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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER O236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

As to Sub-Issue H (Coercive Interrogation Techniques Producing an Involuntary Confession) and Issues 2,3,4, and 5, appellant will rely on his initial brief.

TABLE OF CITATIONS

ISSUE I

E. Custodial Interrogation

In its recent plurality opinion in Rigterink v. State, ____ So.2d ____ (Fla. 2009)[2009 WL 217966] [1], this Court, citing Stansbury v. California, 511 U.S. 318 (1994) and Berkemer v. McCarty, 468 U.S. 420 (1984), reiterated that the determination of whether an interrogation is custodial - - and thus subject to the constitutional protections of Miranda[2] - - depends on the objective circumstances of the interrogation, not on the subjective views of either the interrogating officers or the person being questioned. However, the perception or intent of the interrogating officer becomes relevant for purposes of the objective test when the officer's views are disclosed or articulated by word or deed to be suspect during the course of the interrogation. The Court in Rigterink wrote:

> Similar to the traffic-stop situation at issue in Berkemer, at some point the words and conduct of the interrogating officers may transform that which once was a non-custodial, "voluntary" event into a custodial interrogation, which then triggers Miranda, See, e.g., Mansfield v. State, 758 So.2d 636,644 (Fla. 2000)(the interrogating detectives converted a "voluntary" interview into a custodial interrogation where: [1] [the defendant] was interrogated by three detectives at the police station, [2] he was never told he was free to leave, [3] he was

[1] Rigterink is a 4-2 decision, with Justices Quince, Pariente, and Lewis joining in the plurality opinion, Justice Anstead concurring in result only, Justices Wells and Canady dissenting, and Justice Polston not participating. The plurality opinion therefore does not constitute binding precedent, but it can be persuasive authority. See Allen v. State, 636 So.2d 494,498 n.7 (Fla. 1994); Jones v. State, 640 So.2d 1084,1091 n.11 (Fla. 1994)(Kogan, J., concurring); Barbour v. Haley, 471 F.3d 1222,1229 (11th Cir. 2006); United States v. Gonzalez-Lauzan, 437 F.3d 1128,1139 n.8 (11th Cir. 2006).

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

> confronted with evidence strongly suggesting his guilt, and [4] he was asked questions that made it readily apparent that the detectives considered him the prime, if not the only, suspect"); Caso v. State, 524 So.2d 422,424 (Fla. 1988)(finding the defendant "in custody" and stating, "Contrary to the defendants in Beheler and Mathiason, Caso did not initiate the contact with police. Moreover, Caso was interrogated at the police station and was not specifically informed that he was not under arrest, despite being confronted with evidence which implicated him in the crime....").

The Court distinguished Oregon v. Mathiason, 429 U.S 492,495 (1977) and California v. Beheler, 463 U.S. 1121,1123-25 (1983), emphasizing that in those cases (1) the defendants were explicitly told they were not under arrest, (2) the interviews only lasted thirty minutes, and (3) the defendants were free to leave post-interview. The Rigterink opinion further noted that Mathiason is now "of dubious validity" because it "employed a now abandoned subjective test" regarding the officer's confronting the defendant with evidence of his guilt, and cannot be squared with the modern objective test recognized in Berkemer v. McCarty and Stansbury. In applying the objective test, it doesn't matter how strongly the interrogating officer believes in his mind that the person he is questioning is guilty, but it becomes highly relevant to the custody determination if he communicates that belief (or, as in the instant case, communicates it vehemently and repeatedly) to the interviewee. It is irrelevant whether the officer has focused on the interviewee as his prime or only suspect, but it is highly relevant if he tells the interviewee he is the prime or only suspect. And it doesn't matter how much evidence the police may have pointing to the interviewee's guilt, but it matters very much

if the interrogating officer confronts the suspect with evidence (either real or fabricated) strongly suggesting his guilt. Rigterink; Mansfield v. State, 758 So.2d 636,643-44 (Fla. 2000); Caso v. State, 524 So.2d 422,424 (Fla. 1988).

Rigterink restates the four Ramirez[3] factors to be used as a "channeling mechanism" for determining, under the objective test and under the totality of the circumstances, whether a reasonable person in the defendant's shoes would have felt free to terminate the interview and leave:

> (1) the manner in which police summon the suspect for questioning;
>
> (2) the purpose, place, and manner of the interrogation;
>
> (3) the extent to which the suspect is confronted with evidence of his or her guilt; [and]
>
> (4) whether the suspect is informed that he or she is free to leave the place of questioning.

In the instant case, as in Rigterink (*22), only the first of these four factors weighs in favor of the state's position. But an interrogation which is noncustodial at its inception may become custodial as it progresses, and as its tone and content change from investigatory to accusatory. See also 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).

The remaining three factors clearly show that Blaine Ross was subjected to hours of unwarned custodial interrogation by Detective Waldron - - questioning which was harsh, systematic, and exhaustive (see especially 17:00-17:30 on the videotape) and

managed with psychological skill (17:30-19:00). See Missouri v. Seibert, 542 U.S. 600,615-16 (2004). During those hours, Waldron continually told Blaine he was lying (and bringing his girlfriend and his friend down with him); told him that the police already knew for a certainty that he was guilty; and confronted him with evidence - - some real, some fabricated - - which according to the detective conclusively proved his guilt. By the time (19:20 on the tape) Waldron finally saw fit the administer Miranda warnings, Blaine's psychological and emotional resources were thoroughly broken down, and he had already made numerous incriminating statements which the prosecution later introduced against him in the trial. He admitted that he might have killed his parents; that in light of the blood on his pants he now thought he did kill his parents; that he didn't remember and didn't mean to do it. All that remained to be done, after Waldron's perfunctory administration of Miranda nearly four hours into the interview, was the coup de grace.

In Rigterink (*22) this Court said:

> While the questioning of a suspect within the confines of a police station does not necessarily convert a voluntary interview into custodial interrogation [footnote omitted], the manner in which these detectives conducted Rigterink's questioning-which included repeated accusations and confrontations over several hours that he was lying and was somehow involved in these murders (including confrontation with inculpatory evidence)-militates in favor of the conclusion that a reasonable person in Rigterink's position would not have believed that he or she was free to leave the BCI office or to terminate questioning. Many Florida decisions that have determined the defendant was not in custody have emphasized that the interviewing detectives did not directly contradict

(..continued)

[3] Ramirez v. State, 739 So.2d 568 (Fla. 1999).

> the defendant's story or accuse the defendant of lying. See, e.g., Meredith v. State, 964 So.2d 247,251 (Fla. 4th DCA 2007)(citing Stansbury v. California, 511 U.S. 318 (1994); Pitts; 936 So.2d at 1128). This is not such a case.

In the instant case, Detective Waldron was not so subtle as to merely suggest that Blaine was "somehow involved" in his parents' murders. A full two hours before the Miranda warnings were given he was making statements like "[W]e know what happened...I need to know why" (24/644). "Everything keeps coming back to you, Blaine. Everything centers around you" (24/662); "...There's a lot more that we know, a lot more. And we know the evidence doesn't lie" (25/675-76); "I want to know the truth, Blaine. You know the truth. We know the truth" (25/677). Waldron asked Blaine point-blank if he killed his father, and if he killed his mother (25/681). When Blaine answered "No", the detective replied, "Well, Blaine, I don't believe that. And I'll tell you why. Blood was found on a pair of pants, that matches the crime scene." When Blaine continued to deny that he killed his parents, Waldron said, "Okay, but the blood doesn't lie, the evidence doesn't lie" (25/681-82).[4]

After Waldron informed Blaine (falsely) that he was seen wearing those black pants during the day preceding the night of the murders (25/686-87;27/1082-83;42/3601-02), Blaine said he

[4] 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;see37/2530).

didn’t know how the blood got there (25/687). Waldron replied:

> 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. (25/687-88)

Would any reasonable person in Blaine’s situation, in a small interview room being shouted at by an armed police detective graphically describing how he brutally murdered his parents, and telling him that law enforcement already had indisputable lab-tested scientific evidence establishing his guilt, have felt free to terminate the interview and leave? In State v. Pitts, 936 So.2d

1111,1128 (Fla. 2d DCA 2006), quoted with approval in Rigterink (*24), the appellate court observed:

> 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. That does not mean that whenever a suspect is confronted with some incriminating evidence, the suspect is in custody for purposes of Miranda. 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 nature of the offense.

Here, Detective Waldron informed Blaine that the blood on his pants had already been tested and it matched the murder scene; there was no other way it could have gotten there except when he beat his parents to death. Compare Rigterink (*24):

> Other than a murder weapon or DNA evidence tying the killer to the victims, it is difficult to imagine a more incriminating evidentiary item than one's bloody fingerprints being discovered at the scene of the murders. Along with, and in consideration of all other factors, a reasonable person in Rigterink's position certainly would not have felt free to leave police custody once the detectives disclosed this fingerprint match. Unlike the "potentially self-serving accusation[s]" of cosuspects or codefendants involved in cases such as Pitts, this fingerprint match was very strong physical, albeit circumstantial, evidence of Rigterink's guilt.

The Rigterink and Pitts opinions both recognize that the significance of this factor would be diminished if the suspect had been advised that he was not under arrest and was free to leave; the fourth and final Ramirez factor. In Rigterink, Detective Connolly conceded that neither he nor any of the other detectives informed Rigterink that he was free to leave. The state on appeal stressed the converse; that none of the detectives told Rigterink that he was under arrest or that he was required to remain.

> [H]owever, in Ramirez, we were not concerned with this rephrased inquiry. But see Pitts, 936 So.2d at 1124-25 (engaging in just such a rephrased, converse inquiry). The relevant question is "whether the suspect [wa]s free to leave the place of questioning," not whether the defendant was informed that he or she was required to remain. Ramirez, 739 So.2d at 574. The manner in which we framed the inquiry in Ramirez makes abundant sense because Miranda presumes that incommunicado station-house questioning inherently entails some level of compulsion, which the interrogating officers are always free to dispel by informing or reminding the defendant that the interview is strictly voluntary and that the defendant remains free to terminate questioning and leave the premises.
>
> Decisions from the district courts of appeals are replete with examples of conscientious officers reminding the defendant of the voluntary nature of the interview and his or her ability to leave. See, e.g. Meredith [v. State, 964 So.2d 247,249,252 (Fla. 4th DCA 2007)] (defendant informed that he was not under arrest and that the interview was "strictly voluntary"); State v. Rodriguez, 785 So.2d 759,760-61 (Fla. 3d DCA 2001) (defendant informed that "he was free to leave at any time"). None of the detectives so informed Rigterink. If an interview is truly "voluntary," then it is difficult to understand why any interviewing detective would not undertake this simple expedient, which largely avoids the risk of rendering any unwarned statements inadmissible under Miranda. This is so because a reviewing court is far less likely to find that a reasonable person would have believed that he or she was in custody if the police specifically informed him or her that the interview was strictly voluntary and that he or she was-and continually remained-free to leave at time. See Pitts, 936 So.2d at 1128 n.8. Here, while not singularly dispositive, this factor militates in favor of finding that Rigterink was in custody for Miranda purposes.

Rigterink (*25).

In the instant case, not only did Detective Waldron fail to inform Blaine that he was not under arrest or that he was free to leave, but when Blaine himself indicated that he felt that he was not free to come and go as he pleased, Waldron deliberately obfuscated. The state says in its answer brief:

> Ross criticizes Waldron for failing to clarify Ross' status when Ross asked if they could go smoke a cigarette and offered to let Waldron handcuff him. To the extent that Ross relies on his own statements to suggest that he did not feel he was free to leave, that reliance is misplaced. The test is not a subjective one, but an objective one. Stansbury v. California, 511 U.S. 318, 322-25 (1994); Davis, 698 So.2d at 1188 (inquiry is how a reasonable person in the suspect's position would perceive the situation). (SB41).

The state is absolutely right that the test is objective rather than subjective, but the state omits one key circumstance critical to understanding how a reasonable person would perceive his situation. Blaine did not just ask to go smoke a cigarette and gratuitously offer to be handcuffed. During the previous day's interview, and again during the very early conversational portion of the January 9th interview, Blaine and Waldron had gone downstairs and outside the building to smoke. Shortly after their last outdoor break (24/642-43), when the interrogation resumed, Waldron's tone and demeanor began to change, becoming louder, angrier, and more aggressive as he repeatedly accuses Blaine of lying to him (beginning around 16:41 on the videotape). (24/646-62). From 17:00-17:30 on the tape (and especially during the last five minutes of that time frame), the interrogation reaches its accusatory peak, with Waldron yelling at Blaine; confronting him with the blood evidence and insisting that the evidence doesn't lie; demanding that the time has come to tell him the truth; accusing him of dragging his friends down with him ("You want to see Erin go to prison now? Mikey go to prison? ...For what you did?"); telling him the police knew what happened and the only question was why; and graphically describing to Blaine how he

smashed in his parents' heads and pulled the ropes tighter and tighter around their necks.

Clearly at this point, Detective Waldron's views that (1) Blaine was the prime, indeed the only, suspect and that the police knew for an absolute certainty that he was the killer, and (2) that the physical evidence conclusively proved that Blaine was guilty of the brutal, cold-blooded murder of his parents, were disclosed and articulated by Waldron - - though his words and his demeanor - - to Blaine. See Rigterink; Mansfield; Stansbury v. California; United States v. Griffin, 922 F.2d 1343,1348 (8th Cir. 1990).

It is less than fifteen minutes after this accusatory peak (and more than an hour and half before Miranda warnings were read) when Blaine asks Waldron a favor, "Can we go smoke a cigarette?" Waldron then makes the statement (omitted from the state's argument, SB41) "We can smoke one in here." And it is in response to Waldron's statement that Blaine says, "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). Waldron moved a trash basket and told Blaine to "[p]ut your ashes in here", and for the remainder of the interview, when he smoked, he used that receptacle or a paper cup.

Therefore, contrary to the state's contention, undersigned counsel is not relying on Blaine's subjective feeling that he was not free to leave. Blaine's sense of being in custody was based on the objective circumstances which had unfolded during the previous

hour of accusatory interrogation [see Griffin, 922 F.2d at 1348], coupled with the fact that he would now reasonably perceive that he had just been denied permission to go outside to smoke a cigarette. See Payne v. State, 854 N.E.2d 7,14 (Ind. App. 2006)("...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").

The Rigterink opinion points out that Florida appellate decisions are replete with examples of conscientious police officers reminding interviewees of their freedom to leave; "If an interview is truly "voluntary", then it is difficult to understand why any interviewing detective would not undertake this simple expedient... ." A "reviewing court is far less likely to find that a reasonable person would have believed that he or she was in custody if the police specifically informed him or her that the interview was strictly voluntary and that he or she was - - and continually remained - - free to leave at any time".

In the instant case, when Blaine was told to smoke in the interview room when he asked to go out for a smoke break, and he responded by saying that Waldron could handcuff him to himself to make sure he didn't run, Blaine was communicating to the detective that he believed he was not free to come and go as he pleased. If, in fact, Blaine was free to leave - - which, under the circumstances, is highly unlikely - - Waldron was presented with a perfect opportunity to inform him so. It would have been a simple

expedient for a conscientious police officer, as Waldron acknowledged in the suppression hearing:

> Q: What were you taught to do when the suspect does raise the issue of not feeling free to leave?
>
> DETECTIVE WALDRON: Any time someone brings that up, then you're to clarify or to tell them you know, to answer their question. (27/1058).

Nevertheless, when Blaine clearly manifested his belief that he was not free to leave ("you can handcuff me to yourself to make sure I wasn't gonna run"), Waldron didn't see fit to clarify Blaine's situation; he didn't tell him he was free to leave or terminate the interview, or even that he was free to go outside and smoke. This, according to Waldron, is because Blaine's comment about handcuffing him to make sure he wouldn't run was phrased as a statement rather than a question (27/1059-60). Waldron's deliberate fostering of the (probably correct) impression that Blaine was not free to leave was yet another objective circumstance showing that a reasonable person in Blaine's shoes would have felt exactly the same way Blaine did - - that he was in police custody.

The state's reliance on Yarborough v. Alvarado, 541 U.S. 652 (2004); Thompson v. Keohane, 516 U.S. 99 (1995); and the Ninth Circuit's unpublished opinion on remand in Thompson, 145 F.3d 1341 (table), 1998 WL 230928 (9th Cir. 1998), is misplaced. First of all, those are federal habeas corpus cases with a much more limited scope of review than that applied on direct appeal, especially since the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), under which Alvarado was decided. Accordingly, the Court in Alvarado simply determined that in a case where the

factors bearing on whether the defendant was or was not in custody were more or less evenly balanced, it could not be said that the California appellate court's conclusion that Alvarado was not in custody constituted an unreasonable application of clearly established law. 541 U.S. at 663-66. "We cannot grant relief under the AEDPA by conducting our own independent inquiry into whether the state court was correct as a de novo matter." 541 U.S. at 665. [In contrast, in this direct appeal, the application of the state and federal constitutional law to the factual circumstances under which a confession is obtained is reviewed de novo. Cuervo v. State, 967 So.2d 155,160 (Fla. 2007). Moreover since the January 9th interrogation was videotaped, this Court can independently review it to determine whether the trial court's factual findings were based on competent, substantial evidence. Cuervo, 967 So.2d at 160; see Almeida v. State, 737 So.2d 520,524 n.9 (Fla. 1999); Dooley v. State, 743 So.2d 65,68 (Fla. 4th DCA 1999)].

As for Thompson v. Keohane, the state juxtaposes a footnote from the U.S. Supreme Court opinion (setting forth passages from the transcript of the interrogation which are neither included nor discussed in the unpublished Ninth Circuit opinion), with the result reached by the Ninth Circuit on remand, to misleadingly suggest a composite holding that the officer's accusatory questioning did not lead to a finding of custody (SB43).

What the Supreme Court actually held in Thompson (under pre-AEDPA standards of review)[5] is that on federal habeas corpus

[5] See Kunkle v. Dretke, 352 F.3d 980,985 (5th Cir. 2003); Hoyle v.

review a state court's determination of whether a defendant was in custody for Miranda purposes is not entitled to a statutory presumption of correctness, but instead is a mixed question of law and fact warranting independent review by the federal habeas court. 516 U.S. at 106-16. On remand, the Ninth Circuit (in an unpublished disposition not intended to be cited either as binding or persuasive precedent)[6] affirmed the federal district court's denial of habeas relief based primarily on the fact that the state police informed Thompson numerous times that he was free to leave. Therefore the Ninth Circuit decision in Thompson (assuming arguendo that the state's reliance on the unpublished disposition is procedurally acceptable) is entirely consistent with the recognition in the Rigterink opinion that a reviewing court is far less likely to find that a reasonable person would believe himself to be in custody if the police have specifically informed him that he "was - - and continually remained - - free to leave at any time".

In the instant case, Blaine Ross was never informed that he was free to leave or terminate the interview. He was subjected to hours of intense accusatory interrogation, and when (in response to being told to smoke in the interview room instead of going outside) he suggested that Detective Waldron could handcuff him to the detective to make sure he didn't run, Waldron played semantic games to avoid informing Blaine whether he was or was not free to leave. By any fair analysis of what a reasonable person would have believed, Blaine was in custody at least from around 5:00 p.m.

(..continued)
Ada County, 501 F.3d 1053 (9th Cir. 2007).

(17:00 on the videotape) on January 9th, nearly two and half hours before Miranda warnings were given. During the interim occurred the angriest, most graphic, and most accusatory portion of the interrogation, when Blaine was continually accused of lying, and was confronted by Waldron with repeated assertions that the blood on his pants matched the crime scene and conclusively proved his guilt. Then, when these tactics eventually succeeded in getting Blaine to acquiesce to Waldron's constant suggestions that he might have killed his parents and not remembered doing it, Waldron's approach shifted dramatically as he assumed the demeanor of a compassionate counselor, purporting to want to help Blaine and employing - - as he acknowledged (27/1088-90) - - various minimization techniques (e.g., "I'd rather be able to tell your sister that this was all a horrible accident...", 25/695) to procure incriminating admissions during this still-unwarned portion of the interrogation; statements which ultimately were introduced against Blaine at trial.

F. "Two-Step" Interrogation to Circumvent Miranda

At around 17:30 on the videotape, after Detective Waldron had vehemently insisted that the lab had already tested the blood on Blaine's pants and it indisputably proved his guilt, Waldron showed Blaine the crime scene photographs again, saying "These are your parents. Is this how you want them to be remembered?" (25/692). Waldron said he was going to have to "walk out of here and tell your sister what I know" if Blaine didn't tell him the

(..continued)
[6] See Hart v. Massanari, 266 F.3d 1155,1178 (9th Cir. 2001).

truth (25/693). Waldron then went back to asking Blaine if it was possible he blocked out the murders and couldn't remember (25/690,693). At this point, Blaine acknowledged that, in view of the information he'd been given by the detective and in view of his inability due to his drug and alcohol use to remember the time sequence, "it is a possibility that I could have done this and not remembered" (25/694).

For the next two hours of unwarned interrogation - - with Waldron now speaking in the sympathetic voice of a clergyman or counselor, in marked contrast to his dominating inquisitorial demeanor from 17:00 to 17:30 - - Blaine intermittently makes incriminating statements in response to Waldron's now-gentle prodding; that he remembered being mad and upset at his dad for cheating on his mom (25/699-701,729,738); that he has on a previous occasion exploded in anger and punched a hole in the wall and not remembered doing it (25/701,704-05); (when Waldron suggested that this time something very similar happened with the murder of his parents) "this is the scary part, now I think that I did do it" (25/705); that if he killed his parents he didn't mean to (25/705); that he knew that his girlfriend Erin wasn't at his parents' house, when Waldron says "Blaine, you were there", Blaine replies, "[t]hat's what the evidence says" and "I can't deny the evidence, the hard evidence that puts my pants - - puts me - - " (25/727,see 731); that he has an anger problem (25/728); that he doesn't remember what would have made him snap (25/729); that Waldron made him feel like he did do this (25/730); that he

didn't know if he went there or not, but he may have blacked out or been blinded by rage (25/736); that he didn't plan to kill his parents, but the things Waldron was saying made sense (25/737).

The State argues on appeal that because Blaine did not explicitly state that he did kill his parents until after Miranda was read, the constitutional principle of Missouri v. Seibert, 542 U.S. 600 (2004) - - that police officers may not circumvent Miranda by interrogating in successive unwarned and warned stages, especially when this technique is part of a deliberate game-plan as opposed to an inadvertent oversight - - does not apply (SB44-50).

In Rigterink (*23), the plurality opinion stresses "that the modern practice of in-custody interrogation is psychologically rather than physically oriented" and that one of the central premises of Miranda is that official compulsion is often psychological. In Missouri v. Seibert, 542 U.S. at 615-16, it was stated that:

> The contrast between [Oregon v. Elstad, 470 U.S. 298 (1995)] 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 degree 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 ge-

> nuine choice whether to follow up on the earlier admission.

The facts of Seibert were at the opposite extreme, revealing "a police strategy adapted to undermine the Miranda warnings". The unwarned interrogation took place at the police station, the questioning was "systematic, exhaustive, and managed with psychological skill", and the warned phase occurred in the same location after a pause of only 15 to 20 minutes. 542 U.S. at 616.

In the instant case, Blaine Ross, sitting in a corner in a small interview room at the CID building, was subjected to hours of unwarned accusatory interrogation by a large, armed police detective; some of which was intense and confrontational and some of which involved a serious of minimization techniques; and the whole thing was managed with psychological skill to (1) break down Blaine's defenses; (2) convince him that his situation was hopeless; and (3) offer him a "lifesaver rope" (or a mirage) to avoid a death sentence and to provide closure for his family. As Dr. Gregory DeClue explained in the suppression hearing:

> In looking at the linguistic chronology of an internalized false confession, the person may begin by saying I didn't do it. I know I didn't do it, in response to pressure from the police who is saying but you did do it; But I know I didn't do it. As the person listens to more and more evidence that's presented, may include some true, some false, or totally false evidence, but the evidence you've told me about means I must have done it. Continuing, But I don't remember doing it; But I must have done it; again, referring back to the evidence showing that he did it. If the person gets to the point where he doubts his memory, Maybe I did do it, but I don't remember doing it.
>
> How do you explain that the evidence shows you were there, even though your memory isn't solid? This is the type of statement that a person makes who is making an,

who is giving an internalized false confession. Maybe I did do it but I don't remember doing it; I really don't think I did do it, but if I did, I didn't mean to. Now the person hasn't bought into -- has no memory of it, but once that rescue rope, the life preserver --

Q: Lifesaver?

A: Lifesaver rope that the police have shown with the accident technique -- if you did this and you say you didn't mean to, the police may have suggested or implied or said that you don't get, face as big a penalty -- so if I did it, I didn't mean to. (26/884-85, see also 954-55).

The linguistic chronology described by Dr. DeClue parallels the sequence of gradually more and more incriminating statements which Detective Waldron was able to procure from Blaine during the unwarned portion of the January 9th interview. Similarly, minimization techniques such as the lifesaver rope and the "accident" scenario were used pre-Miranda, as Waldron acknowledged on cross:

Q: In the interrogation school did they teach you how to use the, what I call the lifesaver technique?

A: Yeah, I've heard that discussed before.

Q: Explain it to the Judge, how it works?

A: Give a person a, something that they can cling to, something that they can use as an excuse, as a way out to try to lessen what they've done.

Q: In other words, there may be a bad way that something happened and another way that's not so bad, and if they choose the one that's not so bad, things might not be so bad for them?

A: Somewhat to that extent, to where they're able to disclose, make some admissions without going into full detail, maybe make some excuses for themselves of why something happened.

Q: And you use that technique with this, with Blaine Ross in this interrogation?

A: Not consciously, but from reviewing, I did attempt that.

Q: On page 54, you suggested that it was just a horrible accident, right?

A: That's correct.

Q: And you also suggested on page 52 and 53 that he doesn't remember all of this because of his drug use, that he blocked it out?

A: That's correct. (27/1088-89).

Waldron further acknowledged that explaining the difference between the death penalty and some time in prison, depending on whether the crime was planned or spur of the moment, was part of the same technique (27/1089-90).

So it can be seen that Blaine's ultimate confession was simply the end point of a sequence of incriminating admissions which Detective Waldron procured from Blaine by confronting him with physical evidence (some true, some fabricated, some based on lab testing which Blaine was falsely told had already been performed), and by using minimization and scenario techniques which carry a high risk of producing false confessions. See Dr. DeClue's testimony, 26/855-969;27/976-1052; State v. Sawyer, 561 So.2d 278 (Fla. 2d DCA 1990); Commonwealth v. DiGiambattista, 813 N.E.2d 516,524-27 (Mass. 2004). Everything except the coup de grace was done pre-Miranda.

The state's argument in the instant case seeks to limit Missouri v. Seibert to situations where a full confession made without Miranda warnings is subsequently repeated after Miranda warnings. However, nothing in either the Seibert plurality opinion

or Justice Kennedy's concurring opinion supports such an unreasonably restrictive view. The plurality focuses on objective factors - - the completeness and detail of the prewarning interrogation, the overlapping content of the two rounds of questioning, the timing and circumstances of the two interrogations, the continuity of police personnel, the extent to which the interrogator's questions treated the second round as continuous with the first - - to determine whether the "two-step" interrogation method was used to undermine the Miranda warnings. Justice Kennedy's concurrence focuses on whether the "question-first" technique was deliberately used to circumvent Miranda. Both the plurality and the concurrence disapprove the "two-step" method in no uncertain terms, and both opinions place great weight on whether curative steps (such as advising the suspect that his pre-Miranda statements could not be used against him) were taken. As Justice Kennedy stated, "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 (emphasis supplied); see also United States v. Briones, 390 F.3d 610,613-14 (under Justice Kennedy's analysis focusing on whether "two-step" method was part of a deliberate strategy, postwarning statements related to the substance of what was said earlier are inadmissible in the absence of curative measures); United States v. Gonzalez-Lauzan, 437 F.3d 1128,1136 (11th Cir. 2006)(same).

In Martinez v. State, 272 S.W.3d 615,624 (Tex. Crim. App. 2008)(en banc), the Texas Court of Criminal Appeals wrote:

> When a question-first interrogation begins, it cannot be known whether the suspect will incriminate himself, but the suspect's rights as set out in Miranda have already been violated. Although both Elstad and Seibert involved incriminating statements in the first interrogation that were repeated in the second, that was not the focus of the holdings. In both cases, the prime concern was the constitutional rights that the Miranda decision was intended to protect. Seibert at 611,619,621,124 S.Ct. 2601 (whether warnings could function effectively, as Miranda requires (plurality); "whether admission of the evidence under the circumstances would frustrate Miranda's central concern and objectives"; whether the two-step interrogation technique was used in a calculated way to undermine the Miranda warning (Kennedy, J., concurring)). It is immaterial to our consideration whether incriminating statements emerged from the unwarned interrogation.

In the instant case, Blaine made numerous incriminating statements during the unwarned interrogation, which were introduced against him by the prosecution at trial. The psychological progression of procuring admissions that he might have done it, that he now believes he did it, that he didn't mean to do it, was an integral part of the entire process; to bring Blaine to the precipice of a full confession. At that point, nearly four hours into the interrogation, Waldron said to Blaine in an offhand manner, "There's a couple of things that I need to go over with you real quick. There's a couple of things that 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". Blaine asked if he was being arrested and Waldron said, "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"

(25/742-43).

Clearly, Waldron was treating the second round of interrogation as continuous with the first, and he wanted Blaine to see it that way too. He downplayed the significance of the Miranda warnings before he gave them, and he certainly did not advise Blaine that the incriminating admissions he'd made during the last few hours could not be used against him.

In his order denying the motion to suppress, as quoted by the state (SB44-47), the trial judge relies in part on United States v. Gonzalez-Lauzan, 437 F.3d 1128 (11th Cir. 2006). However, the factual circumstances of Gonzalez-Lauzan are the polar opposite of those in the instant case; much as the circumstances in Elstad differ from those in Seibert. In Gonzalez-Lauzan, the appellate court expressed doubt as to whether the initial unwarned segment constituted an "interrogation" at all under Rhode Island v. Innis, 446 U.S. 291 (1980), but even assuming arguendo that it did, it clearly did not amount to deliberate use of an interrogation technique designed to undermine Miranda. That is because just before the interview commenced the officers gave Gonzalez-Lauzan an introductory admonition that "we are not asking you any questions. We don't want you to say anything. We just have something to say to you and we ask that you listen to it so that you can understand where we are coming from". The officers then described the evidence they had accumulated against Gonzalez-Lauzan, who mostly sat and listened, though he would occasionally blurt out a comment like, "I'm no mastermind", "I'm not the kingpin", or "I'm

not the person." Three times during this portion of the session, the officers repeated that they were not asking questions and Gonzalez-Lauzan should just listen. When Gonzalez-Lauzan suddenly made an unsolicited statement, "Okay, you got me", the officers immediately advised him of his Miranda rights "without first pursuing any questioning or obtaining any detail." 437 F.3d at 1130-31,1136-38. The officers testified in the suppression hearing that it was their intention from the beginning to give Miranda warnings before asking any questions. 437 F.3d at 1137. In addition, there was no hostility displayed by the police officers during the session. 437 F.3d at 1132,1138. (Contrast the instant case, videotape 17:00-17:30).

Under those facts, it is hard to fault the Eleventh Circuit's conclusion that "[b]ecause the officers had yet to ask Gonzalez-Lauzan a single question" before the time they provided Miranda warnings, and because they had repeatedly informed him that he should just listen, there was no circumvention of Miranda and the warnings, when given, were adequate to accomplish their purpose. Compare Gonzalez-Lauzan with the instant case, in which Detective Waldron was well aware that under the Sheriff's Department's long established written policies (not to mention the state and federal constitutions) Miranda warnings are required when questioning progresses to an accusatory stage, yet - - after consultation with his superiors and colleagues - - decided to dispense with them in the instant case. (Waldron opined in the suppression hearing that these are just guidelines, and "in certain circumstances you have

to go outside of those guidelines", but he never explained what it was about the instant case that made Miranda warnings unnecessary. Undersigned counsel would suggest that a double-murder investigation focusing on a 21 year old suspect would, if anything, require more careful adherence to procedures based on constitutional guarantees, in order to protect the suspect's rights, ensure the reliability of any statements, and (from the state's perspective) to obtain admissible, untainted evidence. The state cavalierly says in its brief, "Of course, there is no requirement that a confession be suppressed simply because an officer violates department policy..." (SB47-48). To the contrary, the reason this confession must be suppressed is because it was obtained by means of Detective Waldron's multiple violations of constitutional requirements. His blatant violation of department policy is relevant as one of the many factors showing that his extreme circumvention of Miranda was far from inadvertent, but rather was part of a deliberate strategy. (A strategy which was enabled, or at least acquiesced in, by the elected Sheriff and other officers).

One other point must be made on the Seibert sub-issue. The state asserts that Waldron's administration of Miranda rights four hours into the January 9 interrogation was prompted by his "having learned that law enforcement had discovered a ski mask stained with blood in Ross' car" (SB48,see47-49). [The ski mask apparently turned out to have nothing to do with the case. Blaine explained that that the blood came from his having sex with Erin while she

was on her period (25/747-49), and presumably testing revealed nothing inconsistent with that explanation, since the ski mask was not introduced into evidence at trial (SB48,n.11)]. This somehow indicates, according to the state, that the hours of unwarned interrogation which preceded this discovery was something other than a deliberate circumvention of Miranda.

Why would Waldron think he could belabor the blood on Blaine's pants, telling him (falsely) that the lab had already tested it and it indisputably connected him to the scene of his parents' murders, and that he'd been seen wearing those pants on the day before the night of the murders - - insisting to Blaine repeatedly every time he would deny involvement that "the evidence doesn't lie" - - without benefit of Miranda warnings, yet feel compelled by the discovery of some additional blood on a ski mask in his car to now advise Blaine of his rights? The departmental orders specify that constitutional rights warnings are to be given when the questioning becomes accusatory, and that ship had sailed hours earlier. Waldron's asserted explanation in the suppression hearing was as follows:

> MR. HOCKETT [defense counsel]: Why did you wait until the latter part of the January 9 statement to read Miranda, as opposed to doing it early on, at least on January the 9th?
>
> DETECTIVE WALDRON: Earlier on there still was insufficient evidence or enough in my mind probable cause to charge Blaine Ross. And he had requested to talk about what had been discussed on the news and the news media, so my intention was to answer his questions and to try to see if his statement [wavered] at all from what his previous statement was. And then if there was any indication or inconsistencies or anything incriminating, then at that point in time I felt there would be proba-

> ble cause to arrest him, which would necessitate the reading of Miranda. (27/1094).

But the portion of the interview where Blaine was the one asking questions - - where they were talking about media coverage and Crime Stoppers tips and lack of shoes - - was over by 3:37 in the afternoon, and there was a clearly delineated transition between that segment and the beginning of Waldron's interrogation (24/624-25). Miranda warnings were not given until nearly 7:30. During the intervening hours, Waldron repeatedly accused Blaine of brutally murdering his parents, confronted him with actual and fabricated physical evidence, told him that law enforcement already knew he was guilty and the only question was why, exhorted him to be man and tell the truth, raised the spectre of his girlfriend and his best friend going to prison for what he'd done, etc., etc., etc. During much of this questioning, Waldron displayed anger, and during its height (17:25-17:30) it is not a stretch to describe his demeanor as menacing. Waldron continually cross-examined Blaine about purported inconsistencies in his statements, either with what he'd said the day before or with evidence the police had obtained (or which Waldron falsely claimed the police had obtained)(see especially 24/648-64;25/671-79;689), all of which took place two to three hours before anything about a ski mask came up. If it had been Waldron's intention to advise Blaine of his Miranda rights when his statements "wavered at all" from his previous statements, or "if there was any indication or inconsistencies or anything incriminating", he would have done so early in the January 9th interview, somewhere around 4:40 p.m.

(16:41 on the tape) or shortly thereafter, before his interrogation of Blaine reached its accusatory peak.

Also, it should be noted that a police officer's opinion (not communicated to the suspect) of when probable cause to arrest exists is not relevant to the issue of whether a suspect is in custody for Miranda purposes. Coomer v. Yukins, 533 F.3d 477,486 (6th Cir. 2008); citing Stansbury v. California, 511 U.S. at 326.

Finally, even apart from Missouri v. Seibert, Blaine's postwarning statements would still be inadmissible because of (1) Detective Waldron's steamrolling through his invocation of his right to remain silent [Part G], and because of the numerous coercive tactics employed by Waldron throughout both phases of the interrogation which rendered Blaine's statements both involuntary and unreliable. See Oregon v. Elstad, supra, and the testimony of Dr. DeClue [Part H in initial brief].

G. Invocation of Right to Remain Silent

The cases relied on by the state to support its underlying position that, regardless of the circumstances, the suspect's use of the word "think" automatically voids his attempt to invoke his right to remain silent (SB51) simply do not say that. In Rodriguez v. State, 559 So.2d 392 (Fla. 3d DCA 1990), the defendant's statement indicated affirmatively that he was willing to answer the detective's questions but that he had no real knowledge about the case; while in State v. Owen, 696 So.2d 715 (Fla. 1997) it was ambiguous in their context whether Owen's statements referred only to the immediate topic of conversation (the house and the bicycle)

or whether he was invoking his right to cut off questioning. [See appellant's initial brief, p.64,67-68]. No such ambiguity exists in the instant case.

In Walker v. State, 957 So.2d 560,574 (Fla. 2007)(SB51)("I think I might want to talk to an attorney") the key word expressing equivocation is not "think", but "might". See Alford v. State, 699 A.2d 247,251 (Ind. 1998), noting that under Davis v. United States, 512 U.S. 452 (1994):

> [t]he request for counsel must be made with sufficient clarity such that a "reasonable" police officer in the circumstances would understand the statement to be a request for an attorney." Id.; see also Taylor v. State, 689 N.E.2d 699, 702 (Ind.1997). Under Davis, Alford's statement that "I think it would be in my best interest to talk to an attorney" was an unequivocal request for counsel. The statement was not qualified by expressions of doubt, such as "[m]aybe I should talk to a lawyer," Davis, 512 U.S. at 462,114 S.Ct. 2350, or "I guess I really want a lawyer, but...I don't know." Taylor, 689 N.E.2d at 703. Rather, it was an affirmative declaration of Alford's desire to secure his "best interests."

Not only are the state's cases thoroughly distinguishable, the state does not even attempt to address the point made in the twelve other state and federal appellate decisions cited at p.65-66 of appellant's initial brief, all of which recognize that, depending on the context, a suspect's use of the word "think" does not necessarily render ambiguous his attempt to invoke his Miranda rights; nor does his use of the work "think" necessarily mean that a reasonable police officer would not understand that he was trying to assert his right to stop answering questions and making statements. The most thorough analysis is contained in McDaniel v. Commonwealth, 518 S.E.2d 851,853-54 (Va.App. 1999)(en banc) [see

initial brief, p.65]. McDaniel cites to State v. Jackson, 497 S.E.2d 409 (N.C. 1998)[7], in which the North Carolina Supreme Court stated:

> Having held that the defendant was in custody when he made his statement in regard to counsel, we must now determine whether the defendant articulated his desire for counsel sufficiently that a reasonable officer in the circumstances would have understood the statement to be a request for an attorney. Davis v. United States, 512 U.S. 452,114 S.Ct. 2350,129 L.Ed.2d 362 (1994). The trial court found, based on sufficient evidence, that the defendant said, "I think I need a lawyer present." The state, relying on Davis, says that this statement was ambiguous and that the officers were not required to stop questioning the defendant. In Davis, the defendant said, "Maybe I should talk to a lawyer." Id. at 455,114 S.Ct. at 2353,129 L.Ed.2d at 368. The United States Supreme Court held this was not a request for counsel.
>
> Davis is not precedent for this case. The use of the work "[m]aybe" by the defendant in Davis connotes uncertainty. There was no uncertainty by the defendant. When he said, "I think I need a lawyer present," he told the officers what he thought. He thought he needed a lawyer. This was not an ambiguous statement. The interrogation should have stopped at that time.

Note that in Davis, the statement which was found to be ambiguous was "Maybe I should talk to a lawyer". The interview continued for another hour until Davis said, "I think I want a lawyer before I say anything else"; at that point the interrogation ceased. 512 U.S. at 455. See McDaniel v. Commonwealth, 518 S.E.2d at 854, n.1., and Senn v. State, 947 So.3d 596 (Fla. 4th DCA 2007)("At trial, the state introduced Senn's statements to the police that concluded when he stated 'I think I want a lawyer'").

Another interesting twist can be found in State v. Kennedy,

[7] Abrogated on other grounds in State v. Buchanan, 543 S.E.2d 823 (N.C. 2001); see State v. Dix, 669 S.E.2d 25 (N.C. App. 2008).

510 S.E.2d 426,429-30 (S.C. 1998), where the defendant, after being advised of his rights, said, "Well, I think I need a lawyer". The South Carolina Supreme Court, citing the North Carolina Jackson decision, said (emphasis supplied) "We think petitioner invoked his right to counsel and the Court of Appeals erred in concluding otherwise".

See also Commonwealth v. Barros, 779 N.E.2d 693,698 (Mass.App. 2002)(defendant's choice of words "I don't think I want to talk to you anymore without a lawyer", taken in the context in which these words were spoken, was not a mere ambiguous reference); see Commonwealth v. Contos, 754 N.E.2d 647,657 (Mass. 2001); Commonwealth v. Jones, 786 N.E.2d 1197,1206 (Mass. 2003) (use of the word "think", in common parlance, is "an acceptable and reasonable way to frame a request").

In addition, to consider in context Blaine's attempt to invoke his right to remain silent, and whether Detective Waldron (or a reasonable officer in his shoes) would have understood it as such, it must be remembered that virtually all of the caselaw construing Davis v. United States arises from interrogations where the police officers informed the defendant of his Miranda rights when they were supposed to; as opposed to the instant case where Waldron put Blaine through at least three hours of grueling accusatory interrogation, systematically breaking down his psychological and emotional resources and securing a progression of incrimination admissions, before he finally saw fit to read Miranda, which he

(..continued)

told Blaine was “just a matter of procedure...based on everything we’re talking about”. By this time - - not surprisingly - - Blaine’s voice and manner were no longer assertive (as they had been before Waldron began confronting him and calling him a liar), but weak, miserable, and often accompanied by tears and sobbing. Shortly after he was belatedly advised that he had the right to stop the questioning, Blaine tried to invoke the right he’d just been told he had. When Waldron, for the umpteenth time, said “I know you say you don’t think you did this, but there’s the blood on your pants”, there ensued fourteen seconds of silence; then Blaine, shaking his head negatively from side to side at least 10-12 times, said in a broken voice, “I don’t think I can help you any more. I don’t think I have anything else to say” (25/753). There were no “maybes” or “mights”, and it couldn’t be clearer that Blaine was not referring to a limited topic; he was trying to stop the questioning. Contrast Owen. Any reasonable officer would have understood this; and Waldron did understand it, because what he said conveyed that, notwithstanding what he’d just been told, Blaine had to continue. “Gotta make this right, Blaine”. This is not merely an officer continuing to ask questions because he didn’t understand an ambiguous request; this is an intimidating police detective conveying to a young, emotionally drained suspect whose rights have already been violated for hours that the Miranda warnings don’t really mean what they say, and the questioning isn’t going to stop. Nothing in Davis condones such behavior.

I. Harmful Error

As in Rigterink (*26-31), the interrogation and confession permeated the state's entire presentation of its case to the jury: opening statement (37/2521-31); case-in-chief (41/3164-3200: 42/3203-3349;43/3357-3516); closing argument (46/3868,3874-76, 3880-81,3884-88,3891,3893); and the jurors' replaying of the videotape during deliberations (7/1275;46/3926-30). Moreover, the harmful effect of a confession is not 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 155,167 (Fla. 2007); 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).

In the instant case, the state's ability to try the case with the taped confession - - which left the defense with no other viable trial strategy than to vigorously challenge the reliability and voluntariness of the confession - - came after six days of pretrial hearings on the defense's motion to suppress the confession on multiple constitutional grounds. If the state didn't believe the confession was important to its effort to persuade a jury to convict Blaine Ross of first degree murder and to recommend a death sentence, it certainly could have saved a lot of time and resources by simply agreeing not to introduce it. See Gunn v. State, 78 Fla. 599,83 So. 511 (1919):

> It is contended that...no harm could have been done by the admission of the sheriff's testimony. Then why was it offered by the state and admitted by the court? Surely not merely to consume time and swell the record?..Having gotten it before the jury over the objection of the defendant, and a conviction obtained, the

> state cannot be heard to say it was harmless error. Who can say that the testimony...did not and could not have the effect that the state's attorney intended?

See Farnell v. State, 214 So.2d 753,764 (Fla. 2d DCA 1968) (quoting Gunn); State v. Clarke, 808 P.2d 92,94 n.1 (Or.App. 1991); State v. Newman, 568 S.W.2d 276,282 (Mo.App. 1978).

The state on appeal basically argues that the prosecution did Blaine a favor by introducing his confession against him (SB57) ("The jury's examination of the videotape simply demonstrates that the jury carefully considered Ross defense"..."to make sure that they were not being hasty in rushing to find guilt"). Circular logic at its most specious; the confession was the centerpiece of the state's case (and the only direct evidence of Blaine's guilt) - - the defense challenged it because the state introduced it. In addition to being rank speculation about the jurors' actual thought processes [see Keen v. State, 639 So.2d 597,599-600 (Fla. 1994)], the state's suggestion stands the applicable burden of proof on its head. The defense is not required to prove that the error affected the jury's deliberations and verdict; the state is required to show beyond a reasonable doubt that the error could not have affected their deliberations and verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18 (1967). The state's burden has been described as "most severe" [Holland v. State, 503 So.2d 1250,1253 (Fla. 1987); Varona v. State, 674 So.2d 823,825 (Fla. 4th DCA 1996)], and since a confession (and especially a videotaped confession) is "probably the most damaging evidence that can be admitted" against a defen-

dant, and has a “profound impact” on a jury [Arizona v. Fulminante, 499 U.S. 279,296 (1991) and cases cited in initial brief, p.80-81], it is only under the rarest of circumstances when the introduction of an unconstitutionally obtained confession could be shown to be “harmless”.

The state certainly has not came anywhere close to meeting its burden by opining that the prosecution had a “solid case” (SB57) without the confession, and citing to a statement to a credit union manager which (if her testimony was believed to be accurate by the jury) was only circumstantially incriminating when linked to other evidence. See Fulminante, at 296. In any event, “solid case” - - assuming that is what the prosecution would have had - - is not the test for constitutional harmless error, any more than “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.” DiGuilio, at 1139.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol Dittmar, Assistant Attorney General, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of March, 2009.

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,

_____

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SLB/tll