IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA.

CRIMINAL DIVISION: "R"

CASE NO: 02-7415CF A02

STATE OF FLORIDA,

vs.

ROY THOMPSON,
Defendant.
_____/

DEFENDANT'S MOTION TO SUPPRESS A CONFESSION OR ADMISSION ILLEGALLY OBTAINED

Pursuant to Fla. R. Crim. P. 3.190(i), article I, sections 9 and 12 of the Florida Constitution, and the fourth, fifth and fourteenth amendments to the United States Constitution, Mr. Thompson, through undersigned counsel, requests that this Court grant this motion and in support thereof states the following:

1. Mr. Thompson is charged by information with one count of second degree murder with a weapon.

2. Mr. Thompson is requesting that the following evidence be suppressed:

a. All statements allegedly made by Mr. Thompson when he was arrested at his apartment on May 10, 2002 in Mt. Clemens, Michigan.

b. All statements allegedly made by Mr. Thompson to Detective Derek Hoffmann at the Macomb County Jail on May 10, 2002.

c. Mr. Thompson's tape-recorded interrogation that occurred on May 11, 2002 at the Macomb County Jail.

d. All statements allegedly made by Mr. Thompson to Detective Derek Hoffmann and Detective John Becker on May 11, 2002 in the restroom at the Macomb County Jail.

e. All statements allegedly made by Mr. Thompson to Detective Derek Hoffmann following Mr. Thompson's arraignment at the Macomb County Jail on May 12, 2002.

f. All statements allegedly made by Mr. Thompson to members of law enforcement (from both Michigan and Florida) at the Macomb County Jail on May 13, 2002. These include, but are not limited to, statements that Mr. Thompson made during his two videotaped interrogations, his one polygraphed statement, and his alleged statements to Detectives Becker and Hoffmann when Detective Gatti and Agent Marinello were not present.

FACTS OF CASE

On January 16, 2002, the body of Mr. Raymond Robb was discovered in an apartment in Lake Worth, Florida. Deputy Medical Examiner Barbara Wolf declared the manner of death to be a homicide. The police subsequently focused their attention on two suspects: Barrett Phelps and Roy Thompson.

On May 10, 2002, Detective Derek Hoffmann of the Michigan State Police Department as well as other Michigan police officers approached the door of the apartment where Mr. Thompson was living at the time. Without either knocking on the door or announcing who they were, the officers entered the apartment and apprehended Mr. Thompson. He was then arrested for two active warrants that had been previously issued in Michigan and incarcerated in the Macomb County Jail in Michigan.

In his report, Detective Hoffmann states the following:

> After handcuffing [Thompson] I asked him what his name was. Thompson stated, "John Bartholomew." I escorted Thompson to a Mt. Clemens PD patrol car. While walking he asked, "What is this about?" I told him he knew why he was under arrest and that I wasn't going to talk

> to him if he was going to lie to me. Thompson stated he was sorry about not telling me his name. I asked him if his name was Roy Thompson? He stated, "Yes." He asked, "Is this about Florida?" . . . .
>
> Det. Becker and I transferred him to my vehicle. He stated he knew he was wanted for the murder in Florida. He heard from people that he was wanted for murder and on Michigan's ten most wanted. People were telling his girlfriend, DANAH PLANT, that he committed a murder in Florida and that he was a serial killer. He said, "I'm not a serial killer."

Mr. Thompson was then transported from his apartment to the Macomb County Jail by Detective Hoffmann where he allegedly made additional incriminating statements.

Detective Lorenzo Gatti of the Lake Worth Police Department and Special Agent John Marinello of the Florida Department of Law Enforcement traveled to Michigan where they, along with law enforcement officers from Michigan, interrogated Mr. Thompson on May 11, 2002 and again on May 13, 2002 at the Macomb County Jail.

The May 11th interrogation was audiotaped. In addition, Mr. Thompson allegedly made incriminating statements to Detective Derek Hoffmann and Detective John Becker on that same date in the restroom at the Macomb County Jail.

On May 12, 2002, Mr. Thompson allegedly made incriminating statements to Detective Derek Hoffmann following Mr. Thompson's arraignment on his Michigan charges at the Macomb County Jail.

On May 13, 2003, Mr. Thompson gave two videotaped interrogations[1] and one polygraphed statement. In addition, Mr. Thompson allegedly made incriminating statements to Detectives Becker and Hoffmann when Detective Gatti and Agent Marinello were not present.

[1] The first videotaped statement given on May 13, 2002 was not recorded due to the fact that the video recorder malfunctioned.

From May 11, 2002 through May 13, 2002, members of law enforcement from both Michigan and Florida made various threats and promises to Mr. Thompson in order to coerce him into confessing to the murder of Raymond Robb. These various threats and promises include but are not limited to the following:

a. "We're good friends with the prosecutor. If you don't tell us what we want to hear, you'll get the death penalty."

b. "If you say that it was self-defense, this will all go away."

c. "You're screwed. You better change your story."

d. "If you say that it was self-defense, you won't get charged with anything."

e. "You better cooperate with the Florida detectives. They have the death penalty in Florida."

f. "You're going to get the death penalty, and you deserve it."

g. Mr. Thompson's interrogators also made extremely negative comments about the decedent's character to the effect that he deserved to die in the manner that he did.

In Mr. Thompson's videotaped interrogation of May 13, 2002, there exists a great deal of evidence to prove that Mr. Thompson was, in fact, coerced into making the statements that he did to his interrogators while incarcerated in Michigan beginning on May 10, 2002.

For instance, the following exchange occurred during Mr. Thompson's May 13th videotaped statement:[2]

[2] *See* Exhibit # 1 attached to this motion.

Gatti: Listen, look, we know you felt bad cause look at the way you're feeling now.

Detective Briney: You feel bad.

Gatti: It's all coming out.

Thompson*: Yeah but, yeah but just a minute ago you were yelling at me saying I'm a complete liar and that I I did it.*

Gatti: Well.

Briney: Roy,

Gatti: You've lied.

Thompson: *You're just trying to get stuff out of me.*

Gatti: No, you've lied about so many things.

Italics added.

When questioned at his deposition about this colloquy, Detective Gatti stated the following:[3]

Attorney Chapman: And, you said, it's all coming out, and Thompson says "Yeah, but—yeah, but just a minute ago you were yelling at me saying I am a complete liar and that I did it." When he was saying "you were yelling at me," who was he referring to as far as you know?

Gatti: I don't believe he was referring to me.

Chapman: Who was yelling at him and telling him he was a complete liar and that he did it?

[3] *See* attached Exhibit # 2.

Gatti: I believe that was Special Agent Marinello that he was referring to.

Chapman: How long did that go on that Agent Marinello was yelling at him that he was a complete liar and that he did it? How many times did he tell him that?

Gatti: I think that's just before he asked for an attorney. . . .

Chapman: Okay. Well, now when he was—when Agent Marinello was yelling at him, I mean, how close was he to him when he was yelling at him? Like was he in his face or –

Gatti: No.

Chapman: --was he across the room?

Gatti: No. There was a table in the room.

Chapman: Okay. And, do you recall what else he said besides telling him he was a complete liar and that he did it?

Gatti: Not verbatim I don't; no.

Chapman: Okay. And, that—all of the yelling and all of that, that isn't on any tape at all, audio or video?

Gatti: No. It would have been if it worked.

Chapman: And, I know you don't know verbatim, but roughly what else was he telling him besides that he is a complete liar and that he did it? What else do you recall him telling him?

Gatti: I guess the same thing. You know, you're a liar. You did it. You know, why don't you admit you did it and things of that nature.

When questioned at his deposition about the yelling that occurred at Mr. Thompson's May 13th interrogation, Agent Marinello stated that "there was a lot of details and a lot of admissions in [Thompson's] statement and we confronted him with those. He became very upset, he was yelling, you know, *I'm yelling back at him*. . . . On the 13th when we confronted him with his—you know, with the omissions and his untruthfulness, he became very upset and he started yelling. *And I yelled right back at him* and told him that, you know, we believed he was guilty and that he was leaving things out and now was the time to be honest about it. And then he invoked his right to an attorney" (italics added).[4]

The following exchange also occurred at Agent Marinello's deposition:

Chapman: Do you—and do you recall if anybody else was raising his voice at Roy besides you?

Marinello: No.

Chapman: You don't recall or nobody was?

Marinello: I recall raising my voice to him, okay. He was yelling, okay, at the top of his lungs. I don't recall if Detective Gatti—I was in the midst of trying to communicate with him, I don't recall if Detective Gatti yelled at him also or not.

Chapman: Do you recall if any other officer that was there yelled at him?

Marinello: No, I don't.[5]

Also during the May 13th videotaped interrogation, Mr. Thompson told his interrogators, "I just don't wanna finish everything up tonight if it's gonna be a lot. I'll

[4] *See* attached Exhibit # 3.

come see you tomorrow, okay?"[6] Nevertheless, in spite of Mr. Thompson's request that the interrogation cease at that point, it continued uninterrupted as evidenced by the videotaped recording itself.

When questioned about whether a break occurred when Mr. Thompson asked that the interrogation cease Detective Briney stated, "I don't believe so. Usually in interviews like that, *when they're about to tell you something, it's not a great time to stop, give them a chance to recoup on themselves, you know what I'm saying? Because you want them to confess to* – you know they're not being truthful with you, and that's the time that they usually say what happened."[7]

The following exchange also occurred during Mr. Thompson's May 13th videotaped interrogation:[8]

Thompson: He's not going to get your partner is he?

Gatti: Why are you afraid of him?

Thompson: No I just, he's

Gatti: You don't like him?

Thompson: *Well he said he, he said he wanted to go outside and beat my ass.*

Gatti: He's not gonna do that.

Thompson: I just don't, I don't want to talk to him today, okay, please?

Gatti: Okay well no, he's not going to get anybody, it's just us. Okay? And you don't, listen, I told you, *the screaming, you know, the yelling that's, that's done, okay.*

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[5] *See* attached Exhibit # 4.
[6] *See* attached Exhibit # 5.
[7] *See* attached Exhibit # 6.
[8] *See* attached Exhibit # 7.

Do you hear my voice? I'm not, listen I'm tired, you're tired.[9] Alright we just wanted to get

Thompson: *I'm starving. They didn't,*

Gatti: Okay, they didn't feed you, well we'll get you some food at least, okay. We just wanted to get the facts out, okay?

Thompson: *Is that better what I told you now?*

Gatti: It was better but you know I believe and I'm sure my colleagues here believe that you still, whether it's knowingly or unknowingly, okay, whether you're subconscious is holding something back, some details, okay, that I believe.

(Italics added.)

When Detective Gatti was questioned at his deposition about the aforementioned statements, the following exchange occurred:[10]

Chapman: . . . Now, who is – is he that Thompson is referring to? Is that Marinello again?

Gatti: Yes.

Chapman: All right. And, when did Marinello tell Thompson that he was going to beat his ass?

Gatti: That was when he was in—*after he asked for an attorney*, he said to him as he was going to be escorted, he said "Roy; I am the same age as the victim. *Why don't*

[9] Prior to being polygraphed, Mr. Thompson told Detective Briney that the quality of his sleep was not good. *See* attached Exhibit # 8.
[10] *See* attached Exhibit # 9.

you come and attack me like that?" You know, he says because I – I will kick your ass. So, basically, he—he said—

Chapman: Well, why—why did he tell him that—

Gatti: I don't know.

Chapman: --if you know? I mean—

Gatti: I mean, you will have to ask him that. I don't know why he told me that. *I guess he was upset*. . . .

Chapman: Okay. Now, when you told him here on Page 17, you said to Thompson "I told you the screaming [sic], you know, the yelling, that's done; okay." Yelling, again, by whom, Marinello?

Gatti: Yeah. . . .

Chapman: Did—was anything done at that point when he said I am starving to give him something, food or water or anything that you recall"

Gatti: He didn't – you know, he didn't ask for a break.

Chapman: Well, I mean, was any offered to him? Like, I – I'm starving. Okay; we will take a break here and give you some food.

Gatti: Well, I said, if they don't feed you, we will get you some – some food.

Chapman: Did you – did you get him any food at that point?

Gatti: I believe after we were done we got him food. I don't – I don't think we stopped right at that minute to get him food, but I – I did say we would get him food..

Chapman: So, it was after this was – you finished this statement that you got him some food?

Gatti: Yes.

(Italics added.)

At Detective Hoffmann's deposition, he was asked the question, "[D]o you recall any time during this interview on the 13th that any food was brought to him?" His answer was, "I don't think it was."[11]

At Detective Briney's deposition, he was asked whether any attempt was made to give Mr. Thompson any food when he said he was starving. His response was, "No, not in my – not in the room here, no. If he ate afterwords, I'm sure he did, but that was something somebody else would have handled."[12]

The following exchange occurred at Agent Marinello's deposition:

Chapman: [D]id anybody threaten to beat Thompson, to go outside and beat Thompson's ass?

Marinello: I'll tell you exactly what happened. *After Thompson invoked his right to an attorney*, that was the end of the first statement on the 13th. When we walked outside I told him that he disgusted me, I told him that I was the exact same age as the victim and that I had a lot of empathy for that victim, and I told him he was lucky that they didn't try that on somebody like me because I would've kicked their ass. And that's what I told him.

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[11] *See* attached Exhibit # 10.

[12] *See* attached Exhibit # 11. According to Detective Gatti, the first interrogation on May 13th began at 3:00 p.m. *See* attached Exhibit # 12. According to Detective Briney, his polygraph exam began at 4:15 p.m., and it was discovered at 6:45 p.m. that the video recorder was not working properly. *See* attached Exhibit # 13. The second interrogation on May 13 therefore began sometime after 6:45 p.m. Thus, it is extremely unlikely that Mr. Thompson was fed *at all* during the two interrogations and polygraph examination that occurred on May 13, 2002.

Chapman: And – and that conversation occurred after Thompson invoked his right to a lawyer, right?

Marinello: That's right.

Chapman: And, well, at that point why was there anymore conversation with him at all? How did the --

Marinello: Well, he was –

Chapman: -- conversation come about?

Marinello: He was in the – you know, when we – when he came out he was crying and, you know, saying something about I recall something about – he was very concerned about the death penalty. You know, he said something about the death penalty. And that's when I just – I told him how I felt.[13]

The following colloquy also occurred at Agent Marinello's deposition:

Chapman: The next line down, Thompson says, "I'm starving," they didn't – was any – any discussion at that point of anybody, a note sent, anything saying get him some food that you're aware of?

Marinello: Not that I'm aware of, no. He's – he's in the jail, he's on a regular feeding schedule.[14]

At the *conclusion* of the May 13th interrogation, Detective Hoffman asked Mr. Thompson, "What are, you have a, you've got a, hold on, kidney infection or something

[13] *See* attached Exhibit # 14.
[14] *See* attached Exhibit # 15.

like that?" Mr. Thompson responded, "Yeah." Detective Gatti's response consisted of, "Okay Roy, that's it."[15]

The following exchange occurred at Detective Hoffmann's deposition regarding Mr. Thompson's health:

Chapman: Did [Thompson] complain about any injuries to any part of his body, to be careful about touching any part of his body?

Hoffmann: Yes. He stated that he may have a kidney infection or something to that effect.

Chapman: He said that when you arrested him?

Hoffmann: I'm not sure at what point he said that, *it could have been when we were doing the booking* – at some point he told me that he thought he had an infection of some sort.

Chapman: Okay. Was any attempt made to get him medical treatment for that?

Hoffmann: I don't know. *We did not*, but that's usually the jail's policy that – they have a nurse – they have a nurse or a doctor I believe on duty all the time.[16]

The following colloquy also occurred at Detective Hoffmann's deposition regarding Mr. Thompson's health:

Chapman: Was [Thompson] complaining about his health at all [on May 11, 2002], about how he was feeling?

[15] *See* attached Exhibit # 16.
[16] *See* attached Exhibit # 17.

Hoffmann: He – the only thing that he had told me, and I don't know if – I wouldn't characterize it as complaining, he was just saying that he may have an infection.

Chapman: You mean on his side?

Hoffmann: Right.

Chapman: Why was the decision made to go ahead with the interview when he had an – when he was complaining of an infection?

Hoffmann: Well, when he's entered in the jail a doctor and a nurse – there's a full-time doctor and nurse that check people. So if he's injured or unhealthy or can't be lodged at the county jail, then he won't be admitted.

Chapman: Okay.

Hoffmann: You're retained by the agency and the agency has to seek medical treatment for him.

Chapman: That was the question, why wasn't medical treatment obtained for him prior to his being interviewed?

Hoffmann: Probably because he didn't need it. *I assume that he wasn't sick*, otherwise he'd be treated at the jail or he'd have to be retained by the arresting jail[17] (italics added).

At his deposition, Detective Hoffmann was asked when he first learned that Mr. Thompson had a kidney infection. The following exchange occurred in response to that question:

Hoffmann: Well, he had told me that [he had a kidney infection] I believe the first day he was arrested. And I think I was again asking him what it was . . . . But I

[17] *See* attached Exhibit # 18.

don't know what it was, that's just what he was assuming, what he had said at some point to me.

Chapman: Did you ever look at his – at the area of his body where this kidney infection or whatever it was was occurring?

Hoffmann: I don't remember if I did.

Chapman: Okay. Was any discussion of that – was there any discussion of that with any medical personnel at the jail about, hey, this guy's claiming to have a kidney infection?

Hoffmann: Yes, I'm sure – I think there was.

Chapman: Were you a part of that conversation?

Hoffmann: I don't remember specifically what the conversation was, just that the policy is that someone – if someone reports an injury or appears to be injured or anything like that, then it's checked by – I believe that's the Macomb County Jail's policy, that they're going to examine him. They have, like I said, a doctor there twenty-four hours.

Chapman: I've received medical reports on Thompson, he was operated on on May the 17th, four days later. Was that fact ever brought to your attention by anyone there in Michigan?

Hoffmann: No.[18]

At his deposition, Detective Briney was asked whether Mr. Thompson said anything about an abscess on his side. Briney's response was, "No, he did mention it at

[18] *See* attached Exhibit # 19.

the very end, after everything was done, that he had something going on in his side. *And he lifted up his shirt and he did have like a bump on his side*" [19] (italics added).

At the conclusion of the May 13th videotaped interrogation, the viewer can see Mr. Thompson lifting his shirt up and rubbing the abscess on his right side while grimacing in pain. In fact, on May 17, 2002, just four days after his last interrogation, Mr. Thompson was operated on for a right flank abscess. This fact is evidenced by attached Exhibit # 21 which consists of medical reports from a Dr. D'Almeida who operated on Mr. Thompson in Michigan as well as medical reports from the first doctor who examined Mr. Thompson, a Dr. McQuiston.

Regarding the issue of Mr. Thompson's health, the following colloquy occurred at Agent Marinello's deposition:

Chapman: And just on page 21 of that statement when – it looks like Detective Hoffman says – five lines from the bottom, what are you – you have – you've got a kidney infection or something like that. And that was the first time that you had heard any mention of Thompson having a kidney infection?

Marinello: I don't recall anything before that.

Chapman: And when – and the tape ended I guess at that point. Was there any discussion about getting him any kind of medical treatment for this kidney infection?

Marinello: I – that – he's housed at the Macomb County Jail, you know, there's a Macomb County detective there, two of them. So, I mean, that's not my –

Chapman: Well, did they mention anything like, hey, we've got to get him some medical treatment or –

[19] *See* attached Exhibit # 20.

Marinello: I didn't hear any of those conversations.[20]

Prior to the first interrogation on May 11, 2002, the law enforcement officers who interrogated Mr. Thompson were aware that he had been using heroin up until the time he was arrested the day before.

For example, the following exchange occurred at Detective Gatti's deposition:

Gatti: I know he said he was a heroin addict.

Chapman: How did he appear to you physically? I mean, did he appear strong or weak?

Gatti: Yeah, I mean, he wasn't, you know, a weakling. You know, he is thin but, you know, I mean, attribute that to the heroin use.[21]

The following colloquy occurred at Detective Hoffman's deposition:

Chapman: Now, are you aware of any time that Thompson had been using narcotics in the recent – any recent days to this interview?

Hoffmann: *Just kind of my assumptions and feelings*, but not that – actually that I'm aware of (italics added).[22]

Although Detective Hoffman stated at his deposition that he was not actually aware of Mr. Thompson's use of narcotics, he also testified that a civilian witness who knew Mr. Thompson had told him on May 12, 2003 that Thompson used *and uses* heroin.[23]

The following exchange occurred at Detective Briney's deposition:

[20] *See* attached Exhibit # 22.
[21] *See* attached Exhibit # 23.
[22] *See* attached Exhibit # 24.
[23] *See* attached Exhibit # 25.

Chapman: Okay. When you examined – or when you tested Thompson [prior to his being polygraphed], do you recall what his physical condition was like?

Briney: *I just know he looked weak* and started – he told me during the pre-test that the last time he did heroin was – I wrote that down here – was 5/10/02, last taken. And usually – his appearance . . . heroin users that come in here look like, they look rundown until they get – a lot of times . . . in jail for awhile, they start building back up because they stop using, they start eating better and they look a lot better. But when they first come in they look rundown and worn out. That's what he looked like to me.

Chapman: Was there any discussion among the officers there to not interrogate him until he had built up his strength?

Briney: I have no clue, no. There was no discussion with me . . .[24] (italics added).

Finally, it is important to note that on May 12, 2002 and again on May 13, 2002, medical personnel at the Macomb County Jail determined that Mr. Thompson was "appropriate for placement on Suicide Observation Status."[25]

[24] *See* attached Exhibit # 26. When Mr. Thompson was examined by a Dr. McQuiston on May 17, 2002 (this being just four days after his last interrogation), Mr. Thompson told Dr. McQuiston that he had been using heroin during the last month in order to help lessen the pain of the abscess on his right side. *See* attached Exhibit # 21.
[25] *See* attached Exhibit # 27.

LAW

I. BURDEN OF PROOF

In *Jorgenson v. State,* 714 So. 2d 423, 426 (Fla. 1998), the Florida Supreme Court stated that "the burden of showing that a defendant's statement was voluntarily made is on the State. *Brewer v. State,* 386 So.2d 232, 236 (Fla.1980). The State must establish voluntariness by a preponderance of the evidence. *Id.*" *See also Thompson v. State,* 548 So. 2d 198, 204 (Fla. 1989) ("the burden is on the state to show by a preponderance of the evidence that [a] confession was freely and voluntarily given and that the rights of the accused were knowingly and intelligently waived").

II. KNOCK AND ANNOUNCE

Fla. Stat. § 933.09 states that "[t]he officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of the officer's authority and purpose he or she is refused admittance to said house or access to anything therein."

In the present case, the police officers who entered the apartment where Mr. Thompson was living at the time of his arrest did not knock and announce their presence. That being the case, all of the statements that Mr. Thompson allegedly made to members of law enforcement on the day of his arrest (that being May 10, 2002) should be suppressed. *See State v. Drowne,* 436 So. 2d 916 (Fla. 4th DCA 1983) (failure of officers executing search warrant to comply with knock and announce rule, requiring due notice to occupant of officers' authority and purpose, before forcing front door of home to remain open when young child was attempting to close it, warranted suppression of

evidence seized from defendant's home, in absence of exigent circumstances or circumstances otherwise indicating that compliance with requirement would be idle gesture).

However, even if the officers who entered Mr. Thompson's apartment *did* knock and announce their presence, their entry was still illegal and Mr. Thompson's alleged statements of May 10, 2002 should still be suppressed because the delay between the officers' knocking and announcing and their entry into Mr. Thompson's apartment was not a reasonable time for an occupant to respond.

At his deposition, Detective Hoffmann stated that the delay between the officers' knocking and announcing and their entry into Mr. Thompson's apartment was *within five seconds*. *See* attached Exhibit # 28. And at his deposition, Deputy Sheriff Becker testified that the delay between the officers' knocking and announcing and their entry into Mr. Thompson's apartment was *three to four seconds.*

In *Kellom v. State,* 849 So. 2d 391, 394 (Fla. 1st DCA 2003), approximately five seconds elapsed between the officers' knocking and announcing and their forcible entry into the defendant's residence. In holding that this extremely brief delay violated § 933.09, the *Kellom* Court stated:

> While the quantity of time sufficient to provide a suspect with due notice will vary depending upon the particular circumstances at issue, the facts of this case do not establish that the quantity of time between the officers' knock and announce and their hasty entry was sufficient to permit appellant to respond. *See West v. United States,* 710 A.2d 866, 869 (D.C.Cir.1998) (holding that the officers' five-second wait between knocking and announcing their presence and their forcible entry at approximately 9:40 p.m. was insufficient, as a matter of law, as the time was simply too short to warrant a conclusion that the occupants had deliberately refused the police entry); *United States v. Joyner,* No. 96-CR-20063, 1997 WL 129181, at *4 (C.D.Ill. Mar.5, 1997) (holding that the officers'

> five- to six-second pause between their knock and announce and their forcible entry at approximately 10:15 p.m. was not a reasonable time to conclude that the suspect was denying them entry as the government produced no evidence that the suspect was dangerous or possessed firearms or that he was likely to dispose of the contraband); *Commonwealth v. Means,* 531 Pa. 504, 614 A.2d 220, 223 (1992) (holding that a five- to ten- second delay between the officers' knocking and announcing and their forcible entry at 5:30 p.m. was not a reasonable time for an occupant to respond).

Kellom, 849 So. 2d at 394-395.

III. VOLUNTARINESS OF MR. THOMPSON'S ALLEGED STATEMENTS TO THE POLICE

In *Miranda v. Arizona,* 384 U.S. 436, 448 (1966), the United States Supreme Court stated:

> Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, 'Since Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.' Blackburn v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.

In 1991, the U.S. Supreme Court reaffirmed this same sentiment in *Arizona v. Fulminante,* 499 U.S. 279, 287 (1991) when it stated:

> As we have said, "coercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama,* 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 (1960). *See also Culombe, supra,* 367 U.S., at 584, 81 S.Ct., at 1869; *Reck v. Pate,* 367 U.S. 433, 440-441, 81 S.Ct. 1541, 1546-1547, 6 L.Ed.2d 948 (1961); *Rogers v. Richmond,* 365 U.S. 534, 540, 81 S.Ct. 735, 739, 5 L.Ed.2d 760 (1961); *Payne v. Arkansas,* 356 U.S. 560, 561, 78

> S.Ct. 844, 846, 2 L.Ed.2d 975 1958); *Watts v. Indiana,* 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801 (1949).

And in *Sliney v. State*, 699 So. 2d 662, 667-668 (Fla. 1997), the Florida Supreme Court stated:

> A confession obtained by means of physical or psychological coercion or a violation of a constitutional right will be deemed involuntary and inadmissible. In order for a confession to be admissible, the State must demonstrate by a preponderance of the evidence that the confession was voluntary. *Roman v. State,* 475 So.2d 1228, 1232 (Fla.1985), *cert. denied,* 475 U.S. 1090, 106 S.Ct. 1480, 89 L.Ed.2d 734 (1986); *DeConingh v. State,* 433 So.2d 501, 503 (Fla.1983), *cert. denied,* 465 U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984). Whether a confession is voluntary depends on the totality of the circumstances surrounding the confession. *Traylor v. State,* 596 So.2d 957, 964 (Fla.1992); ***668** *Thompson v. State,* 548 So.2d 198, 203-04 (Fla.1989); *Roman,* 475 So.2d at 1232.

In the present case, the coercion used by Mr. Thompson's interrogators was *both* physical and psychological. Regarding Mr. Thompson's physical condition, Detective Gatti acknowledged the fact that Mr. Thompson was tired, and Mr. Thompson told his interrogators that he was starving.[26]

In *Spano v. People of the State of New York,* 360 U.S. 315, 317, 323-24 (1959), the United States Supreme Court concluded that the defendant confessed involuntarily where his will was overborne in part by fatigue and official pressure and where the interrogation was both persistent and continuous. *See also State v. Sawyer,* 561 So. 2d 278, 288-89 (Fla. 2d DCA 1990) (tape recording revealed defendant's "protestations of wanting to sleep, to rest, to lie down, all ignored and deliberately utilized by the detectives to taunt [defendant] into confessing so that he, and they, could get some

[26] *See above* at pages 8-9.

needed rest"); *Spradley v. State,* 442 So. 2d 1039, 1043 (Fla. 2d DCA 1983) (defendant's statement to police was not free and voluntary in part because she was not given an opportunity to sleep, and she was not permitted to eat); *Chavez v. State,* 832 So. 2d 730, 748-49 (Fla. 2002) (confession voluntary where defendant was provided with food and drink); *Walker v. State,* 707 So. 2d 300, 311 (Fla. 1997) (confession voluntary where defendant was provided with drinks upon request); *State v. Dupont,* 659 So. 2d 405, 406 (Fla. 2d DCA 1995) (confession voluntary where defendant was given food, drink, and cigarettes; he was provided with sufficient opportunity to sleep; the atmosphere was conversational; no promises or threats were made; the questioning was not excessively lengthy).

One of the most blatant instances of persistent and continuous questioning in the present case is found in attached Exhibit # 5 where Mr. Thompson told his interrogators, "I just don't wanna finish everything up tonight if it's gonna be a lot. I'll come see you tomorrow, okay?" Nevertheless, in spite of Mr. Thompson's request that the interrogation cease at that point, it continued uninterrupted as evidenced by the videotaped recording itself.

When questioned about whether a break occurred when Mr. Thompson asked that the interrogation cease Detective Briney stated, "I don't believe so. Usually in interviews like that, when they're about to tell you something, *it's not a great time to stop, give them a chance to recoup on themselves, you know what I'm saying? Because you want them to confess to* – you know they're not being truthful with you, and that's the time that they usually say what happened."[27]

[27] *See* attached Exhibit # 6.

The *Spano* Court condemned precisely this type of unrelenting interrogation when it remarked:

> The police were not . . . merely trying to solve a crime, or even to absolve a suspect. *Compare Crooker v. State of California, supra, and Cicenia v. Lagay, supra*. They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these. Malinski v. People of State of New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029.

Spano, 360 U.S. at 323-24.

But the physical abuse that occurred during Mr. Thompson's interrogation was not limited merely to hunger and fatigue. Attached Exhibit # 21 consists of medical records dictated by Dr. Michael D'Almeida who operated on Mr. Thompson on May 17, 2002—just four days after his last interrogation—because Mr. Thompson had a large abscess in the right flank area. Dr. D'Almeida described Mr. Thompson's case as "urgent."

What makes this case particularly egregious is that Mr. Thompson told his interrogators that he had a kidney infection on the day he was arrested yet they did *absolutely nothing* to provide him with needed medical care. Detective Gatti's response of "Okay Roy, that's it"[28] when Mr. Thompson stated that he had a kidney infection is indicative of the indifference that all of the interrogators had towards Mr. Thompson's urgent medical condition. In fact, these interrogators were "concerned primarily with securing a statement from defendant on which they could convict him" *Spano*, 360 U.S.

[28] *See above* at pages 12-13.

at 323-24, and they used Mr. Thompson's urgent medical condition to help secure his incriminating statements.

But the physical abuse that occurred during Mr. Thompson's interrogation was not limited to hunger, fatigue, and an urgent medical condition. Prior to the first interrogation on May 11, 2002, Mr. Thompson's interrogators were well aware that he had been using heroin up until the time he was arrested the day before.[29] Nevertheless, they again did *absolutely nothing* to help him obtain medical treatment for his withdrawal pains.[30]

In *Simmons v. State,* 227 So. 2d 84, 87 (Fla. 2d DCA 1969), defendant argued that his confession was obtained involuntarily because he was suffering drug withdrawal symptoms when he was interrogated. In rejecting this claim, the *Simmons* Court observed that defendant had been treated for a period of *seventeen days* in the jail clinic prior to his interrogation and that that was a sufficient amount of time for him to have regained his faculties. *Id* at 87.

In the present case, however, the first formal interrogation began *just one day* after Mr. Thompson was arrested. This certainly was not sufficient time for him "to have regained his faculties to the extent that he knew precisely what he was doing." *Id.* at 87.

The final form of physical abuse suffered by Mr. Thompson at the hands of his interrogators was their complete indifference to his mental health situation. On May 12, 2002 and again on May 13, 2002, medical personnel at the Macomb County Jail determined that Mr. Thompson was "appropriate for placement on Suicide Observation

[29] *See above* at pages 17-18.
[30] *See* attached Exhibit # 29 which is a document from the Macomb County Jail stating that Mr. Thompson was experiencing drug withdrawals while at that facility.

Status."[31] Once again, though, Mr. Thompson's interrogators did *absolutely nothing* to help alleviate this situation; instead, they exploited it by relentlessly questioning him.

The videotaped interrogation of May 13, 2002 contains evidence of more than just physical abuse however; it contains ample evidence of psychological coercion as well. Detective Gatti spoke of yelling and screaming during the interrogation as well as calling Mr. Thompson a complete liar. Detective Marinello also admitted to yelling at Mr. Thompson and talking to Mr. Thompson about kicking his ass *after* Mr. Thompson had invoked his right to an attorney.[32]

When the police behaved in this manner, they were acting in an inquisitorial manner rather than an accusatorial manner. In condemning this form of interrogation, the Florida Supreme Court has stated that "[d]ue process contemplates that the police and other state agents act in an accusatorial, not an inquisitorial, manner." *Walls v. State,* 580 So. 2d 131, 133 (Fla. 1991).

Another instance of psychological coercion is found in attached Exhibit # 5 where Mr. Thompson told his interrogators, "I just don't wanna finish everything up tonight if it's gonna be a lot. I'll come see you tomorrow, okay?" Nevertheless, in spite of Mr. Thompson's request that the interrogation cease at that point, it continued uninterrupted as evidenced by the videotaped recording itself.

Finally, the numerous threats and promises of leniency made to Mr. Thompson by his interrogators, just some of which are mentioned above at page 4, constituted several other instances of psychological coercion.

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[31] *See* attached Exhibit # 27.
[32] *See above* at pages 5-12.

In *Brewer v. State,* 386 So. 2d 232, 235-36 (Fla. 1980), the Florida Supreme Court stated that:

> [W]hen a question arises as to the voluntariness of a confession, the inquiry is whether the confession was "free and voluntary; that is (it) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." Bram v. United States, 168 U.S. 532, 542-43, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897). For a confession to be admissible as voluntary, it is required that at the time of the making the confession the mind of the defendant be free to act uninfluenced by either hope or fear. The confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind. Frazier v. State, 107 So.2d 16, 21 (Fla.1958); Harrison v. State, 152 Fla. 86, 12 So.2d 307 (Fla.1943).

The *Brewer* Court found the defendant's confession to be involuntary because his interrogators "raised the spectre of the electric chair, suggested that they had the power to effect leniency, and suggested to the appellant that he would not be given a fair trial." *Brewer*, 386 So. 2d at 235. *See also Arizona v. Fulminante*, 499 U.S. 279, 288 (1991) (confession involuntary where "it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess"); *E.C. v. State,* 841 So. 2d 604, 606 (Fla. 4th DCA 2003) (investigating officer's promise of leniency rendered suspect's statements involuntary); E*dwards v. State,* 793 So. 2d 1044, 1048 (Fla. 4th DCA 2001) (confession given involuntarily where officer threatened to charge suspect with added and more serious charges); *Walker v. State,* 771 So. 2d 573, 576 (Fla. 1st DCA 2000) (defendant's inculpatory statements were involuntary where they were the result of a quid pro quo bargain, influenced by the hope of not being arrested); *Collins v. Wainwright,* 311 So. 2d 787, 789 (Fla. 4th DCA 1975) ("a confession can never

be received in evidence where the prisoner has been influenced by *any* threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner") (italics added); *M.D.B. v. State,* 311 So. 2d 399, 401 (Fla. 4th DCA 1975) (confession involuntary where officers promised suspect that he would not be charged with other offenses if he confessed; the fact that suspect received *Miranda* warnings did not vitiate this error).

The facts in *Martinez v. State*, 545 So. 2d 466 (Fla. 4th DCA 1989) are strikingly similar to the facts in the present case. In reaching the conclusion that the defendant's statements to the police were "not the product of an essentially free and unconstrained choice," *id.* at 467, the *Martinez* Court observed that:

> [T]he police ultimately elicited a confession from Martinez after telling him, among other things, that he "could wind up" in the electric chair if he was not truthful with the police. Although the polygraphist claimed he mentioned the electric chair to advise Martinez of an option which was available to the state, he failed to mention any other option available to the state. Thus, raising the spectre of the electric chair was not simply intended to be informative, but to unduly emphasize this particular option, and psychologically coerce Martinez into confessing to the crime. Moreover, after having examined the polygraph results, the polygraphist told Martinez that it was "impossible" that he was being truthful. He also told Martinez that the state had many witnesses against him, and that "everybody has already said what they had to say and you're going to wind up in a problem and you will be the only one that's going to wind up in problems." Thus, the polygraphist exerted improper influence over Martinez by emphasizing that both the polygraph results and the state's witnesses would contradict his story, and by telling him that he was going to wind up in a problem. *See Brewer v. State,* 386 So.2d 232, 235-36 (Fla.1980).

In *Mincey v. Arizona,* 437 U.S. 385, 401-402 (1978), the United States Supreme Court found the defendant's statements to the police to be involuntary where he was

"weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne." Similarly, in the present case, Mr. Thompson's statements to the police were made involuntarily because he made them when he was weakened by pain from the abscess in his right flank, as well as isolated from family, friends, and legal counsel.

Still another factor to be considered in the present case is the use of deception and trickery by Mr. Thompson's interrogators when they made extremely negative comments about the decedent's character to the effect that he deserved to die in the manner that he did. *See Gaspard v. State*, 387 So. 2d 1016 (1st DCA 1980) ("under the 'totality of the circumstances' test, . . . the use of deception, trickery, or misrepresentation is a factor to be considered. Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954); Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1968)").

In *Spano v. People of the State of New York,* 360 U.S. 315, 320-21 (1959), the United States Supreme Court stated that:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime.

In the present case, Mr. Thompson's interrogators exhibited contempt rather than respect for his fundamental rights. And because they did so, his statements to them are

inherently untrustworthy. That being the case, the State should not be permitted to introduce any of them into evidence at trial.

Finally, in *Culombe v. Connecticut*, 367 U.S. 568 (1961), the U.S. Supreme Court discussed the test for determining whether a suspect's statements to the police were made freely or under official compulsion:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

In light of the numerous coercive factors that are present in Mr. Thompson's case, it is undeniable that his statements to the police were *not* "the product of an essentially free and unconstrained choice" and to permit their introduction at trial would indeed offend the due process clause of the Florida and federal constitutions.

IV. MR. THOMPSON'S INVOCATION OF HIS RIGHT TO SILENCE

During the May 13th videotaped interrogation, Mr. Thompson told his interrogators, "I just don't wanna finish everything up tonight if it's gonna be a lot. I'll come see you tomorrow, okay?"[33] Nevertheless, in spite of Mr. Thompson's request that the interrogation cease at that point, it continued uninterrupted as evidenced by the videotaped recording itself.

Mr. Thompson's invocation of his right to silence and all subsequent statements made to his interrogators should be suppressed since such statements were obtained in violation of his right to silence guaranteed to him by both the Florida and federal constitutions.

The case of *State v. Wininger*, 427 So. 2d 1114 (Fla. 3d DCA 1983) is especially instructive with regards to a defendant such as Mr. Thompson who invokes his right to remain silent but who does not invoke his right to an attorney.

> Wininger, at the request of police officers investigating a homicide, went to the police station for questioning. He was given *Miranda* warnings and to a certain point in the interrogation freely answered questions. That certain point arrived when Wininger was informed he was a suspect. At that moment he stated to the interrogating officer: *"I don't believe it. I want to go home. Can I?"* The officer responded, "Sure, you will be able to go, but I want to talk to you about this. It's very serious. A man you lived with for 17 years is dead." The questioning immediately continued, and the defendant answered the questions. (Italics added).
>
> The trial court found that the defendant's request to go home was the functional equivalent of an "announced desire to cease the interrogation," which was not, when the police continued the interrogation, scrupulously honored, as it had to be. *See Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). It suppressed all statements made by the defendant following the defendant's request to go home. The State has appealed the trial court's suppression order. We affirm.
>
> Our starting and, as will be seen, ending point is *Miranda v. Arizona,* 384 U.S. 436, 473-74, 86 S.Ct. 1602, 1627-28, 16 L.Ed.2d 694, 723, 10 A.L.R.3d 974 (1966), in which the Court stated:
>
> "Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of

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[33] *See* attached Exhibit # 5.

> compulsion, subtle or otherwise." (emphasis supplied).
>
> Because it is clear that the questioning of the defendant did not immediately cease, *see Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (where defendant's request to cut off questioning was honored, resumption of questioning with respect to a different crime after the passage of a significant period of time and fresh set of warnings did not violate *Miranda*), the sole issue before us is whether the defendant's words, "I want to go home. Can I?" indicated *in any manner* that the defendant wished to invoke his right to remain silent.
>
> We agree with the trial court's finding that the defendant's request manifested a desire to end the interrogation. The request, made on the heels of being informed for the first time that he was a suspect, was, at the least, an indication in some manner that the defendant did not want to answer further questions. *See Thompson v. State,* 386 So.2d 264, 267 (Fla. 3d DCA 1980).

Wininger, 427 So. 2d at 1115-1116.

The issue before this Court is whether Mr. Thompson's statement to his interrogators, "I just don't wanna finish everything up tonight if it's gonna be a lot. I'll come see you tomorrow, okay?" indicated *in any manner* that he wished to invoke his right to remain silent. As in *Wininger*, Mr. Thompson's statement was "at the least, an indication in some manner that the defendant did not want to answer further questions." *See id.* at 1116. Accordingly, this statement and those statements which follow it should be suppressed.

The facts in *State v. Belcher,* 520 So. 2d 303, 303-304 (Fla. 3d DCA 1988) are as follows:

> Ann DeMuro and Charles Woods were robbed and murdered as they opened a builders' supply company in the early morning of January 30, 1985. Oliver Belcher, a former employee of the company, was taken into custody three days later at 12:30 a.m. and

> charged with the murders. At approximately 1:55 a.m., Detective Conley approached Belcher in the interview room and informed him of the ***304** charges and read him his *Miranda* rights. Stating that he understood his rights and was willing to speak without an attorney present, Belcher signed a rights waiver form. In response to questioning, the defendant admitted that he had taken a car belonging to one of the murder victims, but denied that he had committed the murders. Conley continued to question Belcher until 4:50 a.m., at which time the defendant said to Conley *"I don't want to talk to you any more."* Conley stopped questioning the defendant and left the room. (Italics added).
>
> A short time later Conley placed a telephone call to another detective on the case, Blocker. Conley informed Blocker that the police had arrested Belcher and that Belcher denied any involvement in the murders and no longer wanted to talk to him. When Blocker arrived at the police station at approximately 6:00 a.m., the defendant was still sitting in the interview room. Blocker entered the interview room, introduced himself to the defendant, and told the defendant that he wanted to hear his side of the story. At no time did Blocker reinform the defendant of his *Miranda* rights. The defendant responded that he wanted to think about it and would like to be left alone. Blocker left the room for five minutes. He then returned to the interview room and again asked the defendant if he wanted to talk to him. The defendant replied, "Just get your pad and pencil," and then gave a confession.

The defendant subsequently filed a motion to suppress his confession in which he argued that his right to remain silent was not scrupulously honored. *Id.* at 304. The trial court granted this motion, *id.*, and the Third District Court of Appeal, in affirming the lower court's ruling, stated:

> In *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), the Supreme Court held that the admissibility of statements obtained after a suspect has cut off questioning depends on whether the suspect's "right to cut off questioning" was "scrupulously honored." *Id.* at 104, 96 S.Ct. at 326, 46 L.Ed.2d at 321. The critical factors in a determination whether a suspect's rights were scrupulously honored include: (1) whether the police ceased the interrogation immediately upon defendant's request; (2) whether the questioning was resumed only after a significant amount of time had passed; (3) whether fresh *Miranda* warnings

were provided; and (4) whether the later questioning was restricted to a crime that had not been the subject of the initial interrogation for which the right to silence had been invoked. *Mosley.*

In this case, Detective Conley stopped the interview when Belcher exercised his right to cut off questioning. However, the other factors set forth in *Mosley* support the trial court's conclusion that the defendant's right to cut off questioning was not scrupulously honored.

After the defendant had invoked his right to silence, the police continued to detain him in the interrogation room. The first detective placed a telephone call to a second detective who arrived at the station house and attempted to renew questioning after a passage of time approximating an hour. When the defendant asked the second detective to leave him alone to allow him time to think things over, the detective merely stepped outside the interview room for five minutes. Although the Supreme Court did not define in *Mosley* what constitutes a "significant period of time," some courts have found periods of time ranging from minutes to several hours to be insufficient under the *Mosley* standard. ***305** *United States v. Clayton,* 407 F.Supp. 204, 206 (E.D.Wis.1976) (fifty minutes insufficient even where defendant was given new *Miranda* rights and signed waiver); *United States v. Olof,* 527 F.2d 752 (9th Cir.1975) (three hours insufficient despite new warnings where police sought to wear down defendant). Other courts have found periods of time ranging from less than an hour to several hours to be sufficient where the defendant was given fresh*Miranda* warnings and the defendant waived his rights. *McNickles v. State,* 505 So.2d 633 (Fla. 4th DCA) (forty-five minutes sufficient where new warnings were given and defendant waived his rights), *rev. denied,* 515 So.2d 230 (Fla.1987); *State v. Isaac,* 465 So.2d 1384 (Fla. 2d DCA 1985) (one hour and forty minutes sufficient where defendant was advised of rights and waived them). Here, however, Detective Blocker neither advised Belcher of his rights when he first attempted to question him nor informed him of his rights when the questioning resumed five minutes later.

Although requestioning a defendant about the same crime following an invocation of the right to silence is not alone determinative of whether the invocation was scrupulously honored, *Jackson v. Wyrick,* 730 F.2d 1177, 1180 (8th Cir.) *cert. denied,* 469 U.S. 849, 105 S.Ct. 167, 83 L.Ed.2d 102 (1984), it is a significant factor in determining whether the right to cut off questioning was respected and, when coupled with a short passage of time and a failure to give fresh warnings, has been held fatal. *United States v.*

> *Lopez-Diaz* 630 F.2d 661, 664 (9th Cir.1980); *United States v. Hernandez,* 574 F.2d 1362, 1369 (5th Cir.1978).

Belcher, 520 So. 2d at 304-305.

In Mr. Thompson's case, *not even one* of the four critical factors enunciated in *Michigan v. Mosely* was satisfied. That is to say, Mr. Thompson's interrogators (1) did not cease the interrogation immediately upon his request; (2) they did not let a significant amount of time pass before resuming their questioning; (3) they did not provide fresh *Miranda* warnings following the invocation of his right to silence; and (4) they did not restrict their questioning to a crime that had not been the subject of the initial interrogation for which the right to silence had been invoked.

In *Spradley v. State,* 442 So. 2d 1039, 1042-43 (Fla. 2d DCA 1983), the Court, in reaching the conclusion that the defendant's right to cut off questioning was not scrupulously honored, stated:

> Appellant unequivocally invoked her Fifth Amendment right to remain silent, but not her Fifth Amendment right to counsel, [FN2] by responding "No" when Deputy Close asked her in his squad car upon advising her of her *Miranda* rights whether she wished to make any statements in addition to those which she had made previously at the houseboat. A person in custody is afforded a lesser degree of protection from further questioning by law enforcement authorities if he invokes the right to remain silent, but not the right to counsel. The Eleventh Circuit Court of Appeals aptly summarized the distinction in *United States v. Bosby,* 675 F.2d 1174, 1181-82 (11th Cir.1982):
>
> > FN2. The right to counsel during custodial interrogation is founded in the Fifth Amendment to the federal constitution, not the Sixth Amendment. *Edwards v. Arizona,* 451 U.S. 477, 485-86, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 386-87 (1981).
>
> Although the assertion of either right mandates the immediate

> cessation of an interrogation, the particular right invoked has a differing impact on subsequent police conduct. [Citation omitted.] Upon assertion of his right to counsel, law enforcement officials cannot subject the defendant to further questioning until an attorney has been appointed for him and he has been accorded the opportunity to consult. [Citations omitted.] Thus a request for counsel acts as an absolute prohibition on the right of police to initiate questioning until an attorney has been appointed. No such proscription upon the right of police to resume questioning exists where a defendant asserts his right to remain silent. Instead, law enforcement officials are required to cease questioning the defendant but may resume the interrogation at some later time. [Citations omitted.]
>
> In *Michigan v. Mosley,* 423 U.S. 96, 104, 96 S.Ct. 321, 325-26, 46 L.Ed.2d 313, 321 (1975), the Supreme Court of the United States declared, paraphrasing from *Miranda,* that resolution of the question of the admissibility of statements obtained after a person in custody has invoked his right to remain silent depends upon whether his decision to assert his "right to cut off questioning" was "scrupulously honored."
>
> In holding that no *Miranda* violation occurred in *Mosley,* the Court stated:
>
> This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation. 423 U.S. at 105-06, 96 S.Ct. at 327, 46 L.Ed.2d at 322.

Unlike the interrogators in *Mosley,* the interrogators in Mr. Thompson's case did *not* immediately cease questioning him when he asked them to do so. Accordingly, Mr. Thompson's inculpatory statements should be suppressed.

In *Bowen v. State*, 404 So. 2d 145, 146 (Fla. 2d DCA 1981), the Court stated:

> Once a person in custody has asserted the right to remain silent, any statements obtained from that person are admissible only if the interrogating officer has scrupulously honored the accused's right to remain silent. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Moreover, where an accused who has refused to discuss a crime subsequently makes an incriminating statement, the state has the heavy burden of showing the accused knowingly waived his right to remain silent. State v. Dixon, 348 So.2d 333 (Fla. 2d DCA 1977). To establish a waiver under these circumstances, the state must demonstrate that the interrogation was terminated at the accused's request and was resumed only when the accused has indicated his desire to make a statement. Rivera Nunez v. State, 227 So.2d 324 (Fla. 4th DCA 1969). . . .
>
> In the instant case, Detective Stanley continued to question Bowen concerning the burglary after he had stated that he did not wish to discuss it. In addition, the state failed to demonstrate any subsequent waiver by Bowen. Therefore, since the detective failed to scrupulously honor the defendant's right to remain silent, the trial court erred in admitting these inculpatory statements.

In Mr. Thompson's case, his interrogators continued to question him even though he told them that he did not wish to continue speaking with them. Because they failed to scrupulously honor his right to remain silent, Mr. Thompson's statements should be suppressed.

V. MR. THOMPSON'S INVOCATION OF HIS RIGHT TO COUNSEL

During his May 13th interrogation, Mr. Thompson invoked his right to counsel. The State should not be permitted to elicit evidence of this fact at trial. *See Miranda v. Arizona,* 384 U.S. 436, 468 (1966) ("[i]n accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed

his privilege in the face of accusation. Cf. Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964) . . . "); *Smith v. State*, 681 So. 2d 894, 895 (Fla. 4th DCA 1996) ("courts must prohibit all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the right of silence").

WHEREFORE, Mr. Thompson, through undersigned counsel, requests that this Court grant Defendant's Motion to Suppress a Confession or Admission Illegally Obtained.

Ronald S. Chapman
Counsel for Defendant

CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished by delivery to Assistant State Attorney Angela Miller this 3d day of October, 2003.

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