IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner/Cross-Respondent,	:	
vs.	:	Case No. SC14-788 SC14-826 Consolidated
MICHAEL LINDSEY MCADAMS,	:	
Respondent/Cross-Petitioner.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM L. SHARWELL
Assistant Public Defender
FLORIDA BAR NUMBER 0908886

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

ATTORNEYS FOR RESPONDENT

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PRELIMINARY STATEMENT

The interrogation in this case was conducted by two detectives. They will be referred to in this brief as "female detective" and "male detective" as did the opinion below so that this brief may be read in harmony with the opinion below.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as substantially correct for purposes of this appeal with the following additions:

> The video shows that the male detective left the interview room at 2:03 p.m. and returned at 2:04 p.m. He then asked the female detective to leave the room so that Mr. McAdams and he could be alone. Following the female detective's exit, the male detective moved in closer to Mr. McAdams and began to talk to him about the effect a long investigation would have on his parents. The male detective then stated that he had been to Mr. McAdams' home in Hernando County and to Mrs. McAdams' residence in Pasco County. He advised that "the evidence ... is really, really strong" and that detectives found "tons of blood evidence and DNA evidence," including blood on shorts and a t-shirt belonging to Mr. McAdams. The male detective stated, "I've already got a pretty dang good idea of what went down." When Mr. McAdams protested that the blood on his clothing was rat blood from feeding his snakes, the male detective retorted that the blood had been tested and was determined to be human blood with DNA. He told Mr. McAdams, "This isn't gonna go away." He urged Mr. McAdams to tell him what happened. When Mr. McAdams was not forthcoming, the male detective reiterated, "I was at your house until, I think, 3:30 this morning. It's all there, and it won't go away." Mr. McAdams responded that he needed a couple of days to think about things, but the male detective advised, "Regretfully, everything is already set in motion."
>
> Mr. McAdams asked, "Am I gonna be able to leave here today?" The male detective

> responded, "I don't know, Mike. I don't know." Mr. McAdams then suggested that possibly his wife's friend could have killed her. He then began to open up, stating that "[w]hatever happened out there Sunday, I was drunk." When Mr. McAdams did not immediately continue with details, the male detective asked, "What are your intentions, Mike?" Mr. McAdams responded that he hoped his wife would come home, to which the male detective responded, "We both know that's not the case." Mr. McAdams asked, "How do you know that?" The male detective answered, "From all that evidence." Mr. McAdams asked for another drink, and the male detective left the room for two minutes. Once the male detective returned, Mr. McAdams asked him, "What happens now?" The male detective responded, "You and I, we talk it out." After a minute or two more, at 2:27 p.m., Mr. McAdams began to make his incriminating statement, detailing the shooting of the victims and ultimately drawing a map to show where he buried their bodies.

McAdams v. State, 137 So. 3d 401, 411-412 (Fla. 2d DCA 2014)(Davis J. dissenting)

SUMMARY OF THE ARGUMENT

I. The certified question should be answered in the affirmative. The due process clause of the Florida Constitution should be interpreted to required that a person undergoing noncustodial interrogation in a police interview room be informed that a lawyer be told that a lawyer has been on their behalf and is in the public section of the station wanting to talk to them. Providing a person with such information is a matter of fundamental fairness to make certain that any waiver of rights is knowing, intelligent, and voluntary.

II. This Court should find that Mr. McAdams was in custody as outlined by the dissent because any reasonable person in the same situation would not have felt free to leave. The interrogation was transformed from noncustodial questioning to the coercive environment of custodial interrogation after about two hours. Mr. McAdams was confronted with physical evidence of guilt and questioned in a manner making it clear he was a suspect. No reasonable person would have feel free to leave the interrogation room after learning that it was not certain they would be allowed to go home that night.

ARGUMENT

ISSUE I

DOES AN ADULT SUSPECT WHO IS NOT IN CUSTODY BUT VOLUNTARILY ENGAGES IN A LENGTHY INTERVIEW IN AN INTERROGATION ROOM AT A LAW ENFORCEMENT OFFICE HAVE A DUE PROCESS RIGHT TO BE INFORMED THAT A LAWYER HAS BEEN RETAINED BY HIS FAMILY AND IS IN THE PUBLIC SECTION OF THE LAW ENFORCEMENT OFFICE AND WISHES TO TALK TO HIM?

This Court should answer the certified question in the affirmative because the deception by omission of critical knowledge that an attorney hired by family members had arrived to provide assistance is unacceptable conduct by law enforcement. The due process clause, art. 1, section 9, of the Florida Constitution should be interpreted by this Court to prohibit such interference by police with an attorney hired by concerned family members whether or not a person is technically in custody when they are in a section of the police station not open to the public and beyond the reach or shouting distance of his retained lawyer..

Petitioner claims there was no governmental interference in this case. However, it was undisputed that a lawyer hired for Mr. McAdams by his parents was not allowed to see Mr. McAdams. Furthermore, police refused to pass either a phone message to Mr. McAdams or a paper message under the door to let him know that a lawyer retained for him was in the public section of the station to provide assistance.

The lawyer arrived at the station and asked to speak to Mr. McAdams but was told he could not do so because questioning by the

major crimes unit would not be interrupted. When the lawyer asked to have a message passed to Mr. McAdams he was told it was not possible and that a message could not be passed under the door. Respondent acknowledges that the majority opinion below found that Respondent was not in custody at the time of his initial confession. However, this conclusion is vigorously challenged in Issue II.

Mr. McAdams may not have been physically restrained but he was alone with police in a section of the station not open to the general public or the lawyer hired to represent him. Petitioner claims that there was no restraint or interference by a government agent. (Initial Brief at 14) Similarly on Page 18, Petitioner alleges that no interference, deception or concealment occurred by police. There was clear interference, deception by omission, and concealment by police that prevented the lawyer hired for Mr. McAdams from having any contact with him. The lawyer was told a phone message was not possible and that a written message could or would not be slipped under the door. Police action prevented Mr. McAdams from learning prior to his confession that while he was in a closed area of the police station a lawyer hired for him was waiting in the public area of the station ready to assist him.

This Court has previously held that the due process clause of the Florida Constitution requires that a suspect in custody be told by police that a lawyer hired by family members was at the police station waiting to provide assistance to the suspect. In Haliburton v. State, 514 So. 2d 1088 (Fla. 1987), an attorney

hired by the defendant's sister went to the police station to assist the defendant was kept from the defendant despite a court order requiring he be given access. On appeal Haliburton argued that police conduct was more egregious than in Moran v. Burbine, 475 U.S. 412 (1986). Additionally, he argued that he was denied due process under article 1, section 9 of the Florida Constitution. This Court rejected the holding of Moran v. Burbine found that police conduct did not rose to the level of a due process violation:

> We find that this conduct violates the due process provision of article I, section 9 of the Florida Constitution. Again we must agree with Justice Stevens that
>
> > due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits.... Just as the government cannot conceal from a suspect material and exculpatory evidence, so too the government cannot conceal from a suspect the material fact of his attorney's communication.
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> > 106 S.Ct. at 1165-66 (Stevens, J., dissenting).

Haliburton, 514 So. 2d at 1089.

There is little difference between the facts of Haliburton and this case. Just as in Haliburton, a lawyer retained by family members arrived at the police station and was not allowed contact with Mr. McAdams either in person or by transmission of a message to Mr. McAdams. Like the police in Haliburton, the police in this

case not only prevented the retained lawyer from contacting Mr. McAdams but they also failed to tell Mr. McAdams that a lawyer was at the station ready to provide assistance. While Mr. McAdams was not technically in "custody" as in he was being interviewed in an interrogation room in a section of the station under controlled access in a location not open to the public and beyond the communication of the lawyer retained for him.

The cases of Smith v. State, 699 So. 2d 629 (Fla. 1997) and Harvey v. State, 529 So. 2d 1083 (Fla. 1988), cited by Petitioner are distinguishable from Haliburton as well as the present case. In both Smith and Harvey, the defendants were read Miranda rights and indicated that they wished to speak with police. Similarly, both Smith and Harvey involved assistant public defenders who went to the police station without any request from a defendant or a family member.

In contrast, in this case as in Haliburton, the attorney who was denied access to the client was retained by family members. Unlike the defendants in Smith and Harvey, Mr. McAdams was not read his Miranda rights prior to his confession.

Additionally, although the assistant public defender had been appointed by a judge in Smith, the appointment was a nullity because it was barred by Section 27.52, Florida Statutes. This Court held that the appointment in Smith did not act as an invocation of the offense specific right to counsel under both the State and Federal constitutions which required personal invocations by the defendant. This Court explained that

Haliburton was decided under the due process clause of article 1, section 9, of the Florida Constitution, and explained the differences between Smith and Haliburton:

> We distinguish Haliburton on two bases. First, Haliburton did not confront the question of waiver under the Sixth Amendment. Second, we find that the offensive police misconduct which compelled the decision in Haliburton was not present in this case.

Smith, 699 So. 2d at 639.

In State v. Allen, 548 So. 2d 762 (Fla. 1st DCA 1989), an attorney was hired by family members as the defendant was being questioned. The attorney called the booking desk at the jail and was told Allen had not been booked but to call the investigative department at the sheriff's office. The lawyer called the investigative section and was erroneously told that Allen was not there. Allen gave a statement to police after being read *Miranda* rights which he later sought to suppress because of a due process violation. The Court held:

> It should be emphasized that the constitutional error in the instant case was the failure to tell the appellee that an attorney wished to speak with him. That the police did not mean to provide Lipman with erroneous information is not the point. Due process under the Florida Constitution requires that an accused be told that an attorney summoned in his behalf wishes to speak with him, and there is no question that the police in the instant case failed to so inform the appellee, and thus denied to appellee the benefit of the advice of counsel to which he was entitled under both the Florida and federal constitutions. (emphasis added)

State v. Allen, 548 So. 2d at 764.

This is exactly what happened to Mr. McAdams. The result should the same too. A new trial should be ordered so that a proper determination of guilt may be made without either statement.

The court in Allen explained why the State was wrong to rely on Harvey v. State for support:

> The Harvey court distinguished Haliburton on the basis that neither the accused nor any member of his family had requested the assistance of this public defender. Rather, he had taken it upon himself, after learning of the arrest, to inquire whether the accused needed counsel. In Harvey, the Supreme Court noted that in Haliburton *I* the defendant's sister had called a "specific attorney" to represent her brother. 529 So.2d at 1085. Likewise, in the instant case, the record shows that at the time of his arrest, the appellee told members of his family to contact Justin Lipman. Accordingly, Harvey v. State, is not controlling as it is factually distinguishable.

Allen, 548 So. 2d at 764-765.

This Court should hold that article 1, section 9 of the Florida Constitution requires that Mr. McAdams be told of the lawyer retained on his behalf who arrived at the station during his interrogation. The same deception by omission which was condemned by this Court in Haliburton is present in this case. Like the defendant in Haliburton, Mr. McAdams was not told by police while he was in a closed access section of the police station that an attorney hired by family members had appeared at the station to provide assistance to him. This Court should find

a due process violation because police prevented Mr. McAdams from talking with or even learning that a lawyer hired for him by his parents was waiting in the public area of the station to provide assistance. See Haliburton, 514 So. 2d at 1090.

Petitioner cites cases which use the "shock the conscience" language from Rochin v. California, 342 U.S. 165 (1952), as a test for a due process violation. Yet this Court did not use the "shock the conscience" standard in Haliburton. The remedy for the violation that occurred in Haliburton is not dismissal but it is a new trial without the taint of the improperly obtained confession.

The critical nature of this right is made clear by the number of the states who accepted the invitation in Moran v. Burbine to develop their own more protective standard than the minimum required by the United States Constitution. See, Commonwealth v. Mavredakis, 725 N.E. 2d 169 (Mass. 2000); State v. Roache, 803 A. 2d 572, 579 (N.H. 2002); Dennis v. State, 990 P.2d 277 (Okla.Crim.App.1999); State ex rel. Juvenile Dept. of Lincoln County v. Cook, 909 P. 2d 202 (Or. 1996); State v. Simonsen, 878 P. 2d 409 (Or. 1994); People v. McCauley, 645 N.E. 2d 923 (Ill. 1994); West v. Commonwealth, 887 Sw. 2d 338 (Ky. 1988)(Rule requiring access to counsel existing prior to Burbine reaffirmed); State v. Reed, 627 A. 2d 630 (N.J. 1993)("Prior to [Burbine], a majority of the states followed a rule similar to the one we enunciate today, without any apparent diminishment in effectiveness of their law enforcement agencies." ; Bryan v.

State, 571 A.2d 170 (Del.1990); State v. Stoddard, 537 A.2d 446 (1988) (under totality of circumstances Miranda waiver may be involuntary where counsel is denied access to client); Roeder v. State, 768 S.W. 2d 745 (Tex.App.Hous.1988).

Respondent agrees with Petitioner that due process involves a balancing of interests test involving the rights of the suspect versus the interest of the public. Requiring that a non-custodial suspect be informed of lawyer retained by family members while he or she is being questioned in a restricted area of the police station who appears at a police station to provide assistance would not greatly burden law enforcement. Such a measure would also benefit the public and the criminal justice system by ensuring fairness and accuracy in statements made to police and avoiding false or coerced confessions.

As noted by Justice Stevens, the majority rule among the States at the time of Moran v. Burbine was that police had to inform a suspect of a lawyer retained by family members who arrived at he station to provide assistance during interrogation. See Moran v. Burbine, supra at 441 n. 10 (Stevens, J. dissenting). Justice Stevens recognized that the state courts correctly realized that knowledge that an attorney was waiting ready to provide assistance was relevant to a knowing and intelligent waiver of that right. Id. at 455-456.

Justice Stevens found that interference by police with attorney-client communications violated the due process requirement of fundamental fairness. Id. at 468. The same

"fairness, integrity, and honor" which Justice Stevens found lacking in Burbine and that this Court found lacking in Haliburton is also missing from this case. The result should be the same. A new trial should be ordered absent the taint of the entire confession.

The New Jersey Supreme Court also noted that the majority rule prior to Burbine was that police were required to tell suspects of a lawyer retained by family members without any significant reduction in police effectiveness. Additionally, the court noted the benefit of a rule requiring that citizens be told of lawyers hired for them who appear at the station ready to provides assistance:

> [W]e do not hesitate to observe that police and prosecutorial behavior, in denying defendant access to counsel, did not well serve the investigative function. Such conduct does not promote public esteem for the law, and it substantially increases the possibility that a suspect's confession will be involuntary. At a minimum, such conduct must not be encouraged by the courts.

Reed, 627 A. 2d at 647.

The State of New York has a rule of law that would support answering the certified question in the affirmative. In New York, the right to counsel attaches when a retained attorney "enters" the matter under investigation. People v. West, 615 N.E. 2d 968, 970-971 (N.Y. 1993) Once an attorney "enters" a case police are prohibited from questioning a suspect whether or not he or she is in or out of custody. Id., at 971-972. Entry into a case takes place when an attorney appears in person or

communicates by telephone with police. People v. Grice, 794 N.E. 2d 9, 11-12 (N.Y. 2003). The attorney who "enters" the case may be hired personally by the defendant or by family members. People v. Garofolo, 389 N.E. 2d 123, 126 (N.Y. 1979); People v. Pinzon, 377 N.E. 2d 721, 724-725 (N.Y. 1978).

The right to counsel under the New York Constitution applies to protect a defendant who is not in custody for Miranda purposes who voluntarily agrees to be questioned at the police station when a lawyer retained by the defendant's sister called the precinct to identify himself as attorney for the defendant and requested that no questioning take place until he met with defendant. People v. Borukhova, 931 N.Y.S. 2d 349, 363-366 (N.Y. App. Div. 2011). This enhanced right is in part grounded in the State constitutional right to due process. Id. at 364.

The New York Court of Appeals explained the enhanced right to counsel under New York law:

> In short, we recognize that the assistance of counsel is essential not only to insure the rights of the individual defendant but for the protection and well-being of society as well. The right of any defendant, however serious or trivial his crime, to stand before a court with counsel at his side to safeguard both his substantive and procedural rights is inviolable and fundamental to our form of justice.

People v. Settles, 385 N.E. 2d 612, 614-615 (N.Y. 1978).

The Courts in both New York and New Jersey recognized that the suspect as well as society each benefit from a right to counsel under the state constitutions that provides broader

protection than that of the United States Constitution. This Court should also continue to recognize the benefit of providing enhanced protection under the due process clause of the Florida Constitution.

This Court should rule that Mr. McAdams should have been told of the attorney hired by his family who appeared at the station to provide assistance prior to his confession. While the rule of law in New York is preferred such an extension is not required to provide relief in this case.

This Court can and should provide relief by extending Haliburton to cover those individuals being questioned by police in a noncustodial situation where the citizen is in a location controlled by police and beyond the reach of family or an attorney hired by others to represent them. Police should be required to allow the retained attorney access to the individual being questioned, or allow communication to the suspect from the attorney so that the individual knows that an attorney is ready and willing to provide counsel prior to the waiver of any rights.

The misconduct in this case is similar to that in Haliburton as police refused to allow the lawyer retained to assist Mr. McAdams any access to Mr. McAdams even though it was alleged he was not in custody. Police refused to provide even a message so that Mr. McAdams could be informed that an attorney retained for him was in the lobby ready to provide assistance.

The misconduct identified in Haliburton is present in this case. This Court should find a due process violation just as it

did in Haliburton for the reasons stated in Haliburton as well as in Reed. Police should be required to provide access to an attorney retained for an individual being questioned in a location beyond the reach of the public and the attorney hired to assist the individual. Alternatively, police should be required to pass messages or other communication to the individual so that they may learn than an attorney has been retained for them and is ready to provide assistance prior to waiver of any constitutional rights. As noted by the court in Reed such a rule would promote public esteem for law and the police as well as reduce involuntary confessions from the coercive environment of incommunicado interrogation.

The precise conduct by police condemned by this Court in Haliburton took place in this case. Respondent was deceived by the failure of police to tell him that a lawyer hired by his family had arrived to provide assistance to him. The due process clause of the Florida Constitution required that Mr. McAdams be told that a lawyer hired by family was ready and willing to provide assistance at the station.

Petitioner argues that the Second District Court of Appeal overlooked a harmless error analysis but does not acknowledge that the issue was raised for the first time in these proceedings [by successor counsel] in a motion for rehearing. It is entirely possible that the Court below considered harmless error but found the error harmful. The Second District Court of Appeal has previously demonstrated an ability to apply harmless error

analysis despite a lack of argument by the State. See Green v. State, 826 So. 2d 351, 353 (Fla. 2d DCA 2002)

The focus [of the harmless error test] 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." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986)(emphasis added). The State must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict," which in turn

> requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. at 1135 (citations omitted).

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 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.

The effect of the error in admission of the second confession is not harmless even assuming for argument sake that the initial confession was properly admitted. First, the second

confession serves as verbal confirmation of the first confession. Second, the actual location of the bodies as well as the bodies themselves provides physical confirmation of the initial confession. Lastly, as noted above in Cuervo, Rice, and Nguyen, the effect on trial strategy is such that the error should not be considered harmless.

Respondent acknowledges that the State presented more than sufficient evidence to convict but would argue that is not the standard under DiGuilio. As explained by this Court:

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached.

Ventura v. State, 29 So. 3d 1086, 1089 (Fla. 2010), (quoting State v. DiGuilio, 491 So. 2d 1129, 1138-1139 (Fla. 1986)); see also, Cooper v. State, 43 So. 3d 42, 43 (Fla. 2010)(remanding for review under DiGuilio standard where court found error harmless due to "substantial evidence" of guilt).

This Court should answer the certified question in the affirmative to hold that all of Mr. McAdams confession should be suppressed. Alternatively, if this Court denies relief on Issue II, then it is requested to affirm the ruling of the Second District Court of Appeal.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT WAS NOT IN CUSTODY WHEN CONFRONTED WITH EVIDENCE AGAINST HIM, QUESTIONNED IN A MANNER SUGGESTING HE WAS A SUSPECT, AND WAS TOLD "I DON'T KNOW" WHEN HE ASKED IF HE WOULD BE ALLOWED TO GO HOME THAT NIGHT?

The Second DCA incorrectly concluded that Mr. McAdams was not in custody at the time of his initial confession to police. It is undisputed that at the start of questioning that Mr. McAdams was not in custody as he was specifically told he was not under arrest. However, the situation transformed into the coercive environment of a custodial interrogation approximately two hours later.

Mr. McAdams was confronted with evidence of guilt and questioned in a manner that made it clear to him that he was a prime suspect. When Mr. McAdams asked if he would be allowed to go home that night the response from the only detective in the room was "I don't know." Mr. McAdams then asked about possible penalties before giving a full confession. Mr. McAdams should have been told of the lawyer hired by his parents who appeared at the police station to provide assistance as well as read his Miranda rights.

This Court is requested to view the videotaped interrogation. 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 was 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.

This issue is not the basis for jurisdiction over this case but this Court has jurisdiction over other properly raised and argued issues because jurisdiction because jurisdiction was accepted by this Court on the certified question. Price v. State, 955 So. 2d 401, 406 (Fla. 2008); Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982). This Court should exercise its discretion because this issue was raised below in both the trial court and the Second District Court of Appeal.

"[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 extent 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.
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> 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.

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, 988 So. 2d 52 (Fla. 1st DCA 2008). Mr. McAdam was not in custody at the start of the questioning because was told he was not under arrest such that an ordinary person in the same circumstances would have felt free to get up and leave.

However, two hours later the nature of the questioning changed dramatically to transform the questioning to a custodial interrogation. The initial questioning of Mr. McAdams involved questions from a male and a female detective about the nature of Mr. McAdams' relationship with his wife as well as account for Mr. McAdams' activities between the prior weekend and the day of the interrogation which was on a Friday.

Police reminded Mr. McAdams that they had been at the home occupied by his wife as well as at his house executing a warrant. Mr. McAdams was told that blood was found at both locations. When Mr. McAdams was attempted to explain that blood on a shirt found at his residence was rat blood from feeding his many snakes he was interrupted by the male detective. The detective told him that he was wrong because it had been tested and was human blood containing DNA. Mr. McAdams was confronted with evidence and questioned in a manner that made clear that he was a suspect.

When Mr. McAdams asked if would be allowed to go home that night he was told "I don't know." Mr. McAdams as well as any other reasonable person in the situation would not have felt free to leave. As if to remove any doubt as to whether he was in

custody, Mr. McAdams then proceeded to ask about possible prison sentences. Only then did he confess to the instant offenses.

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 Mr. McAdams was subjected coercive custodial interrogation before he finally acquiesced the wishes of law enforcement. 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).

Regarding the purpose, place, and manner of the interrogation, the place was a small room in a section of the Hernando County Sheriff's Office that was under controlled access. The nature of the interrogation changed over the over two hour period. At first, Mr. McAdams was asked general questions by a male detective and a female detective in a non-accusatory manner about the relationship with his wife. He was also asked about what he did and where he went from the weekend prior to the disappearance to the day of the interview.

A fundamental change took place in the interview room when the male detective returned to the interrogation room and asked the female detective to leave so that he could be alone with Mr. McAdams. The detective moved physically closer him in the small interview room. Mr. McAdams was confronted with physical evidence

from his own residence as well as the home occupied by his wife. Mr. McAdams was told that his explanation for what appeared to be blood had been proven wrong. The detective told Mr. McAdams that the substance he explained as being rat blood from feeding numerous snakes was in fact human blood containing human DNA. The transformation of the nature and focus of questioning made it clear that police did not believe Mr. McAdams' version of what had taken place during the week and that he was considered a suspect from whom police wanted an explanation.

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 the suspect with evidence - - whether real or fabricated or in the gray area between - - which, according to the interrogator, prove the suspect's guilt. Mr. McAdams was confronted with blood evidence from his wife's residence as well as his own. He was

clearly told that blood which he said was rat blood from feeding his snakes, was in fact human blood with DNA.

Mr. McAdams was repeatedly told that he knew the more and that police would have to get to the bottom of the story. 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 decisions in Mansfield, Rigterink v. State, 2 So. 3d 221 (Fla. 2009), reversed on other grounds, Florida v. Rigterink, 559 U.S. 965 (2010) and Ross v. State, 43 So. 3d 403 (Fla. 2010), this Court should compare the circumstances of Mr. McAdams' interrogation by police 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, police had executed a warrant at Mr. McAdams' residence and had been inside the house occupied by his wife. Mr. McAdams was informed that police had found blood at the house occupied by his wife as well as in his own home. Mr. McAdams attempted to explain that some of the blood found at his residence on clothing was rat blood from rats used to feed pet snakes. He was directly

told by the male detective that this explanation was wrong because tests showed it to be human blood containing DNA. Furthermore, the manner of questioning made it clear that police were focused on Mr. McAdams as suspect by repeatedly asking what had taken place at the house.

Surely by this point Mr. McAdams knew, as any reasonable person in his situation would know, that police 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").

In this case after being confronted with the evidence and faced with repeated police demands for an explanation of what had taken place, Mr. McAdams asked if he would be allowed to go home that night. Mr. McAdams was told "I don't know." While this response did not directly inform him he was free to leave or not

leave, it was a change in circumstances from the start of the interrogation that would cause any reasonable person to believe they were no longer free to leave. As if to remove any doubt as to the custodial nature of the interrogation Mr. McAdams then proceeded to ask about possible deals or sentences immediately before giving his confession.

This Court should examine all of the circumstances including viewing the recorded interrogation to conclude that Mr. McAdams was in custody and should been told about the lawyer who arrived after being retained to assist him as well as being read his Miranda rights. This case is similar to the previously discussed Mansfield case for concluding after analysis of the Ramirez factors that Mr. McAdams was in custody prior to his confession to police. Like the Appellants in both Rigterink v. State, and Ross v. State, 43 So. 3d 403 (Fla. 2010), Mr. McAdams initially went to the police station on his own and was without a doubt free to leave. However, as in both Ross and Rigterink, the interrogation was transformed from non-custodial to custodial.

In Ross, the nature of the questioning changed from trying to explain in consistencies in his story to accusatory questioning which confronted Ross with bloody pants and other evidence claimed to be beyond dispute. While Ross had been permitted to go outside to smoke earlier in the questioning, he was told to smoke in the interrogation room when he requested a second break. In Rigterink, the interrogation started out voluntarily but was transformed into custodial interrogation when

the questioning became highly accusatory pointing to him as a suspect and he was confronted with evidence of bloody fingerprints.

As in Rigterink and Ross, the interrogation may have started out in a non-custodial fashion but was transformed to non-custodial when the interrogation change in nature from simply accounting for time and actions to highly accusatory questioning focusing on Mr. McAdams as a suspect and confronting him with evidence of guilt. The initial questioning in Ross was similar to the similar to the initial questioning in this case as was the transformation to accusatory questioning and confrontation with evidence.

It is undisputed that during the initial part of the questioning, Mr. McAdams was free to leave. However, the change in circumstances when Mr. McAdams asked if he would be allowed to go home that night is similar to the change in circumstances when Ross asked to smoke for a second time and was told to smoke in the interrogation room when he had been previously allowed to smoke outside. The change in circumstances communicated to an ordinary person in either man's place that he or she was no longer free to leave.

The introduction of Mr. McAdams full confession was not harmless error. In Cuervo v. State, 967 So. 2d 155, 167 (Fla. 20070, 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.

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, 281 S.W. 3d 277 (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,

Payne, 854 N.E. 2d at 16-17; Logan, 906 A. 2d at 381]. The confession in this cannot be shown to be harmless beyond a reasonable doubt, as the DiGuilio standard requires, that it could not have contributed to the 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.

This case would be dramatically different without the highly persuasive recorded confession. Without this confession the State's case would be more difficult since the State would have only circumstantial evidence of guilt. See U.S. v. Szymaniak, 934 F. 2d 434, 440 (2d Cir. 1991) (confession obtained in violation of Miranda not harmless error because other evidence

circumstantial); U.S. v. Perdue, 8 F. 3d 1455, 1469 (10th Cir. 1993) (confession obtained in violation of Miranda not harmless because confession only direct evidence linking defendant and crime).

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

Mr. McAdams should have been told of the lawyer hired for him by his parents who arrived at the police station to provide assistance prior to his confession. The failure of police to tell Mr. McAdams about the lawyer violated his right to due process as guaranteed by article I, section 9, of the Florida Constitution.

The trial court's harmful error in allowing the state to introduce McAdams' confession obtained in violation of Miranda 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. Mr. McAdams should be given a new trial without the taint of his illegally obtained confession.

CONCLUSION

Based upon the foregoing argument, authorities, and reasoning, this Court is respectfully requested to order that Respondent's entire confession be suppressed. Alternatively, it is requested that the opinion of the Second District Court of Appeal be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com and to Helene.Parnes@myfloridalegal.com , on this 20th day of August, 2014.

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,

/S/WILLIAM L. SHARWELL
Assistant Public Defender
Florida Bar Number 0908886
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
rsharwell@pd10.state.fl.us
stock_k@pd10.state.fl.us

HOWARD L. "REX" DIMMIG, II
Public Defender
TENTH Judicial Circuit
(863) 534-4200

wls