IN THE SUPREME COURT OF FLORIDA

BLAINE ROSS,	:	
Appellant,	:	
vs.	:	Case No. SC07-2368
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Blaine Ross was charged in Manatee County with two counts of first degree murder (and one count of robbery) in the deaths of his parents Richard and Kathleen Ross (1/5-6;7/1210-11). The Rosses were bludgeoned to death during their sleep on the night of January 6-7, 2004. The defense moved (and renewed the motion at trial) to suppress Blaine's confession, which was obtained after a series of interrogations by Detective William Waldron (1/94-98;3/471-535;37/2511;41/3155-56;43/3356-57). The trial court denied the motion (except for two very minor aspects)(4/714-72). The trial took place in April 2007 before Circuit Judge Edward Nicholas and a jury. [To comply with page limits, the evidence pertaining to each issue raised is discussed in the argument portion of the brief]. The jury returned verdicts of guilty on each count (7/1277-78;46/3932). After the May 2007 penalty phase, the jury (by 8-4 votes) recommended the death penalty, and on November 16, 2007 Judge Nicholas imposed two death sentences (7/1287;49/4418-19;8/1379-1400).

SUMMARY OF THE ARGUMENT

Blaine's confession obtained by Detective Waldron should have been suppressed because (1) it was involuntary; (2) it was the product of a deliberate two-step custodial interrogation designed to circumvent Miranda; and (3) Blaine's invocation of his right to remain silent (after Miranda warnings were belatedly read) was ignored [I,II]. The state's DNA expert was unqualified to testify as to statistical analysis regarding the frequency of a match

[III]. The evidence failed to prove robbery or premeditation [IV]. The judge found an unproven aggravator and ignored uncontroverted evidence that Blaine has a severe mental illness [IV,V]. This is neither among the most aggravated nor least mitigated homicides, and the death penalty is disproportionate [V].

[ISSUE I] THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE VIDEOTAPED IN-CUSTODY CONFESSION OBTAINED BY DETECTIVE WALDRON BY MEANS OF MULTIPLE VIOLATIONS OF APPELLANT'S RIGHTS PROTECTED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS

A. The January 7th and 8th Interrogations

After Blaine (accompanied by his girlfriend Erin) discovered his parents' bodies and Detective Waldron responded to the scene, Blaine expressed concern about the media cameras and wanted to know if they could talk someplace else. Waldron suggested the Criminal Investigation Division, to which Blaine agreed (22/388-91). A brief interview, which was nonconfrontational and information-gathering, began at 2:49 p.m. and ended at 3:25 p.m. (22/395-420, State Exh. 8 in suppression hearing;41/3165-93,State Exh. 40-A at trial). [No Miranda warnings were given; however, undersigned counsel concedes that Blaine was not in custody for Miranda purposes during this first session of interrogation]. After the interview, while Blaine and Waldron were outside smoking, Blaine admitted that during the past few days he had used marijuana and Xanax and consumed alcohol; as a result his mind was little fuzzy and he couldn't clearly remember everything. He also admitted (having previously stated otherwise) that his relationship with Erin, who was 16, was sexual (22/420-22,396). Waldron assured him he wasn't concerned about those things; the purpose of the inter-

view was to investigate how and why his parents were killed (22/420-22).

For the next four hours Blaine remained in the CID building; according to Waldron he was “free to roam around” and there were no physical barriers to his leaving (22/423-25). A second interview, conducted by Detective Waldron (with Detective Schue present) in the same conference room, began at 7:41 p.m. and ended at 8:27 p.m. (22/426-27;23/433-69, State Exh. 9 in suppression hearing;42/3203-37, State Exh. 41-A at trial). Waldron began the interview by telling Blaine there were some discrepancies and conflicting statements between his and Erin’s accounts of their activities today and yesterday, and he wanted to go over some of those things (22/435). [Again, no Miranda warnings were given, and again the undersigned concedes that Blaine was not in custody during the second interrogation session]. During this interview, Blaine told Waldron that on the night of the 6th and early morning of the 7th he and Erin had been with friends, including Mikey Young. When Blaine dropped Mikey off at his house around 3:00 a.m., the door was locked and Mikey didn’t have his keys. Blaine and Mikey smoked a joint, then went back to Erin’s house, where Mikey tried to call his parents to get them to unlock the door. While waiting they smoked more pot. Mikey’s stepdad Glenn eventually called back to Erin’s house. Blaine talked to Glenn, then gave Mikey the phone; after that Blaine drove Mikey home. Then he came right back to Erin’s and crawled into bed with her (23/436,443-46).

After the second interview ended at 8:27 p.m., Blaine re-

mained in the common area at CID, at the round table where the newspapers are. According to Waldron, he and Blaine went outside the building several times that evening between the second and third interrogation sessions. Blaine was not physically restrained during these breaks but Waldron was always with him (23/469-73). Waldron testified that during one of those cigarette breaks, Blaine asked him whether he could go home that night. Waldron replied that since his house was a crime scene he could not go there, and the same was true of his car. Waldron suggested he try to make arrangements to stay with his grandmother, and appellant said maybe he could sleep at Erin's house (23/473).

The interrogation resumed at 11:53 p.m., again conducted by Waldron with Schue present (23/474-584, State Exh. 11-A,B,C in suppression hearing; 42/3246-3349, State Exh. 42-A at trial). [Again no Miranda warnings were given; undersigned counsel asserts that Blaine was subjected to custodial interrogation as this third interview progressed, but the main focus of his argument is on the fourth and climactic interrogation session which took place on January 9, 2004].

At the outset, Waldron asked Blaine if there was anything he'd like to change or clarify, because "there are some things here that deeply bother me about what you told me today", and it was "getting ridiculous at this point" that his story didn't match up with Erin's or Mikey's (23/478-79). Waldron asked Blaine if he'd submit to a DNA swab; Blaine agreed to provide one (and an oral swab was taken later during the session)(23/484,544). Waldron commented to Blaine that "it's almost as if you're totally de-

tached from the death of your parents", and "I'm tired of hearing the drugs as an excuse for why you can't remember" (23/488-89). They then began discussing Blaine's relationship with his parents, who were in the process of divorcing because his dad had cheated on his mom. Blaine said his relationship with his mom was fine, but "[m]y dad on the other hand...I didn't have a real father/son relationship with him. ...I care about my dad, and I love my dad, but...he taught me one thing and did another. And...that makes me mad, because it taught me wrong." When Waldron pointed out that his dad had a good job and didn't do drugs, Blaine said, "Right, but he also taught me to be loyal and to - - like family blood thicker than water, but he'll still go out and have sex with some black lady." Asked if he was mad at his dad, Blaine said, "I'm mad at my dad for cheating on my mom, because he ruined something that was perfectly fine", but people are human and they're going to make mistakes (23/490-92).

Shortly thereafter, the interrogation became more pointed:

WALDRON: Blaine.

BLAINE: Yes.

WALDRON: Why did this happen to your parents?

BLAINE: I don't know.

WALDRON: You don't know or you don't remember? (23/497-98)

Waldron told Blaine it wasn't a burglary; "[y]our parents are dead". This was a homicide, an act of rage, either "spur of the moment heated rage" or "cold premeditated" (23/499-500). Blaine said "I see where you guys are going with this", but "I could never be that mad at my parents" (23/500).

As the interrogation continued, Blaine manifested his awareness that he was being accused of his parents' murders: "I can see it in your eyes, I can see it in his [Schue's] eyes." "...I mean that's how you guys are treating me, and you're treating me like I'm a murderer" (23/509-10). When Waldron said it made no sense for Blaine to have tried the credit card at the Circle K (see 23/463,496-97) after the bank told him the PIN number had been changed, appellant said "that was stupid." Walron rejoined:

> Yeah, it's stupid, it kind of shot your whole alibi all to hell.
>
> BLAINE: I don't have an alibi.
>
> WALDRON: You're exactly right, you don't have an alibi. (23/512).

Waldron suggested that sometimes things happen, "things get heated, you lose control, and you don't mean to." "Or something very traumatic happens and you block out something" (23/522-23). Waldron continued in this vein:

> There's times where people can get very upset over something that's been blowing up inside, and in the heat of the moment do something. And there's also times where somebody can cold calculate or premeditated do something. And there's some huge differences there.
>
> BLAINE: Uh-huh.
>
> WALDRON: Okay, if something happens because of an argument or something just triggers something, you have a poor sense of judgment because you're high or you're intoxicated or something like that, and something happens - - does it lessen what happened? To an extent, but it can kind of explain. We pretty much know here what happened, what we're trying to understand is why.
>
> BLAINE: So does that mean I'm under arrest?
>
> WALDRON: Blaine, you don't have handcuffs on, you're not –
>
> BLAINE: Well –

WALDRON: Has anybody said you're under arrest?

BLAINE: No, but you guys just said that you know what's going on here and that you want to understand.

WALDRON: We do know what's going on. What we're trying to understand from you is why.

BLAINE: I'm trying to help you guys – I'm trying to help you guys. I know you guys don't want to be sitting here either.

WALDRON: Why did this happen?

BALINE: I don't know.

WALDRON: I think you do know. (23/523-24)

Blaine said again that he felt the detectives had made him a suspect, and "you won't let me leave." Waldron said, "Did you ask to leave?", and Blaine said, "No, but I'm pretty sure that I can't" (23/527;see 23/529-32;27/1006,1011;42/3298;4/738). "And I'm not going to walk all the way home neither. Well, I mean if it comes down to it, but" (23/527). Waldron did not inform appellant that he was free to terminate the interview and leave (neither when he said he didn't think he could leave, nor during the cigarette break which immediately followed) (23/527-29,532). [Waldron testified in the suppression hearing that when a suspect raises the issue of not feeling free to leave, "then you're to clarify or tell them, you know, to answer their question" (27/1058). However, since Blaine did not express it in the form of a question, but rather in the form of a statement ("[Y]ou won't let me leave" and "I'm pretty sure that I can't"), Waldron felt no obligation to clarify his situation (27/1059)].

After this cigarette break (still without Miranda warnings), Waldron showed Blaine crime scene photographs of the dead bodies

of his parents in their bed (23/535-37;27/1084), and informed him (falsely) “We have a witness that places your car at the house at 1:30 in the morning, between 1 and 1:30 in the morning.” He told Blaine that a neighbor was out walking his dog and saw Blaine’s car at the house at 1:30 (“[d]escribes your car to a tee”) and that the neighbor had given a sworn affidavit saying so (23/535-38). Blaine asked to flip the crime scene photographs over because he didn’t like looking at them; Waldron replied “These were your parents” and asked Blaine to explain the witness’ observation (23/537). Blaine said the person must be wrong, and insisted he was nowhere near his house around that time; he was at Erin’s and at Mikey’s (23/538).

[In the suppression hearing, Waldron acknowledged that he lied to Blaine about a number of things (27/1064). Waldron equivocated on whether he’d lied when he told Blaine a witness had seen his car at the house between 1:00 and 1:30 a.m., based on the fact that during a police canvass of the neighborhood somebody thought they’d seen Blaine’s car the night prior to the murder at 11:30 and somebody else had thought they’d seen his car “at 6:00 in the morning or it could have been earlier or it could have been later in the day.” Each of these people (in addition to saying 11:30 or 6:00 rather than 1:00 or 1:30) reported that they were not even sure they were talking about the same day, and Waldron agreed that he “didn’t have anything firm”, but he took umbrage at the suggestion that he “outright lied.” Defense counsel called Waldron’s attention to his telling Blaine that the witness who’d (supposedly) placed his car at the house between 1:00 and 1:30 had given a

sworn affidavit, and asked Waldron if that was a lie; Waldron replied “I don’t remember” (27/1065-66)].

In interrogating Blaine (at that point and later in the January 8 and January 9 sessions), Waldron repeatedly confronted him with the detective’s own made-up time frame: “It’s not like we’re talking a ten-hour period. We’re talking about a one-hour period now” (23/538). Blaine asked Waldron (as he did several times throughout the interviews) to do him a favor; to call Mikey’s house and talk to Glenn and ask him what time he called Erin’s house, to confirm that it was after 3:00 a.m. when he drove Mikey home from Erin’s. Blaine continued to insist that he was not out at 1:30. Waldron told Blaine (falsely) that Mikey had said it was around 1:00 a.m. when Blaine finally took him home, and that Mikey was “adamant that he had to be at work 6:00 in the morning, and there’s no way he got home at 3 or 4:00....” Waldron added, “All of a sudden he’s mistaken now, and you’re right, because you have no recollection of times?” (23/539-40). When Blaine said, “Mikey is mistaken, he is two hours premature. I swear”, Waldron countered, “How can you be so sure about that but can’t be sure about anything else?” (23/541, see 558,563-67).

[In actuality, Waldron had interviewed Mikey Young a few hours earlier (sometime between the 7:41 p.m. and 11:53 p.m. interrogation sessions), and Waldron knew that the time frame Mikey gave was pretty close to Blaine’s (23/471-74;42/3571-73)].

Throughout the rest of the interview, Waldron confronted Blaine with the fabricated dog-walking witness, and challenged Blaine’s contrary recollection because of his substance abuse.

["But yet you're very adamant that it was 3, 3:30 in the morning. You take somebody that's out walking their dog at 1:30 in the morning, who are not using any drugs, they're not drunk, they remember what time it is")(23/558,see 545,546,550-51,556,564).

After the oral DNA swab was taken, Waldron resumed, "As I was telling you earlier, we already know what happened. We want to know why"; and he added, "And things do not look good for you" (23/544). If there was any doubt in Blaine's mind as to what Waldron "already knew", Waldron elaborated:

> What happened was you were pissed off that your parents aren't going to give you any more money. You go over there in a fit of rage, and you brutally kill your parents, you take your mom's ATM card, and you go to the bank today and you twice try to use it. (23/546)

Waldron told Blaine, "You're not doing much here to help you out" (23/547). On that note, Waldron then raised the spectre of the death penalty, and how perhaps it might be avoided:

> ...[T]hings happened for various reasons. You lose your cool because you're upset, spur of the moment. That's a lot different than cold-blooded premeditated doing something.
>
> BLAINE: Okay.
>
> WALDRON: If you got pissed off because they wouldn't loan you any money, you were mad, you were high, you weren't in control of your senses, then that changes things. People do some stupid stuff when they're intoxicated or high.
>
> BLAINE: I will agree with you on that statement.
>
> WALDRON: So it's pretty clear what happened, but it still doesn't explain why. And the why it happened can be the difference between the death penalty or some time in prison or some other type of thing. And that's what it comes down to now. We know what happened, what we're not clear about is why, and only you can tell us why. (23/549)

Blaine continued to assert his innocence; "I know I didn't do

it. And I know that I didn’t get high and get in a fit of rage and not know what I was doing and drive to my house and do that.” Waldron replied, “How are you so sure of that when you can’t remember a lot of other things” (23/552). He told Blaine it was time for him to take responsibility for himself and his actions and stop blaming it on the drugs” (23/555). “...[T]he guy out walking his dog at 1:30 in the morning, is he lying, when he says he saw your vehicle there at the house?” (23/556).

Waldron again made it clear to Blaine that the detectives were certain of his guilt; “We’ve been saying it, you killed your parents” (23/559). Blaine continued to deny involvement, and Waldron continued to challenge his memory and his credibility; “You’ve done everything there is to point the finger right at yourself” and “...[Y]ou’ve lied so much that you don’t know what the truth is anymore” (23/559,563,567-68,578).

Waldron reiterated to Blaine that from his years of experience this was not a burglary, but rather it was “up close, personal”; it “reeks of somebody full of rage, spur of the moment, full of rage, not very well planned.” When Blaine said, “I’m not calling you a liar, I know you went to school for all this...”, Waldron interrupted, “You’re in no position to call anybody a liar, even to imply” (23/581). Blaine again asked Waldron to check the phone records to confirm the time of Glenn’s call, and said “I don’t know what to say about that, a person that saw a blue Town Car parked out ...in front of my house” (23/582). Waldron assured him “We’ll be checking more than phone records, I can guarantee you that” (23/582).

Waldron ended the interview at 2:36 a.m. Blaine was allowed to leave the CID building at that time, with the understanding that he would stay at Erin's or, if that didn't work out, he'd call his grandmother or Mikey (23/582-84).

Erin's mother allowed Blaine to spend what was left of the night, and Waldron drove him there. Shortly thereafter, Blaine called and left messages on Waldron's voice mail to the effect that he had some questions regarding some of the things that had been brought up, and that he'd checked the caller ID as to when Mikey's father Glenn had called and "I was right, it was 3:25 a.m. in the morning, and ...everybody else is wrong about the time" (23/585-90,see 24/614).

B. The January 9th Interrogation (Unwarned Portion)

On January 9, Blaine's sister Kim drove him down to the CID office to meet with victim advocate Susie Brown about a voucher to obtain shoes (his own tennis shoes and boots having been confiscated), and because he was unhappy about what had been printed in the newspaper and wanted to clear it up (20/14-15,18,31-33;23/591-92). Upon his arrival, Detective Waldron told him he'd gotten his messages and (once he was finished at Ms. Brown's office) he would be happy to meet with him and talk to him again (23/592).

Regarding what later took place on January 9th, Detective Waldron testified that he believed this would be his last chance to interrogate Blaine (28/1105;44/3549). Unlike the earlier sessions (which were audiotaped), the January 9 interview was conducted in a small, windowless second-floor room equipped with a video camera mounted high on the wall (23/592;20/19;45/3598-99). Asked about

the decision to change rooms, Waldron said he reasonably assumed he could only interview Blaine one more time before he might ask for an attorney. "So it was determined that this would probably be the only opportunity we might have to question him about the details of the case". Recognizing that "this interview could be key, we wanted to have it audio and video recorded" (44/3549). Waldron acknowledged that under his own sheriff's department's general orders (of which he was aware at the time of the interrogation) he was required to give Blaine Miranda warnings before accusing him of a crime or confronting him with evidence pointing to his guilt (27/1056). [The defense introduced Manatee County Sheriff's Office General Order #1027 (4.2 and 4.2.2), promulgated by Sheriff Charles B. Wells, which specifies that "Constitutional Rights Warnings are required before questioning" when a suspect is arrested or when "[q]uestioning passes from the fact-finding process to an accusatory stage". (Def.Exh. 32;11/1844,1857,1869,1881)(see also 25/827-29)]. However, Waldron did not believe that his interrogation of Blaine was in violation of his own department's orders because "General orders are a guideline to follow, and there are times where, in certain circumstances you have to go outside of those guidelines, and in these particular circumstances, you know, I discussed with my supervisors, was told and even given suggestions of how to proceed, and even the Sheriff himself, when I conducted the last interview, had told me how he thought things should go (27/1057). Before the January 9th interrogation, Sheriff Wells told Waldron "he was counting on me to get closure on this, and that he trusted my

judgment, and wished me luck" (27/1057). Asked by defense counsel whether Sheriff Wells specifically told him to violate the department's general orders, Waldron replied "No, he didn't, but he was there the entire time this took place, and if there was a problem with what I was doing any one of the supervisors could have stepped in and...stopped what I was doing, and that never happened" (27/1058). According to Waldron, Sheriff Wells and many other people were in another room viewing the monitor while the videotaped interrogation was occurring (27/1058).

The fourth interview began with some preliminary conversation about Blaine's expressed concerns, including sensationalized or inaccurate media coverage and their possible release of information about Erin; Crime Stoppers tips and monetary incentives to potential witnesses; and his lack of footwear (24/ 604-24). Then, at 3:37 p.m., Waldron resumed his interrogation of Blaine (24/624-25). Once again, Blaine was not advised of his Miranda rights, either at the outset of the interview or as it progressed, until nearly four hours later (7:22 p.m.) when Waldron told him "[t]here's a couple of things that I need to go over with you real quick", and "it's just a matter of procedure...based on everything we're talking about". Waldron then read him Miranda (25/742-43). The interrogation ended at 8:52 p.m. The videotape was introduced in the suppression hearing as State Exhibit 10-A,B,C (23/598, see 24/604-64;25/670-788), and the same videotape (redacted after a hearing on a motion in limine to eliminate irrelevant portions, 30/1432-1545) was introduced at trial as State Exhibit 43 A through D (43/3362-3516).

On the videotape, it can be seen that the athletically-built 6’4, 260 pound Waldron (27/1053-54), with his firearm visibly protruding from the right side of his pants, is seated beside a desk. Blaine, 6’0, 140 pounds, and barefoot, is seated in a straight-backed chair in a corner, effectively wedged in by the desk and Waldron. (When, at 16:46:20 military time on the tape, Blaine says “I’m trying to answer the questions - - I mean, I realize that I’m backed into a corner now” (24/652), his statement is literally accurate).

Undersigned counsel will also represent, based on the video-tape, that in the January 9th interview Detective Waldron employs three very distinctive tones of voice and manner in dealing with Blaine. At the beginning of the interview when he was addressing Blaine’s concerns and when he resumed questioning him about his parents’ deaths, Waldron’s manner is relaxed and conversational. At 16:41 on the tape (24/648) Waldron’s tone begins to take on a scolding quality, gradually rising in volume and displaying anger, as he repeatedly accuses Blaine of lying to him (24/646-62). By 17:00 on the tape (24/662), Waldron’s voice and manner are clearly in the second phase - - raised, angry voice; moving his chair closer to Blaine and leaning forward (sometimes with the back legs of his chair coming off the floor); accusatory, belligerent, talking faster and repeatedly interrupting Blaine’s attempts to answer or explain (24/662-64;25/671-89; videotape 17:00:20-17:05:02, 17:05:59-17:15:36, 17:23:13-17:30:10). This phase reaches its crescendo at 17:25:04-17:30:10, when Waldron, shouting at Blaine, graphically describes how he killed his parents, and

asks him if he wants to see his girlfriend and his best friend go to prison (25/686-89). The third phase, in which Waldron assumes the voice and manner of a compassionate psychologist or counselor begins soon thereafter (once he has gotten Blaine to begin, intermittently, to acquiesce to the detective's constant suggestions that he might have committed the crime and not remembered doing it, see 25/689-97), and continues throughout the remainder of the interview.

Early in the interview Waldron said to Blaine, "All you did the other day...is waste my time by lying to me the entire time, and I don't know how many opportunities I gave you to tell me the truth" (24/648,see 649-50).

WALDRON: Blaine, I need to know the truth.

BLAINE: I have been completely honest with you today.

WALDRON: But you haven't, Blaine, because even today -

BLAINE: Then I was - - I was wrong.

WALDRON: No, it's not a matter of wrong, Blaine.

BLAINE: I'm trying to answer the questions - - I mean, I realize that I'm backed into a corner now.

WALDRON: Are you - - Blaine, I need to know the truth.

BLAINE: And I - -

WALDRON: This is your parents here. (24/651-62)

Waldron continued, "You've fabricated so many lies to so many people, and you've kept up those lies, that - - I can tell you right now it does not look good. It does not look good at all" (24/652). He told Blaine he was brining down Erin, "a 16-year-old girl that's your girlfriend, that's dearly in love with you".

“[H]ow do you think that makes her look. It makes her look pretty guilty. You need to tell me the truth. You’re going to make yourself feel so much better by telling me the truth, telling me everything that’s happened, and why” (24/652-54).

No Miranda warnings had yet been given. Waldron make it clear to Blaine that he wanted a confession:

> ...the thing of it is here, Blaine, it’s time for the truth.
>
> BLAINE: Okay.
>
> WALDRON: It’s time to tell me exactly what - - not so much what happened, because we know what happened.
>
> BLAINE: I came in - -
>
> WALDRON: I need to know why. (24/655)

Waldron continued to accuse Blaine of lying and Blaine continued to maintain his innocence (24/656-62). Here is where Waldron’s voice and manner become angry and confrontational:

> How am I supposed to do my job and find out about the death of your parents if you’re lying to me the whole time and you’re sending me off on wild goose chases, you’ve got everybody else checking out all this stuff, all directing - - misdirecting the detectives from everything. You have done nothing whatsoever to help out, other than one lie after another. You’ve even involved a 16-year-old girl in this, you’ve involved your best friend Mikey in this, and a lot of other people. Okay, even to the point where - - what do you think your sister’s going to feel, your aunt, your grandmother, when they find out you’ve done nothing but lie, and that we’ve been off in all different directions since we initially talked to you at the house. And other things could be done. Everything keeps coming back to you, Blaine. Everything centers around you. (24/662).

Waldron returned to the subject of the time frame when Blaine drove Mikey home, telling him “[n]one of the times are even matching up” (24/663). Waldron asked him how he could be so sure it was around 3 or 3:30, and Blaine said “Because I looked at the

caller-ID." Waldron rejoined:

> No, this is before the ID, Blaine, this is while we're in my office.
>
> BLAINE: I had told you that I was pretty sure that it was after 1:30 whenever I drove Mikey home.
>
> WALDRON: But you said you were positive that it was no - - that it was right around 3, 3:30.
>
> BLAINE: Right.
>
> WALDRON: You said you were positive about that, because Mikey had told us that you actually took him home about 12:30, 1:00, and you said no, that's impossible.
>
> BLAINE: Right. (24/664).

[Waldron was aware at this point that Mikey's estimate of the time was actually pretty close to Blaine's (23/471-74;42/3571-73). Also, Waldron had gone to Erin's house (prior to the interrogation on the 9th) and found that there was indeed a call from Mikey Young's home phone at 3:25 a.m.; Waldron assumed that this call was from Glenn Birmingham to let Mikey know he could come home. Although this had been a big point of the interrogation and Waldron acknowledged that he challenged Blaine pretty hard on the time frame, he never informed Blaine that he now knew he had been right about the time (27/1068-69;43/3358;45/3753-74)].

After chastising Blaine some more for having "done nothing but lie" (25/672-74), Waldron said this to him:

> Blaine, the time is now to be truthful. Okay? You are 21 years old, you are responsible for yourself, you do not need to start bringing other people in here, relying other people on you. You don't need to be pulling anybody else down. The time is now to tell me the truth.
>
> BLAINE: And I - -
>
> WALDRON: I want to know the truth. Now, I don't want to know some story that you've concocted.

BLAINE: Ask me a question - -

WALDRON: No, no, it's not time, I want the truth. I'm done asking questions, I want to know the truth Blaine. I'm - - I've asked you so many questions and you've done nothing but give me lies to most of those questions.

*** ***

It's time to be a man, and it's time to tell me the truth. Okay? Because there's a lot more that we know, a lot more. And we know the evidence doesn't lie.

BLAINE: Okay, um, what do you want me to say. (25/675-76)

Waldron reiterated that he was "done asking you questions"; he wanted the truth about everything that happened (25/676).

[Dr. Gregory DeClue, a forensic psychologist with expertise in the psychology of interrogations and confessions, characterized these kinds of statements as "un-Miranda" statements; where the interrogating detective demands that the suspect confess, or tell him the truth (or what the interrogator will accept as the truth); such statements, according to Dr. DeClue, are inconsistent with the unwarned suspect's actual constitutional rights, which are to remain silent if he so chooses, and/or to consult with an attorney before or during questioning (26/906-07,920,924,936; 27/981)].

Waldron continued in this vein, "I want to know details, Blaine"; "...I asked you to tell me everything"; "I want to know the truth, Blaine, You know the truth. We know the truth" (25/677). Blaine protested that he was trying to be as accurate today as possible, but he was unclear about the times; the only thing he knew for a fact was that it was 3:25 when Glenn called back (25/679). Instead of acknowledging that he knew Blaine had been right about that, Waldron changed the subject to "Blaine, were you upset with your mom?" They discussed the impending

divorce, and Blaine admitted that he was angry at his dad for cheating (25/679-81). Waldron asked him point-blank if he killed his father; Blaine said "No". Waldron asked him if he killed his mother, and he said "No" (25/681). Waldron said, "Well, Blaine, I don't believe that. And I'll tell you why. Blood was found on a pair of your pants, that matches the crime scene". When Blaine persisted in denying that he killed his parents, Waldron said, "Okay, but the blood doesn't lie, the evidence doesn't lie." (25/682).

[Waldron had information at the time that the blood on the pants had tested as human blood, but he had no information indicating that it matched the blood from the crime scene (25/714;27/1078-79;45/3599,3604-05;see 37/2530)].

Waldron asked Blaine whether it was because she (the woman with whom his dad had had an affair) was black. Blaine denied being racist, but said his dad had been a hypocrite (25/683-85). Here Waldron's temper (as can be seen and heard on the tape) begins to rise:

> You're not concerned about the details of the divorce or anything, but that really pisses you off that your dad slept with a black woman. That really pisses you off about that. You're not pissed off about anything else. You didn't even get mad at me the other night about some of the things that I asked you, but you were so pissed off that your dad was sleeping with a black woman. (25/686).

At this point, it is 17:25 military time on the tape (page 25/686 of the record). Undersigned counsel will represent (this Court will determine for itself if the representation is accurate) that for the next five minutes Detective Waldron's voice, manner, and body language are louder, angrier, more belligerent and

aggressive than when it was gradually building up to this point, and certainly in contrast to the almost gentle manner which he displays later.

> And I'm telling you right now, you're brining yourself down, but you're also bringing down a 16-year-old girl and your best friend. Okay? Because they have lied to try to help you out. That blood on those pants that were yours, that were at Erin's house, do not lie. You've brought Erin into this, and you've brought Mikey into this.
>
> You lied to your sister, you've lied to your grandmother, you've lied to your aunt, you've lied to your family. Now is the time to be truthful and be a man about this and tell us what happened and why. Well, we know the what happened, but why. Why, Blaine. Why go to this extent. Why be so upset and angry that you'd do this.
>
> BLAINE: I didn't, and I don't know - -
>
> WALDRON: How did the blood get on your pants?
>
> BLAINE: I don't know of the pants you're speaking of.
>
> WALDRON: A pair of black pants.
>
> BLAINE: A pair of black pants.
>
> WALDRON: And you were seen wearing those black pants on Tuesday.
>
> [No witness saw Blaine wearing those pants on the night of the 6th. Ask is he made that up, Waldron said "I might have" (27/1082-83;45/3601-02)].
>
> BLAINE: Okay. Um, well, I do have a pair of black pants, they're like Dickies.
>
> WALDRON: That's right. Those pair of black Dickies have blood on them.
>
> BLAINE: I do not know how it got there.
>
> WALDRON: I know how that blood got there, Blaine. When you brutally, cold-blooded beat your parents to death, when you smashed in their heads and beat them to death.
>
> [When he says "smashed in their heads and beat them to

death", Waldron is yelling at Blaine. The rest is said slowly and emphatically, leaning toward Blaine's face].

BLAINE: I - -

WALDRON: And then you took that rope that was in the garage and you put it around your mother's neck, and you put it around your father's neck, and you slowly methodically cold-bloodedly pulled it tighter and tighter and tighter, Blaine. After smashing in their heads. That's how you got that blood on your pants, those black Dickies that you were wearing Tuesday.

BLAINE: No.

WALDRON: Yes, Blaine.

BLAINE: I - -

WALDRON: Blaine - -

BLAINE: I'm - -

WALDRON: Blaine, you can't dispute the blood that's on those Dickies. The lab has already tested it.

BLAINE: Okay.

WALDRON: Okay? There's no other way that blood would have got on there. That blood got on there when you beat your parents to death.

BLAINE: I don't even know how those pants got to Erin's house.

WALDRON: The same - -

BLAINE: I was wearing shorts. I had been wearing shorts - -

WALDRON: You weren't wearing shorts yesterday, or the day before?

BLAINE: - - (unintelligible) - -

WALDRON: Tuesday - -

BLAINE: Tuesday during the day I was wearing those black pants.

WALDRON: That's right, Blaine, you were.

BLAINE: And I had stopped at my house - -

WALDRON: And you brought all your clothes over to Erin's house so that Erin could wash them. And Erin washed all of your clothes Tuesday morning - - I mean Wednesday morning, according to you. But the thing that she forgot to wash were those black Dickies that had blood on it from killing your parents.

BLAINE: No.

WALDRON: Yes. Yes, Blaine.

BLAINE: I didn't kill my parents.

WALDRON: That's the only way that blood would have gotten on there, Blaine. You weren't wearing those pants in there when you discovered - - when you called 911, so we know the blood didn't get on there that way. But that blood was on there from when you killed your parents. And it's not just one spot, Blaine. The way your parents were killed, that you killed them, was with so much rage, so much anger - -

BLAINE: I - -

WALDRON: And you even told the lady at the bank that your mom was out of town, knowing full well that there was no way the bank could call your house and talk to your mom.

BLAINE: I don't remember telling that lady - -

WALDRON: You don't remember much at all, okay? And from what you do supposedly remember, has all been lies, because we've been able to verify it. You drug in Erin. You want to see Erin go to prison now? Mikey go to prison? Is that what you want? You want to bring all these people down with you? For what you did? The time is now to be a man. And the evidence doesn't lie.

[By this time, Blaine, in his chair in the corner, is hanging his head down].

BLAINE: I don't know how blood got on those black Dickies. I was not - -

WALDRON: I do know how. There's only one way that blood could have gotten on there.

BLAINE: And I - - I didn't kill my parents. And I'm not trying to bring anybody down with me. (25/686-89).

[It is now about 17:30 on the tape. Blaine has still not been

advised of his Miranda rights, nor would he be for another two hours].

At this point, Waldron says “Blaine, you are”; his aggressive demeanor subsides and his tone becomes compassionate:

> Blaine, is it possible that when this happened, because of how it happened and what happened, that you don’t remember? That you’re blocking part of this out? Blaine, I know - - help me out here. (25/690)

Waldron said, “Blaine, I know it’s hard”, and when Blaine reiterated that he didn’t kill his parents Waldron brought out the crime scene photographs again and said, “Blaine, look at these. These are your parents. Is this how you want them to be remembered?” (25/692). Then, “Tell me the truth. Blaine, I’m going to have to walk out of here and tell your sister what I know....” On the videotape, Waldron shows Blaine the photos again and says, “Is that how you want your sister to remember this?” (25/693).

Waldron went back to asking Blaine if it was possible he blocked it out and couldn’t remember. Blaine made it clear that he was not saying he killed his parents, but there was a possibility, “with the information that I have been given” and in view of his inability to remember the time sequence, “it is a possibility that I could have done this and not remembered” (25/694). Blaine asked Waldron “[d]oes that make sense?” and Waldron replied, “That does make sense.... Blaine, that is the most sense that you’ve told me that you have made out of this” (25/694). Blaine, almost crying, repeated “I didn’t kill my parents” (25/694).

Waldron said, “But Blaine, you were so upset...maybe you didn’t mean to, I’m sure you didn’t mean to. I think maybe something snapped that you don’t remember, that you had no control

over”. Blaine asked “Does that happen?”, and Waldron assured him it does (25/694). Waldron continued in this vein; Blaine is a young kid, he was upset with his dad, things just got to the breaking point, you lose control “and by the time you realize what’s happened, you can’t go back and change it.” Waldron (using what he acknowledged in the suppression hearing is known as the “lifesaver technique”) told Blaine, “I’d rather be able to tell your sister that this was all a horrible accident...” (25/695; 27/1088-90).

Blaine, obviously confused and again almost in tears, said “I didn’t do it. I’m sure of it. I mean I’m - - maybe I’m not sure” (25/695). “[T]he only thing I’m sure about is that I know that 3:30 in the morning I drove Mikey home. And I went back to Erin’s house and I fell asleep. And that’s only because I looked at the caller ID” (25/695). Waldron still did not tell Blaine that he’d confirmed the time of Glenn’s 3:25 a.m. call telling Mikey he could come home (27/1068-69); instead he said “...it probably happened so quickly that you can’t remember clearly. And the times and those things. It’s not like it took hours...for this to happen” (25/696).

Blaine asked if Waldron was saying there was something wrong with him. Waldron said he wasn’t saying that; what he was saying is that Blaine’s life and sense of normalcy had all been turned upside down because of what his father had done. It didn’t mean Blaine was a bad person. His father wasn’t there when he needed him, and “it just got to be so much that things just exploded and happened” (25/697-98).

It is now 17:44 on the videotape (more than an hour and half before Miranda warnings were read). Blaine said to Waldron, “Can I ask you a favor?” “Sure”. “Can we go smoke a cigarette?” Waldron replied, “We can smoke one in here”. Blaine said, “Okay. I was going to say we could - - you can handcuff me to yourself to make sure I wasn’t gonna run” (videotape at 17:44:25;27/1059; see 25/697;43/3444).

[For all of their previous breaks, Blaine and Waldron went downstairs and outside the building. Waldron explained in the suppression hearing, “We were...in a different part of the building” on January 9 (27/1059-60). However, when they had taken a smoke break an hour and half earlier on January 9 they had gone outside (24/642-43). When Blaine said “You can handcuff me to yourself to make sure I wasn’t going to run”, Waldron did not tell him he was free to leave or that he was free to go outside on his own, “because once again he’s making a statement, he’s not asking a question” (27/1059-60)].

Waldron moved a trash basket and told Blaine to “[p]ut your ashes in here” (25/697). For the remainder of the interview, when he smoked, he used that receptacle or a paper or plastic cup.

Blaine said to Waldron, “you could be right, and that’s what I’m scared of.” Waldron said, “Well, Blaine, I don’t think it’s a matter of I think you’re right, I think it’s pretty much what happened” (25/697). “Sometimes traumatic things happen, and we tend to block those things.” Blaine, his voice breaking, said, “I’m scared” (25/698). Waldron asked him if he washed up in his parents’ bathroom after this, or if he went someplace else and

washed up, “[b]ecause I think if you had gone back to Erin’s house and washed up it would be pretty obvious.” He asked Blaine if he changed his T-shirt or if he gave Erin the baseball bat (25/698-99). Blaine said, “You’re making me question myself” (25/699). Blaine again reiterated “I didn’t do this”, but - - as a hypothetical situation - - he didn’t remember cleaning up or changing clothes or getting rid of a bat. Waldron asked him if he remembered being mad and upset at his dad, and Blaine answered that he did. Waldron said, “It was just getting to the point where you exploded. I don’t think you intended to hurt your mother” (25/699).

When Blaine repeated, “I don’t think I did this”, Waldron got him to acknowledge (again) that it was possible. Waldron then asserted that it was more than just a possibility because of the blood on his pants, which put him at the crime scene (25/700). “Blaine, the only way you can put an end to this and to start making things right is to tell me what you remember about that” (25/700).

BLAINE: I didn’t go back there.

WALDRON: But Blaine, you did.

*** ***

BLAINE: I don’t know, I don’t know. I don’t remember going back to my parents’ house. I don’t think I did. But you say you have a pair of my pants with blood on them, and that makes me question myself. Because I don’t remember, I don’t remember doing this, if I did it. And now I’m scared. (25/701-02).

Waldron told Blaine he thought Blaine remembered some of the circumstances that led up to this, and there was a “huge difference” between planning or premeditating something, as opposed to

losing control and exploding in the heat of the moment (25/702;43/3449). “The only way to end this, to bring closure for everybody involved” would be for Blaine to be honest and tell Waldron how this happened. Blaine admitted that he was mad at his dad; he wasn’t mad at his mom (25/702-03). Waldron said:

> I think, Blaine, when this happened that you had no intentions of hurting your mom. After you unleashed your rage, you no longer kept it bottled up, and you hurt your dad - - maybe you just intended to hurt him, but then realized during it that he wasn’t moving anymore. And you knew that - - that without your dad, your mom wouldn’t be able to go on, and you couldn’t bear the fact that your mom saw you do this. And in the rage that had been released, you didn’t intend to do it, that a part of you took over and did.
>
> BLAINE: I don’t know.
>
> WALDRON: And then afterwards you had to make it look like it was a burglary, so that no one would suspect that this happened, that you lost control.
>
> BLAINE: I don’t know. I don’t know anymore....
>
> WALDRON: Blaine, put this to rest. You’re not the only one this affects.
>
> BLAINE: I know, it affects my whole family, and I’m scared now because I know what you’re going to tell them.
>
> WALDRON: But wouldn’t it be better to have the whole family there for you? What’s happened’s happened, that can’t change. Do you love your sister?
>
> BLAINE: (Nodded head.)
>
> WALDRON: I know your sister loves you. And I know no matter what that she will still love you, and will be there for you as much as she can. The same with your grandmother and your aunt. This needs to end. Let’s bring a closure to this, so that your parents can be buried properly.
>
> BLAINE: I don’t know what to say.
>
> WALDRON: I can’t say it for you, Blaine.

BLAINE: I can’t say that I killed my parents, because I don’t know. You made me question myself.

WALDRON: I haven’t made you question yourself.

BLAINE: You made me dig inside and think about it, and you’ve also given me hard evidence that puts me at the crime. And - - I can’t - - I can’t - - I can’t - - I can’t remember if I did this or not. I don’t know. I mean, you have solid evidence, blood on my pants and everything, and I don’t remember doing this, if I did it. And you’re right, I did foul things up, and I have exploded before, and I - - that story that I told you about punching the wall, I don’t remember doing that, but when we came home it was there. And I had gone inside, and I - - (unintelligible) - - like my mom said. I’m pretty sure my sister will remember it too, I don’t know.

WALDRON: This time something very similar happened, didn’t it.

BLAINE: I don’t know. Because I don’t remember punching the wall, and that’s the only thing that I can compare this to, is not remembering what I did whenever I was mad, when I was upset. I think - - this is the scary part, now I think that I did do it.

WALDRON: The evidence doesn’t lie, Blaine.

BLAINE: I don’t remember.

WALDRON: I know you didn’t mean to.

BLAINE: If I did, I didn’t mean to.

WALDRON: I know you didn’t mean to.

BLAINE: I love my parents. (25/703-05).

Waldron said he knew Blaine loved his mom and dad, and he knew he was upset at his dad. “Only you can help yourself. I can be there for you, I’m here for you now” (25/705). Blaine said, “But I can’t tell you I did this and that’s what you want....[T]hat’s what you’re meaning by closure, right?” (25/705-06). Waldron said, “I’ve got to tell your sister what we found out today.” Blaine asked if he could talk to his sister first, and

Waldron agreed (25/706). [The time is now 6:07 p.m.; an hour and a quarter before Waldron gave Blaine Miranda warnings (25/706,742)].

The videotape (18:06-18:10) shows Waldron packing up his equipment and leaving the room. Blaine slumps forward in his chair with his head almost to his knees and his hands over his face, sobbing and sniffling. His sister Kim comes into the room. Their interaction was recorded. At 18:10:19 on the tape, Blaine, crying (almost blubbering) and sounding terrified, says:

> I don't know what happened here, but - - (unintelligible) - - and I don't remember. - - (unintelligible) - - blood on my pants, I don't remember. I don't know if I did this or not. I'm really scared. (25/716).

Blaine told Kim that what he remembered was hanging out with Mikey at Erin's house, "[a]nd we were all fucked up" (25/717). He told Kim "they really think I did this, but I don't remember if I did or not" (25/717). He acknowledged that he has an anger problem, and Kim said that was a trait the two of them and their dad all shared. Blaine said he was upset about the divorce and angry at their dad, "but I don't think I did this"; "I don't think that I could do this" (25/717-19). Blaine said "they say Tuesday I was wearing my [black Dickie] pants", but there's no shirt with blood on it. Kim said "...[T]here's no way you could have done that without - - ", and Blaine said "I know. But he said I changed my clothes" (25/720). Kim advised Blaine, "[i]f you did it, then say you did it. But if you didn't do it, do not let them talk you into it, okay?" Blaine replied that he'd told Waldron he didn't know anything about their parents' deaths, and that was the truth, "[b]ut at the same time they have my pants with their blood, and I do have an anger problem" (25/722). The last words he said to his

sister when they were alone were “I’m scared, I don’t know - - (unintelligible) - - I don’t know what I did” (25/723). Then Detective Waldron returned to the room and dismissed Kim; “I need to talk to Blaine some more, so you can go back over to Susie’s area if you can” (25/723, see 20/36-38).

Waldron, gratuitously, told Blaine that the media was over at Erin’s house (25/723). When the interview resumed, Blaine said:

> I - - I can’t tell you if I did this or if I didn’t, because I don’t know. I - - I thought - -
>
> WALDRON: You don’t know, or you can’t remember.
>
> BLAINE: I don’t know. I don’t know if I - - I don’t know if I don’t know, or I don’t know if I can’t remember. I don’t know what happened with my parents. (25/724)

Waldron said the biggest thing is the physical evidence; “when it comes down to it the evidence tells it all” (25/724). Blaine’s parents, Waldron said, were killed with a lot of anger and rage. “And I don’t know what made you finally unleash, unbottle yourself, ...what happened that triggered this” (25/726). Waldron asked Blaine if Erin was there with him.

> BLAINE: (Shook head.) She - - I - - I don’t think I was there. Well, I know Erin wasn’t.
>
> WALDRON: Blaine, you were there.
>
> BLAINE: That’s - - that’s what the evidence says.
>
> WALDRON: Even Erin says you were wearing those pants.

[Waldron acknowledged in the suppression hearing and at trial that neither Erin nor any other witness had said that Blaine was wearing those pants on the night of the 6th, and he “might have” made that up (27/1081-82;45/3601-02)].

> BLAINE: And I can't - - I can't - - I can't deny the evidence, the hard evidence that puts my pants - - puts me - - (25/727).

Waldron told Blaine the house was staged to make it look like somebody broke in; "that shows me that you realized what happened and then distanced yourself from it" (25/727). Blaine kept saying he didn't know if he did this; he didn't remember if he did it (25/727-29):

> That's what I'm scared of. Because of what you told me. I mean I - - I know that you don't make me think anything, and it's decisions that I make, but from what you've told me you make me feel that I did do this. And I'm scared, because I don't remember, I don't - - I don't know if I did.
>
> WALDRON: Blaine, I'm not trying to make you feel anything.
>
> BLAINE: I know, I know you're not.
>
> WALDRON: Okay.
>
> BLAINE: But it's - - that's the way that I feel. That's the way that I feel.
>
> WALDRON: I presented the evidence to you as it is. I haven't held anything back from you. (25/730).

Blaine asked if the evidence could have been planted, and Waldron replied that there was no way. "There's things called blood spatter" and that "isn't something that somebody could have planted.... We do know from people we talked to that you were wearing those pants that night" (25/732).

Waldron said, "I want this to be over with, and I'm sure you do, too." Blaine said, "I can't tell you I did this", and, "...I don't remember doing this to my parents, if I did." Waldron again replied, "The evidence says you did" (25/733-35). He added, "The only way to deal with this is here and now. I can't tell you what

will happen to you." Blaine asked, "Am I being charged today? Am I going to be arrested as soon as that recorder is off?". Waldron said, "What do you think should happen?" (25/735-37).

Waldron told appellant that his family needed closure, and he would much rather be able to tell them this was an accident, instead of telling them it was cold-blooded and intentional (25/737). Blaine said, "I can tell you that I didn't plan to kill my parents." The things Waldron had told him did make sense; that he could have been so angry and he could have done it. But "...I can't put myself there. I don't remember if I was there, so I can't tell you if I did or not" (25/737). The pictures that Waldron had shown him were in his head (25/738):

> I - - I don't think that I did this. I - - I can't tell you that I did it, because I don't know. I do know that I went back to Erin's house, and I slept there. I do know I dropped Mikey off at 3:30. I do know that we were at Erin's house watching a movie, doing everything that we were doing. And I do know that I was angry at my dad. I was mad at him for cheating on my mom, twice.
>
> WALDRON: I know you were smoking marijuana - -
>
> BLAINE: And taking Xanies - -
>
> WALDRON: - - and drinking alcohol, taking Xanies, that wasn't helping to deal with the anger. Usually it would.
>
> BLAINE: That's - -
>
> WALDRON: And even with all those things, there was still that anger. And it wasn't helping this time.
>
> I don't know, maybe you needed to go back to the house to get something to take on your trip. Maybe there was something that had just recently been said. Maybe you get there and see your dad's car there and that upset you so much that whatever was making you so angry, that this came out. (25/738-39).

[It is now 6:58 p.m. (19:00 on the tape). Waldron leaves the room, leaving Blaine sitting cross-legged on his chair in the

corner. He is smoking, with his head down, intermittently holding his head in his hand or with his hand over his face. A police officer brings him what appears to be a can of soda. After fifteen minutes he gets up and switches the straight-backed chair for a swivel chair, which he moves back into his corner, and he sits back down].

Some thirty seconds later, Waldron came back into the room and asked Blaine if he needed to use the bathroom. Blaine asked if he could see his sister, and Waldron said, “I’ll check to see if she’s still here. Is there anything you want me to tell her or anything?” (25/740-41). Waldron left the room and returned shortly thereafter, saying “Blaine, I can’t find her” (25/740,742).

[Waldron testified in the suppression hearing as follows:

> PROSECUTOR: What happened at that point as you’re asked by Mr. Ross about his sister, what did you do at that point?
>
> WALDRON: Went back out to see if his sister was still with the victim advocate Susie Brown.
>
> PROSECUTOR: Was she?
>
> WALDRON: No, she wasn’t.
>
> PROSECUTOR: Okay. Was she - - were you able to find her anywhere in the Sheriff’s Department?
>
> WALDRON: No, and I couldn’t find Susie Brown either. (25/411).

At trial, Waldron was asked about his statement that he was trying to find Blaine’s sister:

> DEFENSE COUNSEL: That wasn’t quite true, correct?
>
> WALDRON: I remember going out and checking.
>
> DEFENSE COUNSEL: Okay.

> WALDRON: To the best of my knowledge she was not in the building. I don't know what efforts were made, if any. I personally wasn't making any efforts. (45/3604)]

C. The January 9th Interrogation (Miranda and Afterward)

His perfunctory attempt to find Kim having come up empty, Waldron said to Blaine in an offhand manner (Tape at 19:20:50):

> There's a couple of things that I need to go over with you real quick. There's a couple of things I discovered, and before we go any further I want to cover this with you, it's just a matter of procedure, um, based on everything we're talking about. (25/742).

Blaine asked if he was being arrested, and Waldron replied, "Nope. At this time you and I are talking, okay? And I would like to talk to you some more. But before I do, I need to go over this" (25/743). Waldron then - - for the first time - - read Blaine his Miranda rights; including "[y]ou have the right to remain silent" and "[y]ou can decide at any time to exercise these rights and not answer any questions or make any statements" (25/473). Asked if, having these rights in mind, he wished to talk with the detective now, Blaine hesitated, and then said:

> I want - - I'd really like to talk to my sister, and since she's not here - -
>
> WALDRON: We tried to get in touch with her to get her back here.
>
> BLAINE: I don't know what I'm going to do. I don't know what's going to happen, and - -
>
> WALDRON: Well, I'm willing to talk to you if you want. We're trying to get in touch with your sister now so - - you're indicating that you do want to talk to me; correct?
>
> BLAINE: Yes.
>
> WALDRON: Okay, if you would, please sign right there. (25/744).

Shortly after Blaine signed the waiver form (25/743-46;17/3199), Waldron expressed empathy; as human beings we all make mistakes, lose our tempers, hurt people we don't mean to (25/751-53). "But I do know what the evidence is that we have, and that evidence tells a story, and it's a story that cannot be changed or made up or misconstrued or misunderstood" (25/753). Blaine (appearing to be crying, hands over his eyes) said in a very weak voice, "Well, I told you - - you - - you're right, about a lot of things. I, I, I don't think I did this. I don't know...." Waldron replied, "I know you say you don't think you did this, but there's the blood on your pants. This wasn't a burglary, somebody who broke into that house" (25/753).

After fourteen seconds of silence, Blaine - - while shaking his head negatively from side to side at least 10-12 times, and in a broken voice (tape 19:35:44) - - said to Waldron, "I don't think I can help you anymore. I don't think I have anything else to say" (25/753).

After another pause, Waldron said "Gotta make this right, Blaine" (tape 19:35:57; see 43/3486;3/499). ["Gotta make this right, Blaine" is clearly and distinctly audible on the tape; and in the trial transcript Waldron's statement is transcribed as "You got to make this right, Blaine" (43/3486). However, that line is inexplicably omitted from the suppression hearing transcript (25/754)].

Waldron added:

> As I said, you're an adult. You have to accept responsibility for your actions, whether you intended to do something or not. I know you didn't intend for this to happen. You didn't plan this out. But it did happen. You

were there, there's blood on your pants, it's time to accept that and move on, and to be responsible for yourself. (25/754).

The interrogation continued (25/754-57). Blaine again acknowledged his anger problem and that there was a possibility that he did it. Waldron insisted that it was no longer just a possibility, and he presented Blaine with a scenario of what happened:

> You came in through the garage. After it happened you got scared. Anyone would be scared, what's going to happen, how am I going to explain this, what am I going to do, and you panicked. You opened up the drawers. But because, because these are your parents, this is your house, you don't trash it like somebody would do, if it was an outsider. You still have respect for your parents' belongings. You still have respect for your belongings. You're confused, you're angry at yourself, you're in disbelief, but you still have respect. Strange as this may sound, you still have respect for your parents and for yourself, for the house, for their belongings, for your belongings. So you don't break things, you don't throw things across the room, the drawers are pulled out, the clothes are taken out, but they're not scattered all over the place. Things - - (unintelligible) - - blood isn't taken and stuff is written on the mirror or anything like that. You don't take anything, you don't break anything, because you still have respect for yourself, you're still a human being, you're still a person. You go into your own room and mess up things in there, but you don't break anything. A couple things were taken out of your drawers that could have been like that beforehand, maybe it was something you did at the time. And you're scared.
>
> At this time you're thinking what have I done, why did I do it, how am I going to deal with this, how am I going to face my girlfriend, how can I tell anybody, and you need time to think about things, to come to terms with yourself, with your actions. You do a pretty good job of cleaning yourself up and everything, because all you want to do at that time is go back to your girlfriend's house, crawl into bed with her, fell the warmth of her body next to yours, and have some comfort, and know that you're still loved, that you're needed, that somebody wants you. But you can't go back and change what happened. I know you didn't mean for this to happen. Did you. (25/757-59).

[Throughout Waldron's preceding speech, Blaine's head is down with his hands together below the level of his seat, first in a praying position, then clenched].

When Waldron finished, Blaine said, "I need help", and asked if he could be helped; Waldron said there is always hope (25/759). He added, "I can help you by giving you an opportunity to help yourself"; again he reminded Blaine of the difference between a cold-blooded crime and one that happens on the spur of the moment (25/759). Blaine said he was angry at his dad; he wasn't angry at his mom because she was trying to help him and she was giving him money. But Waldron was right that he didn't do it on purpose. He remembered dropping Mikey off in his neighborhood, and he remembered being at his house; and then it was like he'd just woken up and he was standing in front of his parents' bed. "I don't know what triggered me to do it. I know I was angry at my dad, but I -- I don't know why I did this" (25/760). He assured Waldron that everybody else (referring in context to Erin and Mikey) was telling the truth; they had nothing to do with this and weren't trying to cover up for him (25/760,762-63).

Waldron asked him what he did with the baseball bat. Blaine said he threw it in the water off the Green Bridge (8th Street), on the right (hospital) side of the bridge going toward Port Manatee (25/760-64,769-70). Asked what he did with his T-shirt, he said he also threw it in the water (25/763). Waldron asked him if he used the sink in the laundry room to clean up; Blaine said no, he went into the bathroom and used a rag to wipe his arms and face off (25/763,769). [He did not take a shower; neither then, nor when he

got back to Erin's house (25/776)]. The rag was thrown off the bridge with the bat and T-shirt (25/763,769-70,777,780;45/ 3496-97).

Waldron asked Blaine, "Why put the rope around their necks?" Blaine said, "I didn't know I did that." Waldron said "I know the rope came out of the garage because we found the same type", and Blaine again said, "I don't remember doing that" (25/764). [Testimony at trial established that the ropes found loosely encircling the Rosses' necks were different in construction from the ropes in the garage (39/2814-19;45/3682-84)].

Waldron asked Blaine, "And you didn't take anything, did you?", and Blaine initially said, "No" (25/764). Asked if he took his mom's credit card, Blaine said no, she had given it to him earlier along with the gas card (25/766). When he was standing in front of the bed and began to realize what he'd done, he panicked and tried to "cover his tracks". Asked if he went through the drawers and pulled stuff out to make it look like somebody broke in, Blaine said, "I think so" (25/764-68). Waldron asked:

> What's happened to your mom's cell phone and jewelry?
>
> BLAINE: I don't know.
>
> WALDRON: Did you throw that off the bridge too?
>
> BLAINE: (Shook head). Is that gone?
>
> WALDRON: (Nodded head.)
>
> BLAINE: (Nodded head.)
>
> WALDRON: What did you put it in?
>
> BLAINE: (Shook head.)
>
> WALDRON: Did you put it in your pockets, or in the shirt that you had, or - -

BLAINE: Just grabbed it. I just grabbed it, I just grabbed things, to try to cover my tracks. (25/767)

Waldron told Blaine there was a glass jewelry case which was found turned over on his mom's dresser; "Do you remember why you did that?" (25/777;43/3508). Blaine said "I don't know if I grabbed her jewelry out of there or not", and added "I don't know if that's where she kept her jewelry" (25/777). He didn't purposely grab things or not grab things; he just grabbed them. Waldron asked him if he thought he might have dumped the jewelry into his mom's purse, and Blaine said he could have (25/778;43/ 3509). He was pretty sure he just wrapped everything up with him and threw it over the bridge (along with the bat, T-shirt, and rag)(25/777-78).

[Unbeknownst to both Waldron and Blaine, several days before the crime occurred Kathleen Ross had taken her jewelry box containing her jewelry to her mother's house, where it was ultimately found by Blaine's sister Kim (38/2664-67;41/3080-81,3085;45/3614, 3625-27].

Blaine was initially unclear about whether or not he'd taken his mother's purse (25/774-75), but moments later Waldron asked, "you had your mom's purse?" and Blaine said, "Yeah, I think I already told you that. It was right there..." (25/777).

Waldron told Blaine he wanted to do everything possible to recover the discarded items, especially the jewelry because his sister would want to have it. Blaine momentarily questioned whether he might have put some or all the items in a dumpster at the Sabal Cove apartments, but ultimately concluded, "I don't

think I threw anything in the dumpster. I think I threw it off the bridge" (25/779-82). Waldron asked Blaine if he would be willing to accompany the police and show them the location on the bridge where he threw the items, and Blaine agreed to do so (25/776-77).

[Aside from the jewelry, which turned out not to have been taken from the crime scene, none of the items mentioned - - bat, T-shirt, white rag, purse, cell phone, socks, gloves - - were ever found (see 25/797-98;45/3608-12)].

In response to Waldron's questions, Blaine recalled that when he was with Mikey and Erin at Erin's house his anger towards his father had been building up, over the affair and impending divorce; he thought he had forgiven him the first time it happened but he just couldn't do it again (25/771-72). Waldron said he could understand him being upset with his dad, but why did he do it to his mom also? Blaine said he didn't know why; he wasn't upset with his mom and they got along great (25/775). He was ashamed and sorry for what he did; "I didn't mean to. I don't even remember doing it. I don't even remember going to my parents' house. I remember being angry..." (25/772).

D. Standard of Review

A motion to suppress a confession based on the Fifth Amendment and article 1, section 9 of the Florida Constitution presents a mixed question of law and fact. While the trial court's findings of historical fact are accorded deference if supported by competent, substantial evidence, the application of the law to the facts is reviewed de novo. Cuervo v. State, 967 So.2d 155,160 (Fla. 2007). As the interrogation sessions were audiotaped, and in

the case of the January 9th interview, videotaped, this Court can independently review them to assess whether the trial court's factual findings were based on competent, substantial evidence. Cuervo, 967 So.2d at 160. See also Almeida v. State, 737 So.2d 520,524 n.9 (Fla. 1999) and Dooley v. State, 743 So.2d 65,68 (Fla. 4th DCA 1999), recognizing that insofar as a ruling is based on a videotape or audiotape, the trial court is in no better position to evaluate such evidence than the appellate court.

E. Custodial Interrogation

"[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Ramirez v. State, 739 So.2d 568,573 (Fla. 1999), quoting Miranda v. Arizona, 384 U.S. 436,476 (1966). The requirement of Miranda warnings prior to custodial interrogation is not a ritual or an incantation; it is a fundamental protection under the United States and Florida Constitutions. Ramirez; Traylor v. State, 596 So.2d 957,964-66 (Fla. 1992).

The question of whether a person undergoing police interrogation is "in custody" for Miranda purposes is a mixed question of law and fact. Ramirez, at 574. In Mansfield v. State, 758 So.2d 636,644 (Fla. 2000) this Court wrote:

> In Ramirez we formally acknowledged that the determination of whether a reasonable person in the suspect's position would consider himself in custody is guided by the consideration of four factors:
>
> > (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the ex-

> tent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning.
>
> Id. at 574; see also Caso v. State, 524 So.2d 422,424 (Fla. 1988); Roman v. State, 475 So.2d 1228,1231 (Fla. 1985); Drake v. State, 441 So.2d 1079,1081 (Fla. 1983). Consideration of these factors in the instant case leads inevitably to the conclusion that Mansfield was in custody for purposes of Miranda: Mansfield was interrogated by three detectives at the police station, he was never told he was free to leave, he was confronted with evidence strongly suggesting his guilt, and he was asked questions that made it readily apparent that the detectives considered him the prime, if not the only, suspect.

[In this appeal, undersigned counsel is focusing his argument on the January 9th interrogation which produced Blaine Ross' confession. However, counsel asserts that even the late night January 7-8 session was custodial under the totality of the Ramirez factors, despite the fact that on that occasion, when the detectives were finished interrogating him, he was allowed to go to Erin Dodds' house. The Miranda custody test depends on whether, under the totality of the circumstances, a reasonable person would "have felt he or she was not at liberty to terminate the interrogation and leave". Meredith v. State, 964 So.2d 247,250 (Fla. 4th DCA 2007), quoting Thompson v. Keohane, 516 U.S. 99,112 (1995); see also Connor v. State, 803 So.2d 598,605 (Fla. 2001); Lee v. State, 2008 WL 2694955 (Fla. 1st DCA 2008). The fact that the individual was ultimately allowed to leave after the interrogators were finished questioning him is a factor which may be weighed, but it is not dispositive of the question of whether a reasonable person in the suspect's position would have felt free to terminate the interrogation at any point while it was occurring and leave

the police building].

In any event, Blaine Ross was clearly in custody during the crucial January 9th interrogation - - perhaps not at the very beginning, but for hours of blatantly accusatory and confrontational questioning prior to the deliberately belated giving of Miranda warnings (presented to him as "just a matter of procedure...based on everything we're talking about") at 7:22 p.m. By this time, after being subjected to Detective Waldron's incessant, insistent, and often angry accusations (see 17:00-17:30 on the videotape; 24/662-64;25/670-89, and especially 17:25-17:30; 25/686-89) and after repeatedly being called a liar every time he maintained his innocence or told Waldron anything the latter didn't want to hear, Blaine's resistance had been broken and he had already made very damaging admissions that Waldron might be right; he might have killed his parents, and he thought he probably did kill his parents (25/693-705,726-31,737-38). Only then was Blaine read his Miranda rights, but - - significantly - - he was not told that the statements he'd already made could not be used against him. See United States v. Williams, 435 F.3d 1148,1160-61 (9th Cir. 2006), discussing Missouri v. Seibert, 542 U.S. 600 (2004)[see Part F of this Point on Appeal]. He was simply told, for the first time, that he had the right to remain silent; but soon afterward, when he tried to exercise that right, he was told "Gotta make this right, Blaine" and the interrogation continued apace [see Part G].

Returning to the Ramirez factors, only one - - the manner in which the suspect was brought in for questioning - - favors the

state's position; the other three factors strongly show that Blaine was subjected to hours of harsh custodial interrogation before he finally acquiesced to what Waldron kept telling him he did. An interrogation which is noncustodial at its inception may become custodial as it progresses, and as its tone changes from investigatory to accusatory. See Motta v. State, 911 P.2d 34,39 (Alaska 1996); State v. Payne, 149 S.W.3d 20,33 (Tenn. 2004); State v. Snyder, 860 P.2d 351,357 (Utah App. 1993). Blaine came to the CID voluntarily because he had concerns he wanted to discuss with the victim advocate (i.e., getting some shoes) and with Detective Waldron. While they were discussing those concerns, and perhaps even for a short time after Waldron began interrogating Blaine about the deaths of his parents, the interview was indeed noncustodial. At first, as in Meredith v. State, 964 So.2d at 251, the interview was "conducted in a casual and conversational tone." But at some early point in that January 9th session, things changed dramatically.

Regarding the purpose, place, and manner of the interrogation, the place was a small, windowless room on the second floor of the Criminal Investigation Division of the Sheriff's Office; a "controlled environment" (27/1055). The purpose - - ultimately fulfilled - - was to obtain a confession from Blaine Ross; Detective Waldron believed that this would be his last opportunity to interrogate Blaine and, recognizing that this interview could be key, he wanted to have it videotaped. The elected Sheriff, Charlie Wells (who, with others, watched the proceedings on a monitor) told Waldron he was counting on him to get "closure" on this. The

manner, which was initially casual and conversational, transformed into something very different. Around 5:00 p.m. (two and a half hours before Miranda) Waldron became increasingly angry and belligerent, raising his voice at Blaine [see People v. Minjarez, 81 P.3d 348,352 (Colo. 2003)] and interrupting his attempts to answer questions. This stage reached its crescendo from 5:25-5:30 (17:25-17:30) on the tape. Blaine - - 21 years old, 140 pounds, barefoot - - is literally backed into a corner of the small room [see Minjarez, 81 P.3d at 352; State v. Holloway, 760 A2d 223,230 (Me. 2000); State v. Payne, 149 S.W. 3d 20,33 (Tenn. 2004)], wedged in by the 260 pound Waldron (firearm protruding from his waistband) who is leaning forward in his face, berating him:

> I know how that blood got there, Blaine. When you brutally, cold-blooded beat your parents to death, when you smashed in their heads and beat them to death.
>
> BLAINE: I - -
>
> WALDRON: And then you took that rope that was in the garage and you put it around your mother's neck, and you put it around your father's neck, and you slowly methodically cold-bloodedly pulled it tighter and tighter and tighter, Blaine. After smashing in their heads. That's how you got that blood on your pants, those black Dickies that you were wearing Tuesday.
>
> BLAINE: No.
>
> WALDRON: Yes, Blaine. (25/687)(emphasis clearly audible on videotape)

Only after he succeeded in getting Blaine to acquiesce to the "possibility that I could have done this and not remembered" (25/690-94) did Waldron's demeanor shift again; this time into the empathetic counselor persona he would employ for the remainder of the interrogation ("That does make sense." "Blaine that is the most sense that you've told me..." (25/694).

In this regard, it should be emphasized that while a police officer's unarticulated belief that the person being interrogated is the prime suspect, or that he is guilty of the crime, is of little assistance in the determination of custody for Miranda purposes [see Mansfield, 758 So.2d at 643; Stansbury v. California, 511 U.S. 318,323-24 (1994)], it is a very different matter when the interrogating officer communicates to the person that he is the prime suspect or that the officer believes he is guilty; especially when this is done in a forceful or belligerent manner. Such confrontational assertions would go a long way to convince a reasonable suspect that he is no longer free to walk away. And this is even more true when the interrogator presents (or, as in the instant case, browbeats) the suspect with evidence - - whether real or fabricated or in the gray area between - - which, according to the interrogator, prove the suspect's guilt. [In the instant case, Waldron conveyed more than his belief in Blaine's guilt; he repeatedly informed him that the police already knew he was guilty and the only question was why. In addition, while confronting him with evidence of his guilt (much of which he made up), whenever Blaine would protest his innocence or lack of memory Waldron would insist that the evidence doesn't lie].

See United States v. Griffin, 922 F.2d 1343,1348 (8th Cir. 1990)("Although custody is not inferred from the mere circumstance that the police are questioning the one whom they believe to be guilty, the fact that the individual has become the focus of the investigation is relevant 'to the extent that the suspect is aware of the evidence against him' and this awareness contributes to the

suspect's sense of custody"); Mansfield v. State, 758 So.2d at 643 ("Once the interrogation began, however, the police confronted Mansfield with evidence connecting him to the victim and the murder scene, making it abundantly clear that he was their prime suspect"); see also Stansbury v. California, 511 U.S. at 325 ("An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned", and suggesting that the manner in which the officer's beliefs were manifested to the suspect also might play a role in how a reasonable person in the suspect's position would perceive his situation).

Numerous Florida, federal, and other state appellate decisions have recognized that when a person is subjected to prolonged accusatory questioning this would create in a reasonable person a well-founded sense of restraint upon his freedom of movement; on whether he would think he could just get up, say goodbye, and go home. See e.g. Ramirez, 739 So.2d at 574; Mansfield, 758 So.2d at 644; State v. Weiss, 935 So.2d 110,118 (Fla. 4th DCA 2006); United States v. Griffin, 7 F.3d 1512,1518 (10th Cir. 1993); Sprosty v. Buchler, 79 F.3d 635,641 (7th Cir. 1996); United States v. Wauneka, 770 F.2d 1434,1438-49 (9th Cir. 1985); Holguin v. Harrison, 399 F.Supp.2d 1052,1058-59 (N.D. Cal. 2005); United States v. Mahmood, 415 F. Supp.2d 13,18 (D. Mass. 2006).

In particular, in addition to its own decision in Mansfield, this Court should compare the circumstances of Blaine's interrogation by Detective Waldron with the circumstances (including prolonged accusatory questioning) which were found to show custody

in Motta v. State, 911 P.2d 34,36-39 (Alaska 1996); State v. Holloway, 760 A.2d 223,230-31 (Me. 2000); State v. Payne, 149 SW.3d 20,33 (Tenn. 2004); Payne v. State, 854 N.E.2d 7,14 (Ind. App. 2006); Commonwealth v. Coleman, 727 N.E.2d 103,106-07 (Mass. 2000); People v. Minjarez, 81 P.3d 348,352 (Colo. 2003); and People v. Aguilera, 51 Cal.App. 4th 1151,1164-65; 59 Cal.Rptr. 587,594-95 (1996).

In State v. Pitts, 936 So.2d 1111,1127-28 (Fla. 2d DCA 2006), the Second DCA recognized:

> Although not necessarily dispositive, "the extent to which the suspect is confronted with evidence of his or her guilt" can be a circumstance that weighs heavily in the balances. A reasonable person in the situation of a suspect who has been "confronted with evidence strongly suggesting his guilt" may well understand that such evidence means that the police will not allow the suspect to go on his way. Mansfield, 758 So.2d at 644. A reasonable person understands that the police ordinarily will not set free a suspect when there is evidence "strongly suggesting" that the person is guilty of a serious crime.

The significance of this factor turns on the strength of the evidence as understood by a reasonable person in the suspect's position, as well as the seriousness of the offense. Pitts, at 1128. In Pitts, the DCA found that custody was not established by this factor, because Pitts was only confronted with a "bare uncorroborated accusation" made by the witness [T.J.], coupled with the interrogator's statement that he and Pitts both knew that Pitts was present. The DCA found it significant that the interrogator "did not specifically say that he believed the accusation made by T.J. was true." 936 So.2d at 1128.

The contrast between Pitts and the instant case could hardly be clearer. [See also Meredith v. State, 964 So.2d at 251, citing

Pitts and Stansbury v. California for the proposition that "the significance of this factor may be diminished if the police do not express their belief in the suspect's guilt or do nothing to refute the suspect's offered explanation of innocence")]. Here, Detective Waldron repeatedly told Blaine he knew he killed his parents and the only question was why; that there was blood on his pants linking him to the crime scene and the evidence doesn't lie; that he got that blood on his pants "[w]hen you brutally, cold-blooded beat your parents to death, when you smashed in their heads and beat them to death." Whenever Blaine tried to protest his innocence, he was interrupted and/or was called a liar, and he was reminded of the evidence which (Waldron claimed) conclusively proved his guilt.

> You don't remember much at all, okay? And from what you do supposedly remember, has all been lies, because we've been able to verify it. You drug in Erin. You want to see Erin go to prison now? Mikey go to prison? Is that what you want? You want to bring all these people down with you? For what you did? The time is now to be a man. And the evidence doesn't lie. (25/689).

Surely by this point Blaine knew, as any reasonable person in his situation would know, that Waldron had determined that he was going to prison, and that he could not just get up and walk away.

The fourth and final Ramirez factor is whether the suspect is informed that he is free to leave the place of questioning. See Mansfield, 758 So.2d at 644; Caso v. State, 524 So.2d 422,424 (Fla. 1988); Louis v. State, 855 So.2d 253 (Fla. 4th DCA 2003); Lagasse v. State, 923 So.2d 1287 (Fla. 4th DCA 2006). See also People v. Aguilera, 51 Cal.App. 4th at 1164, n.7 ("We do not suggest that police must always give such advice. However, where,

as here, a suspect repeatedly denies criminal responsibility and the police reject the denials, confront the suspect with incriminating evidence, and continually press for the "truth", such advice would be a significant indication that the interrogation remained noncustodial").

Here, not only did Detective Waldron fail to inform Blaine he was free to leave (if he was, which is highly improbable), this was no oversight, but a deliberate stratagem on Waldron's part. In the suppression hearing, on cross, Waldron was asked "What were you taught to do when the suspect does raise the issue of not feeling free to leave?", and Waldron answered, "Any time someone brings that up, then you're to clarify or to tell them, you know, to answer their question" (27/1058). Despite this training, when Blaine said (in the late night January 7-8 session) "You won't let me leave", Waldron did not tell him he was free to leave because "[h]e's not asking a question, he's making a statement. There's a difference there" (27/1059). Then, during the January 9th session, minutes after the absolute height of Waldron's angry accusations (25/686-89), Blaine asked "Can we go smoke a cigarette?," and even though they had previously gone outside to smoke, this time Waldron said, "We can smoke one in here" (25/697). When Blaine said "I was going to say we could - - you can handcuff me to yourself to make sure I wasn't gonna run", Waldron still didn't see fit to clarify Blaine's situation; he neither told him he was free to leave or even that he was free to go outside and smoke on his own. Again, according to Waldron, this is because "he's making a statement, not asking a question" (27/1059-60).

This was not a game of "Jeopardy". Given the prolonged, intense, and accusatory interrogation he was subjected to, Blaine quite reasonably felt that his freedom of movement was restrained. See Payne v. State, 854 N.E.2d at 14 ("...when Payne asked if she could go outside to smoke, the Officers responded that she could smoke inside the room and brought her an ashtray. At no time did the Officers indicate to Payne that she was free to leave"). Detective Waldron obviously wanted Blaine to feel that he was not free to leave or to terminate the interrogation, and the detective's behavior - - on this and every other significant point - - unmistakably shows that the January 9th interrogation session which produced Blaine's confession became custodial long before the belated and ineffectual Miranda warnings were given.

F. "Two-Step" Interrogation to Circumvent Miranda

Prior to what he believed would be his last lawyer-free opportunity to interrogate Blaine on January 9th, Detective Waldron received guidance from many people in his department, including Sheriff Wells, as to "how...thing should go". Although the Sheriff's Department's own General Orders, promulgated by Sheriff Wells, specify that Constitutional Rights Warnings are required before questioning when the questioning passes from the fact-finding process to the accusatory stage, it was evidently decided by Waldron or his higher-ups to invert the order-of-operations in this particular case; to do the accusatory questioning first and then read Miranda. As Waldron explained in the suppression hearing, "General orders are a guideline to follow, and there are times where, in certain circumstances you have to go outside of

those guidelines...” Waldron did not explain why the interrogation of Blaine Ross was one of those circumstances where you “have to” go outside the guidelines, but he did make it clear that the decision on how to proceed was the product of group discussion, and he was not solely responsible. Sheriff Wells (who had told him he was counting on him to get closure on this) and other supervisors were watching the interrogation on a monitor and any one of them could have intervened if they had a problem with what he was doing (see Def.Exh. 32;11/1844,1857,1869,1881;25/827-29;27/1056-58;44/3549).

The “question-first” or “two-step” interrogation technique which was deliberately and successfully used by the Manatee County Sheriff’s Office - - and its point-man Detective Waldron - - to overcome Blaine Ross’ will and to obtain a confession in this case is exactly what was condemned by the United States Supreme Court in Missouri v. Seibert, 542 U.S. 600 (2004).

The four-Justice plurality opinion in Seibert, authored by Justice Souter, observes that “[t]he technique of interrogating in successive, unwarned and warned phases raises a new challenge to Miranda”. 542 U.S. at 609. This technique is popular among interrogators because it works. 524 U.S. at 609-10. Contrasting the circumstances of Oregon v. Elstad, 470 U.S. 298 (1985), the Seibert plurality wrote:

> The contrast between Elstad and this case reveals a series of relevant facts that bear on whether Miranda warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the de-

> gree to which the interrogator's questions treated the second round as continuous with the first. In Elstad, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the Miranda warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.
>
> At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the Miranda warnings [footnote omitted]. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment.

542 U.S. at 615-16.

The opinion also emphasizes that the interrogating officer in Seibert fostered the impression that the post-Miranda questioning was a mere continuation of what had already been discussed. 542 U.S. at 616. [In the instant case, when he finally Mirandized Blaine, Waldron told him "it's just a matter of procedure based on everything we're talking about" (25/742)].

Justice Kennedy, concurring in Seibert, also disapproved the "two-step" method in no uncertain terms:

> The interrogation technique used in this case is designed to circumvent Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). It undermines the Miranda warning and obscures its meaning. The plurality opinion is correct to conclude that statements obtained through the use of this technique are inadmissible. Although I agree with much in the careful and convincing opinion for the plurality, my approach does differ in some respects, requiring this separate statement.

542 U.S. at 618.

Justice Kennedy's approach focuses on whether the "question-

first" technique was used in a calculated way to circumvent or undermine the Miranda warnings. 542 U.S. at 622. "When an interrogator uses this deliberate, two-step strategy, predicated upon violating Miranda during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific curative steps." 542 U.S. at 621.

Among the steps which might ameliorate the effects of the violation, in Justice Kennedy's view, are "a substantial break in time and circumstances" between the prewarning interrogation and the Miranda warning; or an additional warning to the suspect advising him that anything he'd already said during the prewarning portion of the interview could not be used against him. However, in Seibert's case, no curative steps were taken, "so the postwarning statements are inadmissible and the conviction cannot stand."

See United States v. Briones, 390 F.3d 610,613-14 (8th Cir. 2004)("For Justice Kennedy the key question is whether the police conduct was deliberately devised to obtain incriminating statements by circumventing Miranda. ...If a deliberate strategy was used to avoid Miranda requirements, [Oregon v.] Elstad does not apply and postwarning statements related to the substance of what was said earlier are inadmissible in the absence of curative measures").

While some appellate courts have found or suggested that the plurality opinion in Seibert is the controlling or more persuasive authority [see State v. Pye, 653 S.E.2d 450,453 n.6 (Ga. 2007); Martinez v. State, 204 S.W. 914,918-20 (Tex. App. 2006); Crawford

v. State, 100 P.3d 440,450 (Alaska App. 2004); State v. Farris, 849 N.E.2d 985,994 (Ohio 2006); United States v. Carrizales-Toledo, 454 F.3d 1142,1151 (10th Cir. 2006)], Florida courts - - in accord with the majority of federal circuits - - have concluded that the narrower concurring opinion of Justice Kennedy is the controlling authority. Davis v. State, 2008 WL 2277520 (Fla. 2008); State v. Pitts, 936 So.2d 1111,1135-36 (Fla. 2d DCA 2006); State v. Lebron, 979 So.2d 1093 (Fla. 3d DCA 2008); Jump v. State, 983 So.2d 726 (Fla. 1st DCA 2008). See United States v. Briones, 390 F.3d at 613-14; United States v. Stewart, 388 F.3d 1079,1090 (7th Cir. 2004); United States v. Mashburn, 406 F.3d 303,308-09 (4th Cir. 2005); United States v. Naranjo, 426 F.3d 221,231-32 (3rd Cir. 2005); United States v. Williams, 435 F.3d 1148,1157-58 (9th Cir. 2006); see also Cooper v. State, 877 A.2d 1095,1107 (Md. App. 2005); People v. Montgomery, 875 N.E.2d 671,677 (Ill. App. 2007).

The instant case presents such a flagrant violation of the core principles of Seibert that Blaine's postwarning statements are inadmissible whether the Court uses the plurality's test, or Justice Kennedy's test, or a hybrid of the two.

Since a police interrogator will rarely directly admit that he or his department deliberately used the question-first technique for the purpose of circumventing Miranda (although here Detective Waldron came pretty close to such an admission during his cross-examination), the appellate courts in Williams, 435 F.2d at 1158, and Montgomery, 875 N.E.2d at 677, stated that "[I]n determining whether the interrogator deliberately withheld the Miranda warning, courts should consider whether objective evidence

and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the Miranda warning." In addition to the officer's testimony concerning his own subjective motivations, courts (in determining the question of deliberate circumvention) may consider some or all of the objective factors outlined in the Seibert plurality opinion, including "(1) the completeness and detail of the prewarning interrogation; (2) the overlapping content of the two rounds of interrogation; (3) the timing and circumstances of both interrogations; (4) the continuity of police personnel; (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first, and (6) whether any curative measures were taken." Williams, 435 F.3d at 1160; Montgomery, 875 N.E.2d at 677; see People v. Angoco, 2007 WL 951496 (Guam 2007)(applying Williams factors to determine whether "question-first" technique was deliberately used to undermine Miranda).

In the instant case, all of the objective factors weigh strongly in the direction of showing deliberate use of the "question-first" technique to circumvent Miranda. In powerful addition is the testimony of Detective Waldron concerning his thought processes and his preparation for the January 9th interrogation session: (1) he believed this would be his last chance to interrogate Blaine before he might ask for a lawyer; (2) he was aware of his department's general order requiring Miranda warnings before engaging in accusatory questioning, and chose not the follow it; (3) prior to the interrogation he had consulted with his supervi-

sors, including the elected sheriff, as to how to proceed; (4) the Sheriff had told him he was counting on him to get closure on this; and (5) the Sheriff and many other officers watched the interrogation on a monitor, and nobody had a problem with what Waldron was doing or saw fit to intervene.

In sharp contrast to such cases as State v. Pitts, 936 So.2d at 1136 (where there was nothing to suggest that failure to advise Pitts of his rights was in any way calculated, and was "most reasonably attributable to simple inadvertence") and State v. Lebron, 979 So.2d at 1096 (where there was a single statement by the agent amounting to a one-question interrogation, but no thorough "question-first" interrogation like that described in Seibert), in the instant case Blaine Ross was subjected to hours of unwarned questioning - - intense, confrontational, accusatory questioning which broke him down emotionally (as can be seen on the videotape as the interrogation progresses) and which eventually resulted in his coming to doubt his own memory [a hallmark of a coerced internalized confession as well as a false internalized confession, see testimony of Dr. DeClue, 26/881-85,898-99,954-55,959-60,964-65)], and in his admissions first that he might have killed his parents, and then that he thought he did kill his parents but didn't mean to. As in Seibert itself, the totality of the circumstances "by any objective measure reveal a police strategy adopted to undermine the Miranda warnings", and the unwarned interrogation "was systematic, exhaustive, and managed with psychological skill". 542 U.S. at 616.

See also Cooper v. State, 877 A.2d 1095,1108-10 (Md.App.

2005); People v. Montgomery, 875 N.E.2d 671,675-79 (Ill.App. 2007); Payne v. State, 854 N.E.2d 7,14-16 (Ind. App. 2006), each finding purposeful circumvention of Miranda.

In United States v. Ollie, 442 F.3d 1135,1142-43 (8th Cir. 2006), after holding that Justice Kennedy's concurring opinion in Seibert controlled, the appellate court further held that when a defendant moves to suppress a post-warning statement which was given as part of a "question-first" interrogation, the burden is on the prosecution to prove, by a preponderance of the evidence, "that the officer's failure to provide warnings at the outset of questioning was not part of a deliberate attempt to circumvent Miranda." Placing that burden on the prosecution "is consistent with prior Supreme Court decisions that require the government to prove the admissibility of a confession before it may come into evidence." Also, "where one side typically possesses all or most of the pertinent evidence, it is appropriate to burden it with proving the relevant matter." 442 F.3d at 1143. See also United States v. Torres-Lona, 491 F.3d 750,758 (8th Cir. 2007); People v. Angoco, 2007 WL 951496.

In any event, because Detective Waldron's use of the "question-first" technique to procure Blaine's confession was so obviously strategic, this is not a case which turns on burden of proof or which Seibert test controls. Neither the plurality nor Justice Kennedy would condone the tactics he used, and none of the potentially curative measures suggested by either the plurality or Justice Kennedy were undertaken. Blaine's post-warning statements, like his pre-warning statements, were inadmissible under either or

both of the prevailing Seibert opinions.

[Finally, even if Seibert didn't exist or didn't apply, Blaine's post-warning statements would still be inadmissible, because of Detective Waldron's failure to honor his invocation of his right to remain silent [Part G], and because Oregon v. Elstad, 470 U.S. 298,317-18 (1985) does not support the admissibility of post-warning statements when the pre-warning statements were, in addition, the product of coercive interrogation [Part H]].

G. Invocation of Right to Remain Silent

Shortly after 21 year old Blaine Ross, already emotionally drained by hours of unwarned accusatory questioning, was belatedly advised that he had the right to remain silent, and that he could decide at any time not to answer any questions or make any statements (25/743), he tried to exercise that right. The circumstances were as follows. Detective Waldron, pursuing a recurring theme, told Blaine the evidence tells a story that cannot be changed or made up or misconstrued or misunderstood. Blaine, appearing to be crying, hands over his eyes, said in a very weak voice, "Well, I told you - - you - - you're right, about a lot of things. I, I, I don't think I did this. I don't know...." Waldron replied "I know you say you don't think you did this, but there's the blood on your pants. This wasn't a burglary, somebody who broke into that house" (25/753).

After fourteen seconds of silence (at 19:35:44 on the videotape), Blaine - - while shaking his head negatively from side to side at least 10-12 times - - said to Waldron in a broken voice, "I don't think I can help you anymore. I don't think I have

anything else to say" (25/753).

From Waldron's perspective, this must have felt like being stopped on fourth down a foot short of the goal line. After another pause, he said "Gotta make this right, Blaine" (tape 19:35:57; see 43/3486;3/499), and continued:

> As I said, you're an adult. You have to accept responsibility for your actions, whether you intended to do something or not. I know you didn't intend for this to happen. You didn't plan this out. But it did happen. You were there, there's blood on your pants, it's time to accept that and move on, and to be responsible for yourself. (25/754).

Detective Waldron then presented Blaine with a scenario of what Waldron believed happened (25/757-59), and Blaine acquiesced to this scenario, saying it was like he'd just woken up in front of his parents' bed; he knew he was angry at his dad, but he didn't know what triggered him to do it, and he didn't do it on purpose (25/759-60).

In Cuervo v. State, 967 So.2d 155,161 (Fla. 2007) this Court, quoting Miranda v. Arizona, 384 U.S. 436,473-74 (1966), recognized:

> 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. 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.

However, the interrogating officer's obligation to honor a suspect's expressed desire to remain silent depends upon whether a reasonable officer under the circumstances "would understand

the statement to be an assertion of the right to remain silent." State v. Owen, 696 So.2d 715,718 (Fla. 1997)(holding that the rule in Davis v. United States, 512 U.S. 452 (1994) applies equally to invocations of the right to remain silent and the right to counsel). If the request is ambiguous, such that a reasonable officer wouldn't understand it, it may be good practice to clarify the suspect's wishes, but it is not constitutionally required. Davis, 512 U.S. at 461-62; Cuervo, 967 So.2d at 161-62. In the instant case, however, the converse is true; any reasonable officer would have understood that Blaine was trying to exercise the right he'd just been told he had, to stop answering questioning and stop making statements.

In this regard, it is important for this Court to distinguish between clarity (which is required for a successful invocation of rights) and assertiveness (which is not). Invocation of the right to silence does not depend on the use of particular talismanic words [United States v. Reid, 211 F.Supp. 2d 366,374 D. Mass. 2002)], and the suspect is not required "to speak with the precision of an Oxford don." Davis, 512 U.S. at 476 (Souter, J., concurring); Smith v. State, 915 So.2d 692,694 (Fla. 3d DCA 2005); McDaniel v. Commonwealth, 518 S.E.2d 851,853 (Va.App. 1999); People v. Adkins, 113 P.3d 788,791 (Colo. 2005). Similarly, he should not be required to speak with the forcefulness of a Bill O'Reilly or a Reverend Jeremiah Wright; and this is especially true when he has been worn down emotionally by hours of unwarned accusatory questioning. [This Court can see on the videotape how Blaine's voice becomes weaker and more broken as

the interrogation progresses. If Waldron had advised him of his right to remain silent when he was supposed to, Blaine's invocation of that right might well have been more forceful].

In any event, it is apparent that Waldron did understand that Blaine didn't want to talk anymore, because - - in responding "Gotta make this right, Blaine" - - he was basically telling him he had to. Thus, Waldron was not merely continuing to ask questions because he didn't understand that Blaine wanted him to stop; instead, his words could only have conveyed to Blaine that, notwithstanding the "just a matter of procedure" Miranda advisement he'd just been given (see 25/742), he had no choice but to continue being interrogated. Waldron's response went beyond anything contemplated in Davis. Even in cases where the suspect's invocation of his rights can be classified as ambiguous, Davis simply permits the interrogator to continue asking questions; it does not authorize him to make statements undermining the efficacy of the Miranda warnings. See Seibert.

In context, Blaine's statement "I don't think I can help you anymore. I don't think I have anything else to say" (spoken after a 14 second pause after Waldron's last accusatory remark) is in no way ambiguous or unclear. The words "anymore" and "anything else" indicate a desire to stop altogether [see United States v. Reid, 211 F.Supp.2d at 372]; not just not to answer a specific question or questions. Contrast Owen, 696 So.2d at 717,n.4, as discussed in Cuervo, 967 So.2d at 163 and Almeida v. State, 737 So.2d 520,523 (Fla. 1999)(it was unclear whether Owen's statements "I'd rather not talk about it" and "I don't want to talk

about it" referred to the immediate topic of conversation, i.e. the house and the bicycle, or to the underlying right to cut off questioning). Blaine's statement was not a question (nor, on the videotape, does it sound like a question), and there is no "maybe" or "might". In Davis v. United States, Davis' statement which was found to be ambiguous was "Maybe I should talk to a lawyer". 512 U.S. at 455. The interview continued for another hour until Davis said, "I think I want a lawyer before I say anything else"; at that point questioning ceased. 512 U.S. at 455. See McDaniel v. Commonwealth, 518 S.E.2d at 854,n.1. (finding the Supreme Court's recitation of the circumstances leading up to the cessation of questioning in Davis to be significant).

If Blaine had omitted the word "think" there is no question that a reasonable police officer would have understood that he was invoking his right to remain silent. See Smith v. State, 915 So.2d 692 (Fla. 3d DCA 2005)(defendant's statement that he had "nothing to say" constituted unequivocal invocation of his right to remain silent); United States v. Reid, 211 F.Supp.2d at 372-75 (suspect unequivocally asserted his right to silence by telling police "I have nothing else to say"). Therefore, the only remaining question is whether Blaine's use of the word "think" rendered his statements so unclear that Detective Waldron (or a reasonable police officer in his circumstances) would not understand that he was trying to invoke his right to stop answering questions and making statements.

In McDaniel v. Commonwealth, 518 S.E.2d 851,853-54 (Va.App. 1999)(en banc), the Court of Appeals of Virginia addressed this

question persuasively:

> McDaniel's response after the detective informed him of the Miranda rights was, "I think I would rather have an attorney here to speak for me." That statement contains no ambiguity. The work "think" is generally defined "to have in one's mind as an intention or desire." Webster's Third New International Dictionary of the English Language 2376 (1986), and the word "rather," in the context of McDaniel's statement, means "more readily" or "prefer to." Id. at 1885. The statement was an appropriate response to the warnings, which gave McDaniel the choice of speaking with the detective without an attorney or having an attorney present while the detective questioned him. By indicating his preference, McDaniel made his choice clear, informing the detective that he desired to have an attorney speak for him. See State v. Jackson, 348 N.C. 52,497 S.E.2d 409,412 (1998) (ruling that the response "'I think I need a lawyer present,'...was not an ambiguous statement"). In requesting an attorney, McDaniel was not required to "'speak with the discrimination of an Oxford don.'" Davis, 512 U.S. at 459,114 S.Ct. 2350.
>
> McDaniel's statement is qualitatively different than statements held to be ambiguous by the United States Supreme Court and the Supreme Court of Virginia. McDaniel did not phrase his response in the form of a question. See Mueller v. Commonwealth, 244 Va. 386,396-897, 422 S.E.2d 380,387 (1992)("Do you think I need an attorney here?"); Eaton v. Commonwealth, 240 Va. 236,252-54,397 S.E.2d 385,395-96 (1990)("You did say I could have an attorney if I wanted one?"). Furthermore, McDaniel expressed more than a mere "reservation" about continuing the interrogation without counsel. See Davis, 512 U.S. at 462,114 S.Ct. 2350 ("Maybe I should talk to a lawyer"); Midkiff v. Commonwealth, 250 Va. 262,267,462 S.E.2d 112,115-16 (1995)("I'm scared to say anything without talking to a lawyer"). [footnote omitted].

Other appellate decisions reaching the same sound conclusion that the suspect's use of the word "think" does not necessarily render his invocation ambiguous include Cannady v. Dugger, 931 F.2d 752,755 (11th Cir. 1991), cited in the post-Davis case of Correll v. Thompson, 63 F.3d 1279,1286 (4th Cir. 1995); Alford v. State, 699 N.E.2d 247,251 (Ind. 1998); State v. Kennedy, 510 S.E.2d 714 (S.C. 1998); People v. Bradshaw, 156 P.3d 452,457

(Colo. 2007); Commonwealth v. Contos, 754 N.E.2d 647,656-67 (Mass. 2001); Commonwealth v. Barros, 779 N.E.2d 693,698 (Mass.App. 2002); State v. Hannon, 636 N.W.2d 796,804 (Minn. 2001); State v. Munson, 594 N.W.2d 128,139-40 (Minn. 1999); State v. Jackson, 497 S.E.2d 409,411-12 (N.C. 1998); People v. Porter, 878 N.E.2d 998 (N.Y. 2007).

The cases relied on by the trial judge in the instant case in his order denying the motion to suppress (4/759) - - Kyser v. State, 533 So.2d 285 (Fla. 1988) and Rodriguez v. State, 559 So.2d 392 (Fla. 3d DCA 1990) - - do not compel or support a different conclusion. First of all, Kyser, Rodriguez, and Long v. State, 517 So.2d 664 (Fla. 1987)(discussed in Kyser), are all pre-Davis decisions, meaning that if the request was unambiguous all questioning must cease, but even if the request was deemed ambiguous the only permissible further questioning would be to clarify the suspect's intentions. In Long, the defendant's statement was "I think I might need an attorney". 517 So.2d at 666-67 (emphasis supplied). This Court found that the statement in Long, "while equivocal, put officers on notice that the only permissible further questioning could be questions attempting to clarify the suspect's request for counsel" [Kyser, 533 So.2d at 286]; therefore Long's confession should have been suppressed and his conviction was reversed on appeal. In Kyser, the defendant's statement, when asked if he wanted to discuss a Panama City shooting, was "Can we talk about something else, I think I want to talk to a lawyer before I talk about that and I hope you understand that" 533 So.2d at 286. This Court did not expressly

decide whether Kyser's statement should be characterized as equivocal or unequivocal (nor did it need to determine that question to decide the case, because under the law pre-Davis the result was the same either way). The Court simply said, in dicta, "In our view, the statement made by Kyser was less equivocal than that made in Long." 533 So.2d at 287. Consequently, the introduction at trial of Kyser's statements made after his request for counsel violated his fifth amendment rights.

Neither Long nor Kyser stands for the proposition that a suspect's use of the word "think" renders his invocation of his right to remain silent or his right to counsel ambiguous under a Davis analysis, which turns on whether a reasonable officer would have understood the request. Rodriguez is even more distinguishable. There, after properly (and presumably timely) advising Rodriguez of his Miranda rights, the detective asked him "Are you willing to answer my questions?", whereupon Rodriguez replied, "Yes, but I really don't have anything to say." 559 So.2d at 313 (emphasis supplied). The appellate court correctly observed that "[i]n context, the defendant's above-stated response meant nothing more than that [he] was willing to answer police questions, but had no real knowledge about the case." 559 So.2d at 393. In the instant case, in contrast, Blaine had been answering or trying to answer Detective Waldron's questions and accusations for hours, and his statement, shortly after the Miranda warnings were finally given, "I don't think I can help you anymore. I don't think I have anything else to say", should have been understood by any reasonable police officer as an invocation of

his right to remain silent. Consequently, Blaine's post-Miranda statements are inadmissible on that basis, in addition to the Missouri v. Seibert grounds asserted in Part F.

H. Coercive Interrogation Techniques Producing An Involuntary Confession

Before a confession may be introduced, the state bears the burden of establishing by a preponderance of the evidence that it was voluntarily made. Cuervo v. State, 967 So.2d 155,160 (Fla. 2007); Martinez v. State, 545 So.2d 466 (Fla. 4th DCA 1989). The question which must be resolved is whether:

> the confession [is] the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

United States v. Lopez, 437 F.3d 1059,1063 (10th Cir. 2006); quoting Culombe v. Connecticut, 367 U.S. 568,602 (1961); see Martinez, 545 So.2d at 467.

To establish that a confession or inculpatory statement is involuntary, it must be the product of coercive conduct on the part of the police. Colorado v. Connelly, 479 U.S. 157,163-67 (1986); Chavez v. State, 832 So.2d 730,749 (Fla. 2002). Police coercion can be psychological as well as physical. Colorado v. Connelly, 479 U.S. at 164; State v. Sawyer, 561 So.2d 278,281 (Fla. 2d DCA 1990).

The deliberate use of deception and manipulation by police interrogators raises serious concerns about whether the suspect's will was overborne, and appears to be incompatible "with a system that presumes innocence and assures that a conviction will not be

secured by inquisitorial means." Voltaire v. State, 697 So.2d 1002,1004 (Fla. 4th DCA 1997); quoting Miller v. Fenton, 474 U.S. 104,116 (1985).

Police misrepresentations of the evidence, standing alone, will not necessarily render a confession involuntary. Frazier v. Cupp, 394 U.S. 731,739 (1969); Conde v. State, 860 So.2d 930,952 (Fla. 2003). The voluntariness of a confession is determined under the totality of the circumstances, and police misrepresentations are a relevant factor to be considered. Frazier v. Cupp, at 739; see also Escobar v. State, 699 So.2d 984,987 (Fla. 1999) (cautioning law enforcement that such tactics can go too far); Miller v. Fenton, 796 F.2d 598,607 (3d Cir. 1986)(effect of misrepresentation "must be analyzed in the context of all of the circumstances of the interrogation"). Under this analysis courts have also recognized that while a single or isolated use of a coercive interrogation technique may not render a confession involuntary, when two or more such tactics are employed the resulting confession is likely to be found involuntary. See Miller v. Fenton, 474 U.S. at 116, citing Gallegos v. Colorado, 370 U.S. 49 (1962)(suggesting that "a compound of two influences" requires that some confessions be condemned); State v. Sawyer, 561 So.2d at 281-82 ("[a]lthough particular statements or actions considered on an individual basis might not vitiate a confession, when two or more statements or courses of conduct are employed against a suspect, courts have more readily found the confession to be involuntary"); see also Commonwealth v. DiGiambattista, 813 N.E.2d 516,524,527-28 (Mass. 2004). Furthermore, where the

police use psychologically coercive interrogation methods, “an accused’s emotional condition is an important factor in determining whether statements were voluntarily made.” Sawyer, at 282; Rickard v. State, 508 So.2d 736 (Fla. 2d DCA 1987). [This Court can see for itself on the January 9th videotape the deterioration in Blaine’s emotional condition as Detective Waldron’s interrogation progresses].

In the instant case, Detective Waldron not only misrepresented evidence, he did so on a number of critical matters. He told Blaine (in the late night January 7-8 interview) that a neighbor out walking his dog - - a witness who unlike Blaine was sober and not using drugs - - had seen his car at his parents’ house at 1:00 a.m., and had given a sworn statement saying so. In fact no such witness existed. Waldron told Blaine on January 9th that the lab had tested his pants and found blood conclusively linking him to the crime scene. In fact Waldron knew only that the blood spots were human blood. He told Blaine that witnesses, even his girlfriend Erin, had said he was wearing those pants on the night his parents were killed. In fact Waldron had no such statement from any witness, including Erin.

Not only did Waldron misrepresent the evidence, he repeatedly went back to his own made up evidence to interrupt and/or contradict Blaine nearly every time he tried to maintain his innocence, and to encourage him to doubt his own memory. [Waldron knew that Blaine had been drinking alcohol, smoking marijuana, and taking Xanax on the night the crime occurred (see also the trial judge’s sentencing order, 8/1393), and he used this to challenge Blaine’s

ability to remember (see e.g. 23/519-25,546,549); thus, Waldron's witness who saw Blaine's car was more reliable than Blaine because the fictional witness wasn't drunk or stoned (23/544-45,550-51,558)]. Many times during the course of the interrogation - - with intended or unintended irony - - Waldron insisted to Blaine that the evidence doesn't lie (25/682,689,705; see 724,734-35); it "cannot be changed or made up or misconstrued or misunderstood" (25/753).

Confronted with what Waldron claimed to be incontrovertible evidence [see Commonwealth v. DiGiambattista, 813 N.E.2d at 524-25], Blaine made statements indicating that he didn't think he did it, he didn't remember doing it, but the evidence was making him question himself (25/699,702,704,727); and "from what you've told me you make me feel that I did do this. And I'm scared, because I don't remember, I don't - - I don't know if I did". Waldron's response to this was to tell Blaine, "I presented the evidence to you as it is" (25/730).

[See testimony of Dr. DeClue explaining that providing "the raw materials for a false memory" and persuading the suspect that he can't trust his own memory are among the hallmarks of a coerced internalized confession as well as a coerced internalized false confession (26/881-85,899,908,950-55,958-61,964-65). See also State v. Sawyer, 561 So.2d at 289 (most puzzling aspect of the interrogation is whether Sawyer confessed to the killing because he recalled doing it, or merely acquiesced to officers' suggestion that he did the killing during an alcoholic blackout and therefore could not recall details).

Not only did Waldron's deception go much too far, in such a way as to overbear Blaine's will and impair the reliability of his statements [see Escobar, 699 So.2d at 987]; incredibly, all of this was done before he was advised of his right to remain silent. See Loredo v. State, 836 So.2d 1103,1105 (Fla. 2d DCA 2003)("The record here does not establish that law enforcement overstepped the line of permitted deception. We do suggest, however, that when law enforcement uses such deception, the legality of the confession is more likely to be sustained when Miranda warnings have been given"); see also State v. Cayward, 552 So.2d 971,973 (Fla. 2d DCA 1989); State v. Moore, 530 So.2d 349,350-51 (Fla. 2d DCA 1988). Aside from the issue of custodial interrogation, proof of whether Miranda warnings were given is relevant to determine whether the police questioning was in fact coercive. People v. Rogers, 614 N.E.2d 1334,1341 (Ill.App. 1993); see Frazier v. Cupp, 394 U.S. at 739; Roman v. State, 475 So.2d 1228,1232 (Fla. 1985); Wesley v. State, 498 So.2d 1276 (Fla. 2d DCA 1986).

Throughout the late night January 7-8 interrogation and the hours-long unwarned portion of the January 9th interrogation, Detective Waldron also utilized several other psychologically coercive techniques to overbear Blaine's will and to secure an involuntary and unreliable confession. He used "minimization" to overtly suggest that Blaine could avoid the death penalty if he confessed:

> You lose your cool because you're upset, spur of the moment. That's a lot different than cold-blooded premeditated doing something. ...If you got pissed off because they wouldn't loan you any money, you were mad,

> you were high, you weren't in control of your senses, then that changes things. People do some stupid stuff when they're intoxicated or high. ...So its pretty clear what happened, but it still doesn't explain why. And the why it happened can be the difference between the death penalty or some time in prison or some other type of thing. And that's what it comes down to now. We know what happened, what we're not clear about is why, and only you can tell us why. (23/549)

See Martinez v. State, 545 So.2d 466 (Fla. 4th DCA 1989) ("raising the spectre of the electric chair was not simply intended to be informative, but to unduly emphasize this particular option, and psychologically coerce Martinez into confessing to the crime"); Brewer v. State, 386 So.2d 232,235 (Fla. 1980); see also People v. Flores, 144 Cal.App. 3d 459,192 Cal.Rptr. 772 (1983)(interrogating officers used possibility of death penalty for robbery murder as the "stick", and the implication that suspect would be treated more leniently if he confessed to killing decedent in a fight as the "carrot").

On January 9th, immediately following his angriest and most intimidating confrontation with Blaine (25/686-89;videotape 17:25-17:30), Detective Waldron employed minimization techniques [see State v. Sawyer, 561 So.2d at 287; Commonwealth v. DiGiambattista, 813 N.E.2d at 526-27] throughout the remainder of the interview (25/693-703,725-28,735-37,750-53,757-59); for example, telling Blaine "...I'm sure you didn't mean to. I think maybe something snapped that you don't remember, that you had no control over" (25/694). Waldron said, "I'd rather be able to tell your sister that this was all a horrible accident, that you didn't do this on purpose..." (25/695), and "You have your family here, they need some closure, and I would much rather be able to

tell them that this was an accident, it was never intended to happen...” (25/737).

[See Dr. DeClue’s testimony regarding the “accident” or “lifesaver” technique which suggests to the suspect that by accepting the interrogator’s invitation to confess to an accidental or unintentional crime he can avoid a death sentence and can expect a more lenient punishment (26/876-77,885,910,914,919,941-43,963,1030)].

On cross-examination in the suppression hearing, Detective Waldron acknowledged his familiarity with the lifesaver technique. He stated that he did not consciously use this technique with Blaine, “but from reviewing, I did attempt that.” Waldron further acknowledged that explaining to a suspect the difference between the death penalty and some time in prison, depending on whether the crime was planned or just happened spur of the moment, is part of that technique (27/1088-90).

In addition, at various points during the interrogation, Waldron accused Blaine of dragging his friends down with him; most egregiously in the following statement:

> You don’t remember much at all, okay? And from what you do supposedly remember, has all been lies, because we’ve been able to verify it. You drug in Erin. You want to see Erin go to prison now? Mikey go to prison? Is that what you want? You want to bring all these people down with you? For what you did? The time is now to be a man. (25/689)

In Spano v. New York, 360 U.S. 315,322-23 (1959), which was recently discussed by this Court in Wyche v. State, 2008 WL 2678058 (Fla. 2008), the interrogating officers played on Spano’s loyalties by falsely informing him that the job of one of the

officers - - a childhood friend of Spano's - - was in jeopardy because of Spano, which would be disastrous for his friend's family. See State v. Manning, 506 So.2d 1094,1098 (Fla. 3d DCA 1987); United States v. Anderson, 929 F.2d 96,100 (2nd Cir. 1991). In the instant case, Detective Waldron threatened Blaine that unless he cooperated by confessing to the murder of his parents his girlfriend and his best friend might go to prison because of him. Such psychologically coercive tactics cannot be condoned, especially in combination with everything else Waldron did to overbear Blaine's free will.

Dr. Gregory DeClue, a forensic psychologist with expertise in the psychology of interrogations and confessions was called as a defense witness in both the suppression hearing (26/855-969;27/976-1052;11/1890-1906) and at trial (45/3699-3738). Dr. DeClue testified at length, explaining his opinion that Blaine's statements were coerced (26/969).

The state did not object to the admissibility of Dr. DeClue's testimony or his ultimate opinion in the suppression hearing. At trial, the state objected only to the introduction of Dr. DeClue's ultimate opinion on the issue of voluntariness on the ground that it would invade the province of the jury; defense counsel stated that he did not anticipate bringing that out before the jury (45/3632-33,3719). Aside from the lack of an objection or request for a Frye hearing by the state, expert psychological testimony regarding interrogations and confessions has been presented in other Florida trials [see State v. Sawyer, 561 So.2d at 287 (experts testified for defense and prosecu-

tion)], and has been recognized in other jurisdictions as admissible within the trial court's discretion. See e.g. United States v. Hall, 93 F.3d 1337,1341-46 (7th Cir. 1996); People v. Kogut, 806 N.Y.S.2d 366 (N.Y. Sup. 2005).

Dr. DeClue's opinion, of course, is not binding on the trial court or reviewing court. What is important is that the reasons underlying Dr. DeClue's opinion are entirely consistent with the caselaw addressing the kinds of coercive interrogation techniques which can overbear a suspect's will and produce an involuntary confession. The key question is whether the state met its burden of establishing by a preponderance of the evidence that Blaine's confession was "the product of an essentially free and unconstrained choice by its maker." Culombe v. Connecticut, 367 U.S. at 602; United States v. Lopez, 437 F.3d at 1063; see Cuervo, 967 So.2d at 160. Dr. DeClue's testimony, in combination with the audiotape (Jan. 7-8), videotape (Jan. 9), and even Detective Waldron's own admissions regarding his tactics all show, to the contrary, that Blaine's will was methodically broken down over the course of many hours of coercive interrogation. Even then he didn't exactly "confess" (in the sense of telling the interrogator what happened and providing details which could be independently confirmed); the crime scene details (e.g. baseball bat, ropes) and even the emotions that he was supposedly feeling (see 26/878-79,911-14,942,951,964-65;27/1047-49) were provided by Detective Waldron. What Blaine eventually did can be more accurately described as acquiescence to the scenario given to him by Detective Waldron, over the hours of interrogation and culminat-

ing in Waldron's narrative at 25/757-59 (following which Blaine nodded his head and said "I need help"). See the prosecutor's opening statement at trial, 37/2530, and Dr. DeClue's testimony 26/964-65; see also State v. Sawyer, 561 So.2d at 287-90 (discussing how "scenario technique" can impair the voluntariness and reliability of a confession).

On the matter of reliability, it is also noteworthy that the only concrete details which Blaine gave Waldron (as opposed to the other way around) had to do with his panicked attempt, after he'd realized what he'd done, to make it look like a burglary by pulling out drawers and grabbing items. He told Waldron he wrapped up the bat, t-shirt, and rag, and threw them off the Green Bridge, along with the purse and gloves. At one point he thought he might have put some or all of the items in a dumpster at Sabal Cove apartments, but on further thought he was sure it was the bridge (25/760-85;45/3495-3515). Three days later, on January 12 [see Issue II], Waldron told Blaine they'd searched the river and come up empty; the purse had straps and should have hung up on something, and the bat should have floated or bobbled (25/796-804). At trial, Waldron acknowledged that although the river in the vicinity of the bridge was searched by dive teams for twenty hours, and although dumpsters were checked, none of the items which might have been taken from the Ross house on the night of the murders, or which might have been used in the commission of the crime, were ever located (44/3531-32;45/3608-09,3617-18). See Sawyer, 561 So.2d at 288, and Dr. DeClue's testimony, 26/878-79,913;27/1048-49). While it may be true, as

Waldron testified, that sometimes water searches are unsuccessful (44/3532), it also strongly suggests that Blaine may have had no real knowledge concerning the crime - - either because he didn't remember doing it (coerced internalized confession) or because he didn't do it (coerced internalized false confession).

In this series of interrogations - - conducted until near the very end without benefit of Miranda warnings - - Detective Waldron employed a variety of coercive techniques to overbear Blaine's will, to cause him to doubt his own memory, and to convince him that regardless of what he remembered he must have done it, because the evidence doesn't lie. In conjunction with this, Waldron threw Blaine the "lifesaver rope" - - "I'd rather be able to tell your sister that this was all a horrible accident" among the many examples - - and planted the idea that Blaine could avoid the death penalty and keep his girlfriend and his best friend from going to prison if he would just tell the detective that he was right about what happened.

The prosecution could not and did not meet its burden of showing that Blaine's confession was voluntarily made, and its introduction in this capital trial violates due process.

I. Harmful Error

Blaine's confession to Detective Waldron was the centerpiece of the state's case. It was featured in the prosecutor's opening statement (37/2521-31). At trial, the playing of the audiotapes and videotape before the jury took most of April 24 and all of April 25 (41/3164-3200;42/3203-3349;43/3357-3516). References to

the contents of the tapes permeated the prosecutor's rebuttal closing argument to the jury (see 46/3868,3874-76,3880-81,3884-88,3891,3893). When the jurors retired to deliberate, they were given all of the exhibits except for State Exhibit 43, the videotape of the January 9th interrogation. (The jury did have the audiotapes of the earlier sessions, although they had neither an audiocassette player nor a video player). It was agreed by the court and counsel that if the jurors requested any of these materials the issue would be addressed at that time (46/3926-27). About three hours into their deliberations, the jury sent out a note requesting, "Please provide TV and video player with remotes to view video interview with Blaine Ross"; accordingly, these items were then sent back to the jury room (7/1275;46/3928-30). The jurors, therefore, had the ability during deliberations not only to watch the entire videotape for a second time, but to pause, rewind, and repeatedly view any portion of the interview which they considered of prime importance.

Nevertheless, based on track record, the state can be expected to contend that the introduction of Blaine's confession was "harmless error". In Cuervo v. State, 967 So.2d at 167, quoting the standard established in State v. DiGuilio, 491 So.2d 1129,1139 (Fla. 1986), this Court recognized:

> [The harmless error] test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was

> harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

See also Chapman v. California, 386 U.S. 18,24 (1967)(placing burden on state, as beneficiary of an error of constitutional dimension, to prove beyond a reasonable doubt that error complained of did not contribute to the verdict).

While the erroneous introduction of a confession is not "structural" error, and is therefore subject to harmless error analysis, Arizona v. Fulminante, 499 U.S. 279 (1991), the Supreme Court in Fulminante also recognized that a confession is like no other evidence; it is probably the most probative and damaging evidence that can be admitted against a defendant; and confessions certainly have a profound impact on the jury. 499 U.S. at 296. See, e.g. United States v. Williams, 435 F.3d 1148,1162-63 (9th Cir. 2006); United States v. Stewart, 388 F.3d 1079,1091 (7th Cir. 2004); Sparkman v. State, 2008 WL 733002 (Ark. 2008); Payne v. State, 854 N.E.2d 7, 16-17 (Ind. App. 2006); State v. Logan, 906 A.2d 374,381-82 (Md. 2006); State v. Pillar, 820 A.2d 1,19 (N.J. Super. 2003); McCarthy v. State, 65 S.W.3d 47,55-56 (Tex.Crim.App. 2001); Maxfield v. State, 27 S.W.2d 449,452 (Ark.App. 2000); Commonwealth v. Ardestani, 736 A.2d 552,556-57 (Pa. 1999); Quinn v. Commonwealth, 492 S.E.2d 470,479 (Va.App. 1997).

The impact of a confession is magnified when the jurors watch it on a videotape [see Stewart, 388 F.2d at 1091; Sparkman, 2008 WL 733002, Payne, 854 N.E.2d at 16-17; Logan, 906 A.2d at 381]; and when, as here, the jurors specifically request and are given

the opportunity to watch the videotaped confession again - - this time during their deliberations - - it clearly cannot be shown beyond a reasonable doubt, as the DiGuilio standard requires, that it could not have contributed to their verdict. See Ardestani, 736 A.2d at 557 ("The prejudice arising from the jury hearing the most inculpatory declarations from the mouth of the defendant himself cannot be described as insignificant or de minimis [footnote omitted]. In fact, it may be the linchpin in securing the jury's ultimate verdict. Thus, the admission of the recordings cannot be deemed harmless error").

Nor is the harmful effect of a confession limited to its direct impact on the jury. It can virtually dictate a defendant's trial strategy and foreclose alternative theories of defense. See Cuervo v. State, 967 So.2d at 167; Rice v. Wood, 77 F.3d 1138,1142 (9th Cir. 1996); Nguyen v. McGrath, 323 F.Supp.2d 1007,1119-20 (N.D. Cal. 2004). "A wrongfully admitted confession...forces [the] defendant to devote valuable trial resources neutralizing the confession or explaining it to the jury...." Rice, 77 F.3d at 1142; Nguyen, 323 F. Supp. 2d at 1019-20. In the instant case, in renewing his motion to suppress and other pretrial motions just prior to opening statements, defense counsel expressly put on the record that "a large part of my statement deals with evidence that we have attempted to suppress or exclude, and I wouldn't be making this statement if the Court had...granted our motion" (37/2512).

This Court made it clear in DiGuilio, 491 So.2d at 1136, that the test for harmless error is not "a device whereby the appel-

late court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence." Instead, the focus is on whether the erroneously admitted evidence may have played a substantial part in the jury's deliberation and thus contributed to the verdict. Additionally, it is important to recognize that, while the state introduced three letters written by Blaine (two to his girlfriend Erin, one to his sister Kim) containing supposed admissions, these were ambiguous [in one of the letters, for instance, the recipient Erin was of the opinion that Blaine was not even referring this his parents' deaths but rather to his ex-girlfriend Samantha's abortion], devoid of any details, and in none of them did Blaine expressly admit having killed his parents. (See 16/2964-70; 34/2088-91;35/2208-12;37/2538-39;39/2759-64,2791-96;41/3081-85;46/3814-17). Similarly, his brief January 12, 2004 statement to Detective Waldron concerning the river search (assuming arguendo that it was admissible, see Issue II), which was essentially a postscript to his inadmissible and involuntary January 9 statements, contains no detail and no express admission of the murders (44/3523-32). The evidence regarding DNA was fraught with problems and may have been given little weight by the jury, especially in light of (1) the FDLE serologist's obvious lack of expertise in the areas of population genetics and statistics, and her failure to explain the statistical methods she used to arrive at her astronomical numbers [see Issue III]; (2) the fact that the four (or possibly five) spots

or smears of blood (out of 37 visible stains, the rest of which were not blood) on Blaine's pants were never compared with Blaine's own DNA; (3) the fact that neither Erin nor any other witness testified that Blaine was wearing those pants on January 6; and (4) the possibility of contamination in law enforcement's handling of the pants. (See 37/2538;39/2776;41/3098,3110-13,3127-32,3136-40;45/3569-71,3591-92;46/3810-11;3824-31).

The trial court's harmful error in allowing the state to introduce Blaine's confession violated the Fifth Amendment of the U.S. Constitution; article I, section 9 of the Florida Constitution; and (because it was not shown to have been voluntarily made) the due process clauses of both Constitutions. His convictions and death sentences must be reversed for a new trial.

[ISSUE II] THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE APPELLANT'S JANUARY 12, 2004 STATEMENTS TO DETECTIVE WALDRON.

At the end of the January 9 interview, Blaine told Detective Waldron he'd thrown the bat, purse, and other items into the river off the Green Bridge (25/760-85). At first appearance an attorney was appointed to represent him. As a result of a phone message received from Blaine's sister saying that Blaine wanted to see him at the jail, Waldron went there on the afternoon of January 12 (25/791-92). He brought a tape recorder (25/792). On the tape, Blaine began talking about drug dealers, indicating that he could show Waldron where at least five or six of them lived, but he wanted to make a deal before he said anything (25/796). Waldron said he understood ("[c]razy people in here, huh"); then changed the subject, saying, "We looked around the

past few days in the river, and we're not finding anything" (25/797). [It was at this point, according to the trial judge, that Waldron began subjecting Blaine to interrogation, as his goal was to elicit an incriminating response (4/768)]. Blaine said he was pretty sure that was where he threw the bat, and the other stuff probably floated away. Waldron said the purse had straps and should have hung up on something, and the bat should float or bobble. The searchers were finding unrelated items from a long time ago, but nothing from Blaine's parents' house; did he think maybe he'd thrown the items anywhere else, "[s]o your sister can have those". Blaine said he understood, but reiterated that he'd thrown them from the bridge (25/797-98).

Then, midway through the interrogation, Waldron read Blaine his Miranda rights (25/798-99). He asked him if, heaving those rights in mind, he wished to talk to him; Blaine said, "I'll talk to you, but I'm not going to give you like information" (25/799). Waldron, returning to the original subject, said, "Tell me exactly what it is...you would like to do in exchange for these two murder charges?" Blaine said he thought possibly a reduction in sentence, or maybe not so much that as the opportunity to work outside, like in the motor pool. In exchange he would give Waldron the names of drug dealers in Bradenton that he'd bought from in the past. Waldron said he'd bring that to the attention of the State Attorney's Office but he was not in a position to offer a deal (25/799-801).

Then Waldron changed the subject back to the river search, covering the same ground as before Miranda:

> WALDRON: ...And as far as the purse we're talking about, you're pretty sure it was thrown off the bridge?
>
> BLAINE: Yes, and the bat too.
>
> WALDRON: And the bat. It was dark at the time you did this?
>
> BLAINE: Yes, it was dark. It was morning time.
>
> WALDRON: Okay, because we searched all weekend and we haven't found anything, and - - just - - we're trying to do the best we can to recover these items for your family.
>
> BLAINE: Uh-huh.
>
> WALDRON: And any place else that you might have - -
>
> BLAINE: I don't think so. I've had some time to really think about everything and I - - I haven't thought of anywhere else that I could have thrown it at. (25/801-02).

The trial judge suppressed the pre-Miranda portion of the January 12 statements from the point where Waldron began interrogating Blaine about the river search and the items thrown from the bridge, but he allowed the state to introduce the audiotape and transcript of the post-Miranda portion (4/766-71;44/3523-32). The introduction of these statements was constitutional error, for many of the reasons discussed in Issue I, though on a smaller scale. The January 12 statements were essentially a postscript to the coerced January 9 statements, and Waldron employed a "mini-two step" technique, interrogating Blaine on tape, without benefit of Miranda warnings, about the river search and the missing items (which was not the subject which Blaine had initiated); then - - after eliciting the incriminating answers he sought (see 4/768) - - giving midstream Miranda warnings, followed by a replay of the same questions and answers. Since there

is no question that Blaine was in custody, Waldron's plainly intentional use of the "question first" interrogation technique violated Missouri v. Seibert, 542 U.S. 600 (2004) under both the plurality's and Justice Kennedy's analysis. [Moreover, even assuming arguendo that Seibert didn't apply, the January 12 statements would still be inadmissible under Oregon v. Elstad, 470 U.S. 298 (1985) because they were the direct product of the coerced and involuntary January 9 statements, with no showing that the January 12 statements were insulated from the effect of all that went before. See United States v. Lopez, 437 F.3d 1059,1066 (10th Cir. 2006)].

[ISSUE III] THE STATE FAILED TO DEMONSTRATE THAT THE FDLE SEROLOGIST BENCIVENGA WAS QUALIFIED TO TESTIFY TO THE STATISTICAL SIGNIFICANCE OF THE DNA EVIDENCE.

DNA testing is a two-step process; one is biochemical (using principles of molecular biology and chemistry to determine that two DNA samples appear alike), the other is statistical (to determine the frequency of the profile in the population). Perdomo v. State, 829 So.2d 280,282 (Fla. 3d DCA 2002); Gibson v. State, 915 So.2d 199,201 (Fla. 4th DCA 2005). "[C]onfirmation of a DNA match is in and of itself meaningless without a scientifically valid estimate...of the frequency with which such matches might occur by chance"; without the probability assessment the jury doesn't know whether the matching patterns "are as common as pictures with two eyes, or as unique as the Mona Lisa". State v. Johnson, 905 P.2d 1002,1006 (Ariz.App. 1995). The fact that a witness may be an expert in the biochemical field of DNA analysis does not necessarily make him or her a qualified expert in the

statistical area. See Perdomo; Gibson; Hudson v. State, 820 So.2d 1070,1072-74 (Fla. 5th DCA 2002). While it is not mandated that the witness be a statistician or a mathematician, it is required that the witness display sufficient knowledge of the statistical method used. Perdomo; Gibson.

In the instant case, the state's DNA witness was Patricia Bencivenga, a forensic serologist with the FDLE. She holds a B.S. degree in microbiology from U.S.F. Asked if she had any training in vital statistics either in college or on the job, she replied "[a] little of both" (41/3097). The prosecutor asked:

> Are you subject to any annual or proficiency tests?
>
> A: Yes. At FDLE, we take a minimum of two external and one internal proficiency test yearly.
>
> Q: As part of those tests, are you tested in the statistical analysis of your DNA results?
>
> A: No, we are not. (41/3098)

[Contrast Hudson v. State, 844 So.2d 762,764 (Fla. 5th DCA 2003)(after remand, state established, inter alia, that its witness "maintains her certification in DNA analysis, a component of which involves passing regular testing in statistical analysis")].

Bencivenga testified that the database used by the FDLE was set up and maintained by the FBI, according to the National Research Council's guidelines, and has been validated by peer literature (41/3098-99).

Defense counsel, citing Gibson, objected to Bencivenga's testimony on the statistical significance of a DNA match on the ground that she was not shown to be qualified (41/3110-11). The

prosecutor said he would ask a few more predicate questions. He elicited from Ms. Bencivenga that the database consists of approximately 200 samples from each of the major population groups: Caucasian, African-American, and Southeastern Hispanic (41/3111). She reiterated that the database had been validated by the N.R.C. guidelines, and by peer literature which she had read (41/3111-12). The database is:

> set up and maintained at the FBI. The samples were collected at the University of North Texas, shipped to the FBI who actually performed the DNA analysis and had statisticians actually perform the various calculations that we use.
>
> In addition to the calculations that were derived, we're also trained at FDLE to be able to manually or hand-calculate the same calculations that are using so we don't have to strictly rely on the computer program. (41/3112).

The prosecutor directed the trial judge's attention to the Hudson opinion on remand, 844 So.2d at 763-64. The judge overruled the defense's objection and allowed Bencivenga to testify as an expert regarding the statistical frequency of a match (41/3113). She proceeded to tell the jury that the faint bloodstain on the pants labeled Q-1-A was a mixture stain; the major contributor matched Kathleen Ross' profile (frequency of occurrence 1 in 940 trillion Caucasians, 1 in 33 quadrillion African-Americans, 1 in 4.9 quadrillion Hispanics), while the profile of the minor contributor did not exclude Richard Ross. The faint bloodstain labeled Q-1-B and the pencil-eraser sized stain labeled Q-1-C were also mixture stains; in each, the major contributor matched Richard (1 in 3 quadrillion Cauc., 1 in 10 quadrillion Af., 1 in 3.2 quadrillion Hisp.), while the profile

of the minor contributor did not exclude Kathleen. The stain labeled Q-1-D, which may have been a “soak-through” from Q-1-A, matched Kathleen’s profile (1 in 420 thousand Cauc., 1 in 1.9 million Af., 1 in 770 thousand Hisp.). The faint swabbing labeled SW-1 was a mixture; the major contributor matched Kathleen (1 in 6.9 quadrillion Cauc., 1 in 16 quadrillion Af., 1 in 18 quadrillion Hisp.), while the profile of the minor contributor did not exclude Richard (41/3109-10,3113-20,3134-38). [These astronomical numbers, derived from a database comprised of approximately 200 samples from each racial group, suggest that it would take one hundred thousand or even a million planet Earths before a random match would be found. (See 41/3111,3113)]. Bencivenga testified on cross-examination:

> DEFENSE COUNSEL: Now, you said something about a computer entry. Is this how you get your statistical number?
>
> A: Correct. It’s a computer program called POPSTAT.
>
> Q: POPSTAT?
>
> A: POPSTAT.
>
> Q: So you’re inputting the information and the computer is giving you the frequency?
>
> A: That’s correct. (41/3130)

Bencivenga testified that there were 37 visible stains on the pants; out of 49 swabbings, 44 were negative for blood. She collected only the five she believed were bloodstains and did not test the other stains (41/3136-37). The bloodstains did not appear to be spatter; Bencivenga saw them as smears or drops, while her colleague saw them as drops (41/3139). Bencivenga acknowledged that there is no scientific way to tell how long a

stain has been on a pair of pants (41/3138). Contamination can occur in the handling of evidence before it arrives at a lab, and people who live in close contact can get their DNA on each other (41/3127).

The statistical frequencies Bencivenga gave are for unrelated individuals (41/3130-31). If people are related, they would share more DNA; they would have more alleles in common (41/3131-32). [A child inherits 50 percent of his or her DNA from each parent (41/3117)]. Therefore, the numbers would change (41/3131). However, according to Bencivenga, there is an "inbreeding coefficient" factored into the calculations which "basically lower our numbers just in case there has been any relatedness that has occurred" (41/3131, 3151).

Bencivenga testified that you always try to get samples from all possible contributors in a given case. In this case she specifically requested a known DNA sample from Blaine Ross, but she never received one. Therefore, she knows nothing about Blaine's DNA profile (41/3128).

[Note that during the January 7-8 interrogation, Blaine provided an oral DNA swab at Detective Waldron's request (23/484,544)].

See also Young v. State, 879 A.2d 44,56 n.12 (Md. 2005) (noting that FBI's DNA Advisory Board recommends that where there is reason to believe a relative could have been a contributor of the evidence, the best course of action is to obtain a reference DNA sample from the relative)]. Nevertheless, Bencivenga remained of the opinion that the samples contained a mixture of two

individuals' DNA, not simply one individual who is an offspring (41/3117-18;3149,3153).

Despite having two opportunities to lay the required predicate, the state failed to establish that Ms. Bencivenga was qualified to testify as an expert in this field. While she is tested for proficiency in the biochemical aspects of DNA comparison, the FDLE does not test her for proficiency in statistical analysis (41/3098). Contrast Hudson, 844 So.2d at 764. Even more importantly, she demonstrated no personal knowledge of the statistical methods used to come up with the astronomical numbers she gave the jury. As in Perdomo, she did not expressly state whether she used the "product rule", nor did she explain what that is. See Perdomo, 829 So.2d at 284 ("Although Alpisar gave a general description of the method he employed, he did not expressly state that he used the product rule, nor is his testimony adequate to deduce that he used that method. We decline the state's invitation to theorize whether Alpisar "seemed" to employ the product rule method").

The product rule, in turn, relies on two assumptions, both of which must exist in order for its calculations to be accurate. The first, known as "Hardy-Weinberg" equilibrium, assumes that members of the racial groups represented in the databases mate randomly within their group and thus mix the gene pool evenly, while the second, known as "linkage equilibrium" assumes that the DNA bands identified by the RFLP procedure are not related to each other, and are thus statistically independent. See People v. Dalcallo, 669 N.E.2d 378,387 (Ill. App. 1996); see also Martinez

v. State, 549 So.2d 694,697 (Fla. 5th DCA 1989)(DNA statistical evidence is based on Hardy-Weinberg equilibria formula); State v. Johnson, 905 P.2d at 1006 ("[u]nder the product rule, each DNA matching band (allele) is presumed to provide statistically independent evidence, and the frequencies of the individual alleles are multiplied together to obtain a frequency of the complete DNA pattern").

The closest Bencivenga came to explaining the statistical method used was to agree with defense counsel's statement on cross that "basically it's the principle of multiplying statistical values, correct?" (41/3129). That is woefully insufficient. Compare Hudson, 820 So.2d at 1073-74 (witness' qualifications insufficiently established where "the record does not reveal the statistical methodology used, beyond simple multiplication") with Hudson, 844 So.2d at 764 (after remand)(witness was shown to be qualified where, inter alia, (1) she maintains her certification, a component of which requires passing regular testing in statistical DNA analysis, and (2) she "gave a detailed explanation of the statistical method she used as well as the actual calculation she performed in this case").

The harmful effect of having an unqualified expert give the jury such extraordinary numbers without a meaningful explanation of how they were arrived at is compounded by the fact that (in Bengivenga's opinion) four of the five stains - - the exception being the possible "soak-through"- - contained mixtures of DNA at only some (7,6,1, and 1) loci (41/3118-20). See Wynn v. State, 791 So.2d 1258 (Fla. 5th DCA 2001)(state's expert explained that

National Research Council recommends that in cases of DNA mixture, the product rule should be used for both the numerator and the denominator); Roberts v. Unites States, 916 A.2d 922,927-28 and n.3 and 4 (D.C. 2007) (using the formula for mixed samples usually produces much more conservative numbers than single-source profiles).

Although the District Courts of Appeal in Perdomo, Hudson, and Gibson remanded for an evidentiary hearing to afford the state an opportunity to establish whether the witness was in fact qualified, here the state has already had its bite at that apple. See Bevil v. State, 875 So.2d 1265,1269 (Fla. 1st DCA 2004). The prosecutor examined Bencivenga concerning her qualifications in statistical analysis (41/3096-99), and when the defense made its objection based on Gibson the prosecutor again attempted to lay a predicate (41/3110-13). Consequently, as in Bevil, "the situation is no different from any other appeal based on an evidentiary error, where the appellee might have demonstrated admissibility in the trial court, but did not". See also Greene v. State, 351 So.2d 941,942 (Fla. 1977) and Smith v. State, 372 So.2d 86,88 (Fla. 1979) in which, in other contexts, this Court reversed for new trials and expressed disapproval of "piecemeal" appellate remedies which can result in erosion of due process.

[ISSUE IV] THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO PROVE (1) ROBBERY (AS A SEPARATE OFFENSE AND AS THE PREDICATE FELONY FOR FELONY-MURDER); (2) THAT THE KILLINGS WERE MOTIVATED BY FINANCIAL GAIN; AND (3) PREMEDITATION.

[For purposes of this argument, undersigned counsel will assume without conceding Blaine Ross' identity as the person who

committed these murders].

The state's theory of the case at trial was that Blaine killed his parents, who were in the process of divorcing, because his mother was cutting off or at least strictly limiting his access to her money. The asserted basis for the robbery charge was the hypothesis that Blaine committed the murders in order to take his mother's purse, which, the state contended, contained her ATM card and her Sam's Club card. As the prosecutor pointed out, the Rosses were asleep and Blaine could easily have taken the purse, which was right inside the doorway, without any violence. However, according to the state's hypothesis, Blaine was not interested in making some quick withdrawals before the card would be cancelled; he wanted "unrestricted access to his mother's account" (7/1344;49/4374-75).

While of course it is conceivable that Blaine is so stupid, or was so addled by drugs and alcohol, that he thought he could tap his mother's bank account indefinitely after their bodies were discovered, undersigned counsel would submit that this is a less than reasonable inference.

A criminal conviction based on circumstantial evidence cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis which would negate an essential element of the crime. Kinsler v. State, 873 So.2d 551,555 (Fla. 1st DCA 2004), citing State v. Law, 559 So.2d 187 (Fla. 1989). Similarly, an aggravating factor based on circumstantial evidence "must be inconsistent with any reasonable hypothesis which might negate the aggravating factor". Geralds v. State, 601 So.2d 1157,1163

(Fla. 1992); Harris v. State, 843 So.2d 856,866 (Fla. 2003); Brooks v. State, 918 So.2d 181,206 (Fla. 2005). Aggravating factors, like convictions, require proof beyond a reasonable doubt, not mere speculation derived from equivocal evidence or testimony." Brooks, at 206.

The evidence in this case pertaining to robbery and financial motivation is equivocal and speculative at best. In his sentencing order finding the merged aggravating factor, the trial judge essentially acknowledged as much: "Whether he killed his parents in order to obtain the inheritance he expected to receive upon their deaths or simply to obtain his mother's bank card and the funds available therein, the Court cannot be certain" (8/1387). No evidence in this case established that Blaine was slated to receive an inheritance, or that he expected to receive an inheritance, or that that was in any way a motive for the murders. For all we know the Rosses, aware of Blaine's immaturity, impulsivity, and drug problems, may have left everything to their daughter.

Nor did the state prove that Blaine killed his parents in order to steal his mother's purse and its contents. The evidence is at least equally consistent - - maybe more so - - with the version of the killings which Blaine acknowledged after hours of interrogation by Detective Waldron. The evidence shows beyond question that Blaine was a deeply troubled young man with an anger problem, largely manifesting itself in conflict with his father. [His girlfriend Erin and his sister Kim corroborated Blaine's statements that he had a close and loving relationship

with his mother (39/2750;2789;41/3089; see 41/3080,3082;42/3237, 3260-63;43/3446,3506;46/3852,3854)]. He was upset about his parents' separation and impending divorce, and very angry at his father for cheating on his mother (and his perceived hypocrisy in his choice of a partner) and breaking up the family. Blaine was up late at night on January 6-7, taking Xanax, smoking marijuana, and drinking alcohol (see 8/1393), and nothing was alleviating his anger. It was suggested by Waldron that Blaine might have gone to his house and when he saw his father's car in the drive-way that was what triggered his rage. The nature of the killings themselves - - as Waldron repeatedly pointed out - - strongly indicates that they were committed in a rage.

Blaine told Waldron that he didn't remember the actual killings, but he recalled being at the foot of his parents' bed and realizing what he'd done. [The state introduced no evidence refuting Blaine's impaired memory]. In a panic, Blaine began pulling out drawers and taking things; trying to cover his tracks by making it look like a burglar had broken in. In his statements to Waldron, Blaine said he was just grabbing things without thinking. Asked if he thought he might have dumped the jewelry from the glass case into his mom's purse, Blaine said he could have (when in fact he could not have because, unknown to both Waldron and Blaine, the jewelry was at his grandmother's house). At trial, the state continued to assert that after the killings occurred Blaine "staged" a burglary (see 37/2505-07;38/2629-34;40/2947-50,2993-95;46/3867-70).

The circumstantial evidence does not exclude the reasonable

hypothesis that the taking of the purse and its contents was done in the effort to stage a burglary, after killing his parents in an emotional rage fueled by drugs and alcohol. When the taking occurs as an afterthought, as opposed to being the motive for the force or violence, robbery is not established. See Kinsler; Knowles v. State, 632 So.2d 62,66 (Fla. 1993); Parker v. State, 458 So.2d 750,754 (Fla. 1984). Moreover, absent the unproven financial gain hypothesis, the evidence in this case does not prove that the killings were premeditated; which requires "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide." Spinkellink v. State, 313 So.2d 666,670 (Fla. 1975); quoting McCutchen v. State, 96 So.2d 152 (Fla. 1957); see also Mitchell v. State, 527 So.2d 179,182 (Fla. 1988)("[a] rage is inconsistent with the premeditated intent to kill someone"). This Court should reduce Blaine Ross' conviction of first degree murder to second degree murder, and vacate the robbery convictions.

[ISSUE V] THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED.

Florida law reserves the death penalty for only the most aggravated and least mitigated of first degree murders. Urbin v. State, 714 So.2d 411,416 (Fla. 1990); Cooper v. State, 739 So.2d 82,85 (Fla. 1999); Almeida v. State, 748 So.2d 922,933-34 (Fla. 1999); Crook v. State, 908 So.2d 350,357 (Fla. 2005). This Court's "inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most

aggravated, and (2) the least mitigated of [first-degree] murders". Cooper, at 85; Almeida, at 933; Crook, at 357 (emphasis in opinions). The instant case meets neither criterion.

If this Court finds the circumstantial evidence insufficient to prove the merged robbery/financial gain aggravator, that leaves only a single aggravating factor (the contemporaneous homicides of two victims)(8/1383-84) alongside substantial mitigation (including both mental mitigators based on the trial court's finding that Blaine's drug use may have impaired his self-control and his ability to think clearly)(8/1389-94,1396-99). See Green v. State, 975 So.2d 1081,1088 (Fla. 2008). Even if this Court were to uphold the second aggravator, however, this is still not among the "most aggravated" first degree murders which this Court has reviewed. Significantly, neither the HAC nor the CCP aggravating factors was found by the trial court or argued by the prosecution in the instant case. These are "two of the most serious aggravators set out in the statutory sentencing scheme", and their absence, while not controlling, is relevant to the proportionality analysis. Larkins v. State, 739 So.2d 90,95 (Fla. 1999); see (and contrast) Buzia v. State, 926 So.2d 1203,1216 (Fla. 2006). Nor does Blaine have a prior history of violent crime (see 8/1388-89). The attack on his parents was an unprecedented explosion of violence which occurred during a period of intense family turmoil. See Almeida, 748 So.2d at 933 (Almeida's present crime and his prior capital felonies "all arose from a single brief period of marital crisis that spanned six weeks." Blaine told Detective Waldron that he didn't remember the actual

commission of the murders; the state presented no evidence disproving that assertion, and Blaine's state of intoxication from alcohol, marijuana, and Xanax tends to corroborate it.

As far as the mitigation prong, the trial court found both the impaired capacity and extreme mental or emotional disturbance mitigators. Since these are "two of the weightiest mitigating factors – those establishing substantial mental imbalance and loss of emotional control" [Santos v. State, 629 So.2d 838,840 (Fla. 1994)], and since there was also voluminous testimony from over a dozen family members and friends (including the same four family members whom the state had earlier presented as victim impact witnesses) attesting to Blaine's generous, helpful, and loving nature before he got involved with drugs (47/4032-4111; 48/4251-98;49/4336-63; see 47/3996-99,4003-06), it cannot be said, under the totality of the circumstances, that this is among the least mitigated of first degree murders. Moreover, in basing his findings of the mental mitigators solely on Blaine's drug and alcohol use, the trial court ignored uncontradicted evidence that Blaine suffers from a significant mental disorder. See Coday v. State, 946 So.2d 988,1000-05 (Fla. 2006); Crook v. State, 813 So.2d 68,74-76 (Fla. 2002); Knowles v. State, 632 So.2d 62,67 (Fla. 1993). Both Dr. Maher (a psychiatrist) and Dr. Wood (a neuropsychologist) diagnosed Blaine as suffering from a preschizophrenic condition, i.e., the brain illness and deterioration which precedes full-blown schizophrenia (48/4133-38,4149-50,4187-88,4214-17). Dr. Wood testified that Blaine Ross is the most mentally ill defendant of the 80-100 he has examined (48/4187);

his choices “are seriously contaminated by disturbed psychotic and bizarre thinking” (48/4217), and he comes close to the legal standard for insanity (48/4240-41). [The state’s witness, Dr. Eikman, is not an expert on psychiatric or psychological disease; he did not address Dr. Wood’s diagnosis in his testimony; and he did not know whether a PET scan could or could not assist in determining whether Blaine Ross is suffering from schizophrenia (47/4039-45). Note also that Dr. Wood’s diagnosis was based on many factors (including interviews with Blaine, his sister, and friends) in addition to the PET scan (48/4186-87,4195-99,4209-16), and that Dr. Maher’s diagnosis - - not addressed at all by Dr. Eikman - - was also based on a multiplicity of sources including personal examination (48/4131-34)].

CONCLUSION: Appellant respectfully requests this Court to reverse his convictions (and death sentences) for a new trial, at which his statements to Detective Waldron will be inadmissible.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Carol Dittmar, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of September, 2008.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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