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IN the Supreme Court of Florida

DUANE EUGENE OWEN,
APPELLANT,

VS.

STATE OF FLORIDA,
APPELLEE.

CASE NO: 68,549

Reply pro se brief of Appellant

DUANE EUGENE OWEN, pro-se
FLA. State Prison # 101660
P.O. Box 747
Starke, Fla. 32091

Appellant

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Preliminary Statements

The numerical designation given to the forthcoming arguments correspond to the arguments in Appellant's pro-se supplemental brief.

The symbols will be used as follows;

"R"	Record on Appeal
"SR"	Supplemental Record on Appeal
"AB"	Appellant's Initial brief
"APB"	Appellant's pro se brief
"SAB"	State's answer brief

Additional Statement of the Facts

The supplemental record on appeal which contains the transcription of the numerous hours of interrogation were made from copies of the original tapes.

The Clerk of the Supreme Court has in its possession copies of the video taped interrogations rather than the originals which are still in the possession of the various law enforcement agencies.

I. Appellant's statements were obtained in violation of the Fifth, Sixth and Fourteenth Amendment to the United States Constitution.

1) Appellant's request to consult with an attorney of his choice.

In its brief, the State argues that appellant never requested to speak with an attorney .... namely, Paul Moyle. However, the State goes on to say that this allegation was never raised at the trial court, thereby it must be assumed no error was committed, otherwise the argument has been waived. (SAB 68-69).

The State cannot claim on one hand that appellant never requested for the assistance of counsel .... but then on the other hand claim that if appellant did in fact request to speak with an attorney that no error has been committed because the claim wasn't raised at trial. Furthermore, the trial court reviewed all the evidence, testimony and viewed the videotapes .... so therefore, if in fact this Court agrees that appellant did assert his Fifth Amendment right to an attorney of his choice, then it would be said that the trial court committed fundamental error in not recognizing this assertion.

In any event, the State's argument is totally without merit and flys directly in the face of our constitution and supporting case law under Miranda,(1). Under the Miranda, ruling, the United States Supreme Court set out the following and stated that;

(1) —
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

"if an individual indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Id. 384 U.S. at 444-445.

In the present case, appellant requested from the beginning of the interrogations throughout all interrogations to speak with an attorney of his choice. In fact, the following colloquy took place between appellant and one of the police officers on May 30th, 1984, and as testified by officer Woods at the motion to suppress:

State Attorney: "Please relate to the Court, as specifically as you can, what conversation was held, so the Court understands."

Officer Woods: "He was asking me how much time in prison he could get for the different offenses; the burglaries and the homicide and the other cases that Boca had pending.

And I told him that I couldn't give him legal advice on what the sentences were, and, you know, that I wasn't able to arrange any deals for him like that; that that would have to be with someone with proper authority, and I believe I named Mr. Paul Moyle the chief prosecutor ..... (R 797-798)

As clearly indicated through this passage, appellant was told at the beginning of all interrogations that if he needed any

legal advice, that that would have to be with someone with proper authority. (R 797-798). Regardless of the fact that the attorney whom appellant requested was an assistant state attorney does not in any manner effect the assertion of appellant's fifth amendment right, under Miranda, to an attorney of his choice. Especially after the police office directed appellant to this attorney for legal advice.

In a similar analogy, even if an individual wished to make a statement to law enforcement officials ..... that individual still has a Fifth Amendment right to the assistance of counsel during the interrogation. Miranda, supra. The reason behind this is so that the individual's rights are protected and for the attorney to act as a referee so that no wrongdoings will occur during the interrogation by the law enforcement officials. Miranda.

In the present case, appellant had a fifth amendment right to the assistance of counsel of his choice. The State suggest that appellant knew the difference between Paul Moyle and an attorney. However, it is abundantly clear, "crystal clear", that an attorney is an attorney ... and as soon as any attorney was requested ... all interrogation must ceased. Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981); Miranda, supra.

The State is attempting to show that appellant wanted to make a deal and not for legal advice. However, again, this reasoning is totally without merit and just as a person has a right to make a statement, he likewise has a fifth amendment right to the assistance of counsel at all interrogations, Miranda, Edwards, supra, especially in the instant case, whereas, the police officer told appellant that all legal advice must come from Paul Moyle.

Furthermore, the United States Supreme Court in Miranda did not separate or discriminate between a defense attorney or a prosecuting attorney. All the rule requires is that a criminal suspect has "a right to a lawyer of his choice". Id.

Therefore, appellant was entitled to a lawyer of his choice during the first interrogation and to consult with Paul Moyle, and said denial was a violation of appellant's fifth Amendment and sixth Amendment right to counsel under the United States Constitution and any evidence derived therefrom after the first interrogation of May 30th, 1984 is "fruit of the poisonous tree."

2) The police continued to interrogate appellant even after appointment of counsel.

Today, the law which governs resolution of appellant's claim is Michigan v. Jackson, 106 S. Ct. 1404 (1986). There the Supreme Court held that when .....

> "a person who has previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment .... the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an unconseled defendant that might have been entirely proper at an earlier stage of their investigation." Id.

Thus,

> "if police initiate interrogation after a defendant's assertion,

at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."

Jackson, 106 S.Ct. at 1411 (emphasis supplied).

Appellant in the present case became the "accused" on May 30th 1984 (R 689-691), (R 873-894) throughout the interrogations leading up to the June 21st 1984 police-initiated interrogation in which appellant gave an alleged statement.

Appellant in the instant case asserted his right to counsel. Law enforcement nevertheless initiated questioning on June 21, 1984. Under Jackson, the resulting statements were flatly inadmissible.

The sixth amendment right to counsel "attaches ..... upon the initiation of adversary judicial proceedings, whether by way of formal charge, preliminary hearing, indictment, or information.

Here, the appellant had been arrested five times (2), had sought and received the appointment of counsel and had been formally charged with various crimes, including being officially appointed counsel by the Court.

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(2) Appellant was arrested, arraigned and appointed counsel in 1982 and was ultimately arrested again on a pending capias, case no: 82-5781. He was formally charged on two additional cases; ie: 83-144 MM and 84-8900 MM. Additionally, counsel was appointed on those two cases. Furthermore, two informations were filed against appellant on May 31, 1984 in case no: 84-3460 CF A02, and on June 13, 1984 on case no: 84-3459 CF A02. Both informations were filed prior to the alleged statements given on the instant case on June 21, 1984. Counsel was also appointed on those two informations. Attached as Appendix "A".

In its brief, the State is arguing that Jackson is not applicable sub judice. (SAB 80). Furthermore, the State is attempting to suggest that no formal charges had be filed against Appellant on any of the cases prior to or on June 21, 1988. (SAB 81). This statement is incorrect and Jackson is controlling sub judice. See, Appendix "A".

Contrary to the States assertions, the fundamental sixth Amendment right at issue in the present case is not dependent on a technical nicety ..... an actual "arraignment" for a specific crime is not required to trigger the right to counsel. What is required is the initiation of judicial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Brewer v. Williams, 430 U.S. 387, 399 (1977), citing, Kirby v. Illinois, 406 U.S. 682, 689 (1972).

Appellant was under arrest, formally charged at a judicial proceeding, and was in custody. Cf. Brewer, supra at 400; See also, United States v. Gouveia, 467 U.S. 180, 187 (1984); Smith v. Wainwright, 777 F.2d. 609, 619 (11th Cir. 1985) (Adversarial proceedings had been initiated against Smith when he was arrested and charged with the murders.) It is thus of no moment that Appellant had not yet been technically "arraigned" at the time his Sixth Amendment rights were violated. Nor it is of any moment that the formal judicial proceedings which had in fact been initiated against appellant did not specifically embrace the Worden homicide.

In Jackson, supra, the petitioner had been arrested and arraigned on wholly unrelated charge at the time he was interrogated and gave the sixth Amendment - violative statement there at issue. Id. 106 S.Ct. at 1406.

Similarly, in Brewer, supra, the petitioner Williams had been arrested and arraigned for another charge at the time statements implicating him in the murder were given. Id. 430 U.S. at 392. In Brewer, law enforcement did not even know that a murder had occured until they interrogated the suspect. Id.

In the instant case, Appellant had been formally arrested and charged at the time the statements at issue were illegally obtained. Appellant had also implicated himself in numerous offenses prior to the instant case, however, the law enforcement officers withheld the filing of those until after Appellant implicated himself in the Worden case. This is not following the letter of the law as the State suggest. (SAB 92).

However, in any event, Appellant was already arrested, arraigned, and appointed counsel on a pending capias, ... formally charged, and arrested for various offenses as outlined infra, at, (footnote 1, page 5).

Moreover, there can be no question that the authorities "had committed themselves to prosecution", and thus that the sixth Amendment right to counsel had attached by the time the officers interrogated Appellant, see, Gouveia, supra, 467 U.S. at 188, and that it had been asserted at a peior judicial proceeding. (R 645), (R 760), (R 769), (R 780). Of course, by the time of the alleged statements in this case, the government had long been irrevocably committed to Appellant's prosecution.

Thus, it matters not that counsel had not been appointed to represent Appellant on the Worden homicide. Again, Jackson and Brewer control: in neither of those cases was counsel "appointed" to represent "the petitioner's" with reference to the murders at

issue, ... in those cases, as here, the petitioners had not yet been charged with the crimes for which they were ultimately convicted when the sixth amendment right attached." Indeed, in JACKSON, petitioner Blaidel's counsel were not even aware they had been appointed at all, on any offense, until after the incriminating statements were illegally elicited. JACKSON, 106 S. Ct. at 1406.

Once the sixth amendment right to counsel attached, as it undeniably had here by the time the challenged statements were elicited, any waiver of that right after law enforcement's initiation of the June 21st 1984 interrogation is flatly invalid.

> "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." JACKSON, 106 S. Ct. at 1411.

As discussed herein at length and in appellant's supplemental pco-ss beief, the right had attached, and under JACKSON any waiver of that right -- "executed" by the signing of a form specifically prepared by law enforcement in anticipation of the illegal interrogation which ultimately occured -- was invalid.

The State presents a fuether wholly unfounded assertion: that the sixth amendment protections afforded by JACKSON were not implicated instanter because appellant somehow "initiated" the discussions during which he made the challeged statement. (SAB 92). However, the state concedes that the police initiated the June 21,

1984 interrogation whereas the police formally "executed" the formal reading and arrested Appellant for the Worden homicide. The State list only the following dates in which they alleged that appellant initiated the communications, and they are: "June 1, June 3, June 7, June 8, and June 18, 1984." As clearly indicated .... June 21, 1984 was not one of those times.

Therefore, the June 21, 1984 interrogation where the alleged statements were obtained was <u>initiated by the police</u>.

Although the State is attempting to argue that by Appellant initiating prior communication ... that that in and of itself would waive Appellant's right to counsel at the June 21, 1984 police-initiated interrogation. This argument has been flatly rejected in <u>Edwards v. Arizona</u>, 451 U.S. 486, 101 S. Ct. 1880 (1981). The Court in <u>Edwards</u> stated that:

> "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights". <u>Id.</u> 101 S. Ct. at 1884-1885.

The <u>Jackson</u> court concluded that:

> "just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a fifth amendment analysis, so too they are insufficient after the request for counsel in a sixth amendment analysis." <u>Id.</u> 106

S.Ct. 1410-1411.

In the present case, and taking the standards under Edwards, supra, Jackson, supra, appellant was entitled to the assistance of counsel under the Sixth Amendment analysis. It is clear that the direct questioning by the police officers on June 21, 1984, during the police-initiated interrogation easily meets the standards of "interrogation" as set forth under Rhode Island v. Innis, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 1689-1690 (1980).

It is crystal clear in the present case that the State "at the time of the interrogation took place" ... that they had crossed the constitutionally significant divide from fact-finder to adversary.

In supplemental support of appellant's claim, appellant directed this Court to Espinoza v. Fairman, 813 F.2d. 117 (7th Cir. 1987). The State is also claiming that Espinoza is not controlling here as this Court rejected an idential claim in Light v. State, 512 So.2d. 922, 925-926 (Fla. 1987). However, a review of that case shows that this Court only rejected that claim because the State had not begun to prosecute Light at the time of the alleged confession.

In the instant case, it is clear that the State had begun to prosecute appellant at the time of the June 21, 1984 interrogation.

While it may be true that the Massiah v. United States, 377 U.S. 201 (1964) exclusion applies only to evidence pertaining to the charges as to which the sixth amendment right to counsel had specifically attached at the time the evidence was obtained, (also see; Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477 (1985)), the

instant claim is not founded on the "Massiah, Moulton, exclusion." Massiah and Moulton and its progeny address a very different question than the one here at issue --- governmental surreptitious investigation of the criminally accused, not custodial interrogation.

In Moulton, supra, in what had been referred to as a "surreptitious investigation", police obtained incriminating statements pertaining to two crimes, one for which the defendant had been indicted, the other for which he had not. The Court concluded that Although the evidence relating to the charge for which Moulton had been indicted had been obtained in violation of the Sixth Amendment right to counsel, and thus, was inadmissible, "to exclude evidence pertaining to charges as to which the sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at the time, would unnecessary frustrate the public's interest in the investigation of criminal activities." Id. 106 S.Ct. at 489.

The Sixth Amendment standards attendant to custodial interrogation, Brewer, Jackson, and Espinzona, supra, are crystal clear and simply prohibit All governmental-initiated custodial interrogation once the right to counsel had attached. Id. Massiah and Moulton involves quite different governmental overreaching than the governmental overreaching involved in Brewer, Jackson, Espinoza and the instant case. Also see; Henderson v. Dugger, No: 88-54-CIV-OC-16, April 11, 1988, (Mid. dis. of Fla.) (decision pending).

Although the State relies on the supplemental authority of Patterson v. Illinois, ___ U.S. ___, 43 CR.L. 3146 (case no: 86-7059 June 24, 1988), in which the United States Supreme Court denied Patterson's claim of "right to counsel" under the Sixth

Amendment context, Patterson is not controlling in the present case. The Patterson Court held that:

"the postindictment questioning that produced petitioner's incriminating statements did not violate his Sixth Amendment right to counsel." Id. 43 CR.L. 3146.

"there can be no doubt that petitioner had the right to have the assistance of counsel at his postindictment interviews with law enforcement authorities. Our cases make it plain that the Sixth Amendment guarantees this right to criminal defendants." Michigan v. Jackson, 475 U.S. 625, 629-630 (1986); Brewer v. Williams, 430 U.S. 387, 399-399 (1977); Massiah v. United States, 377 U.S. 201, 205-207 (1968)."(3)

In the present case, Jackson, supra is controlling and there are several factors, distinct factors to support appellant's claim of "right to counsel".

(3) —

We note as a matter of some significance that petitioner had not retained or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. See, Maine v. Moulton, 474 U.S. 159, 176 (1986).

Indeed, the analysis changes markedly once an accused even request the assistance of counsel. See; Michigan v. Jackson, supra, (part II-A, infra).

Those distinct factors in the present case are:

a) Appellant was appointed counsel to represent him on several cases, see; (footnote 1, pg. 5) supra; And,
b) Appellant requested the assistance of counsel at prior court proceedings; And,
c) the State begun to prosecute Appellant at the time of the warden homicide.

Using those distinct factors herein and supporting case authorities, Appellant has clearly shown that his Sixth Amendment right to counsel was violated during the police-initiated interrogation held on June 21, 1984. Jackson, Edwards, and Espinoza, supra. Furthermore, Appellant was likewise denied his Fifth Amendment right to counsel while in continous police custody during the police-initiated interrogation since he asserted that right at a previous arraignment and prior first appearance. Miranda, Edwards, and Espinoza, supra.

Therefore, the conviction and sentence must be reversed and remanded to the trial court with directions this Court deems appropriate.

II. Appellant was deprived of Due Process of law and a fair trial by the State's Destruction of Evidence in violation of the Fifth and Fourteenth Amendments, Florida law, and notions of basic fairness.

In its brief, the state is claiming that no due process occured by the failure to record the interrogations on May 30th and June 1st, 1984. (SAB 85-86). Although it is true that no recordings were made on those particular days, the issue involved is not only that the state failed to preserve the first two sessions, but that the police continued thereafter by -- "selectively recording" Appellant's statements. This is a Due Process violation.

The State has made an improper comment on Appellant's right to remain silent. (SAB 85). It is true that Appellant never took the stand during the suppression hearing, but Appellant only decided not to take the stand because of the state's failure to preserve the interrogations and then "selectively recoeding" the remaining interrogations. Furthermore, Appellant was unable to testify as to the effects of the alter tapes since he was unable to view the entire contents of the videotapes. (R 625).

The Court: Is it a fair statement, Mr. Kaischer, that you on your investigation have reviewed the tapes?

Mr. Kaischer: All of them.

If I might add, I am glad you pointed that out. Mr. Owen has advised me that he was only provided ----

As clearly indicated through this passage, counsel for appellant attempted to inform the Court that appellant never viewed the tapes in their entirety, however, the Court interrupted counsel ---- so the matter was never brought to the Courts attention again.

Appellant elected to exercise his Constitutional Fifth Amendment right to remain silent and therefore he should not be subjected to improper comments by the State. This act would not be proper during trial and likewise, should not be tolerated during appeal.

Furthermore, the state suggests that no prejudice occured, but if it did, then raising it at this late hour is barred. (SAB 85). The state's argument is based on the fact that since appellant never took the stand, he cannot show prejudice, And since appellant never listed what the "promises" were to contradict what the officers testified too, then Appellant's claim is without merit. (SAB 85-86). This reasoning is totally without merit and the State knows very well that since appellant never took the stand to testify as to the "promises" .... it is not part of the record and cannot be brought up on appeal. However, if any error occured, it is a fundamental error on the part of the trial judge since the "promises" were spoke of during the videotapes. (see; (ST 60-89); (ST 103); (ST 114); (APB 15-17).

"

> The contents of an interrogation are obviously material in determining the voluntariness of a confession. The state usually attempts to show voluntariness through the interrogating officers' testimony that the defendant's constitutional rights were

protected. The defendant, on the other hand, often testifies to the contrary. The results, then, is a swearing match between the law enforcement official and the defendant, which the Courts must resolve." Grano, Voluntariness, Free Will, And the Law of Confessions, 65 VA. L. REV. 859, 898, N. 192 (1979).

The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado.

"Interrogations still take 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." Miranda, 384 U.S. at 445, 86 S.Ct. at 1612, 1614, 16 L.Ed.2d. at 707, 709.

In the present case, the State's failure to preserve the first two interrogations resulted in a gap as to what really occured during those interrogations and a gap in our knowledge as to what took place. Without the exact extent of the interrogations during May 30th and June 1st, it is impossible to determine the voluntariness of appellant's alleged confession.

This is a violation of Due Process.

Florida Courts have also been faced with issues of voluntariness of consent pertaining to search and seizures. Smith III v. State, ___ So.2d. ___, 12 FLW 2455, (Fla. 4DCA, Oct. 21, 1987); Hunter v. State, ___ So.2d. ___, 13 F.L.W. 233, (Fla. 4DCA, JAN. 29, 1988).

In both decisions, the Court was refered to a procedure used by the Alaska Supreme Court in, Stephens v. State, 711 P.2d. 1156 (Alaska 1985).(4)

In Stephens, supra, the Court held;

"

More than five years ago, in Mallott v. State, 608 P.2d. 737 (Alaska 1980) we informed Alaska law enforcement officials that; (it is incumbent upon them to tape record, where feasible, any questioning of ceiminal suspects and particularly that which occues in a place of detention). Id. at 743 n. 5 (citation omitted). This requirement (hereinafter the Mallot Rule) was again noted in S.B. v. State, 614 P.2d. 786 (Alaska 1980) with the observation that an electronic record of such interviews "will be a great aid" when the Courts are called upon to determine "the circumstances of a confession or other waiver of a suspect's Miranda Rights". Id. at 790 n. 9.

In a thied case, McMahan v. State, 617 P.2d. 494 (Alaska 1980), cert. denied, 454 U.S. 839, 102 S.Ct. 146, 70 L.Ed.2d. 121 (1981), the recording requirement was repeated, with fruther statement that, "if Miranda Rights are read to the defendant, this too should be recorded." 617 P.2d. at 499 n. 11.

Today, we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention "violates a suspect's right to due process, under Alaska Constitution(5), and that any statement thus obtained is generally inadmissible." See; Hendricks v. Swenson, 456

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(4) A complete copy of this decision can be found as a Supplemental authority in Owen v. State, 68,550.

F.2d. 503, 506-507 (8th Cir. 1972) (suggesting that videotapes of interrogations protect a defendant's rights and are a step forward in the search for truth); Ragan v. State, 642 S.W.2d. 489, 490 (Texas Crim. App. 1982) (Texas Code Crim. Proc. Ann. Art. 38.22, §3 (Vernon 1979) (requiring that oral statements must be recorded in order to be admissible); Model Code of Pre-Arraignment Procedure §13.04 (Proposed official draft) (1975) (requiring sound recordings of custodial interviews). See; generally Kamisar, Forward: Brewer v. Williams, A Hard look at a discomfitting Record, 66 Geo. L. J. 209 (1977-1978); Williams, the authentication of statements to the police, Crim. L. Rev. 6 (Jan. 1979). Id. at 1157-58.

* * * *

"The Alaska Court of Appeals' refusal to adopt an exclusionary rule in these circumstances is perhaps due to failure on our part to adequately explain the full significance of our prior decisions. Electronic recordings of suspect's interrogations was described in these cases, rather ambiguously, as "part of a law enforcement agency's duty to preserve evidence." Mallott v. State, supra at 743 n. 5 (citing), Catlett v. State, 585 P.2d. 553, 558 n. 5 (Alaska 1978)(6). Today, we resolve that ambiguity. Such recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible. We reach this conclusion because we are convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, right against incrimination and a fair trial." Id.

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(5) Alaska Const. Art. I, §7, provides in part: "no person shall be deprived of life, liberty, or property without due process of law."

In the present case, Appellant was deprived of due process and a fair trial by the State's failure to preserve the first two interrogations, which resulted in prejudice toward Appellant. As our own constitution states; Florida Constitution, Art. 1, § 9, that:

> "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself." Id.

Not only was Appellant deprived of due process in that the State failed to preserve the first two interrogations, but likewise, deprived of a fair trial in that the State "selectively recorded" Appellant's remaining interrogations without the consent or preserving those recordings in violation of Florida Statute, Sec. § 934.01. Although under this chapter, section § 934.03(2)(c); it states,

> "It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the persons to the communication has given prior consent to such interception and the purpose is to obtain evidence of a criminal act. Id."

(6) — — — — — — — — — — — — — — — — — —

In Catlett, we held that, because of the important due process rights involved, evidence should not be destroyed based on an investigator's evaluation of its usefulness, instead, state investigator's should have standard procedures for the preservation of evidence obtained during the investigation. 585 F.2d. at 558 n. 5.

this section does not pertain to the instant case as it was never established if any of the parties consented to the illegal interception of the communications during the motion to suppress. Id.

Even assuming that this Court finds that the State never violated sec. § 934.03 (2)(c), this Court must continue to review the correct procedure in obtaining oral communications as set forth by the legislation.

In section, § 934.09 (7)(a), it states, in pertinent part, that;

> "the recording of the contents of any wire or oral communication under this chapter (subsection) shall be kept in such a way as will protect the recording from editing or other alterations." Id.

> "Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the Judge issuing such order and sealed under his directions." Id.

In the present case, although there was no order issued for the interception of said communications, the law enforcement officials were still under the obligation to follow the procedures set for under this chapter.

The State violated this chapter by not making available the videotapes to the Judge of competent jurisdiction in order to seal the tapes. Instead, the tapes are still in the possession of the various law enforcement officials, so this alone violated this chapter further under, F.S. § 934.09 (7)(b) in which states,

"The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under s. 934.08(3)." Id.

In the instant case and as clearly shown herein, the State clearly violated Appellant's due process rights. Not only did the State fail to preserve the first two interrogations, but they circumvented their case by "selectively recording" the remaining interrogations in vilation of F.S. §934.01.

Since the videotapes were obtained by the means of illegal electronical surveillance and not sealed by a competent Judge or clerk thereof, the videotapes cannot be said to reflect true and accurate contents.

Therefore, Appellant's conviction and sentence must be reversed with directions that the videotapes be suppressed.

Conclusion

Based upon the following Arguments and the Authorities cited, Appellant Respectfully Request this Honorable Court to Reverse the Judgement and sentence of the trial Court and Remand this cause with directions this Court deems Appropriate.

Respectfully Submitted,

Certificate of Service

I, Hereby Certify that a true and correct copy of the foregoing has been furnished by the U.S. Postal Service this 9th day of August, 1988, to the following;

1) Georgina Jimenez - Orosa, Assistant Attorney General
111 Georgia Ave., Suite 204
W. Palm Beach, Fla. 33401, and,

2) Craig Braudrean, Esquire
220 Sunrize Ave., Suite 207
Palm Beach, Fla. 33480

Respectfully,