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IN THE SUPREME COURT OF FLORIDA

MARSHALL LEE GORE,

Appellant,

v. CASE NO. 75,955

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR COLUMBIA COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Pursuant to this Court's order dated September 11, 1991, granting Appellant's motion for leave to file supplemental brief, Appellee has prepared the following argument as its supplemental answer to the arguments submitted in Issue I.

ARGUMENT

ISSUE

SUPPLEMENTAL ARGUMENT REGARDING WHETHER THE TRIAL COURT ERRED IN DENYING GORE'S MOTION TO SUPPRESS STATEMENTS SINCE THE STATEMENTS WERE OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL

Gore seeks to supplement his argument as to Issue I through an invitation "not to follow *McNeil* [*v. Wisconsin*, 501 U.S. ____, 111 S.Ct. ____, 115 L.Ed.2d 158 (1991)], and to hold that the Constitution of Florida affords a criminal defendant greater protections under these circumstances." (Appellant's Supplemental Brief, page 3). Gore argues that in the interest of protecting "attorney-client relationship" and "due process in criminal proceedings" this Court should, under the Florida Constitution, specifically, Article I, §§9 & 16, prohibit police initiated custodial interrogation on any offense after a given defendant is represented by counsel on an offense specific charge and remains in custody. He argues that **McNeil v. Wisconsin**, 501 U.S. ____, 111 S.Ct. ____, 115 L.Ed.2d 158 (1991), does an injustice to the right to counsel. The State would argue to the contrary and assert that the instant case falls squarely within the decision of **McNeil v. Wisconsin**, but more importantly, **McNeil** provides:

> Having described the nature and effects of both the Sixth Amendment right to counsel and the *Miranda-Edwards* "Fifth Amendment" right to counsel, we come at last to the issue here: Petitioner seeks to prevail by combining the two of them. He contends that, although he expressly waived his *Miranda* right to counsel, on every occasion he was interrogated, those waivers were the invalid product of impermissible approaches, because his prior invocation of the offense-specific Sixth

Amendment right with regard to the West Allis burglary was also an invocation of the non-offense-specific *Miranda-Edwards* right. We think that is false as a matter of fact and inadvisable (if even permissible) as a contrary-to-fact presumption of policy.

As to the former: The purpose of the Sixth Amendment counsel guarantee--and hence the purpose of invoking it--is to "protec[t] the unaided layman at critical confrontations" with his "expert adversary," the government, *after* "the adverse positions of government and defendant have solidified" with respect to a particular alleged crime." (cite omitted). The purpose of the *Miranda-Edwards* guarantee, on the other hand--and hence the purpose of invoking it--is to protect a quite different interest: the suspect's "desire to deal with the police only through counsel," *Edwards*, 451 U.S., at 484. This is in one respect narrower than the interest protected by the Sixth Amendment guarantee (because it relates only to custodial interrogation) and in another respect broader (because it relates to interrogation regarding *any* suspected crime and attaches whether or not the "adversarial relationship" produced by a pending prosecution has yet arisen). To invoke the Sixth Amendment interest is, as a matter of *fact, not* to invoke the *Miranda-Edwards* interest. One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution. I can be said, perhaps, that it is *likely* that one who has asked for counsel's assistance in defending against a prosecution would want counsel present for all custodial interrogation, even interrogation unrelated to the charge. That is not necessarily true, since suspects often believe that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions. But even if it were true, the *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards*. The rule of that case applies only when the suspect "ha[s] *expressed* his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. (cite omitted). It requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for

> the assistance of an attorney *in dealing with custodial interrogation by the police*. Requesting the assistance of an attorney at a bail hearing does not bear that construction. . . .

The court observed in rejecting McNeil's "sound policy" to declare a policy that an assertion of a Sixth Amendment right to counsel would in fact imply an assertion of a **Miranda** Fifth Amendment right that, "such an expansive power under the constitution," would not be wise. The court opined:

> . . . If a suspect does not wish to communicate with the police except through an attorney, he can simply tell them that when they give him the *Miranda* warnings. There is not the remotest chance that he will feel "badgered" by their asking to talk to him without counsel present, since the subject will not be the charge on which he has already requested counsel's assistance (for in that event *Jackson* would preclude initiation of the interview) and he will not have rejected uncounseled interrogation on *any* subject before (for in that event *Edwards* would preclude initiation of the interview). The proposed rule would, however, seriously impede effective law enforcement. The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused, and in most States, at least with respect to serious offenses, free counsel is made available at that time and ordinarily requested. Thus, if we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned*. Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." (cite omitted).

Similarly, Gore's invitation to "adopt different standards for Florida", serves no purpose. The clear delineation between a Sixth Amendment right and a Fifth Amendment right under Florida's Constitution equivalent, would serve no purpose as thoroughly discussed in **McNeil.**

Based on the arguments presented by Appellee in its main answer brief, the State would urge that Gore never asserted a Fifth Amendment right to counsel. As such, pursuant to **McNeil v. Wisconsin, supra,** the trial court was correct in denying Gore's motion to suppress the exculpatory statements made by Gore to Detective Sims that Gore knew nothing about the black Mustang, he had never met Susan Roark; he did not know Tina Marie Corolis and he did not drive her red 1987 Toyota. All relief should be denied as to this claim.

CONCLUSION

Based on the foregoing, all relief should be denied.

Respectfully submitted,

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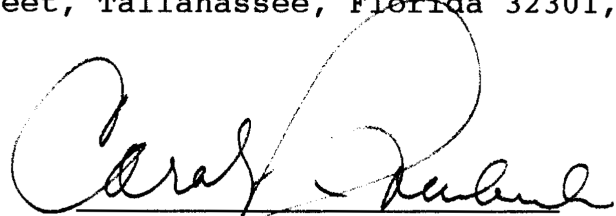
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. W.C. McLain, Esq., Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 20th day of September, 1991.



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