

IN THE

Supreme Court of Florida

JUAN CARLOS CHAVEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 94,586

Death Penalty Appeal

9th Judicial Circuit on

Change of Venue from the

11th Judicial Circuit

AMENDED REPLY BRIEF OF APPELLANT

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2. Statutes

Ch. 80-376, § 10, Laws of Fla. 16

§ 27.59, Fla. Stat. 16

§ 90.403, Fla. Stat. 21

§ 901.151, Fla. Stat. 4

§ 901.17, Fla. Stat. 13

§ 921.141(7), Fla. Stat. 33

§ 932.06, Fla. Stat. 18

3. Other Authority

4th Amend., U.S. Const. 14

8th Amend., U.S. Const. 32

14th Amend., U.S. Const. 8, 14, 32

Art. I, § 9, Fla. Const. 15

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D.R. 4-3.8, Fla. Bar Code Prof. Resp. 12

Rule 3.130, Fla.R.Crim.P. 11

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C. ARGUMENT IN RESPONSE AND REBUTTAL

1. The trial court's holding that Juan Chavez voluntarily went with officers to the homicide division of the Miami Dade Police Department was clearly erroneous; under the facts of the case, no reasonable person would have believed he was free to disregard the officers' request; as the police had no probable cause to arrest Mr. Chavez for any act relating to the disappearance of Jimmy Ryce, any subsequent statements from Mr. Chavez should have been suppressed.

The state's answer is based on the assertion that Juan Chavez was properly detained on charges relating to the alleged theft of property belonging to Susan Scheinhaus. (Answer Brief of the Appellee, hereafter, "ABA," p. 35). The state's response is also based on the claim that Mr. Chavez subsequently and "voluntarily" went with the police officers to the homicide office of the Metro Dade Police Department. (ABA, p. 37). The challenged trial court order similarly is based upon those two assumptions: "the defendant was detained by police for the crime of theft of Susan Scheinhaus' property; and the defendant subsequently voluntarily agreed to go to the Metro Dade police station to discuss accusations of Ms. Scheinhaus and the investigation as it pertained to the book bag." (R17-3937). Those two assumptions are incorrect; and, under the analysis of the facts as they actually existed, the arrest of Mr. Chavez for the disappearance of Jimmy Ryce, as well as the alleged theft of Ms. Scheinhaus' property, was without probable cause. Mr. Chavez furthermore never voluntarily agreed to accompany the police to the homicide division of the police

station.

The testimony of the arresting officers at the motion to suppress hearing established that the FBI was contacted by Susan Scheinhaus on 06 December 1995. (R18-4024-5; 4047). Ms. Scheinhaus contacted the FBI, not the Metro Dade Police Department, about a book bag she discovered in Mr. Chavez' trailer. The book bag contained documents with the name Jimmy Ryce on them. (R18-4025). The FBI contacted Metro Dade police and both agencies then responded to the Scheinhaus residence. The Federal Bureau of Investigation has no concurrent jurisdiction over a state property crime. Neither agency responded in a manner indicative of a theft investigation. The FBI special agent testified that she and her fellow agents were armed, were wearing bullet-proof vests, and had on raid jackets. (R18-4029). The Metro Dade agents were also armed. (R18-4037). The agents responded to the Scheinhaus residence to investigate Jimmy Ryce's disappearance by detaining and interrogating Juan Chavez. The Court must analyze the case by asking whether the police had probable cause to arrest and then question Mr. Chavez for the disappearance of Jimmy Ryce.

The evidence strongly supports the conclusion that Juan Chavez was arrested, not merely temporarily detained, by the police in the matter of Jimmy Ryce's disappearance. The evidence further establishes that Mr. Chavez did not voluntarily agree to accompany the police to the homicide division of the Metro Dade police department. Therefore, before the state can justify the admission into evidence of the "confession" by Mr. Chavez, it must first prove that the arrest was proper and that no

intervening events broke the causal connection between the illegal arrest and the confession so that the confession is sufficiently an act of free will to purge primary taint. *Taylor v. Alabama*, 457 U.S. 687, 689-93, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). The state has the burden of proving by clear and convincing evidence that the confession was not the product of the illegal arrest; a burden that is not satisfied by showing mere submission to a claim of lawful authority. *Reynolds v. State*, 592 So.2d 1082 (Fla. 1992).

The trial court found that Mr. Chavez “voluntarily” accompanied the officers to the police station. (R17-3937). This finding was clearly erroneous and despite the “presumption of correctness” which attaches to a trial court’s ruling on a motion to suppress, *Almeida v. State*, 737 So.2d 520, 529 (Fla. 1999), the Court should find instead that a reasonable person in Mr. Chavez’ position would not have felt free to reject the officers’ “invitation” to accompany them to the police station.

What the record establishes is that at least six to eight FBI agents (R18-4026) and several Metro Dade police officers arrived at the Scheinhaus residence for the sole purpose of detaining Juan Chavez and to question him about the disappearance of Jimmy Ryce. When Mr. Chavez arrived at the Scheinhaus property, where Mr. Chavez also lived, at 7:35 p.m. (R18-4059), the law enforcement agents conducted a raid-type take-down. Weapons were drawn (R18-4032), the agents were wearing raid jackets (R18-4029-30), and yelled at Mr. Chavez to “freeze” and for Mr. Chavez to put his hands up. (R18-4032). Mr. Chavez was then “ordered” to the ground and a pat-down search for weapons was conducted. (R18-4032-33). Mr. Chavez was later handcuffed

and placed in a police car. (R18-4066). A mere seven minutes later, at 7:42 p.m., the police claimed, and the trial court found, that Mr. Chavez voluntarily went with them to the police station. (R18-4066). In the seven minutes from when Mr. Chavez was rushed and taken down by armed federal and state law enforcement agents, to his transportation to the police department. A reasonable person would have believed he had no choice but to accompany the police. The trial court's holding on the matter is clearly erroneous. There is no question that Mr. Chavez was arrested whether the Court analyzes the facts under a physical force or submission to the assertion of authority theory of arrest. *See California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991).

The Appellant maintains the position he took in the initial brief that Ms. Scheinhaus was not the disinterested citizen informant whose information should not first be corroborated before a warrantless arrest is made. Furthermore, the information that Ms. Scheinhaus provided did not provide the police probable cause to arrest Mr. Chavez for any crime relating to the disappearance of Jimmy Ryce. At most, a reasonable suspicion existed that would have only allowed temporary detainment for an investigation. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Fla. Stat. § 901.151. If probable cause developed, an arrest warrant could have then been properly sought. Instead, the police arrested Mr. Chavez, took him to the police station, and interrogated him 54 hours until he made some incriminating statements which only *then* provided probable cause for an arrest. Accordingly, the subsequent statements by Mr. Chavez should be suppressed. *See e.g., Wong Sun v. United States*,

371 U.S. 471, 484-87, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

2. The trial court erred in denying the Appellant’s motion to suppress his confession as the confession was the involuntary product of improper police conduct during an extraordinarily long interrogation; the admission of the confession, which formed the basis of the state’s prosecution against the Appellant was not harmless error.

The state’s argument in response is simply to factually distinguish the individual cases cited by the Appellant. However, courts have warned that determinations of voluntariness deal with more than mere “color-matching” of cases. It requires careful evaluation of all the circumstances of the interrogation. *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Gaspard v. State*, 387 So.2d 1016, 1021 (Fla. 1st DCA 1980). The totality of the circumstances test looks at both “the characteristics of the accused and the details of the interrogation.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Thompson v. State*, 548 So.2d 198, 204 (Fla. 1989). Each of the cases cited by the Appellant demonstrates an important factor tending to show that the interrogation at issue produced an involuntary confession. Naturally, every case has a set of facts different from the facts of the case under review, but Mr. Chavez’ case has a unique set of factors that when combined lead to a conclusion that the confession was not voluntarily made.

a. The extraordinary length of Mr. Chavez’ interrogation (over 54 hours) is a significant factor the Court should consider in determining whether the

statements made by Mr. Chavez were voluntary and not improperly coerced.

The most significant issue, and one which provides the backdrop for all the others, was the extraordinary length of the interrogation of over 54 hours. The state argues that the length of interrogation in this case did not lead to an involuntary confession because Mr. Chavez was provided many breaks, both to the restroom and for food and beverage, during the questioning. (ABA, p. 39). The state argues Mr. Chavez' case is distinguishable from *State v. Sawyer*, 561 So.2d 278 (Fla. 2d DCA 1990), a case cited in the initial brief. (ABA, p. 44). Due to the extraordinary length of time Mr. Chavez was in *continuous* police custody, (following an illegal arrest, see issue 1, *supra*), it would have been impossible for the police *not* to provide Mr. Chavez food or beverage breaks, or for that matter, restroom breaks. Unlike the mere sixteen hours of interrogation in *Sawyer*, Mr. Chavez underwent an interrogation process over three times as long. Food, water and restroom breaks were a necessity, not a convenience afforded Mr. Chavez as the state suggests. The length of time a suspect undergoes questioning, without sleep, is an important factor for a court to consider when determining the voluntariness of a confession. *Sawyer*, 561 So.2d at 288.

The *Sawyer* court further found that the questioning was accomplished through the use of a cadre of investigators. *Id.* at 290-291. A similar situation existed in Mr. Chavez' case with at least five officers, acting as a tag team, questioning the Appellant. Whether the investigators in this case took turns questioning Mr. Chavez because the original officers had other matters to attend to, as the state points out (ABA, p. 41), makes no difference in the analysis. The fact is that the investigators were significantly

more rested than the suspect.

The state also makes much ado about the differences between the polygraph test in *Sawyer* and tests administered in this case. (ABA, p. 47). The state pointed out that the polygrapher in *Sawyer* testified that the police should have known that they had gained a “false confession” and that Mr. Sawyer in fact did not lie during the polygraph test. *Sawyer, supra* at 290. However, during his interrogation, Mr. Sawyer was never told that the tests did not reveal deception. He was told that same thing Mr. Chavez was told: *the tests proved he was lying*. In that way, the polygraph tests and the manner in which the police handled the test results is exactly the same between *Sawyer* and Mr. Chavez. Both tests were given after a lengthy interrogation process and late at night. In fact, Mr. Chavez was given two polygraph tests beginning five hours after he was in custody and the first did not begin until after 1:00 a.m. (R18-4084). The administering of a polygraph test after intensive interrogation and late at night was a factor which contributed to a false confession in *Sawyer*. Finally, the state argues that the evidence in *Sawyer* established that the defendant was actually tired and wanted sleep because the audio tapes of the interrogation revealed “loud sounds of yawning” and “protestations of wanting to sleep.” *Id.* at 288. Unfortunately, the Miami Dade police department did not choose to record a single moment of Mr. Chavez’ extraordinarily long interrogation.

b. The police on at least two occasions subjected Mr. Chavez to the “Christian burial” ploy in order to induce a confession.

The state argues that at no point did Detective Estopinan’s use of the Christian

Burial Technique result in a confession by Mr. Chavez. (ABA, p. 50). The first time the technique was employed, however, Mr. Chavez reportedly replied that they should go back to the police department because “Jimmy Ryce no longer exists.” (R19-4454). Prior to that, Mr. Chavez had only admitted that he accidentally killed Jimmy Ryce and disposed of the body. Mr. Chavez gave a different story than he had given before, and further incriminated himself by claiming that he had burned the body at the Scheinhaus property. (R19-4456, 4458). The change in story was a *direct* result of the use of the Christian Burial Technique. The second use of the technique by Detective Estopinan prompted, just two hours later, the final confession. (R19-4504-06). The Appellant never argued that standing alone this practice necessitated a finding of involuntariness. However, it is without question a “blatantly coercive and deceptive ploy” which this Court has condemned. *Hudson v. State*, 538 So.2d 829, 830 (Fla. 1989); *Roman v. State*, 475 So.2d 1228, 1232 (Fla. 1985). It should be another factor the Court considers in determining the confession made by Mr. Chavez was involuntary.

c. Law enforcement officers failed to properly advise the Appellant of his *Miranda* rights, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution.

The Appellant maintains the position that the *Miranda* warnings given to Mr. Chavez were insufficient. According to the testimony at the suppression hearing, Mr. Chavez was never advised that he had a right to consult with counsel *prior* to interrogation by the police. (R18-4246). *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 57 L.Ed.2d 694 (1966) (holding that the police must advise a suspect that

if he “cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”).

d. The Appellant’s confession was obtained in violation of *Miranda* because law enforcement officers failed to scrupulously honor the unequivocal invocation of the right to remain silent by the Appellant.

The state characterizes Mr. Chavez’ invocation of his right to remain silent as a bargaining ploy with the detectives. (ABA, p. 52). Mr. Chavez told Detective Estopinan that he would tell him where the body was only if the detective guaranteed Mr. Chavez the death penalty. (R19-4493). Mr. Chavez made the invocation more than once. (R19-4494). Every time Mr. Chavez made the request, the detective not only refused to honor it, but, more importantly, refused to cease questioning. “Every time he would make this request of me, I told him I couldn’t do it.” (R19-4494). Even as the two began to discuss the statement, Mr. Chavez continued with his request that before he would disclose the location of the body, he wanted a guarantee of the death penalty. (R19-4494). Mr. Chavez went so far as to ask the detective to consult with his supervisors regarding his request for the death penalty. (R19-4494). Mr. Chavez’ insistence and repeated requests for the death penalty was an unequivocal invocation of his right to remain silent. The fact that Mr. Chavez conditioned his silence on the act the detective could not provide does not make the invocation equivocal. The detective still ignored the invocation, and continued to ask questions. (R19-4494). Once a defendant has invoked his right to remain silent, all questioning must cease unless reinitiated by the defendant at some later time. *See Edwards v. Arizona*, 451

U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Owen*, 696 So.2d 715, 719 (Fla. 1997).

e. The Appellant's alienage, lack of prior experience with the United States criminal justice system, and limited understanding of English led to the involuntary confession.

Another factor that the Court can properly consider in determining the voluntariness of the confession is Mr. Chavez' alienage and lack of prior experience with the United States criminal justice system, as well as his limited understanding of English. The state in answer argues that Mr. Chavez expressed himself well and clearly in the statements he made during his interrogation. (ABA, p. 55). Even so, the fact remains that Mr. Chavez came from a totalitarian country which lacks any of the protections afforded an individual in the United States when confronted with accusations of criminal wrongdoing. The Appellant's position is not that his alienage and poor English alone necessitate a reversal of the suppression order, but only that these are factors to be used by the Court in determining whether the confession given by Mr. Chavez was voluntary. All of the factors, when placed in the context of a 54-hour interrogation inside the homicide division of the police department, compel a conclusion that the confession was not voluntary.

f. The error in admitting the statement was not harmless.

Lastly, the state argues that even if the confession should have been suppressed, its admission constitutes harmless error. (ABA, p. 56). It is incredible to suggest that the admission of the detailed fifty-four page confession, and three oral versions by

officers did not affect the verdict in this case. In *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986), the Court set out the test for determining whether an error at trial was harmless. “The 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.” *Id.* “The question is whether there is a reasonable possibility that the error affected the verdict.” *Id.* The burden is on the state and 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. *Id.* Clearly, the state cannot meet this burden as a matter of law. Regardless of what other evidence the state introduced against Mr. Chavez, it must prove that the admission of the confession *did not affect* the verdict. The confession was the *substantial* basis of the state’s prosecution of Mr. Chavez. It was by far the most critical piece of evidence and took up the lion’s share of the state’s case-in-chief and led to the *corpus delicti*. The error was clearly harmful.

The state’s reliance on *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), is misplaced. Without the confession, the planters which contained the remains of Jimmy Ryce could not be tied to Mr. Chavez anymore than they could be tied to any other member of the Scheinhaus family. The avocado-field trailer, where the murder occurred and where blood stains matching Jimmy Ryce were discovered, was not the trailer where Mr. Chavez lived. (ABA, p. 57); this trailer was on property owned by David Santana. (T44-8652; T46-9103). Evidence from the Santana trailer would have little impact in a trial of Mr. Chavez without the confession.

Nevertheless, none of the evidence changes the fact that there is no reasonable doubt but that the confession affected the verdict.

3. The delay of the first appearance for Juan Carlos Chavez deprived him of his constitutional right to counsel.

a. The delay in presenting Mr. Chavez to a magistrate was unconstitutional and was exploited by agents of the state to extend questioning without counsel in violation of Fla. R. Crim. P. 3.130.

The state in answer firstly contends that the delay in presenting Appellant Chavez for his first appearance did not induce the subsequently elicited confession, and argues in support the alleged sufficiency of the form presented to Appellant Chavez purporting to waive the right to a first appearance. Appellant Chavez contends that the mere fact that the prosecution and law enforcement sought an after-the-fact waiver of the right of his first appearance illustrates the improper motive to gather additional evidence to support the warrantless arrest and interrogation. This endeavor was in bad faith by the prosecution and law enforcement. The facial insufficiency of the written first appearance waiver form, coupled with the attendant waiver, induced the subsequently elicited confession, and undermined the knowing and voluntary nature of the purported waiver.

Prosecutor Catherine Vogel committed prosecutorial misconduct by seeking the late first appearance waiver. Fla. Bar Code Prof. Resp. D.R. 4-3.8. The form used to elicit from Appellant Chavez the waiver of his right to first appearance was facially insufficient and contains more indicators of the bad faith motive on the part of the state.

(R14-3053). Not only did Prosecutor Vogel and law enforcement officers neglect to inform Appellant Chavez of his correct status as an arrested accused, they drafted a deceptive affidavit that affirmatively misled Appellant Chavez that he was not under arrest at the same time the state sought waiver of his right to first appearance, which he would only have if he was arrested.

The deception by law enforcement and the seasoned prosecutor rendered the confession involuntary. *See, United States v. Swint*, 15 F.3d 286 (3d Cir. 1994); *United States v. Rogers*, 906 F.2d 189 (5th Cir. 1990); *State v. Sawyer*, 561 So.2d 278 (Fla. 2d DCA 1990); *Martinez v. State*, 545 So.2d 466 (Fla. 4th DCA 1989). The failure of the state to advise Appellant Chavez that he was, in fact, under arrest, and misleading him on the nature of the charges against him was highly improper and constitutes evidence of deliberate, intentional and coercive tactics used by the state. § 901.17, Fla. Stat.; *State v. Madruga-Jimenez*, 485 So.2d 462, 465 (Fla. 3d DCA 1986).

Appellant Chavez, an unsophisticated refugee from a totalitarian state, cannot be said to have knowingly and voluntarily waived his right to receive the constitutional advice from a judge to which he was already entitled, had the waiver form presented properly informed him. Accordingly, because the deliberate and unreasonable delay in first appearance induced the subsequently elicited confessions, the statements should have been suppressed. *See Keen v. State*, 504 So.2d 396, 400 (Fla. 1987), *disapproved on other grounds*, *Owen v. State*, 596 So.2d 985 (Fla. 1992). Even under the standards supplied by the state, the unreasonable, purposeful interference with the first

appearance rights of Appellant Chavez warrants suppression of the fruits obtained therefrom. Factors to be considered before suppression is warranted include whether *Miranda* warnings were administered, the temporal proximity of the arrest and confession, the presence of intervening factors, and, particularly, the purpose and flagrancy of the officer misconduct. ABA, p. 62; *Voorhees v. State*, 699 So.2d 602, 611 (Fla. 1997). The proper analysis of the facts of the instant case, in accord with *Voorhees*, establishes that the confessions of Appellant Chavez should have been suppressed.

Firstly, the flagrancy and purpose of the officer misconduct are clear. Under *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-67, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49 (1991), the delay was patently unreasonable because of its design to gather additional evidence to justify the warrantless arrest. Contrary to the assertion by the state, the delay in bringing Appellant Chavez to court was not “directly and solely related to appellant’s willingness to cooperate with law enforcement in the attempt to locate a missing child.” (ABA, p. 63). The evidence of psychological trickery, the gradual wearing down of Appellant Chavez over a period of 54 hours, and the deficient, deceptive, and untimely written affidavit of waiver indicate the self-serving reasons behind the continuation of the interrogation. Additionally, the temporal proximity of the arrest and confession, approximately 54 hours, coupled with the sole purpose of the delay on the part of law enforcement, support the position of Appellant Chavez that the delay was unreasonable. Even under the standards cited to by the state, the insufficient and bad faith waiver demonstrate the delay induced the

subsequently obtained confession.

b. The denial of a prompt judicial determination of probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Sections 9 and 12, of the Florida Constitution, and Florida Rule of Criminal Procedure 3.133.

The state in answer apparently contends that because Appellant Chavez received a determination of probable cause and where appellant voluntarily confessed to the crime, the constitutional challenge is moot. For reasons described *supra*, the confession cannot be considered voluntary as it was induced by the purposeful delay. Also, the discussion by the state concerning the 24-hour first appearance rule and the 48-hour period for a determination of probable cause (ABA, p. 68-69), misconstrues the nature of the claim made by Appellant Chavez. The state seems to think the first appearance rule and probable cause determination rule permit the state to unilaterally bifurcate the proceedings to evaluate the benefits available to the state. Appellant Chavez respectfully maintains that the position adopted by the state is incorrect.

c. The failure to provide Mr. Chavez a timely probable cause determination requires suppression of his confession.

The evidence against Appellant Chavez should also have been suppressed because the state deliberately interfered with his right to a neutral judicial determination of probable cause. Every criminal defendant arrested without a warrant has a constitutional right to such a probable cause determination. U.S. Constitution Amends. IV, XIV; Art. I, §§ 9, 12, Fla. Const.; *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854,

43 L.Ed.2d 54 (1975). Appellant Chavez was arrested without a warrant, for either the Scheinhaus grand theft or the disappearance of Jimmy Ryce. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), extends this protection to Florida prosecutions. The state violated Appellant Chavez' rights by denying a determination of probable cause for over 72 hours. The delay in presenting Appellant Chavez for a determination of probable cause is presumptively unreasonable, as was the delay in first appearance. *Gerstein; County of Riverside v. McLaughlin*, 500 U.S. 44, 57, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). Accordingly, Appellant Chavez contends that the delays in *both* presenting him for a first appearance, and for a probable cause determination, induced the subsequently obtained confession.

d. The right to counsel enjoyed by all persons taken into custody was violated by keeping Mr. Chavez out of court so his right to counsel could affix and be asserted.

The state additionally argues in answer that these unconstitutional delays had no effect on the right to counsel for Appellant Chavez. (ABA, p. 69). Incredibly, the state asserts that Appellant Chavez received counsel as soon as feasible after custodial restraint. (ABA, p. 69). In addition to the patently unreasonable delays discussed above, the facts demonstrate that *nothing* was done by the state "as soon as feasible after custodial restraint" to provide counsel. Rather, the facts reveal a purposeful stonewalling of Assistant Public Defender Edith Georgi who sought access to the defendant "as soon as feasible"; she was denied access by state officials.

"The public defenders and assistant public defenders shall be empowered to

inquire of all persons who are incarcerated in lieu of bond and to tender them advice and counsel at any time.” Fla. Stat. § 27.59 (1995). This provision authorized Assistant Public Defender Georgi to tender advice to Appellant Chavez before he was presented to court, regardless of the inevitable appointment of the Office of the Public Defender by that court. In 1980, the legislature deleted language that limited this authority to situations in which the suspect was in custody for over 48 hours. Ch. 80-376, § 10, Laws of Fla. The language of the statute is mandatory, and Ms. Georgi was authorized to intervene on behalf of Appellant Chavez and advise him at any time. If the state had probable cause to arrest Mr. Chavez as the state argues, it had the obligation to provide counsel. The state had the obligation to allow counsel access.

The Equal Protection Clause requires the Court suppress Appellant Chavez’ statements. Had Ms. Georgi been hired to represent Appellant, the statements would undoubtedly have been suppressed. *Haliburton v. State*, 514 So.2d 1088, 1090 (Fla. 1987). Reaching the opposite result solely because Ms. Georgi, rather than privately retained counsel, sought to speak with Appellant would violate the tenets of equal protection. Even where a protection is not specifically guaranteed by the Federal constitution, the equal protection clause requires that protection not be denied on the basis of whether someone is rich or poor. *See Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956). The equal protection clause found in Article I, Section 12 of the Florida Constitution requires that, “Each Florida citizen, regardless of financial means, stands on equal footing with others in every court of law throughout our state.” *Traylor v. State*, 596 So.2d 957, 970 (Fla. 1992). Neither *Haliburton* nor

the Appellant requested an attorney. Appellant Chavez, like *Haliburton*, purportedly waived his right to counsel. Both *Haliburton* and Appellant Chavez made their waivers without knowing an attorney was actively attempting to speak with them. The only difference between *Haliburton* and Appellant Chavez was that *Haliburton's* sister had the money to afford a lawyer. To treat the two defendants differently would violate equal protection under both the Florida and Federal constitutions.

In conclusion, Appellant Chavez maintains that the concerted effort on behalf of law enforcement and the prosecution, aimed at continuing the interrogation of Appellant Chavez at the expense of the court appearances to which he was entitled, and the purposeful and deceptive tactics regarding Assistant Public Defender Edith Georgi, demonstrate that the subsequently obtained “confession” was neither voluntary nor admissible. Accordingly, the appropriate remedy for the multiple, purposeful constitutional violations is suppression of the tainted confession.

4. Permitting the media to photograph the jurors and the jurors' faces deprived Appellant Chavez of his right to a fair trial.

a. The trial court erred when it reversed its earlier ruling, which prohibited photography of the jurors in the courtroom, without first affording defense counsel the opportunity to present evidence to support continuation of the initial order.

b. The trial court abused its discretion and improperly restricted the questioning of defense counsel during jury selection *voir dire*, thus denying the Appellant his right to a fair and impartial jury.

The state in answer mislabels the actions of the trial court as “removing a prior restraint against showing visual depictions of jurors.” (ABA, p. 71). However, as raised below, the actions of the trial court did not constitute a “prior restraint” because the initial order did not prohibit the media from publishing information it otherwise had obtained, nor otherwise limit the publication of information floating freely about the courtroom. *Sunbeam Television Corporation v. State and Hernandez*, 723 So.2d 275 (Fla. 3d DCA 1999); (T37-7377). The state claims that the issue is not ripe for review because an interlocutory appeal may have been available to the defense to raise the issue. Such an appeal by a criminal defendant is not authorized by statute, Fla. Stat. § 932.06, or Rule 9.140, Fla.R.App.P. *See also* Rule 9.100(d), Fla.R.App.P. *Slomovic v. Grundman*, 430 So.2d 609 (Fla. 4th DCA 1983). Although the underlying criminal trial had ended, an action is not declared moot for purposes of determining whether jurors in a high-profile case could be videotaped for broadcast, since the issue presented was capable of repetition yet evading review. *Sunbeam, supra*, 723 So.2d at 275.

The main thrust of Appellant Chavez’ argument is that the trial court impermissibly interfered with the ability of the defense to establish the requisite factual basis by restricting *voir dire* of potential jurors. In the trial court, defense counsel argued that if the court was inclined to grant the motion filed by Channel 6, the court “must give us an opportunity to make the record.” (T37-7384). Counsel specifically moved the court to permit *voir dire* of jurors regarding the effects of being photographed, which the court denied without comment. (T37-7931).

The state argues that the defense presented no additional evidence in support of its argument for individual *voir dire*. (ABA, p. 77). However, the court order limiting *voir dire* put the defense in a Catch-22 concerning the effects of cameras in the courtroom. The trial court repeatedly denied defense motions to *voir dire* potential jurors about the effects of cameras in the courtroom, effectively denying the defense its ability to establish the predicate factual basis necessary for issuance of the order despite the expressed reservations of two venire members regarding the presence of cameras in the courtroom. The trial court erroneously accepted as true the speculation offered by Channel 6 that the change in venue operated to attenuate the taint caused by the media frenzy in Miami, without any additional findings of fact to support the point. Simply because the state asserts that no juror who expressed such reservations ultimately sat on the jury fails to address the issue that other members of the jury were free from such realistic reservations. The defense was clearly entitled to inquire of each juror individually after the court reversed its constitutionally firm prior order against videotaping jurors. Accordingly, Appellant Chavez maintains that he was deprived of his right to a fair trial by an unbiased jury.

5. The admission of the blood-stained mattress was unduly prejudicial to the defense, which prejudice clearly outweighed its, at best, limited probative value; the mattress was simply irrelevant to any material fact at issue.

The state responds to issue five by arguing that the bloody mattress was relevant to counter the defense theory that the officers force fed details to him to create a confession. (ABA, p. 78). The argument only works, however, if it were plausible that

the police would create such a story. If the police had fed Mr. Chavez the detail that the blood on the mattress came from Jimmy Ryce prior to determining whether in fact the blood came from Jimmy Ryce, the police would have run the serious risk of having it blow up in their face. It would have been obvious that the confession was manufactured by the police. The state's argument was simply an excuse to get irrelevant and highly prejudicial evidence before the jury. Even the trial court's instruction to the jury indicates the mattress was not relevant. The trial court instructed the jury that the mattress was being admitted "for the limited purpose of showing that the stain on that exhibit is *not related* to this case, and specifically that the source of that stain is unknown, and that Samuel James Ryce and Juan Carlos Chavez have been excluded as the source of that stain." (T50-9859) (emphasis added). If the mattress was not related to the case, it cannot be relevant for anything other than prejudice to the defense.

The state continues that the admission of the mattress was not prejudicial because it was stipulated pretrial that the blood on the mattress was not from either Jimmy Ryce or Juan Chavez. (ABA, p. 79). That the blood came from someone other than Chavez or Ryce is what makes the admission of the mattress unduly prejudicial as opposed to relevant. If the blood had come from Jimmy Ryce, the mattress would obviously be relevant to prove that the child died at the trailer. If the blood had come from Mr. Chavez, it would arguably be relevant to prove that Mr. Chavez spent time at the avocado-grove trailer doing acts which resulted in bloodshed. However, because the blood could not be tied to either, the jury was left with the obvious implication that

Mr. Chavez had killed others at the trailer before. This, undoubtedly, was the intent of the state.

Assuming the bloody mattress was relevant, the limited probative value of that evidence, when compared to its obvious and highly prejudicial impact, still should have required its omission from the trial. Fla. Stat. § 90.403.

6. The trial court erred in denying Appellant Chavez' motion for judgment of acquittal as to the capital sexual battery charge, Count II.

The state firstly argues in answer that it presented sufficient evidence to corroborate the confession of Appellant Chavez. (ABA, p. 81). Instead of citing actual evidence presented in the trial court, the state quotes the prosecutor's argument below. The state based its argument on the perceived fact that because the autopsy photographs indicated that the pants were unzipped and opened, and that a shoe and sock were missing, a sexual battery must have occurred. (T51-10059-10061). The state then provides a laundry list of facts completely unrelated to Count II, capital sexual battery, seeking to satisfy the *corpus delicti* for the sexual battery. The "evidence" cited by the state (ABA, p. 82) does not tend to establish the crime of capital sexual battery, nor does it even corroborate the confession that constituted the sole evidence of the offense.

Nothing listed by the state constitutes corroboration of a sexual battery. The placement and condition of the body after having been manipulated by the medical examiner for purposes of autopsy, does not constitute evidence at all, and is an insufficient basis for the finding of *corpus delicti*. The prosecutor implored the trial

court to “look at the pictures” and draw its own inferences. The pictures were taken for autopsy purposes, and no physical evidence was found to either support the charge of capital sexual battery, nor to justify the loose inferences the prosecutor submitted to the court as evidence of *corpus delicti*. (ABA, p. 81). None of the items in the laundry list provided by the state in answer tends to establish the existence of sexual battery. Even though the state alleged that finding a tube of lubricant should be sufficient corroboration, there was no evidence that the substance was a sexual lubricant, a petroleum jelly, or axle grease. No lubricant was found on or near the body. Thus, the confession as to capital sexual battery was not corroborated and *corpus delicti* was not established.

The state cites *Schwab v. State*, 636 So.2d 3, 6 (Fla. 1994), in support of its position. In *Schwab*, the defendant telephoned his mother and informed her he was forced by an accomplice to kidnap and rape the minor victim. The defendant subsequently confessed to law enforcement, and directed the police to the body. *Schwab*, 636 So.2d at 4. The Court held that the proof adduced by the state was sufficient to establish the *corpus delicti* for the crime of sexual battery. In support of its conclusion, the Court opined that the body of the victim was found nude and the details of the statement made by the defendant corresponded to the physical evidence obtained. *Id.*, at 6.

The facts of the instant case do not corroborate as did the facts in *Schwab*. The body in *Schwab* was not decomposed as was the body of Jimmy Ryce. Therefore, the medical examiner in *Schwab* was able to determine the cause of death as manual

asphyxiation, and that the clothing of the nude victim had been cut off. *Id.*, at 6. The body of Jimmy Ryce was not found in the same assembled condition as represented to the jury and the court. None of the specific evidence alluded to by the state tends to establish the specific offense of capital sexual battery. The prosecutor merely argued that the remains of the body after manipulation by the medical examiner established evidence of the *corpus delicti*.

The state alternatively asks the Court, in the event it agrees with the argument asserted by Appellant Chavez, to modify the existing strict *corpus delicti* rule and create a new rule of law. In essence, the state is asking the Court to ensure the infirm conviction obtained against Appellant Chavez is preserved by altering the rule which resulted in the infirmity. Appellant Chavez urges the court to reaffirm its decision in *J.B. v. State*, 705 So.2d 1376 (Fla. 1998), wherein this Court refused a similar request by the state to modify the *corpus delicti* rule. The serious nature of the offense charged should not be the controlling factor, as the state asserts.

The trial court erred in denying the defense motions for judgement of acquittal as to Count II. Appellant Chavez acknowledges that a reversal on this point would yield little practical effect, but it would result in the vacation of one of two consecutive life sentences and vacation of the minimum three-year mandatory firearm portion of his sentence.

7. The trial court erred by admitting, over defense objection, numerous cumulative photographs depicting the decomposed body of the victim re-assembled at the office of the medical examiner.

The state contends in answer that the gruesome photographs in this case were relevant to several issues. (ABA, p. 87). Firstly, the state argues that the pictures depicted the nature and extent of the victim's injuries. Appellant Chavez maintains, however, that there was only one injury sustained by Jimmy Ryce for which the photographs could be relevant, the fatal bullet wound. Everything else depicted by the photographs was inflicted post-mortem. The state also claims that the photographs were necessary to "shed light on the nature of the force used and violence used by the appellant." (ABA, p. 88). Again, this is an irrelevant issue in the prosecution of the Appellant, because the nature of the force was post-mortem.

What the state characterizes as "homicidal violence against the victim" mischaracterizes the content of the photographs. The gruesome content of the photographs were used to exploit what happened to the body of Jimmy Ryce *after* his death, to inflame the jurors to find guilt as to the events which led to his death to aggravate any potential penalty. Photographs serving only to create passion should be rejected. *Swan v. State*, 322 So.2d 485, 487 (Fla. 1975). Assuming that a photograph may be relevant to show the trajectory of the bullet, as argued by the state, no justification existed upon which to support the admission by the trial court of numerous angles and depictions of the severed and highly decomposed body. Accordingly, the trial court abused its discretion in admitting the numerous gruesome photographs over defense objection.

8. The capital sentencing process imposed on the Defendant was both flawed and unconstitutional.

a. The trial court erred in denying the defense requested instruction on “doubling” regarding the “in-the-course-of-a-kidnapping” aggravator, resulting in the reliance by the jury upon the same factual circumstances of the offense to double the aggravating circumstances for the sentence.

The state responds that the duplication of a felony murder element in the capital sentence scheme does not make death the automatically preferred sentence. Applying the same facts to support two separate aggravating factors constitutes improper doubling. *See Peterka v. State*, 640 So.2d 59 (Fla. 1994); *Bello v. State*, 547 So.2d 914 (Fla. 1989). Doubling of aggravating circumstances is improper where they refer to the “same aspect” of the crime. *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977); *Ray v. State*, 755 So.2d 604, 611 (Fla. 2000); *Cherry v. State*, 544 So.2d 184, 187 (Fla. 1989).

Here both the challenged aggravator and the underlying felony-murder conviction are based on the “same aspect,” kidnapping. The facts below present a situation analogous to a capital felony being committed in the course of a burglary and being committed for pecuniary gain. The felony-murder rule of the burglary provides the same factual base as the aggravator, pecuniary gain. The situational factor below as to the substantive offense (felony murder) are the same as for the aggravator (in-the-course-of-kidnapping). Both the conviction for the capital murder and the aggravator were based on the same aspect, the same occurrence, the kidnapping. *Ray v. State*, *supra*, 255 So.2d at 611.

b. The trial court erred in considering as an aggravating factor, and in

instructing the jury that it could consider as an aggravating factor, that the murder was committed for the purpose of avoiding or preventing lawful arrest.

The state argues circumstantial evidence (ABA, page 91) and direct evidence (*id.*, at 92) support the finding of this aggravating circumstance. However, to support this aggravator where the victim is not a law enforcement officer, the state must prove beyond a reasonable doubt, the dominant motive for the murder was the elimination of the witness. *Doyle v. State*, 460 So.2d 353 (Fla. 1984); *Menendez v. State*, 368 So.2d 1278 (Fla. 1979); *Riley v. State*, 366 So.2d 19 (Fla. 1978), *cert. denied*, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982). Typically, the aggravator is applied to the murder of law enforcement personnel. However, the aggravating circumstance has been applied to the murder of a witness to a crime as well. In such an instance, the mere fact of a death is not enough to invoke the factor. Proof of the requisite intent to avoid arrest and detection must be very strong. Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid-arrest aggravator. Likewise, the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator. A motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance, and it is not necessary that an arrest be imminent at the time of the murder. *Foster v. State*, — So.2d —, 2000 WL 1259395, 10-11 (Fla. 2000); *Trease v. State*, 768 So.2d 1050, 1055 (Fla. 2000).

The state notes the death of Jimmy Ryce according to the words of Appellant Chavez was an accident (T47-9225-26; ABA, page 92). Yet, according to the

argument, the dominant motive was of the homicide witness elimination. The mere fact that the victim may have been able to identify Mr. Chavez is insufficient to support the application of the avoid-arrest aggravator. *Zack v. State*, 753 So.2d 9, 20 (Fla. 2000). The record suggests only that Jimmy Ryce's death was part of the original plan. *Id.* For every hypothesis supporting the implication of the avoid-arrest aggravator, a distinct reasonable hypothesis militates against the aggravator. Under the case law of Florida, the aggravator cannot be sustained.

c. The trial court erred in giving the standard jury instruction, over timely defense objection, regarding the “heinous, atrocious, or cruel” aggravating circumstance because insufficient evidence was presented at trial to support its finding and the definition of the aggravating circumstance is unconstitutionally vague as applied to the case.

The heinous, atrocious, and cruel (HAC) aggravator is appropriate according to the state, based on the findings of the trial court (ABA, pages 93-94), which detail the kidnapping. In this case the HAC aggravator results from application of the “automatic aggravator,” the underlying kidnapping. *Freeman v. State*, 761 So.2d 1055, 1066 (Fla. 2000). The argument of the state impermissibly doubles the same aspect of the underlying substantiation. Appellant would therefore incorporate the doubling argument set forth in section 8(a) of the Initial Brief of Appellant and Reply Brief of Appellant in response to this argument.

Fear and emotional strain may be considered in the determination of whether the HAC aggravator may be applied. *Lott v. State*, 695 So.2d 1239, 1244 (Fla. 1997). The

Court is required to review the record to ensure that the finding is supported by substantial competent evidence. *Hildwin v. State*, 727 So.2d 193, 196 (Fla. 1998), *cert. denied*, 528 U.S. 856, 120 S.Ct. 139, 149 L.Ed.2d 119 (1999). *Mansfield v. State*, 758 So.2d 636, 645 (Fla. 2000).

HAC is present as a valid aggravator in a certain class of exceptional murder cases, particularly strangulation. *Blackwood v. State*, — So.2d —, 2000 WL 1862663 (Fla. 2000). The HAC aggravator does not apply to must instantaneous deaths or to deaths that occur fairly quickly. The death in this case occurred fairly quickly consequent to a single gunshot wound.

The HAC aggravator instruction in this case has origin in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), where the Court defined HAC:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id., at 9. The terms “heinous,” and “atrocious” are both defined as being “wicked,” which is nowhere else defined.

The language of Florida’s “especially heinous, atrocious or cruel” aggravating circumstance is unconstitutionally vague without further definition. *See Maynard v. Cartwright*, 486 U.S. 356, 363-64, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); and

Moore v. Gibson, 195 F.3d 1152 (10th Cir. 1999), *cert. denied*, — U.S. —, 120 S.Ct. 2206, 147 L.Ed.2d 239 (2000). In *Gibson* the trial court, however, did further seek to narrow the application of this aggravator by instructing the jury that the term “heinous” means extremely wicked or shockingly evil; “atrocious” means outrageously wicked and vile; “cruel” means pitiless or designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others. The court further instructed that the phrase “especially heinous, atrocious or cruel” is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse. The Tenth Circuit found the first part of this instruction, by itself, insufficiently narrowed the application of this aggravator. See *Shell v. Mississippi*, 498 U.S. 1, 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) (per curiam); *id.*, at 2, 111 S.Ct. 313 (Marshall, J., concurring) (setting forth language of challenged instruction). But the last sentence did constitutionally narrow this aggravating circumstance. See *Walton v. Arizona*, 497 U.S. 639, 652-55, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (plurality) (upholding limiting application of “especially heinous, cruel or depraved” aggravating factor to murders involving mental anguish or physical abuse occurring prior to death); *see also*, e.g., *Hooks v. Ward*, 184 F.3d 1206, 1239-1241 (10th Cir. 1999) (upholding constitutionality of jury instruction identical to instruction challenged in *Gibson*); *LaFevers v. Gibson*, 182 F.3d 705, 720-21 (10th Cir. 1999) (same); *Cooks v. Ward*, 165 F.3d 1283, 1290 & n.3 (10th Cir. 1998) (same), *petition for cert. filed* (U.S. May 14, 1999) (No. 98-9420). The jury instruction below did not satisfy the constitutional requirements of further definition and limitation.

d. The trial court erred in giving the standard jury instruction, over timely defense objection, regarding the “heinous, atrocious, or cruel” aggravating circumstance because insufficient evidence was presented at trial to support its finding and the definition of the aggravating circumstance is unconstitutionally vague as applied to the case.

In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the defense attorney, in closing argument to the jury at the sentencing phase, asked the jury to “confront both the gravity and responsibility of calling for another’s death.” 472 U.S. at 324. In response, the prosecutor strongly disagreed with the defense attorney’s comments and stated:

Now, they would have you believe that you’re going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it.... For they know, as I know, and as [the judge] has told you, that the decision you render is automatically reviewable by the Supreme Court.

Id., at 325-26.

By a five to three vote, the United States Supreme Court reversed the decision of the state supreme court upholding the defendant’s death sentence. In an opinion by Justice Marshall, the United States Supreme Court held that the prosecutor’s comments improperly led the jurors to believe that the responsibility for determining the appropriateness of a death sentence lay elsewhere. In a portion of his opinion that was joined by three other justices, Justice Marshall responded to the state’s argument that the prosecutor’s comments were permissible because it is proper to give a capital sentencing jury accurate information about post-sentencing procedures. 472 U.S. at

335-36. Justice Marshall rejected the argument on two grounds: (1) that the prosecutor's remarks were neither "accurate" nor (2) "relevant to a valid state penological interest." *Id.*, at 336. He explained:

[I]t was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform. Similarly, the prosecutor's argument is not linked to any arguably valid sentencing consideration. That appellate review is available to a capital defendant sentenced to death is no valid basis for a jury to return such a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence.

See Riley v. Taylor, — F.3d —, 2001 WL 43597, *21 (3rd Cir. 2001).

Justice O'Connor, who cast the deciding fifth vote for reversal in *Caldwell*, did not join this part of Justice Marshall's analysis. Justice O'Connor did not endorse the principle that "the giving of nonmisleading and accurate information regarding the jury's role in the sentencing scheme is irrelevant to the sentencing decision." 472 U.S. at 341 (opinion of O'Connor, J.) (emphasis added). However, she agreed that the prosecutor's statements were improper because they "creat[ed] the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate," whereas in fact the state supreme court exercised only a narrow scope of review. *Id.*

In subsequent cases, the Court has clarified the holding in *Caldwell*. In *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), the Court wrote as follows:

As Justice O'Connor supplied the fifth vote in *Caldwell*, and concurred

on grounds narrower than those put forth by the plurality, her position is controlling. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)... Accordingly, we have since read *Caldwell* as “relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.” *Darden v. Wainwright*, 477 U.S. 168, 184, n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). “To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.” *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), *see also Sawyer v. Smith*, 497 U.S. 227, 233, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

The *Romano* Court rejected the *Caldwell* argument advanced in that case because “the jury was not affirmatively misled regarding its role in the sentencing process.” *Id.*, at 10. Thus, in order to establish a *Caldwell* violation, a defendant must show that the prosecutor’s comments inaccurately or misleadingly minimized the finality or importance of the jury’s verdict at the penalty phase.

Mr. Chavez’ argument is based on a statement made by the prosecutor in summation at the sentencing phase of the trial. (T56-11032). The state concedes timely objection (ABA, page 91). That the improper comment invited, and received, a response by defense counsel does not cure the error; it only exacerbates it. The issue is not diminished, but amplified. The whole thrust of the argument is to say, in effect: “Don’t take this penalty phase recommendation too seriously. The final sentence is up to the judge anyway.”

Remember, again, you are not asked to pass sentence. That is solely the burden of the Court, and this Court alone. The Court will weigh your recommendation.

(T56-11032). The issue should be addressed by the Court.

e. The imposition of the death penalty violates the prohibition against cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Chavez adopts Justice Blackmun's dissent in *Callins v. Collins*, 510 U.S. 1141, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994), and specifically Justice Blackmun's statement that "[e]xperience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness – individualized sentencing." (Internal citations omitted). While Mr. Chavez relies on the dissent in *Callins*, Appellant understands the majority upheld the petitioner's punishment. *See also* Initial Brief of Appellant, pages 80-90.

f. Section 921.141(7), Florida Statutes, which permits introduction of victim impact evidence in a capital sentencing proceeding, is unconstitutional.

(1) Section 921.141(7) is unconstitutional as it leaves judge and jury with unguided discretion allowing for imposition of the death penalty in an arbitrary and capricious manner.

Section 921.141(7), Florida Statutes (1995) provides:

Victim impact evidence. Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the

appropriate sentence shall not be permitted as a part of victim impact evidence.

The victim impact evidence in this case provided the jury with two types of information. First, it described the personal characteristics of the victim and the emotional impact of the crime on the family. Second, it set forth irrelevant facts pertaining to aggravating circumstances. The state called the parents of the victim, Claudine Ryce (T55-10890) and Donald Ryce (T55-10913) and rested. (T55-10925).

The following questions were asked by the prosecution and answered by the victim's mother:

Q. When did you first find out that Jimmy was missing?

A. I called home to see how Gin was doing with her first piano lesson.

* * *

Gin said, Jimmy's not here. I said, that's impossible because he always comes straight home. He should be home by 3:15.

Q. You were away on a business trip when you first found out and you called home and found out he was missing?

A. Right. I had a 20-year-old neighbor, Fred Benderman. I had him come to stay with Gin and Jimmy was – I had Fred stay with the children – Jimmy before. Ted didn't live at home at that time because he was 18 and he just left. We set him up in an apartment near the junior college.

Q. As soon as you found out, what did you and your husband, Don, do?

(T55-10898).

A. Well, I knew something was wrong right away. This was not like Jimmy. And when Don came in – I started packing. And when Don came in he

tried to calm me. There must be an explanation. He called home and he checked with the piano teacher and Ted had come by, dropped in. He had Jimmy's brother check at the bus stop, check around the neighborhood. We began to immediately drive home. We called the police on the way home as we were driving.

(T55-10899).

* * *

A. ... Jimmy was taken on September 11th.

* * *

Someone will ask for ransom or something. We will get him back.

(T55-0903).

Could I say one thing?

Q. Yes.

A. I know Jimmy didn't want to die. He had many things he wanted to do. One time he was about six years old. We were watching television. We were watching the news. Jimmy was playing in front of the television. He heard a story about a little boy who was burned up and dead. Jimmy asked me, he said, mama, why did God let that little boy die. I said, well, maybe God wanted him to come back to him. Jimmy thought about it a minute and he said, yeah, but, mama, what if he wanted to be with his family first. What if he wanted to grow a lot is what he was saying. What if he wanted to grow up.

(T55-10904).

The discretion of the sentencer in capital cases must be channeled by standards and definiteness, lest the Court be asked to affirm a sentence of death due to the status

of victim in life. In this case the issue of lack of definition has manifested by the presentation of evidence which merely goes to an aggravating circumstance. Appellant would renew the arguments made in Section 8(f) of the Initial Brief of Appellant.

E. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Scott A. Browne
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by hand/mail delivery this _____ day of February, 2001.

Respectfully submitted,

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