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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/
Cross-Respondent,

v.

MICHAEL McADAMS,

Respondent/
Cross-Petitioner.

Case Nos. SC14-788; SC14-826
CONSOLIDATED

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

The instant case has two separate case numbers based on both parties having filed notices to invoke discretionary jurisdiction of this Court. The above cases are hereby consolidated, on this Court's own motion, for all appellate purposes. The State of Florida has been ordered as Petitioner/Cross-Respondent for this appeal.

The State is seeking this Court's review because the Second District Court of Appeal's opinion ordered a new trial despite the fact that the court found the pre-Miranda statements were properly admitted. The Second District failed to conduct a harmless error analysis. The State further disagrees with the Second District's opinion extending Haliburton to the post-Miranda evidence even though there was an absence of outrageous police conduct.

## STATEMENT OF THE CASE AND FACTS

Relevant to this appeal, McAdams moved to suppress his confession and evidence collected after he confessed. The Second District Court of Appeal reversed McAdams' judgment and sentences. Specifically, the Second District held that McAdams was not "in custody" for Miranda purposes when he confessed to murder during his interview at the sheriff's office. The Court did, however, certify a question of great public importance with regard to this holding:

> 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?

The Second District further held that the officers' failure to inform McAdams that a private attorney was waiting to talk to him violated due process once his interview turned custodial upon his confession and arrest. McAdams, 137 So. 3d 401, 407 (Fla. 2d DCA 2014).

The facts as set forth by the Second District Court of Appeal in its opinion are as follows:

Michael McAdams was convicted of murdering his wife, Lynda McAdams, and her coworker and boyfriend, Ryan Andrews. He was

sentenced to two consecutive life sentences. [] Lynda McAdams and Ryan Andrews were reported missing by their families. During the course of the missing persons' investigation, a detective searching for Lynda McAdams entered her Pasco County home, and based on his observations, detectives from major crimes became involved in the investigation. The detectives contacted Mr. McAdams at his parents' home in Hernando County and obtained his written consent to search his wife's residence. Although Mr. McAdams no longer lived at the Pasco County home, detectives presumably sought his consent because he still co-owned the home with Mrs. McAdams.

Mr. McAdams moved to suppress the evidence seized during the search of his wife's residence. The trial court denied the motion finding that the initial entry was justified by exigent circumstances and that the subsequent search was done with Mr. McAdams' consent. After the search of Mrs. McAdams residence, Hernando County detectives visited Mr. McAdams at his home and asked him if he would be willing to meet with the Pasco County detectives who were investigating his wife's disappearance. He agreed and accompanied them to the Hernando County Sheriff's Office to meet with the detectives from Pasco County. The entire interview, which lasted approximately two and a half hours, was videotaped. During this interview, Mr. McAdams confessed to killing his wife and Mr. Andrews. At that point the detectives

advised Mr. McAdams of his Miranda rights, which he waived. He then led detectives to where he had buried the bodies of Mrs. McAdams and Mr. Andrews. He also showed them where he had left Mr. Andrews' car, and he took them to where he had disposed of the gun he had used in the murders.

Unbeknownst to Mr. McAdams, while he was being interviewed an attorney hired by his parents had arrived at the sheriff's office. The attorney asked that the interview be terminated and that he be allowed to speak with Mr. McAdams. The detectives conducting the interview declined both requests and continued with the interview without telling Mr. McAdams about the attorney. It was not until after Mr. McAdams had taken the detectives to the place where he had buried the bodies of his victims that the detectives told him about the attorney. []

The trial court denied the motion after concluding that Mr. McAdams was not in custody at the time he confessed and that the detectives' delay in advising him about the attorney was not misconduct that would amount to a due process violation.

McAdams, 137 So. 3d at 403.

At the suppression hearing and at trial, additional evidence was presented. The victims had been reported missing by their families. (T. 81-84, 88). The two victims had been missing for days, and the victims who were coworkers had not gone to work or called in; this was unusual for both of them.

(R. 516-517). There was evidence that the victims were involved in a relationship and there was a pending divorce between McAdams and Mrs. McAdams. Mrs. McAdams' neighbor, knew that Mrs. McAdams was having an affair with Mr. Andrews. McAdams had asked Ms. Ervin to go to Mrs. McAdams' home and check on the horses and to give them food and water. (T. 129-130). Nicole McAdams, the McAdams' daughter, reported seeing on October 19th, McAdams' van backed up to the front of Mrs. McAdams' home with its rear doors open and the seats removed. (R. 517-518, T. 123-124).

Evidence further revealed that McAdams co-owned the residence. Blood was found on the washing machine and on the clothing inside the washer. Several bottles of cleaner, a box of latex gloves, and silver and black duct tape were found in the kitchen and entryway. A mop with blood on it was found in the sink. Gunshot fragments and a bullet hole in the master bedroom door were found. All bullet projectiles found came from the same gun. Mrs. McAdams truck was at the home. There was evidence of attempts to clean the home, and to clean clothing and towels. There was also evidence that clothes were burned. (R. 773-774, 779, 856; T. 148-152, 188-191, 196-197).

The State further admitted into evidence McAdams' statement made to his daughter, "If I ever catch a man in my house, I'm going to kill him." (T. 110-111). Two witnesses, Justin Brand and Craig Lisk, testified that on October 19th, the day after the

murders, they helped McAdams move his truck, which was stuck in a heavily wooded area in Hernando County. They saw a shovel in the truck. (T. 366-367, 370).

The evidence showed that at the time of the murders, McAdams was living at a residence on Glover Drive in Spring Hill. Approximately eight months later, Nelson Diaz and Gladys Ortega rented this home and found Mrs. McAdams' purse in the attic with her ID and/or credit cards and her broken cell phone inside. Mrs. McAdams' cell phone had blood on it. Evidence further showed that the last phone call on her cell phone was from Mr. Andrews on day of the murder, October 18th, showing that she was in the vicinity of her home in Pasco when this call was received, not in Hernando County where the cell phone was ultimately recovered. (T. 359-360, 393-394, 397-398).

## SUMMARY OF THE ARGUMENT

No due process violation had occurred when McAdams initially confessed to the crimes because he was not in custody and thus was not under any police restraint. Moreover, no attorney-client relationship was established since McAdams was not in custody. The State further submits that no due process violation occurred once McAdams was read Miranda and in custody since the police conduct was not outrageous. Even if this Court finds error in admitting the post-Miranda evidence, it was harmless since McAdams admitted pre-Miranda that he shot the victims, cleaned up the bodies, dumped them and buried them. And the confession made after Miranda was given was almost identical to the confession made pre-Miranda. The only difference between the pre-Miranda and post-Miranda statements was the information leading to the location of the victims' bodies, and this evidence did not affect the verdict in this case.

## 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?**

There cannot be a due process violation when there has been no government interference, and no attorney-client relationship has been established. The crucial aspect in the instant case is that McAdams was not in custody when this attorney retained by his family appeared at the police station to speak with him. The police were investigating two missing persons. The police were questioning several persons including McAdams regarding the whereabouts of the victims. Although the police suspected foul play, at the time McAdams was being interviewed at the station, they still did not know whether the victims were alive and what had occurred. Their focus was attempting to find the victims and speak to all family members, friends, co-workers and any other persons who may have come into contact with them. McAdams was a potential suspect, but he was never restrained in any way. Ramirez v. State, 739 So. 2d 568 (Fla. 1999); State v. Pitts, 936 So. 2d 1111 (Fla. 2d DCA 2006).

When a person is placed under arrest and taken into

custody, everything changes. "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself." Article 1, section 9 of the Florida Constitution. "As the Supreme Court explained in Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed. 2d 437 (1992), the "'freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.'" Mitchell v. State, 911 So. 2d 1211, 1216-1217 (Fla. 2005). Governmental misconduct that violates a defendant's due process rights under the Florida constitution requires dismissal of the defendant's criminal charges. Anderson v. State, 574 So. 2d 87, 92 (Fla. 1991). "This court reviews de novo the trial court's legal conclusion as to whether the facts constitute a due process violation." State v. Cannon, 57 So. 3d 892 (Fla. 4th DCA 2011); State v. Myers, 814 So. 2d 1200, 1201 (Fla. 1st DCA 2002). No governmental misconduct had occurred when McAdams initially confessed to the crimes because he was not in custody and thus was not under any police restraint.

Generally, the courts require outrageous police conduct when determining due process violations. Outrageous police conduct is evaluated under the due process provisions outlined by this Court. It requires reviewing the totality in order to ascertain whether they offend the canons of decency and

fairness which express the notions of justice. See Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Due process is violated when the conduct of law enforcement is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction. Tercero v. State, 963 So. 2d 878 (Fla. 4th DCA 2007); State v. Glosson, 462 So. 2d 1082, 1084 (Fla. 1985).

It is a balancing test and the Court must weigh the rights of the Defendant against the government's need to combat crime. McDonald v. State, 742 So. 2d 830 (Fla. 4th DCA 1999). Courts have noted that due process, unlike some legal rules, is not a technical conception with a fixed content. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951). Cases finding a due process violation based on outrageous conduct have one common thread: affirmative and unacceptable conduct by law enforcement. State v. Glosson, 462 So. 2d 1082 (Fla. 1985); Bist v. State, 35 So. 3d 936 (Fla. 5th DCA 2010)("…we do not find the methods employed by law enforcement so outrageous that due process considerations would bar prosecution.").

It must be conduct that "shocks the conscience." Rochin, 342 U.S. at 172, 72 S.Ct. at 209. This rule is narrowly applied and is limited to those instances where the government's conduct so offends decency or a sense of justice that the judicial power

may not be exercised to obtain a conviction. Rochin, 342 U.S. at 173; Hamon v. State, 744 So. 2d 1065, 1067-68 (Fla. 4th DCA 1999)("Simply put, the selling of imitation cocaine instead of real cocaine neither shocks the conscience of this court nor does it offend those canons of decency and fairness which express the notions of justice."); Malinski v. New York, 324 U.S. 401, 416-417, 65 S.Ct. 781, 89 L.Ed. 1029 (1945). And the mere use of deceit does not violate due process. Bist, 35 So. 3d at 940. There are no Florida cases that have extended the due process defense beyond the in custody situation present in Haliburton v. State, 476 So. 2d 192 (Fla. 1985), hereinafter Haliburton I; Haliburton v. State, 514 So. 2d 1088 (Fla. 1987), hereinafter Haliburton II (This Court found that the conduct of law enforcement was so outrageous as to violate the Defendant's due process rights); Compare State v. Myers, 814 So. 2d 1200 (Fla. 1st DCA 2002)("Recent Florida cases have been reluctant to extend the parameters of the due process defense.").

In Haliburton I, this Court held that although a suspect has previously been informed of his right to counsel, he must be informed when his counsel actually appears and seeks to advise him. The State appealed that decision to the United States Supreme Court in Florida v. Haliburton, 475 U.S. 1078 (1986) and the Supreme Court remanded the case back to this Court to be consistent with its decision in Moran v. Burbine,

475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed. 2d 410 (1986), which had been decided a few months earlier. In Burbine, the Court held that the failure to inform a suspect of telephone calls from his attorney did not undermine the validity of a custodial defendant's waiver of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). In Haliburton II, this Court looked to the facts and suppressed the confession on a due process claim.

The facts of Haliburton are clearly distinguishable from the case at bar. In Haliburton, the Defendant was arrested at 6:30 a.m. and post-Miranda was questioned until 9:30 a.m. He submitted to a polygraph at 10:00 a.m. and 2:05 p.m. The attorney arrived at the stationhouse at 4:00 p.m. and when refused access, he got a court order at 4:18 p.m. requiring the police to give him access. Id. at 194. It was only after the judge called a second time did police stop the questioning. This Court noted that the Defendant's right to counsel present during custodial interrogation may be waived, but the police refused access even though the judge called police and a court order was issued. Id. at 194-195.

Here, an attorney arrived at the stationhouse while detectives were conducting a non-custodial interview with McAdams. The lead detective decided not to allow the attorney to be part of the interview and never told McAdams an attorney

wished to speak with him. The attorney then left and McAdams made various admissions before and after Miranda. The actions of law enforcement in this case do not mirror the outrageous conduct of law enforcement in Haliburton.

"In Haliburton, the court determined that certain police conduct violated the due process provision of the Florida Constitution. However, the court did not hold or suggest that the basis for the decision was that the due process provision of the Florida Constitution is to be construed more broadly than the Due Process Clause of the United States Constitution." Barrett v. State, 862 So. 2d 44, 48 (Fla. 2d DCA 2003). The case at bar is materially distinguishable from the Haliburton case and all other cases concerning due process violations. Haliburton concerned itself with law enforcement not allowing a custodial defendant to have access to his attorney, as well as law enforcement disregarding a court order compelling access.

Moreover, even after a telephone call from a judge requiring access by counsel, law enforcement continued its questioning of the defendant. In the case at bar, there was no court order nor phone calls from a judge. Importantly, since McAdams was not in custody, a court order compelling access would have never been issued. Detective Christensen's actions do not meet the threshold requirement of outrageous conduct.

As opined by the Second District Court of Appeal:

> We believe there is a critical distinction between this case and Haliburton. Unlike Mr. McAdams, the defendant in Haliburton was in custody and had been read his Miranda rights, which he had waived at the time his attorney was trying to see him.

McAdams, 137 So. 3d at 407. When an individual is not in custody, there can be no due process violation. No restraint or interference by a government agent has occurred. A comparison can be made with Jenkins v. Anderson, 447 U.S. 231, 239-240, 100 S.Ct. 2124, 65 L.Ed. 2d 86 (1980).

In Jenkins, the U.S. Supreme Court examined whether pre-arrest, pre-Miranda silence could be used to impeach a defendant. The defendant was not apprehended until he turned himself in two weeks after he stabbed and killed the victim. Jenkins, 447 U.S. at 232. The U.S. Supreme Court held in Jenkins that the defendant's pre-arrest, pre-Miranda silence could be admitted to impeach, provided it was admissible under the applicable rules of evidence. See Jenkins, 447 U.S. at 239-240 (No Fourteenth Amendment violation occurred because no governmental action induced the defendant to remain silent before arrest; the use of the defendant's pre-arrest silence to impeach his credibility does not violate the Constitution); contra State v. Hoggins, 718 So. 2d 761 (Fla. 1998)("Contrary to the State's assertion, this is not a pre-arrest, pre-Miranda situation like the one in Jenkins, where comments were made

about the defendant's silence during the two-week period between the murder and defendant's surrender."); Reaser v. State, 356 So. 2d 891 (Fla. 3d DCA 1978)(The prosecutor's comment was legitimate impeachment based on pre-arrest silence, not a comment on post-arrest silence).

In the instant case, McAdams' admission was made pre-arrest and pre-Miranda. He was not in custody and was free to leave. McAdams was told he was not under arrest. (R. 470). Thus, he was not entitled to representation. There has been no due process violation.

Failure to inform McAdams who was not in custody about an attorney who was retained by his family does not shock the conscience. The Second District recognized: "Neither Haliburton nor any other case McAdams cites holds that it is misconduct for law enforcement officers to refuse to interrupt a noncustodial interview to permit an attorney access to a suspect who has voluntarily agreed to be interviewed…" McAdams, 137 So. 3d at 407. A similar argument was raised in State v. Knowlton, 383 N.W.2d 665 (Minn. 1986). In Knowlton, the defendant acknowledged that his fifth and sixth amendment rights had not been violated, but claimed his due process rights were violated because the police conduct was so egregious. Knowlton involved questioning of the defendant who was not in custody after the defendant's attorney instructed police not to question the defendant without

counsel. The police through defendant's friends and family, continued to question him about the murder. The court held that the Rochin standard had not been met. Id. at 669. Knowlton like McAdams was not in custody. Thus, the police conduct was not outrageous and did not "shock the conscience."

Haliburton involved a Defendant who was in custody and the defense argued that State action interfered with the attorney-client relationship. See Walls v. State, 580 So. 2d 131 (Fla. 1991)(deliberate use of gross deception and manipulation by the police while Walls was **in custody** interfered with the attorney-client relationship in violation of Haliburton)(emphasis added); see also Voltaire v. State, 697 So. 2d 1002 (Fla. 4th DCA 1997)("Interrogation takes place for Section 9 purposes when a person **in custody** is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response.")(emphasis added). Since McAdams was not in custody when he initially confessed to the crimes, there was no attorney-client relationship and thus, no outrageous police conduct.

In State v. Allen, 548 So. 2d 762 (Fla. 1st DCA 1989), the defendant sought to suppress two statements the defendant made. The first statement was made during custodial interrogation and the second statement was made while the defendant was being

escorted to jail. The court held that the first statement was properly suppressed based on this Court's opinion in Haliburton; however, the court held that the second statement should not have been suppressed:

> However, as for the suppression of the statement made by the appellee to his wife while being escorted to the jail, we find the trial court erred. The rule announced in Haliburton would not prohibit the use of the parking lot statement since the appellee's due process rights were not violated by police during the escort to jail. Clearly, at that point, the appellee **was not subject to custodial interrogation and the police were not interfering with the attorney-client relationship**. The appellee has cited to this court no authority upon which to hold the parking lot statement to his wife inadmissible.

Allen, 648 So. 2d at 765 (emphasis added).

This proposition is further evidenced by this Court's holding in Smith v. State, 699 So. 2d 629 (Fla. 1997) and Harvey v. State, 529 So. 2d 1083 (Fla. 1988). In those cases, neither defendant was represented by the respective attorneys who showed up at the police stations. No attorney-client relationship had been established. No deception on the part of law enforcement took place. Here, although the family hired the attorney to represent McAdams, no attorney-client relationship was established since McAdams was not in custody. He was free to leave and was not being interrogated at the time the attorney showed up at the police station. McAdams as well as several

other persons were being questioned about the disappearance of the victims. As in Smith and Harvey, no deception by the officers occurred.

The instant case does not rise to that same level and does not cause offense to a court's sense of justice or fairness. Constitutional protections attach once some type of governmental interference has occurred. This is illustrated by the custodial restraint needed to invoke 5th or 6th Amendment protections. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981); Hunter v. State, 8 So. 3d 1052, 1063 (Fla. 2008)(Miranda warnings apply only to in-custody interrogations); Globe v. State, 877 So. 2d 663 (Fla. 2004)(This Court reiterated the rule that the right to counsel applies to a "custodial interrogation"); Perez-Ortiz v. State, 954 So. 2d 1256 (Fla. 5th DCA 2007)(holding that Miranda safeguards do not apply outside the context of custodial interrogations); Smith v. State, 699 So. 2d 629 (Fla. 1997)(6th Amendment right attached when indictment issued); Bevard v. State, 976 So. 2d 1163 (Fla. 5th DCA 2008). "The foundation of Haliburton II was based on what was deemed deception or concealment by the police." Perez v. State, 673 So. 2d 160 (Fla. 4th DCA 1996). There was no such conduct in the instant case.

With regard to the Majority's holding that a due process violation occurred once McAdams was in custody, the State

maintains that the police conduct here did not rise to the level pertinent to the outcome in Haliburton. No outrageous police conduct was evident. The State argued that Haliburton had no application to the pre- and post-Miranda statements and is distinguishable because in that case officers refused access to the attorney even after receiving a court order. The Majority disagreed and held:

> While the violation of the court order was obviously pertinent to the outcome in Haliburton, as we read the supreme court's opinion it does not appear to us that the violation of the court order was determinative of the question of whether law enforcement's conduct rose to the level of a violation of due process.

McAdams, 137 So. 3d at 408.

However, the State had argued that it was law enforcement's failure to notify Haliburton about the attorney's presence and request to see him coupled with two court orders that made the police conduct egregious. The instant case does not rise to the level of such egregious behavior. The failure to inform an in-custody defendant of the presence of an attorney hired by the defendant's family standing alone is not the outrageous police conduct which violates the due process provision of the Florida Constitution.

The State submits that Haliburton has been erroneously applied to cases on these facts alone. In Allen, the defendant

waived Miranda and underwent interrogation. During this time, the defendant's family hired an attorney who was attempting to reach the defendant. The attorney was mistakenly told that the defendant was not at the station. The First District held that Haliburton was controlling and even though the police did not intentionally misinform the attorney, this police conduct was still a violation of due process. Allen, 548 So. 2d at 763-764. The State submits that the facts in Allen did not rise to the level of outrageous police conduct. A police tactic or omission by itself does not rise to the level of a due process violation.

An illustration of the type of outrageous police conduct condemned by Haliburton is seen in Bruce v. State, 92 So. 3d 902 (Fla. 4th DCA 2012). In Bruce, the defendant himself asked his mother to call his attorney with the intention of retaining him. The police were told about the attorney from the defendant's mother and ignored the attorney's repeated instructions not to question the defendant. Bruce, 92 So. 3d at 903-904. This type of outrageous police conduct was not present in the instant case.

Nevertheless, even if this Court should find that Haliburton applied once McAdams was in custody, the Second District Court of Appeal's opinion suppressing the post-Miranda evidence was erroneous since the court overlooked a harmless error analysis. The Second District as well as this Court has a

duty to determine harmless error "regardless of any lack of argument on the issue by the state." Jackson v. State, 107 So. 3d 328 (Fla. 2012); Green v. State, 826 So. 2d 351 (Fla. 2d DCA 2002)(although harmless error not argued by the state, the court is not precluded from applying the harmless error test); Goodwin v. State, 751 So. 2d 537 (Fla. 1999)(Section 924.051(7) reaffirms existing standards of review requiring the application of harmless error test to errors that are not per se reversible); Bowen v. State, 79 So. 3d 241 (Fla. 4th DCA 2012)("Although the State has not argued that the failure to give the Miranda warnings was harmless, we have conducted an independent review for harmlessness.")

The State submits that a reversal was not mandated because the admission of McAdams' statements after Miranda was read and he was in custody was harmless error. Kirkland v. State, 478 So. 2d 1092 (Fla. 1st DCA 1985).

> Application of the harmless error test requires a close examination of the entire record 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.

Jackson, 107 So. 3d at 342.

It is clear that the jury would have returned a verdict of guilty even if the suppressed statements had not been before

them. Kirkland, 478 So. 2d at 1094. In Kirkland, the court held that Haliburton, supra was not applicable to the facts of the case. However, the court further held that even if Haliburton was applicable, a reversal would not be mandated because the admission of Kirkland's statement was harmless error. Kirkland, 78 So. 2d at 1094. Prior to his transcribed confession, Kirkland had made other incriminating statements. These other inculpatory statements were almost identical to the transcribed confession and thus the jury would have returned a verdict of guilty even if the transcribed statement had not been before them. Kirkland, 78 So. 2d at 1094.

Similarly, in the instant case, the confession made after Miranda was given was almost identical to the confession made pre-Miranda. Prior to Miranda, McAdams admitted that he shot the victims, cleaned up the bodies, dumped them and buried them. He stated that he shot his wife in the face after she threatened to call 911. He used a .38 and fired five shots. (State Exhibit #1 - CD, R. 1002, time stamp 2:32-2:37). He further admitted that he dumped the gun off the Howard Frankland Bridge. (State Exhibit #1 - CD, R. 1002, time stamp 2:41). Since McAdams confessed to killing the victims before he invoked his right to remain silent, any error was harmless. Johnson v. State, 2014 WL 68134 (Fla. 2014); Almeida v. State, 748 So. 2d 922, 932 (Fla. 1999)(The record shows that along with his taped confession,

Almeida also confessed to the detective prior to giving the taped statement; Almeida's other admissions and the murder weapon found in his car were also admitted at trial. Thus, there is no reasonable possibility that admission of the taped statement affected the verdict.)

Post-Miranda, McAdams confessed again. He then told the detectives where he buried the bodies. (State Exhibit #1 - CD, R. 1002, time stamp 2:42). This additional information had no effect on the verdict considering McAdams' pre-Miranda statements that he shot the victims, cleaned up the bodies, dumped them and buried them. The State further presented extensive testimony and evidence at trial, which corroborates this additional information. As recognized in the McAdams concurring/dissenting opinion, evidence was found inside McAdams' home: "A Florida Department of Law Enforcement expert also testified that a blood stain on Mr. McAdams' shirt contained human DNA that matched the DNA of Mrs. McAdams and that a blood stain on Mr. McAdams' shorts contained DNA that matched the DNA of Mr. Andrews. Further testimony showed that these two items of clothing were found in Mr. McAdams' Hernando County residence." McAdams, 137 So. 2d at 409, Davis, C.J., concurring in part and dissenting in part.

Evidence also was presented that the victims had been reported missing by their families. (T. 81-84, 88). The two

victims had been missing for days, and the victims who were coworkers had not gone to work or called in; this was unusual for both of them. (R. 516-517). There was evidence that the victims were involved in a relationship and there was a pending divorce between McAdams and Mrs. McAdams. Mrs. McAdams' neighbor, Tracy Ervin, was concerned about Mrs. McAdams' disappearance and knew that Mrs. McAdams was having an affair with Mr. Andrews. McAdams had asked Ms. Ervin to go to Mrs. McAdams' home and check on the horses and to give them food and water. (T. 129-130). Nicole McAdams, the McAdams' daughter, reported seeing McAdams' van backed up to the front of Mrs. McAdams' home with its rear doors open and the seats removed on October 19th. (R. 517-518, T. 123-124).

The State admitted additional evidence from Mrs. McAdams' home. McAdams co-owned the residence. Blood was found on the washing machine and on the clothing inside the washer. Several bottles of cleaner, a box of latex gloves, and silver and black duct tape were found in the kitchen and entryway. A mop with blood on it was found in the sink. Gunshot fragments and a bullet hole in the master bedroom door were found. All bullet projectiles found came from the same gun. Mrs. McAdams truck was at the home. There was evidence of attempts to clean the home, and to clean clothing and towels. There was also evidence that clothes were burned.

The State further admitted into evidence McAdams' statement made to his daughter, "If I ever catch a man in my house, I'm going to kill him." (T. 110-111). Two witnesses, Justin Brand and Craig Lisk, testified that on October 19th, the day after the murders, they helped McAdams move his truck, which was stuck in a heavily wooded area in Hernando County. They saw a shovel in the truck.

The evidence showed that at the time of the murders, McAdams was living at a residence on Glover Drive in Spring Hill. Approximately eight months later, Nelson Diaz and Gladys Ortega rented this home and found Mrs. McAdams' purse in the attic with her ID and/or credit cards and her broken cell phone inside. Mrs. McAdams' cell phone had blood on it. Evidence further showed that the last phone call on her cell phone was from Mr. Andrews on the day of the murder, October 18th, showing that she was in the vicinity of her home in Pasco when this call was received, not in Hernando County where the cell phone was ultimately recovered.

Even without the post-Miranda statements, the jury would have returned a guilty verdict. Johnson, 2014 WL 68134, at *26. The only difference between the pre-Miranda and post-Miranda statements was the information leading to the location of the victims' bodies. However, the testimony and admissions regarding the location of the victims' bodies did not affect the verdict

in this case.

The State had ample evidence to prove the corpus delicti without McAdams' post-Miranda confession.

> To establish the corpus delicti of murder, the state need only show:
> (1) [T]he fact of death; (2) the existence of the criminal agency of another; and (3) the identity of the deceased.

Buenoano v. State, 527 So. 2d 194, 197 (Fla. 1988). Ample evidence independent of McAdams' statements was adduced at trial to establish the corpus delicti of each offense. The State presented a plethora of evidence establishing that McAdams killed the victims in Mrs. McAdams' home, removed the bodies and attempted to clean up the scene. Failure to admit evidence of the actual bodies does not create harmful error. Sochor v. State, 619 So. 2d 285 (Fla. 1993)(circumstantial evidence is sufficient to prove corpus delicti; sufficient evidence that the victim was dead and that her death was due to the criminal agency of the defendant).

The State presented a substantial body of evidence concerning the murders that exceeded the scope of evidence necessary to simply prove that McAdams was charged with the murders. The focus of a harmless error analysis is on the effect of the error on the jury. State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). And the Court must look at whether the impermissible evidence constituted a substantial part of the

prosecution's case. Id. at 1138-1139 ("[A]n 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…"); Contra Ventura v. State, 29 So. 3d 1086 (Fla. 2010).

Here, the impermissible evidence consisted of a repeated, almost identical confession, and the actual location of the bodies. The location of the bodies was a small part of the prosecution's case and would not have played a substantial part in the jury's deliberation and thus did not contribute to the verdict. Further, since the permissible evidence included McAdams' admission that he shot them and buried them, and that McAdams was seen by two witnesses in a wooded area with a shovel the day after the murders, the impact from the inclusion of the impermissible evidence was minimal. Applying this test, and considering how both the permissible and impermissible evidence could have affected the jury, the error is harmless beyond a reasonable doubt as to McAdams' guilt. Delhall v. State, 95 So. 3d 134 (Fla. 2012). There is no reasonable possibility that the error contributed to the conviction. DiGuilio, supra.

## CONCLUSION

This Court should answer the certified question in the negative. This Court should further find any error in the admission of the post-Miranda statements and evidence was

harmless.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to William Sharwell, Assistant Public Defender, appealfilings@pd10.state.fl.us, RSharwell@pd10.state.fl.us, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, this 1st day of July, 2014.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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