IN THE SUPREME COURT OF FLORIDA

ROBERT SAPP

Petitioner,

vs. CASE NO. 86,622

STATE OF FLORIDA ,

Respondent .
_____/

BRIEF OF THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION, AMICUS CURIAE

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PRELIMINARY STATEMENT

The Florida Prosecuting Attorneys Association submits this brief pursuant to the Order of this Court dated November 22, 1995 granting the Association's Motion for Leave to Appear as Amicus Curiae. The argument presented herein will be confined solely to the question certified to this Court by the lower tribunal and the issue belatedly raised by the Petitioner and not disposed of by the District Court of whether the Florida Constitution, as interpreted by this Court, compels suppression of the Petitioner's admissions that were voluntarily given to the authorities after the Petitioner had been advised of his right to remain silent and his right to have counsel present.

STATEMENT OF THE CASE AND FACTS

The Amicus accepts the Statement of the Case and Facts as set forth on pages two through twelve of the Petitioner's Brief.

SUMMARY OF ARGUMENT

The District Court properly rejected the Petitioner's request to extend the reach of Miranda-Edwards to encompass a suspect sitting in his cell, free of any interrogation, impending or otherwise. Adoption of the Petitioner's claim would deprive the State of its compelling interest in obtaining ***voluntary*** statements from persons who may have knowledge of criminal activity, would deprive a suspect an opportunity to exercise ***his*** right of self-determination and personal autonomy [1] - which this Court has held is protected by the Florida Constitution - and would diminish the "bright-line" nature of the Supreme Court's Miranda jurisprudence. Petitioner's claim was implicitly rejected by the Supreme Court in McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d (1991) and by this Court in Durocher v. State, 596 So.2d 997 (Fla. 1992) - a case not mentioned by the lower court. Moreover, the Circuit Court's of Appeal that have been presented with the federal question raised and disposed of by the District Court of Appeal, except the Tenth Circuit Court of Appeals, have answered it in the negative.

The Amicus suggests that for these reasons and based upon the argument presented hereinafter the Court should answer the certified question in the negative and affirm the decision of the District Court.

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[1] By this the Amicus means the right of a suspect from changing his mind and electing to speak with law enforcement officers on unrelated charges.

ARGUMENT

ISSUE

WHETHER AN ACCUSED IN CUSTODY EFFECTIVELY INVOKES HIS FIFTH AMENDMENT RIGHT TO COUNSEL UNDER MIRANDA WHEN, EVEN THOUGH INTERROGATION IS NOT IMMINENT, HE SIGNS A CLAIM OF RIGHTS FORM AT OR SHORTLY BEFORE A FIRST APPEARANCE HEARING, SPECIFICALLY CLAIMING A FIFTH AMENDMENT RIGHT TO COUNSEL?

At the outset the Amicus would suggest that the certified question is somewhat ambiguous in that the Petitioner was in physical custody but on a charge that was unrelated to the charges that Detective Baxter subsequently questioned him about. That is not made clear in the question as posed by the District Court. Obviously, if they were the same charges the statement would have been inadmissible in the State's case in chief, Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L.Ed.2d 704 (1988); Owen v. State, 596 So.2d 985 (Fla. 1992) and Durocher v. State, 596 So.2d 997, 999-1000 (Fla. 1992) because Petitioner's right to counsel would have attached. This Court may wish to amend the question presented to make this factual matter clear and unambiguous.

It is clear, however, that the Petitioner's Sixth Amendment right to counsel had not attached as to the charges Detective Baxter was questioning him about and therefore Arizona v. Roberson, supra, is inapplicable. McNeil v. Wisconsin, supra; Durocher v. State, supra; Kight v. State, 512 So.2d 922 (Fla.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Parham v. State, 522 So.2d 991 (Fla.3d DCA 1988); Valle v. State, 474 So.2d 796 (Fla.1985), vacated on other grounds, 476 U.S. 1102, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986); Waterhouse v. State, 429 So.2d 301 (Fla.), cert. denied, 464 U.S. 977, 104 S.Ct. 415, 78 L.Ed.2d 352 (1983); Rivera v. State, 547 So.2d 140 (Fla. 4th DCA 1989), review denied, 558 So.2d 19 (Fla.1990); and Lofton v. State, 471 So.2d 665 (Fla. 5th DCA), review denied, 480 So.2d 1294 (Fla.1985). The Petitioner's argument that Roberson supports his position is simply untenable. Likewise Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) is not applicable because Edwards invoked

his right to counsel during an interrogation which is when the Miranda-Edwards Fifth Amendment attaches.

The Petitioner is correct in noting that in Durocher, supra, the defendant had initiated the communication with the investigating detective, but that has no bearing on his claim that Roberson is involved. Durocher had relied upon an "Edward's Notice", as was done here. He claimed that Roberson required a suppression of the statement. This Court rejected that claim saying:

> " . . .[1][2][3] Durocher had exercised his Sixth Amendment right to counsel as to the murder charge for which he was awaiting sentencing. When Durocher confessed to the second murder, however, he had not been charged with that crime, and, therefore, no Sixth Amendment right to counsel had attached as to that second murder. McNeil v. Wisconsin, --- U.S. ----, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); Kight v. State, 512 So.2d 922 (Fla.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Parham v. State, 522 So.2d 991 (Fla.3d DCA 1988). The Sixth Amendment right to counsel is "offense-specific" and "cannot be invoked once for all future prosecutions." McNeil, 111 S.Ct. at 2207; Kight (when sixth amendment has not attached to a second crime, invoking the right for a first crime has no effect on the second). Moreover, an attorney cannot unilaterally invoke a client's right to counsel for crimes for which the client has not been charged. Valle v. State, 474 So.2d 796 (Fla.1985), vacated on other grounds, 476 U.S. 1102, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986). Thus, the public defender's letter raised no impediment to Durocher's confession. Waterhouse v. State, 429 So.2d 301 (Fla.), cert. denied, 464 U.S. 977, 104 S.Ct. 415, 78 L.Ed.2d 352 (1983); Rivera v. State, 547 So.2d 140 (Fla. 4th DCA 1989), review denied, 558 So.2d 19 (Fla.1990); Parham; Lofton v. State, 471 So.2d 665 (Fla. 5th DCA), review denied, 480 So.2d 1294 (Fla.1985). There is no merit to Durocher's argument regarding a Sixth Amendment violation. . . "
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> Id. at pp 999-1000

It should be noted that Durocher had also signed the "Edward's Notice" just as the petitioner here. See footnote 4 of Justice Kogan's dissent in Durocher wherein Justice Kogan states, ". . . Because the "Edwards Notice" here was signed by both Durocher and his attorney, [FN5] it must be construed as Durocher's personal invocation of his Fifth Amendment right not to be questioned by police in the absence of counsel. I therefore cannot agree with the majority's statement that Durocher had not validly invoked his Fifth Amendment rights prior to the time he confessed. He

clearly had. . .". The Amicus suggests that the Court in Durocher simply recognized that the *right to remain silent* under the Fifth Amendment and the right to counsel judicially created in Miranda and Edwards cannot be invoked in the future and must be invoked during an interrogation and that an individual is free to change his mind with respect to the Fifth Amendment right to remain silent. [2] This, of course, is harmonious with Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) and within the holding of McNeil v. Wisconsin, supra.

Counsel for Petitioner is also correct that McNeil does not specifically address the question of whether invocation of the " . . .Miranda-Edwards 'Fifth Amendment' right to counsel . . ." before any interrogation would preclude law enforcement officers from approaching a suspect in custody and the District Court so noted. This is because McNeil only invoked his Sixth Amendment right to counsel and never suggested that he did not wish to speak to anyone without *an* attorney present. This is what caused JUSTICE STEVENS to suggest that McNeil could and would be circumvented in the future by making certain that counsel and the defendant invoked their Sixth and Miranda-Fifth Amendment right to counsel. 501 U.S. at 184. The majority responded to that suggestion in footnote 3, saying:

> " . . .We have in fact never held that a person can invoke his Miranda rights anticipatorily, in a context other than "custodial interrogation"--which a preliminary hearing will not always, or even usually, involve, cf. Pennsylvania v. Muniz, 496 U.S. 582, 601-602, 110 S.Ct. 2638, 2650-2651, 110 L.Ed.2d 528 (1990) (plurality opinion); Rhode Island v. Innis, 446 U.S. 291, 298- 303, 100 S.Ct. 1682, 1688-1691, 64 L.Ed.2d 297 (1980). If the Miranda right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the Miranda right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of

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[2] . It would be strange jurisprudence to hold that the right to counsel, which is specifically referred to in the Sixth Amendment, can not be invoked before the right has attached but the "Miranda-Edwards 'Fifth Amendment' right to counsel", McNeil, supra, at 184, can be invoked prior to any custody and interrogation which is when that right attaches. Yet, that is precisely what Petitioner is contending.

custodial interrogation, with similar future effect. . ."

Id. at 182.

The lower federal courts - except the Tenth Circuit - have specifically relied on this exchange to conclude that to invoke the "Miranda right to counsel", it must be invoked during an interrogation or where an interrogation is imminent. United States v. LaGrone, 43 F.3d 332,339-340 (7th Cir. 1994); Alston v. Redman, 34 F.3d 1237 (3d Cir. 1994) cert. den. 115 S.Ct. 1122; United States v. Wright, 962 F.2d 953 (9th Cir. 1992); and United States v. Carpenter, 963 F.2d 736 (5th Cir. 1992) cert. den. 113 S.Ct. 355. Several State courts have reached the same conclusion to which the District Court cited. State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456 (1995); Commonwealth v. Morgan, 416 Pa.Super. 145, 610 A.2d 1013 (1992), appeal denied, Commonwealth v. Morgan, 533 Pa. 618, 619 A.2d 700 (1993); and State v. Warness, 77 Wash.App. 636, 893 P.2d 665 (1995).

The most comprehensive discussion of the issue presented here and under facts remarkably similar to the facts of this case is found in Alston v. Redman, supra. In Alston they arrested the defendant in North Carolina on warrants issued against him for a number of robberies committed in the State of Delaware. After his return to Delaware and while in custody the police questioned him. Three days later he was taken before a magistrate where he was committed to prison for pretrial detention. A person from the Public Defender's office visited the defendant and during that interview the defendant signed a form letter addressed to the warden of the prison instructing the warden that he would not speak to any police officers or other law enforcement agents without a public defender being present. The letter was not delivered to the warden because it was the policy that someone would call the Public Defender's office when officers sought to question a prisoner. Several days later the defendant was indicted for what was identified as the Medkeff-Sands robberies. On August 29, 1985, the day after Alston was indicted, they transported him to the Wilmington police department for processing on other charges and while there was questioned about the other charges. The defendant was administered Miranda warnings and after waiving said rights made admissions that were used against him on the new charges. The state trial judge denied Alston's pretrial motion to suppress and he was ultimately convicted. He was denied relief in the

state courts and ultimately filed a federal writ of habeas corpus pursuant to 28 U.S.C. §2254. The defendant claimed that the " . . .execution of the invocation of counsel form letter was sufficient to trigger his Miranda right to counsel, thus rendering inadmissible at trial any statements made during the August 29th interrogation . . .". The district court denied relief on the grounds that ". . .that petitioner's execution of the invocation form was insufficient to trigger his Miranda right to counsel. The magistrate found that the attempt to invoke the right to counsel was made outside of the context of custodial interrogation, and was thus ineffective. . .". 34 F.3d at 1244. On appeal the Third Circuit Court of Appeals rejected Alston's claim on the authority of McNeil v. Wisconsin and United States v. Wright, supra, concluding that the defendant was requesting the court to extend the reach of Miranda and Edwards and ". . .would diminish the 'bright line' nature of the Supreme Court's Miranda jurisprudence . . ." 34 F.3d at 1249, FN11. Indeed, the court specifically found that " . . . the Supreme Court's opinion in McNeil . . .presaged the result in this case. . . ", and that the High Court ". . . explicitly rejected the "bright-line" rule proposed by McNeil-- 'no police-initiated questioning of any person in custody who has requested counsel to assist him in defense or interrogation'--which was similar to the one advocated by the instant petitioner. . ". Id. at 1245.

In discussing McNeil, the Third Circuit stated:

> " . . .*1246 [15] Of particular interest to the case sub judice is the majority's reply to the dissent's prediction that the decision would be circumvented by the explicit invocation of the Miranda right to counsel at preliminary hearings. See id. at 184, 111 S.Ct. at 2212 (Stevens, J., dissenting). The majority noted that premature invocation of the Miranda right to counsel would be impermissible: 'We have in fact never held that a person can invoke his Miranda rights anticipatorily, in a context other than "custodial interrogation"--which a preliminary hearing will not always, or even usually, involve. If the Miranda right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the Miranda right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect'. Id. at 182 n. 3, 111 S.Ct. at 2211 n. 3 (citations omitted) (emphasis added). Though this passage in McNeil is

essentially dicta, being a response to a hypothetical posed by the dissent, we must consider it with deference, given the High Court's paramount position in our "three-tier system of federal courts." Casey v. Planned Parenthood, 14 F.3d 848, 857 (3d Cir.1994), and its limited docket. See Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 495 n. 41 (3d Cir.) (in banc), cert. denied, --- U.S. ----, 113 S.Ct. 196, 121 L.Ed.2d 139 (1992); accord Doughty v. Underwriters at Lloyd's, London, 6 F.3d 856, 861 & n. 3 (1st Cir.1993); Hendricks County Rural Elec. Membership Corp. v. N.L.R.B., 627 F.2d 766, 768 n. 1 (7th Cir.1980) ("A dictum in a Supreme Court opinion may be brushed aside by the Supreme Court as dictum when the exact question is later presented, but it cannot be treated lightly by inferior federal courts until disavowed by the Supreme Court.") (citing 1B Moore's Federal Practice P 0.402, at 112 & n. 3), rev'd on other grounds, 454 U.S. 170, 102 S.Ct. 216, 70 L.Ed.2d 323 (1981). The footnote strongly supports the proposition that, to be effective, a request for Miranda counsel must be made within "the context of custodial interrogation" and no sooner. See United States v. Wright, 962 F.2d 953, 955 (9th Cir.1992); United States v. Barnett, 814 F.Supp. 1449, 1454 (D.Alaska 1992). . ."

34 F.3d at 1246

The Amicus submits that the Alston court's analysis is correct and should be followed by this Court. Not only because it is a sound legal analysis but it promotes a compelling governmental interest. In McNeil, JUSTICE SCALIA, speaking for six members of the Court, recognized the importance of appropriate interrogations by law enforcement officials. The Court said:

" . . .[6] There remains to be considered the possibility that, even though the assertion of the Sixth Amendment right to counsel does not in fact imply an assertion of the Miranda 'Fifth Amendment' right, we should declare it to be such as a matter of sound policy. Assuming we have such an expansive power under the Constitution, it would not wisely be exercised. Petitioner's proposed rule has only insignificant advantages. 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. [3]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

[3]. Interestingly, in this very case the Petitioner testified at the suppression hearing that he understood the letter to mean he did not have to talk to anyone. In short, he full well understood his legal rights under Miranda and its progeny.

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'. . ."

501 U.S. 180-181.

This Court has recognized the legitimacy and importance of voluntary confessions or admissions in the criminal justice system, Traylor v. State, 596 So.2d 957, 965 (Fla. 1992) and the Amicus urges the Court not to erect unwarranted and unjustified barriers to obtaining that type of evidence. As the Supreme Court and the Courts of Appeal have stated, ". . .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. . .". Id at 180. In this case the Petitioner never declined to speak with law enforcement officers when approached by the latter and there has been no claim that the defendant was the victim of police badgering or other overreaching or that he did not knowingly waive his rights which they explained to him before being questioned.

Additionally, in both Traylor, supra, and In re Matter of Patricia Dubreuil, 629 So.2d 819(Fla.1994) this Court recognized that the Florida Constitution guarantees an individual the right to self-determination and personal autonomy that could not be interfered with by the State absent a compelling governmental interest. An adoption of the Petitioner's argument would violate that right by denying him the right to speak to law enforcement officers, if that is his desire, despite a prior expression to the contrary. It is one thing for counsel to urge his client not to speak with agents of law enforcement - indeed, that is exactly what counsel should do: it is quite another to

suggest that he can take action that would deprive his client from electing a different course of action. That is simply unwarranted because it is the suspect's right to remain silent and to have counsel present during an interrogation — not counsel's right! In protecting individuals from improper police conduct the Court should not erect a barrier to an individual's right to decide for himself about what is in his best interest. As JUSTICE SCALIA observed in McNeil, a person in custody could very well wish to discuss a potential charge with the authorities 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.

Since the Federal Constitution does not bar the introduction of the statements given by Petitioner in this case, this Court, — assuming it allows the Petitioner to belatedly raise the State Constitutional issue even though it was not presented and disposed of by the lower tribunals — should interpret the Florida Constitution consistent with the interpretation of Miranda-Edwards by the federal courts. The petitioner gives no compelling reason why this Court should interpret Florida law differently. As a matter of fact, this Court in Gore v. State, 599 So.2d 978 (Fla. 1992) rejected an argument that "this Court should not follow McNeil". Id at 982. This Court said, " . . We believe that the holding adopted by the Supreme Court in McNeil adequately protects the right to counsel. . . ". JUSTICES KOGAN and BARKETT dissented and agreed with JUSTICE STEVENS' position in McNeil, supra, and would have found a violation of Article 1, Sections 9 and 16 of the Florida Constitution. The majority in Gore obviously rejected that interpretation of Florida's Constitution. Should the Court reach the issue the Amicus urges the Court to explicitly reject the argument that the Florida Constitution bars the introduction of statements which are voluntary and which were given after the accused has been advised of his rights required by Miranda and its progeny.

To adopt Petitioner's position would create utter confusion in the law enforcement community in this state. Questioning under such circumstances would be permitted and confessions could be admitted in federal criminal prosecutions even where state officials interrogated the defendant because of federal supremacy. Federal officials believing that questioning under such

circumstances would subsequently learn that any statement would be inadmissible in a state criminal proceedings.[4] In a state such as Florida where there is a closely integrated and cooperative effort by state and federal authorities in attempting to solve serious crime and the existence of overlapping jurisdiction, different principles of law should not exist without some sound and compelling policy reason. Indeed, adoption of more stringent legal requirements on State law enforcement could result in more cases being driven from the State courts to the federal system for prosecution. As crime becomes more rampant the citizens would demand action and the Congress would be all to happy to fill the void by enacting more federal criminal laws. We have already seen evidence of that in recent years. That most assuredly would ***not*** benefit the citizens of the State of Florida who are accused of criminal activity.

The Petitioner has advanced no compelling reason for this Court to reach a result different from that established by the federal courts. He simply wants this Court to reach a result contrary to the federal rule because he would prevail in this case. While that is understandable from the Petitioner's perspective, that is woefully inadequate to convince this Court that it should reject rational federal interpretations of Miranda and its progeny simply because it has the power to develop state law principles that give greater protection than the Federal Constitution. Moreover, the mere existence of the power do to so is hardly a justification for departing from federal interpretation of similar provisions of the respective Constitutions. The party urging for such a departure should be required to demonstrate there are compelling reasons justifying such departure. The Petitioner has utterly failed to do so.

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[4] It should be remembered that often initial investigation by one goverenmental agency reveals that subsequently the offense is more properly within the jurisdiction of the other. It is simply unworkable for the two systems to have significantly different "rules of the road".

CONCLUSION

Inasmuch as the Petitioner has failed to present any convincing reason to adopt his argument and the law already provides sufficient protection to those who do not wish to communicate with law enforcement personnel or only to do so with counsel present, this Court ought not adopt a rule which would impede admittedly legitimate and compelling governmental goals. The Court should affirm the well-reasoned decision of the District Court in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the forgoing document has been served by U.S. Mail upon the Hon. James T. Miller, Corse, Bell and Miller, 233 East Bay Street, Suite 230, Jacksonville, Florida, 32202, and the Hon. Edward C. Hill, Jr., Assistant Attorney General, The Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32399-1050, this 21st day of December, 1995.

Raymond L. Marky

RAYMOND L. MARKY