his right to silence, the warning form states: "You have the right to remain silent and you do not have to talk to me unless you wish to do so. You do not have to answer any of my questions." (R. 1802). In contrast to the right to counsel, this warning told Mr. Braddy he could exercise his rights by choosing not to talk and refusing to answer questions. This is what Mr. Braddy did for more than half an hour. *See Doody v.*

Schriro, 548 F.3d 847, 865 (9th Cir. 2008) ("With his silence, Doody gave every appearance of trying to exercise his right to remain silent in the precise fashion described earlier by the officers.").[4]

Second Invocation

Mr. Braddy again attempted to invoke his right to silence when he told Detective Chambers he did not want to "incriminate himself." At 7:45 a.m. on November 8, Mr. Braddy told Detective Chambers he wanted to be alone, and "made a statement concerning not incriminating himself."[5] (V. 30 p. 85; V. 52 pp. 232, 238-39). Detective Chambers momentarily ceased his interrogation, but he and Detective Suco resumed questioning at 8:00 a.m. (V. 30 p. 85; V. 52 p. 232).

Mr. Braddy unambiguously invoked his *Miranda* rights when he stated he did not wish to incriminate himself. In *Miranda*, the Court developed "protective devices" in order to safeguard "one of our Nation's most cherished principles – that **the individual may not be compelled to incriminate himself.**" 384 U.S. at 457-58. An invocation of *Miranda* rights that actually quotes the language of *Miranda*

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[4] The *Doody* court did not ultimately reach the issue of whether Doody's silence had invoked his rights. *Id.* at 865 n.7.

[5] Although he could not recall the precise words Mr. Braddy used to invoke his rights, Detective Chambers agreed with the prosecutor that Mr. Braddy did not use the following language to do so: "I don't want to talk to any of you guys anymore," "I don't want to tell you where this girl is," "I want a lawyer, forget about it, I'm just not talking, I'm not speaking to any of you anymore," "he wanted to invoke his right against self incrimination." (V. 52 pp. 239-40).

can scarcely be called ambiguous. *See State v. Day*, 619 N.W.2d 745, 749-50 (Minn. 2000). Prior to this failed invocation, Mr. Braddy had not made any incriminating statements. When Suco and Chambers resumed interrogation, he stated that the last time he saw Quatisha was in the same place where he dropped off Shandelle Maycock. (V. 30 pp. 48, 89).

Third Invocation

After some 14 hours in custody and 12 hours of interrogation, the detectives finally honored Mr. Braddy's third invocation of his right to remain silent:

> [DEFENSE]: ... Does there come a time when Braddy tells you specifically that he no longer wants to speak to you?
>
> [DET. SUCO]: Yes, it was around 9:00 in the morning on Sunday morning. [November 8.]

(V. 30 pp. 75, 78). The detectives then went to McDonald's, leaving Mr. Braddy alone in the interrogation room. (V. 30 p. 49). They returned between 10:30 and 11:00 a.m.

Mr. Braddy invoked his rights with perfect clarity. He wanted to end the interrogation: he no longer wished to speak to the detectives, and he wanted to leave. The test is whether "a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." *Owen*, 696 So. 2d at 718. An officer would have to willfully misunderstand Mr. Braddy's words in order to believe they might indicate a willingness to continue

questioning.[6] What is more, the detectives not only *should* have understood this to be an invocation, they actually *did* understand it to be an invocation and ceased questioning. *See Cuervo v. State*, 967 So. 2d 155, 163 (Fla. 2007) ("[Deputy] Garcia understood Cuervo's response as an election not to talk to the officers and clearly conveyed that understanding to [Detective] Palmieri."); *Pierre v. State*, 22 So. 3d 759 (Fla. 4th DCA 2009) ("The only interpretation that can be made from the tape is that, as a reasonable police officer, Detective Campbell understood Pierre's statement to be a demand that questioning cease.").

2. The State Failed to Scrupulously Honor Mr. Braddy's Invocation of His Right to Remain Silent

Police must "scrupulously honor" a defendant's invocation of the right to silence. "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' " *Cuervo*, 967 So. 2d at 164 n.9 (quoting *Michigan v. Mosley*, 423 U.S. 96, 104 (1975)). This Court looks to five factors in determining the legitimacy of renewed questioning after an invocation: (1)

[6] *Ford v. State*, 801 So. 2d 318 (Fla. 1st DCA 2001) does not teach otherwise. In *Ford*, the district court found no unambiguous invocation where the defendant stated "Just take me to jail," three times. *Id.* at 319. Mr. Braddy's request to go to jail, unlike Ford's, was coupled with a statement of his desire to end the questioning. Ford's requests, moreover, were made in a context where police discussed jail as the alternative to execution. 801 So. 2d at 320 n.1. ("[A]fter you asked him that, if he'd rather die than go to jail, he said he does care about that and just to take him to jail, right?").

whether police re-administered *Miranda* warnings; (2) whether they immediately ceased questioning in response to the invocation; (3) whether police waited a significant amount of time before reinitiating the interrogation; (4) whether the renewed questioning occurred in a different location; and (5) whether the later questioning concerned a different crime. *Globe v. State*, 877 So. 2d 663, 670 (Fla. 2004) (citing *Henry v. State*, 574 So. 2d 66, 69 (Fla. 1991)).

None of these factors favor the admissibility of Mr. Braddy's statements. The detectives did not honor Mr. Braddy's invocation by silence at all. They simply continued to ask questions. When Mr. Braddy told Detective Chambers he did not want to incriminate himself, the police did pause their interrogation. However, they did not reread the *Miranda* warnings. They resumed questioning within fifteen minutes, in the same interrogation room, and regarding the same crime.

While the detectives may have initially honored the third invocation, they improperly resumed the interrogation. Detective Suco testified that when he returned from breakfast, Mr. Braddy told him he would take the detectives to where he left Quatisha. (V. 30 p. 49). This act did not of itself constitute a waiver of his invocation. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45 (1983) (plurality opinion). In *Bradshaw*, the defendant invoked his right to counsel, but reinitiated conversation with the police. The Court concluded that the reinitation alone did

not establish a waiver of the prior invocation. Instead, it pointed to the fact that police immediately reminded Bradshaw that he did not need to speak with them, and re-read his *Miranda* warnings before resuming interrogation. *Id.* 1045-46. Indeed, the police read *Miranda* a third time before obtaining Bradshaw's confession. 462 U.S at 1049 (Powell, J. concurring).

Relying on *Bradshaw*, this Court recently explained the relevant inquiry:

> [W]hen an accused has invoked the right to silence or right to counsel, if the accused initiates further conversation, **is reminded of his rights, and knowingly and voluntarily waives those rights**, any incriminating statements made during this conversation may be properly admitted

Welch v. State, 992 So. 2d 206, 214 (Fla. 2008). In *Welch*, the defendant invoked his right to silence, and questioning ceased. *Id.* at 213. Welch asked for some water, and an agent took him to a water cooler, where he asked the agent what would happen to him next, and then offered to tell his side of the story *Id.* The agents reread the *Miranda* warnings and resumed questioning. The Court relied on the combination of defendant-re-initiation and refreshed *Miranda* warnings to find the second confession admissible:

> Where, as here, the accused had invoked his right to silence but later initiated a conversation with law enforcement and subsequently exercised a voluntary, knowing, and intelligent waiver **after being advised of his rights for the second time**, the resulting confession is admissible under *Bradshaw*.

Id. at 215; *see also State v. Blackburn*, 840 So. 2d 1092 (Fla. 5th DCA 2003) (defendant reinitiated and police reread *Miranda* warnings).

The renewed interrogation of Mr. Braddy falls afoul of *Welch*. The police never reread the rights warnings, obtained a new waiver, or cautioned Mr. Braddy in any way. Just the opposite: during the renewed questioning at the scene, they physically assaulted him. Physical coercion during police interrogation is the antithesis of the rights embodied by *Miranda* warnings.

3. *Owen*'s Extension of *Davis* to Silence is Contrary to Reason and the Constitution

Mr. Braddy unambiguously invoked his right to silence three times. The Supreme Court of the United States has, moreover, never held that the "unambiguous" or "unequivocal" standard applies to invocations of the right to remain silent. In *Davis v. United States*, 512 U.S. 452 (1994), the United States Supreme Court held that police need not pause to clarify equivocal requests for *counsel*. In *State v. Owen*, 696 So. 2d 715 (Fla. 1997), this Court extended *Davis* to invocations of the right to silence. In applying *Davis* to the right to remain silent, *Owen* adopts a position that violates the Fifth and Fourteenth Amendments.[7]

[7] To be sure, this Court is not alone in applying *Davis* to the right to silence. *See People v. Martinez*, __ Cal. Rptr. 3d __, 2010 WL 114933 (Cal. 2010) ("A plurality of state courts, and at least five of the 11 federal circuit courts, have specifically applied *Davis* to invocations of the right to remain silent.") (citing cases).

The *Miranda* right to counsel exists to protect the core Fifth-Amendment right to remain silent. 384 U.S. at 469, 477; *Davis*, 512 U.S. at 457. From *Miranda* onwards, the Supreme Court has drawn a distinction between the right to silence and the Fifth-Amendment right to counsel.

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. ... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Miranda, 384 U.S. at 473-74 (footnote omitted). The Court imposed distinct consequences to the violation of the rights to silence and counsel. When a suspect asks for an attorney, there can be no questioning until that request is honored. If the suspect signals his desire to remain silent, interrogation must end for an unspecified period of time. *Id.*; *see Edwards v. Arizona*, 451 U.S. 477, 485 (1994); *Michigan v. Mosley*, 423 U.S. 96, 102-04 (1975) (explaining that the language of *Miranda* means neither that interrogation may immediately resume nor that questioning is permanently barred). In *Mosley*, the Court distinguished the rights to silence and counsel based on the procedural safeguards triggered by invocation. 423 U.S. at 104 n.10. *Edwards* drew the same distinction. *Edwards* created a "rigid prophylactic rule" in contrast to the more flexible re-initiation standard of *Mosley*.

The Supreme Court imposed different consequences for the invocation of the right to silence and the right to counsel. It likewise imposed different triggers. To cease questioning, the defendant must signal his desire "in any manner." To invoke the right to counsel, the defendant must "state that he wants an attorney." The plain language of *Miranda* thus requires much greater precision to invoke the right to counsel. To equate the standards for invocation would be to read the words "indicates in any manner" out of *Miranda*, replacing them with the word "state." This Court applied just this reading in *Owen*. In so doing, it violated *Miranda* and the Fifth and Fourteenth Amendments.

Applying *Davis* to the right to remain silence has yielded absurd results. In *United States v. Sherrod*, 445 F.3d 980, 982 (7th Cir. 2006), the defendant told police: "I'm not going to talk about nothin'" The court found this ambiguous: "A suspect telling a police officer that "he's 'not going to talk about nothin'" is as much a taunt – even a provocation – as it is an invocation of the right to remain silent." In *Delao v. State*, No. 10-05-00323-CR, 2006 WL 3317718, at 2 (Tex. App. Nov. 15, 2006) (unpublished decision), *aff'd.* 235 S.W.3d 235 (Tex.Crim.App. Sep 26, 2007), the defendant was schizophrenic and had a 55 IQ. The police told him that if he invoked his right to silence, he could go home. He repeatedly asked to go home saying, for example: "Well, can I go home, man? ... I gotta go home ... Can I go home now?" *Id.* at 4-5. The court found this

invocation "at most" ambiguous. In *Anderson v. Terhune*, 467 F.3d 1208, 1211-12 (9th Cir. 2006), *rev'd en banc*, 516 F.3d 781 (9th Cir. 2008), the defendant stated: "I plead the fifth." The detective responded, "Plead the fifth. What's that?" The panel found that "I plead the fifth," could be an ambiguous invocation. 467 F.3d 1211-12.[8]

Even the clearest invocations run the risk of being considered legally ambiguous under *Davis*. At least one court held that an otherwise clear invocation was ambiguous because the defendant was "not emphatic," and he *may have meant the opposite of what he said.* In *United States v. Ford*, 2006 WL 3533080 (U.S. D. Kan. 2006) (unpublished opinion), the court wrote:

> While defendant did not need to be coaxed to speak, his interrogators did coax defendant to say what they apparently wanted to hear. When defendant said, "I'm not answering anything else," he repeated it two or three times. But, he was not emphatic. ... **It's not clear that the comments were intended to be taken literally. ... Sometimes people say they won't do what they know they are going to do, or they make statements in contradiction to what they really think.** For instance, a person might say it's not going to rain, when he thinks it is going to rain. In context, defendant's statement that he wasn't going to answer anything else did not appear to clearly announce a decision to invoke his *Miranda* rights.

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[8] *See generally*, Marcy Strauss, *The Sounds Of Silence: Reconsidering The Invocation Of The Right To Remain Silent Under* Miranda, 17 Wm. & Mary Bill Rts. J. 773 (2009); Wayne D. Holley, *Ambiguous Invocations Of The Right To Remain Silent: A Post-*Davis *Analysis And Proposal*, 29 Seton Hall L. Rev. 558 (1998).

Id. at 2. *Miranda* rights exist to empower the otherwise powerless to protect their Fifth-Amendment rights. The application of *Davis* to the right to silence permits police and courts to side-step an invocation wherever they can conceive of an alternate meaning to the defendant's words, no matter how fanciful. This Court's extension of *Davis* is inconsistent with *Miranda* and incompatible with the Fifth Amendment.[9]

B. The State Resorted to Physical Force to Obtain The Defendant's Statements.

An involuntary statement is inadmissible to prove a defendant's guilt. *Brown v. Mississippi*, 297 U.S. 278 (1936). In order to to be found voluntary, a statement "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." *Brewer v. State*, 386 So. 2d 232, 235 (Fla. 1980) (quoting *Bram v. United States*, 168 U.S. 532, 542-23 (1897). A defendant's mind must be "free to act uninfluenced by either hope or fear." *Id.*

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[9] Professor Janet Ainsworth explores how women and some minorities are more likely to use the linguistic styles courts will find ambiguous. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 Yale L.J. 259 (1993). *See also* Peter M. Tiersma & Lawrence M. Solan, *Cops And Robbers: Selective Literalism In American Criminal Law*, 38 Law & Soc'y Rev. 229 (2004).

It was after the police failed to honor Mr. Braddy's invocations of the right to silence that Detective Gregory Smith attacked him. Detective Smith admittedly assaulted Harrel Braddy. Mr. Braddy was helpless at the time – handcuffed, shackled, and wearing an immobilizing leg-brace. (V. 30 pp. 50, 52; V. 52 pp. 218-20). As Smith himself admitted, at approximately 2:30 p.m. he seized Mr. Braddy by the shirt, dragged him from the car and slammed him up against it. (V. 30 pp. 112, 133). He pressed his forearm against Mr. Braddy's throat and repeatedly demanded to know where Quatisha was, using "pretty harsh words." (V 30. p. 133). In response, Harrel Braddy said he would take them to where he had last seen Quatisha. The detective then told Mr. Braddy: "Let's go. Walk goddamn it. Get your ass down the road." (V. 30 p. 99).[10] During the ensuing interrogation, Detective Smith obtained incriminating statements including the question how long it takes a body to surface, and the statement that an autopsy would show that he did not abuse her. (V. 30 pp. 117, 124-25). This coercive interrogation alone rendered all subsequent statements presumptively involuntary. *Brewer*, 386 So. 2d at 286.

The state conceded that Mr. Braddy's statements to Detective Smith in Palm Beach County were inadmissible, saying:

> The State has no intention of offering the statements that, any statement that the defendant made to Detective Smith with regard to,

[10] Detective Suco emphatically stated that Detective Smith said this, though Smith denied it. (V. 30 pp. 99, 133).

> well, there were no statements that he made to Smith indicating where the victim was.
>
> The statement was made, this was up in Palm Beach, the physical force was up in Palm Beach.

V. 43 pp. 45-46). Despite its representation to the court, the state introduced these statements in its case-in-chief.[11] (T. 2143-48).

The state likewise failed to overcome the presumption of coercion that attached to the statements to Detective Diaz in Palm Beach, and the later statements on I-75 and at headquarters. In determining whether a subsequent statement is untainted by the coercion, courts look to the totality of the circumstances, including renewed *Miranda* warnings, the passage of time, and the

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[11] In contrast to the state's promise, the court's ruling on this issue – if any – was less than clear. The ruling appears to be directed to those statements the state had already conceded to be coerced. The court concluded that there was "walking around," which the state characterized as "just killing time" and:

> It certainly didn't produce any evidence that helped the police officers. So I don't think that the situation with Greg Smith, as intolerable as it is and should not be tolerated, led to a direct piece of inculpatory evidence so the time line there attenuated any of the problems with that physical confrontation. And that continuing down the time line that we have a result of speaking with Diaz, the defendant took the officers down to the alligator alley area, things were said, things were talked about, but ultimately there were no results, quite frankly, as far as getting the body of the child at that time.

(V. 43 pp. 67-68). To the extent the court found the coercive effect of Smith's questioning to be attenuated – even as to statements made in the same place and in the presence of the officer who assaulted Mr. Braddy – it erred as discussed below.

presence of officers involved in the original coercion. *See Brewer*, 386 So. 2d 236-37); *Lyons v. Oklahoma*, 322 U.S. 596 (1943); *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984).

The most important of these factors is a renewed *Miranda* warning. Cases finding a second confession admissible almost invariably rely on a fresh rights warning between the coercion and the subsequent statement. The state principally relied on *Leon v. State*, 410 So. 2d 201 (Fla. 3d DCA 1982). There the Court relied in part on the fact that "a complete set of *Miranda* warnings was meticulously given, understood, and waived before the subsequent statements." *Id.* at 204. In *Lyons*, a pre-*Miranda* decision, the Supreme Court noted that authorities warned Lyons of his rights before the second confession. 322 U.S. at 604. Other decisions admitting post-coercion statements point to intervening reminders of Fifth Amendment rights. *See, e.g., Holland v. McGillis*, 963 F.2d 1044 (7th Cir. 1992). Indeed, each of the post-*Miranda* decisions that the *Leon* court relied upon involved a rights warning before the second statement. *See Berry v. State*, 582 S.W.2d 463 (Tex.Crim.App.1979); *State v. Oyarzo*, 274 So. 2d 519 (Fla. 1973); *Brown v. State*, 304 So.2d 17, 25 (Ala. 1974); *State v. Shular*, 400 So. 2d 781 (Fla. 3d DCA 1981) (statement untainted by illegal arrest where defendant was warned of his rights and actually consulted with counsel).

Even *Miranda* warnings are not in themselves sufficient to dissipate the taint of coercive conduct. In *Brewer*, the police did not physically abuse the defendant, but coerced the first statement by "threats and promises." He was then brought to a first-appearance hearing where a *judge* advised him of his rights. The Court held that the ensuing written confession should have been suppressed. In *United States v. Lopez*, 437 F.3d 1059, 1066-67 (10th Cir. 2006), the second confession was suppressed despite renewed *Miranda* warnings, a twelve-hour interval between statements, and "a night's sleep and a meal." In the present case, the Miami-Dade detectives made no effort to rewarn Harrel Braddy. Twenty-two hours had elapsed between the first and only warnings and the time he sat across the table from Detective Hoadley. (R. 1802; V. 52 p. 283).

The failure to re-read *Miranda* warnings is particularly significant in this case. The Court does not review coercive interrogations in a vacuum. It considers the totality of the circumstances. *See Brewer*, 386 So. 2d at 237. Even before Smith assaulted Mr. Braddy, the detectives had ignored two attempts to assert his rights, and they avoiding reading the *Miranda* warnings as required to resume interrogation after the "re-initiation." Courts have placed a special emphasis on reminders of *Miranda* rights in admitting the products of renewed interrogation. *See Welch v. State*, 992 So. 2d 206 (Fla. 2008) and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *Michigan v. Mosley*, 423 U.S. 96 (1975). The detectives' steadfast

refusal to remind Harrel Braddy of his rights, in light of his repeated attempts to invoke his them and the *Bradshaw* violation, is fatal to the attempt to dissipate the taint from Smith's attack.

Other relevant factors likewise do not establish dissipation of the presumed coercion. Courts often consider whether the subsequent statement is obtained by officers unrelated to the original coercion. *See, e.g. Lyons*, 322 U.S. at 596 (1943); *Brewer*, 386 So. 2d at 236; *Leon*, 410 So. 2d 202-04. Detective Hoadley was present for the attack, and there is no indication that he tried to prevent or end it. (V. 52 p. 274). When Diaz questioned Mr. Braddy at the Palm Beach site, he did so in the presence of Smith. (V. 30 pp. 148-49). When they went to I-75, it was Detectives Smith and Diaz who rode with Mr. Braddy. (V. 30 p. 119). Both were there when Mr. Braddy directed them where to search, and both were present for the "how long does it take a body to float?" remark. (V. 30 p. 124, 154). When Diaz resumed the interrogation at the homicide office, he began by referring back to statements Mr. Braddy made on I-75. (V. 30 p. 158).

C. The *Miranda* Rights Waiver Form Was Insufficient to Inform the Defendant of His Right to Consult with Counsel Before Interrogation.

The *Miranda* waiver form failed to inform Mr. Braddy of his right to consult counsel *before* interrogation. The warnings form stated:

> If you want a lawyer to be present during questioning, at his time or at anytime hereafter, you are entitled to have the lawyer present. Do you understand that right?

(R. 1802). This warning was inadequate to protect Mr. Braddy's rights under article I, Section 9 of the Florida Constitution The Court has previously rejected challenges to the Miami-Dade warning form at issue here. *See Chavez v. State*, 832 So. 2d 730, 750 (Fla. 2002); *Johnson v. State*, 750 So. 2d 22, 25 (Fla. 1999); *Cooper v. State*, 739 So. 2d 82, 84 n. 8 (Fla. 1999). Nevertheless, the Court must reconsider these opinions in light of *State v. Powell*, 998 So. 2d 531 (Fla. 2008).[12]

In *Powell*, the Court held that law enforcement officers must inform a defendant of his right to have counsel present both prior to and during interrogation. The Court wrote:

> Under article I, section 9 of the Florida Constitution, as interpreted in *Traylor v. State*,[13] a defendant has a right to a lawyer's help, that is, **the right to consult with a lawyer before being interrogated** and to have the lawyer present during interrogation.

998 So. 2d at 540. The Court went on to quote *Miranda*: "[t]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning." *Id.* at 541 (quoting *Miranda*, 384 U.S. at 469-70).

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[12] In *Florida v. Powell*, 130 S.Ct. 1195 (2010), the Supreme Court of the United States reversed *Powell* to the extent it relied on the United States Constitution.

[13] *Traylor v. State*, 596 So. 2d 957 (Fla. 1992).

In its previous decisions the Court relied on a flawed premise to conclude that police need not inform a suspect of the right to consult with a lawyer prior to interrogation. The Court dispensed with the issue by way of a footnote in *Cooper*, stating that the Miami-Dade warning tracked the language of *Miranda*. 739 So. 2d at 85 n.8. *Chavez* and *Johnson* merely rely on *Cooper*. 832 So. 2d at 750; 750 So. 2d at 25. In *Powell*, the Court recognized that a suspect is guaranteed two distinct forms of access to counsel: Both the right to consult with counsel before questioning and the right to have counsel present during questioning. In light of *Powell*, the Court must revisit and overrule *Cooper*, *Johnson*, and *Chavez*.

D. The State Cannot Prove Beyond a Reasonable Doubt that the Error in Admitting the Defendant's Statements Was Harmless.

The state bears the burden of proving that the trial court's error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla.1986). The harmless error test "is not guided by a sufficiency-of-the-evidence, correct-result, not-clearly wrong, substantial-evidence, more-probable-than-not, clear-and-convincing, or overwhelming-evidence test." *Rigterink v. State*, 2 So. 3d 221, 256 (Fla. 2009). Before error can be deemed harmless, the state must prove beyond a reasonable doubt that the error did not contribute to the conviction. *DiGuilio*, 491 So. 2d 1138 (Fla. 1986). Error contributes to the verdict where the improper evidence may have been relied on, even though the jury may have reached the

same result without the error. *DiGuilio*, 491 So. 2d at 1136, (citing *People v. Ross*, 429 P.2d 606 (1967) (Traynor, C.J. dissenting), *rev'd sub nom, Ross v. California*, 391 U.S. 470 (1968). The state can hardly prove that the jury did not "rely on" the most damning piece of evidence against Harrel Braddy where they made it the feature of their case against him.

II. THE TRIAL COURT ERRED IN FAILING TO RULE ON OR GRANT MR. BRADDY'S MOTIONS TO DISQUALIFY WHICH ALLEGED A REASONABLE FEAR OF BIAS BASED ON THE COURT'S REFUSAL TO HEAR DEFENSE ARGUMENT BEFORE RULING, AND A PATTERN OF RUDENESS AND MOCKERY.

On June 19, 2006, Mr. Braddy moved to represent himself. Following a *Faretta*[14] inquiry, the trial court determined Mr. Braddy was competent to do so. (V 89. pp. 12-20). Over the next several months, the trial court evinced growing antipathy toward Mr. Braddy, refusing to let him speak, denying the most anodyne requests, addressing him with rudeness and mockery. By October 3, 2006, the trial court openly castigated the defendant. Nothing in his in-court conduct warranted this intemperance. Apprehensive about receiving a fair trial, Mr. Braddy moved for recusal to no avail.

[14] *Faretta v California*, 422 U.S. 806 (1975).