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 BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The following arguments are to supplement the arguments presented in Issue I.

ARGUMENT

ISSUE I

SUPPLEMENTAL ARGUMENT IN SUPPORT OF THE PROPOSITION THAT 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's position in Issue I is that his Fifth Amendment right to have counsel present during custodial interrogation was violated when the police initiated further questioning after Gore's assertion of his right to counsel, and the allegedly secured a waiver of counsel without having counsel actually present was invalid. The statements obtained should have been suppressed pursuant to Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and Minnick v. Mississippi, 498 U.S. ___, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1990). (Initial Brief at 26-31) The State argued that Gore never asserted his Fifth Amendment right to counsel and that the assertion of his Sixth Amendment right to counsel at the federal proceedings did not invoke his Fifth Amendment right and the protections of Edwards were inapplicable. In his reply brief, Gore responded that he had asserted his Fifth Amendment right to counsel. Alternatively, even if he had only asserted his Sixth Amendment right, such an assertion was sufficient to invoke Edwards. Since the filing of the reply brief, the United States Supreme

Court decided McNeil v. Wisconsin, 501 U.S. ___, 111 S.Ct. ___, 115 L.Ed.2d 158 (1991), which held that the assertion of the Sixth Amendment right to counsel in a judicial proceeding on one charge did not afford Edwards protections to the defendant during custodial interrogation on other charges. McNeil affects the alternative position Gore maintained in his reply brief, and it is this argument he now amplifies in light of McNeil.

In McNeil, the Unites States Supreme Court held that a defendant's assertion of his Sixth Amendment right to counsel in a judicial proceeding was not equivalent to an assertion of his Fifth Amendment right to counsel during custodial interrogation on unrelated, uncharged offenses. McNeil was arrested in Nebraska for a robbery occurring in Wisconsin. While transporting him, deputies read him his Miranda rights and tried to question McNeil. He refused to answer questions. A public defender represented McNeil at the bail and preliminary hearings on the robbery charge. After the hearing, a detective approached McNeil in jail and questioned him about a murder charge. Over the next few days, detectives questioned McNeil about the murder during two more interviews. The Wisconsin Supreme Court held that McNeil's assertion of his right to counsel at judicial proceedings on the robbery charge was not the same as asserting his Fifth Amendment right to have counsel present during any custodial interrogation regarding the uncharged murder. Affirming the lower court, the United States Supreme Court agreed. Concluding the the Sixth Amendment right

to counsel was "offense specific," the Court said that McNeil did not have the protections of Edwards v. Arizona and its progeny when questioned about the murder. If McNeil had asked for a lawyer's presence when he cut off questioning on the robbery charge, pursuant to Miranda, he would have had the protections of Edwards under Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), since a request for counsel during interrogation is not "offense specific." See, McNeil, 115 L.Ed.2d at 168.

Gore asks this Court not to follow McNeil and to hold that the Constitution of Florida affords a criminal defendant greater protections under these circumstances. In the interest of protecting the attorney-client relationship and assuring due process in criminal proceedings, this Court should hold that Article I Sections 9 and 16 of the Florida Constitution prohibits police-initiated custodial interrogation on one offense after a defendant is represented by counsel on another charge and remains in custody. This Court has seen fit to afford greater protections to the attorney-client relationship in the past. Haliburton v. State, 514 So.2d 1089 (Fla. 1987); see, also Walls v. State, 580 So.2d 131 (Fla. 1991). Just as in Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 1145, 89 L.Ed.2d 410 (1986), which this Court chose not to follow under the state constitution, Haliburton, the Supreme Court in McNeil invited the states to fashion their own procedural guidelines for the interrogation of a suspect as deemed appropriate. 115 L.Ed.2d at 170-171. The McNeil case does an injustice to the

right to counsel, and Gore urges this Court to adopt different standards for Florida.

Justice Stevens pointedly wrote in his dissent why the McNeil holding is not reasonable or desirable. Of paramount concern to Justice Stevens was that the decision undermines the right to counsel:

> The Court's opinion demeans the importance of the right to counsel. As a practical matter, the opinion probably will have only a slight impact on current custodial interrogation procedures. As a theoretical matter, the Court's innovative development of an "offense-specific" limitation on the scope of the attorney-client relationship can only generate confusion in the law and undermine the protections that undergird our adversarial system of justice. As a symbolic matter, today's decision is ominous because it reflects a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant to the cause of justice.

115 L.Ed.2d at 172, Stevens, J., dissenting. Justice Stevens continued his discussion and wrote:

> The outcome of this case is determined by the Court's parsimonious "offense-specific" description of the right to counsel guaranteed by the Sixth Amendment. The Court's definition is inconsistent with the high value our prior cases have placed on this right, with the ordinary understanding of the scope of the right, and with the accepted practice of the legal profession.
>
> * * * *
>
> Today, however, the Court accepts a narrow, rather than a broad, interpretation of the [right to counsel]. It accepts the State's suggestion that although, under our prior holding in Michagan v. Jackson, a request for the assistance of counsel at a

> formal proceeding such as an arraignment constitutes an invocation of the right to counsel at police-initiated custodial interrogation as well, such a request only covers interrogation about the specific charge that has formal proceeding was held. Today's approach of construing ambiguous requests for counsel narrowly and presuming a waiver of rights is the opposite of that taken in Jackson.
>
> The Court's holding today moreover rejects the common-sense evaluation of the nature of and accused's request for counsel that we expressly endorsed in Jackson. (quotation from Jackson omitted)
>
> * * * *
>
> Finally, the Court's "offense-specific" characterization of the constitutional right to counsel ignores the substance of the attorney-client relationship that the legal profession has developed over the years. The scope of the relationship between an individual accused of crime and his attorney is as broad as the subject matter that might reasonably be encompassed by negotiations for a plea bargain or the contents of a presentence investigation report. Any notion that a constitutional right to counsel is or should be, narrowly defined by the elements of a pending charge is both unrealistic and invidious.

115 L.Ed.2d at 172-174. These concerns justify action from this Court to protect the right to counsel in Florida.

If this Court determines that Gore did not assert his Fifth Amendment right to counsel and, consequently, must reach the question of the impact of his Sixth Amendment right to counsel, Gore asks this Court to adopt greater protections for the right to counsel than afforded by McNeil.

CONCLUSION

For the reasons presented in the initial brief, the reply brief and this supplemental brief, Marshall Lee Gore asks this Court to reverse his judgements with directions to give him a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Supplemental Brief has been furnished by hand-delivery to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Marshall L. Gore, c/o Dade County Jail, #8825558, Cell P506, 1321 N.W. 13th Street, Miami, Florida, 33125, on this 4 day of September, 1991.

W. C. McLAIN