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IN THE SUPREME COURT
OF FLORIDA

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ROBERT SAPP,

Petitioner,

vs. Case no. 86,622

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER

ON REVIEW OF A CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

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PRELIMINARY STATEMENT

Petitioner, Robert Sapp, was the Appellant before the First District Court of Appeal and the Defendant in the Circuit Court, Fourth Judicial Circuit. Respondent, the State of Florida, was the Appellee before the First District Court of Appeal and prosecuted Petitioner in the Circuit Court.

As to the facts concerning the certified question, Petitioner will primarily refer to the opinion of the First District Court of Appeal (attached to this brief as Appendix A). Any other references to the Record on Appeal before the First District Court of Appeal will either be "R." (references to the Record on Appeal which contains the pleadings and orders filed in this cause) or "T." (references to the trial transcripts), followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Petitioner, pursuant to the authority of Reed v. State, 470 So. 2d 1382 (Fla. 1985), requests this Court to consider some of the issues raised below which the First District Court of Appeal did not include within the certified question. Petitioner will first outline the relevant facts of the certified question and then the facts for the issues raised in this brief.

The certified question in this case:

> 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? (Appendix A).

The facts which led to this certified question are as follows: The police initially arrested Petitioner on charges other than the charges in this case (first degree felony murder and attempted armed robbery). (R. 20). (Appendix A, pg. 2). At the time of the arrest for the separate robbery charge, the police advised Petitioner of his Miranda rights - he waived them and agreed to talk to the police. (Appendix A, pg. 2). The police then took Petitioner to jail. (Id.) Within 24 hours Petitioner was taken from the jail to a holding room for a "chute speech" - a talk where an Assistant Public Defender gives advice and explains first appearance court procedures. (Appendix A, pg. 3). The Assistant Public Defender discusses a Claim of Rights form - bailiffs distribute copies to the prisoners. (Appendix A, pg. 3).

The form reads:

DEFENDANT'S CLAIM OF RIGHTS

> 1. The Defendant, together with the undersigned counsel, the Public Defender for the Fourth Judicial Circuit of Florida, hereby asserts his/her right not to make any statements, oral or written, regarding the facts or circumstances of the offense(s) with which he/she is charged, or regarding the facts or circumstances of any criminal offenses for which he/she is not charged (but is merely a witness or suspect), unless his/her attorney is present during any questioning and/or making of any such statements. The Defendant claims his/her right to counsel and the right to remain silent pursuant to Amendments 5 and 6 of the Constitution of the United States.
>
> 2. Defendant further asserts that any future waiver of the right to have counsel present or to remain silent must be in writing (with reference to this notice), and only after notice has been given to his/her attorney of the Defendant's intention to waive this right and an opportunity provided for the Defendant and his/her attorney to discuss the waiver of these rights.

(Appendix A, pg. 3).

The prisoners sign these forms before they appear in court, as a matter of judicial convenience. (Appendix A, pg. 3). The forms are explained by the Assistant Public Defender because some of the individuals may not be able to read and write. (T. 15). The Assistant Public Defender explains the Claim of Rights forms as follows: The signing of the form means the assertion of the right to remain silent and the right to not be forced to say anything that can be used against you. (T. 17). In this case, the Assistant Public Defender gave examples of how problems can arise for individuals if they talk to anyone other than an attorney or investigator from the Public Defender's Office. (T. 17). Bailiffs handle the signing of the forms (after the "chute speech") because the Bailiffs are in charge of writing implements for security reasons. (T. 18). After an individual appears in court, the original of the form is filed with the

Clerk of the Court; a copy goes to the State Attorney; and a copy is stapled to the individuals jail commitment papers. (T. 19).

The Assistant Public Defender explained he talked to the individuals (about the Claim of Rights forms) before court because 99% of the time, the Public Defender's Office is appointed to represent individuals charged with felonies. (T. 22). The judges prefer, as a matter of convenience, that the Affidavits of Insolvency and Claim of Rights forms are signed before the individuals charged with felonies appear in court. (T. 23).

Petitioner testified at the suppression hearing about the Claim of Rights form. He appeared in first appearance court on an armed robbery charge. (T. 61). He acknowledged the signature on the Claim of Rights form; it was received into evidence by stipulation. (T. 47). The State asked Petitioner if someone went over the Claim of Rights form with him - Petitioner said yes - he did not know if it was an attorney or a bailiff. (T. 63). Petitioner was told that "you don't want to talk to no one." (T. 63). Petitioner testified as to what the form meant to him - "to me it means saying if you don't want to speak to no one, you don't have to speak to them about any case at all. The case you're on, the cases they ask you about." (T. 68).

Detective Baxter testified about his contact with Petitioner (which led to the confession in question) and his understanding of the rights form procedure. Baxter did nothing to determine if Petitioner was represented on the felony charge for which he was in custody. (T. 45). Baxter had seen Claim of Rights forms similar to the one in this case. (T. 46). He acknowledged that he knew he could not initiate contact

with an individual on a particular charge where an attorney had been appointed on that charge. (T. 48). However, Baxter believed he could initiate contact on charges unrelated to the charge where an attorney had been appointed. (T. 49). Baxter did not check Appellant's jail records to determine if a Claim of Rights form had been filed. (T. 51). Baxter did not ask Appellant if he had signed a Claim of Rights form. (T. 53). By stipulation, Petitioner established that the Claim of Rights form was in Petitioner's file. (T. 59).

Petitioner was still in jail a week later, awaiting trial on the original robbery charge. (Appendix A, pg. 4). Petitioner was then taken to the homicide office where a police detective initiated an interrogation concerning the facts of the present case. (Id.) Before the police questioned Petitioner, they advised him of his Miranda rights (outlined in footnote 2 of the opinion, Appendix A, pg. 4). Petitioner signed a form waiver of these rights. (Id.) Without requesting an attorney, Petitioner talked about the circumstances that gave rise to the present case; he also signed a written statement. (Id.)

After talking to other suspects, the same detective approached Petitioner a second time, twelve hours later. (Appendix A, pg. 5). Petitioner again signed a form waiver of constitutional rights, agreed to talk to the detective and signed a second written statement. (Id.) By Motion to Suppress filed before trial, Petitioner argued that his statements to the detective should not be admitted at trial because he had invoked his Fifth Amendment right to counsel when he signed the Claim of Rights form. (Id.) Petitioner contended that his subsequent police-initiated custodial

interrogation, without counsel present, was unlawful under Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), and that evidence obtained as a result should be excluded. (Id.) The trial court denied the Motion to Suppress and allowed the extrajudicial statements in evidence at trial, over objection. (Id.)

The rest of the relevant facts of this case are as follows:

A grand jury indicted Petitioner for first degree murder and attempted armed robbery. (R. 20). During the questioning of Petitioner by Detective Baxter, Petitioner admitted his part in the shooting and attempted robbery of the victim. (R. 68-69). Petitioner identified the other suspects in the case, through photographs. (T. 33). Detective Baxter then interviewed two of the other suspects. (T. 35). Baxter then re-interviewed Petitioner. (T. 36). Petitioner then gave another statement about his part in the shooting and robbery attempt. (R. 66-67). The State introduced these statements at trial. (T. 283-84). The statements indicated that Petitioner, Shawn Whitaker, Calvin Powell and Arthur Hanks tried to rob the victim (Axson). (T. 284). Calvin Powell shot Axson; Petitioner initially admitted to being in on the planning stage of the robbery, but did not go to the robbery. (T. 264). Petitioner, in the second statement, admitted he was present during the attempted robbery; he had a shotgun and knocked on Axson's door, prior to Powell shooting through the door. (T. 290-91).

Ronald Ramsey, age 14, was in Axson's house at the time of the homicide. (T. 309-11). He heard some arguing by Axson (a female) and a male voice. (T. 312). Ramsey heard the male voice say, "Don't move, I got a gun." (T. 312). Ramsey then

heard (but did not see) shots fired through the door which killed Axson. (T. 315-16).

David Curry testified that a week or so before the Axson murder, he was with Petitioner, Shawn Whitaker and Calvin Powell. (T. 325). The group discussed robbing Axson. (T. 325). Another time, Curry was present when Petitioner, Whitaker, Powell and Arthur Hanks again discussed robbing Axson. (T. 329).

The police arrested Arthur Hanks for the murder of Axson. He agreed to testify for the State - he pleaded guilty to second degree felony murder and attempted armed robbery. (T. 384). On January 9, 1993, Hanks was with Petitioner, Powell and Whitaker. (T. 343). A week earlier the group had planned to rob Joyce Axson. (T. 345). The plan was to get drugs from Axson and divide it evenly. (T. 347). Whitaker told the group they did not need guns because Axson did not have any guns. (T. 344-45). The plan was for Petitioner to get Axson to open her door by trying to buy drugs from her. (T. 345). If Axson did not open the door, the group was going to manipulate its way in. (T. 346-47). During deposition, Hanks testified the group did not discuss what would happen if Axson did not open the door. (T. 372). As the group went to Axson's house, they had guns, ski masks and bullet proof vests. (T. 347). During deposition, Hanks did not testify about the masks and vests. (T. 392-93). Hanks admitted he did not tell the truth in deposition about these matters. (T. 395). Hanks testified that as the group approached Axson's house, he had a .45, Petitioner had a shotgun and Powell had a 9 mm pistol. (T. 349).

According to Hanks, Petitioner talked to Axson through a closed door. (T. 350). She would not open the door. (Id.) She asked, "If I don't open the door,

what's going to happen?" (Id.) Petitioner said, "Nothing, just open the door and let me talk to you." (T. 350). Calvin Powell then shot through the door. (T. 350). Although an outside storm door was locked, the inside wooden door was cracked open. (T. 351-52). Axson's face was not visible. (T. 351).

Petitioner turned to walk away from the house before Powell shot Axson. (T. 375). The porch lights were out. (Id.) Before the shooting, Hanks testified he said, "Lets go." - he expected this to induce Axson to come outside. (T. 407). At that point, Petitioner had turned around and started to leave.

Shawn Whitaker also testified against Petitioner. He described the plan to rob Axson. (T. 457-58). He told the group about Axson having drugs - he also told them she would be an easy "lick" because she did not have guns. (T. 435). The plan was for Petitioner to use the name "Archie" to get inside Axson's house by trying to buy drugs. (T. 440). Whitaker testified at trial that the plan was that if Axson did not open the door, they would force their way in. (T. 440-41). Whitaker admitted that in his sworn statement to the State Attorney he said that the plan was if she did not open the door, they would just leave. (T. 456).

During the incident, Whitaker was in a car down the street. (T. 438-441). He could not see Petitioner at the door. (T. 441). He heard a gunshot and then saw the group running to the car. (T. 442). The Medical Examiner and a firearm examiner determined that a single 9 mm projectile killed Axson. (T. 423,472). Crack cocaine and $834.00 were removed from the bra of the victim. (T. 474).

After the State rested its case, Petitioner moved for a judgment of acquittal. (T.

532). As to the attempted armed robbery charge, Petitioner argued there was no completed attempt and he abandoned any such attempt. (T. 532-33). Petitioner also argued the shooting (felony murder charge) was outside the scope of the robbery. (T. 536-37). The trial court denied the motion. (Id.)

The parties then made their closing arguments to the jury. During Respondent's first argument, the State Attorney commented on Petitioner's first statement to the police (Petitioner denied complete involvement) and then stated:

> "Then he gets arrested. Now his story today, through his lawyer, is that he didn't have the shotgun and he left before the shots were fired. I guess if the trial were to be held a couple of months from now, he might be back to that original statement which was he didn't have anything to do with it." (T. 615).

Petitioner objected to the comments and asked for a curative instruction. (T. 616). The court overruled the objection and stated:

> THE COURT: "I will caution you, though, I think you ..."
>
> MR. BORELLO (State Attorney): "That's all I was going to say."
>
> THE COURT: "Okay. Not on the objection, but I think you're getting awfully close to commenting on his failure." (T. 616).

Petitioner then objected to the comments because they were a comment on his right to not testify. (T. 617). The court again overruled the objection. (T. 617). The State later made the following argument:

> "Ladies and gentlemen, this Defendant wants you to give him a free ticket. He planned a robbery, he went on it, he knocked on the door, had discussions with the victim, he

> had a shotgun in his hand. The co-defendants' had guns and the victim was killed. Robert Sapp wants you to give him a free ride for that. He wants you to tell him that what he did was not wrong, that it was not a crime. Ladies and Gentlemen, that's not right and it's not the law. A not guilty verdict says to this Defendant that you can try to rob people, that you can bring guns to their house, shoot them, whatever..." (T. 618-19).

Petitioner objected. (T. 617). The trial court overruled the objection because the State tailored the comment specifically to Petitioner - suggesting to the jury what a not guilty verdict says to Petitioner about his conduct. (T. 620). The court stated: "I'll overrule the objection. He has very carefully characterized it as this Defendant's message." (T. 620). Petitioner renewed his objection about the comment on the results of the verdict to him and to society at large. (T. 620). Petitioner moved for a curative instruction and mistrial. (T. 620). The trial court denied both motions.

During the State's second argument, the State Attorney was discussing the felony murder rule and whether Calvin Powell's shooting of Axson was an independent act outside the scope of the armed robbery. Ms. McCallum (the Assistant State Attorney) stated:

> "That's not independent act, doesn't even come close to being an independent act, and its amazing to me that the State Attorney's Office, myself, who I've got enough files upstairs, Lord knows, that I would go through all this trouble to frame poor little..." (T. 653).

Petitioner then objected. (T. 653). The court commented:

> THE COURT: "Ms. McCallum, let's limit to this case only."
>
> MS. MCCALLUM: "Yes, sir."

THE COURT: "Thank you."

MS. MCCALLUM: "That I would conspire against Robert Sapp."

THE COURT: "Ms. McCallum -- ...let's go on to this case." (T. 654).

Later in the argument, the Assistant State Attorney discussed the plea agreements made with Petitioner's co-defendants:

> "If you have a problem, if you're sitting there thinking why did they give Arthur Hanks, and eight-time convicted felon, a deal, why did they let him do that, because, as we all know, they are as responsible as this Defendant. Why did the State let them do that? If you have a problem with it, write a letter to Harry Shorstein. Tell him that the State, Mr. Borello, Ms. McCallum, did a terrible job in giving these two guys a deal, they should not have done it. Complain about us." (T. 656).

Petitioner objected and argued that such personalizing of the argument by the State was improper. (T. 656). The court overruled the objection and noted that the argument was a fair comment on Petitioner's argument. (T. 656).

Petitioner at that time also objected to earlier comments on his failure to testify about whether he did or did not leave/plan to leave the porch before the shooting. (T. 656-57). The prosecutor had just previously argued:

> "Do you think these people are the type of people that are going to say, oh, my, she didn't open the door, let's go home and come back another day when she's more accommodating to us? Does that make any sense to you? Absolutely not. You have heard no evidence, absolutely none, that this Defendant said, okay, guys, that's it, you know, let's go back home, let's not do this. I don't think it's a good idea." (T. 652).

The State Attorney then commented on the abandonment defense:

> "Abandoned his attempt or otherwise abandoned his attempt indicating a complete and voluntary renunciation of his criminal purpose. Have you heard anything to that effect? Absolutely no {sic}. There's no evidence that he abandoned and there's no evidence of independent act." (T. 652-53).

The trial court overruled Petitioner's objection and denied a curative instruction because the above comments were not a comment on the failure of Petitioner to testify. (T. 657). After arguments and jury instructions, the jury found Petitioner guilty of attempted armed robbery and felony murder. (T. 694-95).

Petitioner was sentenced to life with a mandatory sentence of 25 years on the first degree murder conviction; he was classified as a habitual felony offender on the attempted armed robbery conviction and sentenced to 15 years with a minimum, mandatory sentence of 3 years to run consecutively to the life sentence. (T. 738-39).

In the opinion below, the First District Court of Appeal discussed only the issue concerning the validity of Petitioner's confession. Petitioner raised four issues in his brief before the First District Court of Appeal. Pursuant to Reed v. State, 470 So. 2d 1382 (Fla. 1985), Petitioner will raise in this brief the issues of the sufficiency of the evidence and whether the prosecutor's arguments deprived Petitioner of a fair trial.

SUMMARY OF ARGUMENT

This Court should affirmatively answer the certified question. Under the Florida Constitution, Traylor v. State. 596 So. 2d 957 (Fla. 1992), and the decision of the United States supreme Court in McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), an individual should be able to invoke his right to counsel, under Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), or Article I, Sections 9 and 16, of the Florida Constitution, in open court through the assistance of an attorney. Although the United States Supreme Court in McNeil v. Wisconsin, supra, in dicta, suggested that Miranda rights could not be asserted outside the context of custodial interrogation, the McNeil court did not address the question posed by the facts of this case: assertion of the rights guaranteed by Edwards v. Arizona, supra, and Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), in open court through counsel (while the defendant was in custody) after defendant had previously waived his rights and talked to the police. In McNeil, supra, the Supreme Court did not want to create a rule which made defendants unapproachable by the police when they had not made a clear expression of the desired to deal with the police only through counsel. In this case, Petitioner unequivocally expressed a desire to deal with the police with the help of counsel.

As this Court did in Haliburton v. State, 514 So. 2d 1088 (Fla. 1987), this Court should decide that Florida law gives defendants more protection than the United States Constitution, as interpreted by the United States Supreme Court. Under Traylor v. State, supra, this Court held that if an individual indicated in any manner a

desire for the help of counsel, then present or future interrogation should cease or not begin. This Court should apply this rule to the facts of this case.

If this Court decides, in its discretion, to consider the other issues outside the certified question, the Court should find that there was insufficient evidence to convict Petitioner. There was insufficient evidence of an attempt under State v. Coker, 452 So. 2d 1135 (Fla. 2d DCA 1984), and Adams v. Murphy, 394 So. 2d 411 (Fla. 1981). If this Court finds there was sufficient evidence to convict, Petitioner should still receive a new trial. The numerous improper arguments by the prosecutor deprived Petitioner of a fair trial and this Court should resolutely condemn these arguments to prevent their use in the future. In this case, the prosecutor: 1) commented on Petitioner's failure to testify, **See** Eberhardt v. State, 550 So. 2d 102 (Fla. 1st DCA 1989); 2) made improper personal comments on whether she was framing Petitioner; 3) argued that the jury should decide the case on matters outside the evidence and law by stating that if the jury had credibility problems with the co-defendants they should complain to the State Attorney for the Fourth Judicial Circuit; and 4) inflamed the jury by arguing that Petitioner was trying to get a free ride and a not guilty verdict would tell Petitioner it was alright to try to rob and shoot people.

ARGUMENT

ISSUE I

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 (STATEMENT OF CERTIFIED QUESTION?)

A. The decision by the First District Court of Appeal: The issue in this case.

The First District Court of Appeal essentially held that although Petitioner unequivocally expressed his desire to deal with the police only through counsel while he was in jail (the police were on notice of Petitioner's invocation of his Fifth Amendment right to counsel), Petitioner's invocation of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), was invalid because he did not invoke his rights during a custodial interrogation (although Petitioner was in jail at the time, he invoked his rights through a Claim of Rights form filed in first appearance court with a copy attached to his jail commitment papers.) The rights form in this case did not specifically mention Miranda; the form cited the Fifth and Sixth Amendment to the United States Constitution. Although Miranda is invoked only during custodial interrogation there is no requirement of custody to invoke self incrimination rights under the Fifth Amendment. (For example, before a

grand jury).

The First District relied upon decisions from several state courts and the federal courts to justify its conclusion that a defendant can invoke Miranda - Roberson rights only during custodial interrogation by the police. All of these cases are not directly applicable to this cause because of different factual circumstances. For example, in Commonwealth v. Morgan, 610 A. 2d 1013 (PA. Super. Ct. 1992); appeal denied, Commonwealth v. Morgan, 619 A. 2d 700 (PA. 1957), the defendant attempted to invoke Miranda rights before being taken into custody. **See Also** State v. Warness, 893 P. 2d 665 (Wash. Ct. App. 1995), (pre-custodial invocation). In United States v. LaGrone, 43 F. 3d 332 (7th Cir. 1994), the defendant attempted to invoke Miranda rights outside custody and during a request for consent to search, not during a custodial interrogation.

The case of United States v. Thompson, 35 F. 3d 100 (2nd Cir. 1994), is simply not applicable to this case in any way - that case concerned whether a notice of appearance form entered by an attorney with the Immigration and Naturalization Service (no invocation of any Miranda rights by defendant) was an invocation of the right to counsel. In United States v. Thompson, supra, at 104, the Second Circuit Court of Appeal noted that the key to the invocation of Miranda rights is some statement that can be reasonably construed to be an expression of desire for the assistance of an attorney in dealing with custodial interrogation by the police. Alston v. Redman, 34 F. 3d 1237 (3rd Cir. 1994); cert. denied, 115 S. Ct. 1122 (1995), is not applicable because the alleged invocation of Miranda rights (a signed form letter) was

not delivered to the prison warden. In United States v. Wright, 962 F. 2d 953 (9th Cir. 1992), the defendant's attorney stated during a plea hearing that she wanted to be present during any later interviews with her client. **See Also** Durocher v. State, 596 So. 2d 997 (Fla. 1992)(Defendant initiated further contact).

None of the cases relied upon by the First District Court of Appeal involve the circumstances of this case: Petitioner personally invoking his Miranda - Roberson (right to avoid reinitiation of contact by police after invocation of the right to deal with police only through counsel) rights in court (while he was in jail) after the appointment of counsel and after he had previously talked with the police without the assistance of counsel. The opinion below found that Petitioner had expressed a desire to deal with the police only with the assistance of counsel. The cases relied upon by the First District Court either involve a non-custodial situation or an invocation by another person other than the defendant.

Petitioner does concede that the above-discussed cases do suggest that a defendant may only invoke Miranda - Roberson rights during a custodial interrogation. Consequently, the issue for this Court is whether such an invocation does not apply outside custodial interrogation under the United States Constitution. The Claim of Rights form in this case invoked only rights under the United States Constitution. There was no claim below of any additional or different protections under the Florida Constitution. If this Court finds that a defendant cannot invoke Miranda rights outside custodial interrogation under the United States Constitution, then Petitioner respectfully asks this Court to consider (under this Court's inherent supervisory power

over Florida Courts) whether a defendant may invoke his Miranda - Roberson rights under the factual circumstances of this case pursuant to the Florida Constitution and this Court's decision in Traylor v. State, 596 So. 2d 957 (Fla. 1992), and Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).

B. The decisions of the United States Supreme Court in McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), and Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

In Arizona v. Roberson, supra, the United States Supreme Court established the "bright line rule" that once individuals in custody indicates that they want a lawyer before answering any questions, the police cannot re-initiate contact and question the individuals on any charges (including subsequent charges), unless counsel is present. In Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the Supreme Court held that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available, unless the accused initiates further communication, exchanges or converses with the police. The court in Arizona v. Roberson further noted that if a suspect indicates he is incapable of undergoing questioning without the advice of counsel, then a subsequent waiver of these rights is presumed involuntary; any subsequent statement made with counsel's presence should be viewed with skepticism. 108 S. Ct. at 2097-98. **See Also** Michigan v. Mosely, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

In Arizona v. Roberson, supra, the court also held the fact that the police officer

who conducted the second interrogation of Roberson did not know that he had previously requested counsel was of no significance. The court stated:

> "In this case respondent's request had been properly memorialized in a written report but the officer who conducted the interrogation simply failed to examine the report. Whether a contemplated reinterrogation concerns the same or different offense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists. The police department's failure to honor that request cannot be justified by the lack of diligence of a particular officer." 108 S. Ct. at 2101.

In this case, Petitioner's invocation of his rights was in his jail records. The interrogating officer simply did not read the records to determine if Petitioner had invoked his right to counsel. The officer made no attempt to determine if Petitioner had previously invoked his rights. Moreover, the officer mistakenly believed that such an invocation would not apply to a different offense. This view, of course, is directly contrary to Arizona v. Roberson, supra.

The decision in Arizona v. Roberson does not specifically limit its holding to situations involving the invocation of the right to counsel during custodial interrogation. The opinion merely refers to the request for counsel during interrogation made while a suspect is in custody. 108 S. Ct. at 2096. The court on this point noted:

> "It is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 108 S. Ct. at 2097, quoting Edwards v. Arizona, supra, 101 S. Ct. at 1885. The decision specifically refers to reinterrogation of an accused in custody; in this case the

police reinterrogated Petitioner while he was in custody.

The opinion below relied upon the decision in McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), on this issue. In McNeil v. Wisconsin, supra, the Supreme Court decided that the accused's request for counsel (Sixth Amendment right to counsel) at an initial appearance on a charged offense did not invoke a Fifth Amendment right to counsel that precluded police interrogation on unrelated, uncharged offenses. In McNeil, the court simply ruled that a mere request for counsel on a charged offense did not necessarily constitute a request for counsel on unrelated, uncharged offenses. There must be some expression for a desire for the assistance of an attorney in dealing with custodial interrogation. 111 S. Ct. at 2209. In McNeil, there was no such request.

The majority opinion in McNeil, in dicta, did discuss the question posed by this case. In footnote 3 of the opinion, Justice Scalia wrote:

> The dissent predicts that the result in this case will routinely be circumvented when, `[i]n future preliminary hearings, competent counsel ... make sure that they, or their clients, make a statement on the record' invoking the Miranda right to counsel. Post. at 2212. 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 custodial interrogation, with similar future effect. Assuming, however, that an assertion at arraignment would be effective, and would be routinely made, the mere fact that adherence to the principle of our decisions will not have substantial consequences is no reason to abandon that principle. It would remain intolerable that a person in custody who had expressed no objection to being questioned would be unapproachable. 111 S.Ct. at 2211.

The above footnote indicates that the United States Supreme Court did not actually decide that the Miranda - Roberson rights could not be asserted outside the context of custodial interrogation. The First District Court of Appeal below recognized that this fact was an open question. Although the majority opinion may have suggested a defendant could not assert such rights outside the context of custodial interrogation, the McNeil court did not decide that issue. The McNeil court in footnote 3 also postulated several hypothetical scenarios not present in this case - assertion of Miranda - Roberson rights by letter prior to arrest or before identification as a suspect. In this case, Petitioner was in custody, had been arrested on other charges and asserted his rights in court after the appointment of counsel.

The decisions in Roberson, Edwards and McNeil all stand for a proposition which the First District Court of Appeal ignored in its opinion - the "bright line rule" against reinitiation of contact and reinterrogation after a defendant in custody has informed the police that he does not wish to deal with them, except through counsel. These cases hold that any subsequent waiver of right to counsel will be invalid, if the defendant has indicated a desire to deal with the police only through counsel.

Logically, it should not matter that Petitioner asserted the right in court, rather than during police interrogation. In this case, unlike the cases reviewed above, Petitioner, at the time he invoked his right to counsel, had already been interrogated in jail. Once he was informed of his right not to be interrogated without counsel present, Petitioner then decided to deal with the police only through counsel. However, the police blithely ignored the requirements of Roberson - Edwards and interrogated Petitioner a second time.

C. The fundamentally illogical and anomalous results created by the decision of the First District Court of Appeal.

If a defendant may invoke subsequent Miranda - Roberson rights only during custodial interrogation, then somewhat unusual and anomalous results will occur. If the logical foundation of Roberson - Edwards is the protection of the right to deal with future police interrogation (while in custody) only with counsel, then the opinion below produces the strange result that the right is invalid. If it is asserted in court by the signing of a specific form explained to the defendant by an attorney, such right is invalid even though it is a part of the official court file and is attached to the defendant's official jail records. In this case, there is no question about the fact that Petitioner asserted his Fifth Amendment right to counsel. However, under the opinion below, an invocation by a defendant during custodial interrogation (almost always no other witnesses to the invocation other than the defendant and police officers) receives greater credence and protection.

The question of whether a defendant invoked a right to counsel (unless the

interrogation is recorded) is almost always a matter of the defendant's word against a police officer's word. An invocation of such a right made as a matter of record in open court during first appearance is, under the decision below, not valid.

This Court need not decide the "slippery slope" question of whether a defendant or suspect may invoke Miranda - Roberson rights outside custodial interrogation by a simple letter or statement to the police. Under the facts of this case, Petitioner asserted the right while he was in custody and after he had been interrogated by the police and after he had conferred with counsel. Petitioner may have realized that it was better not to talk to the police, except with counsel, after he had already talked with the police. Under the holding of McNeil, Petitioner asserted his rights while he was in custody and he unequivocally expressed his desire not to deal with the police except with counsel. This Court should extend the reasoning and holding of McNeil to this particular factual circumstance - a defendant may assert his Roberson rights in court (while he is in custody) after he has been interrogated by the police.

D. This Court's authority to find the assertion of Petitioner's rights to be valid under the Florida Constitution.

1. Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).

Petitioner did not raise any Florida Constitutional claim below at trial or on appeal because the Claim of Rights form invoked only rights under the Fifth and Sixth Amendments to the United States Constitution. Petitioner recognizes that generally an appellate court will not consider matters which were not raised at the trial level.

However, this case presents the unusual situation of this Court attempting to decide how the United States Supreme Court would decide the issue in this case. If this Court decides that Petitioner did not properly invoke his rights under the United States Constitution, this Court is still free to adopt different requirements for the issue of the invocation of Miranda - Roberson rights. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987). In Haliburton v. State, this Court addressed this issue. In the initial decision in Haliburton v. State, 476 So. 2d 192 (Fla. 1985), this Court held it was error not to suppress a statement made while an attorney, retained on Haliburton's behalf, was at the police station requesting to speak with him. The police didn't inform Haliburton of this fact. This Court decided that under Miranda v. Arizona, supra, and Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), the police deprived Haliburton of essential information to a knowing and intelligent waiver of his right to counsel. In Florida v. Haliburton, 475 U.S. 1078, 106 S. Ct. 1452, 89 L. Ed. 2d 711 (1986), the United States Supreme Court rejected this Court's holding. In light of Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), the Supreme Court vacated this Court's decision and remanded the case for reconsideration.

This Court then decided that under Article I, Section 9, of the Florida Constitution, the police conduct was a violation of due process. The relevance of that fact to this case is that this Court did not specifically address a Florida Constitutional claim in Haliburton I. On remand from the United States Supreme Court, this Court

then considered whether the conduct involved violated the Florida Constitution. This Court should do the same in this case - decide whether the assertion of Petitioner's rights was valid, notwithstanding how the United States Supreme Court would rule on the issue. This Court is free to adopt different requirements on this issue under the Florida Constitution and Traylor v. State, 596 So. 2d 957 (Fla. 1992).

2. Traylor v. State, supra, and the right to counsel and right against self-incrimination in Florida.

This Court in Traylor v. State discussed the right to counsel, under the Florida Constitution (Article I, Section 16), for charged offenses. The Traylor court held that this right is offense-specific. Consequently, that particular right to counsel does not apply to this cause. However, this Court also discussed the voluntariness of confessions under Article I, Section 9, of the Florida Constitution. The Traylor court held:

> Under Section 9, if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not being or, if it has already begun, must immediately stop. If the suspect indicates in any manner that he or she wants the help of a lawyer, interrogation must not begin until a lawyer had been appointed and is present or, if it has already begun, must immediately stop until a lawyer is present. Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present. 596 So. 2d at 966. (Emphasis supplied.)

Although the above-holding was in a factual context different from the present case, this Court should apply the holding to this case. in Traylor v. State, supra, this Court discussed, in great detail, the principles of federalism and the right of this Court to

give greater protection under the Florida Constitution than the protection given by the United States Supreme Court under the Fifth Amendment. 596 So. 2d at 961. In Traylor, this Court held that if a suspect indicates in any manner that he or she wants to the help of a lawyer then there can be no future interrogation of a suspect in custody, unless counsel is present.

In this case, Petitioner indicated, in any manner, he wanted the protections afforded by Traylor v. State, supra. Under Traylor, the custodial interrogation/non-custodial interrogation should not apply. Petitioner asks this Court to hold that the "in any manner" language in Traylor applies to the facts of this case: Petitioner was in custody and asserted his rights in open court after he had been interrogated and after he conferred with counsel. If this Court does not adopt this view, then the right to counsel and the right to re-assert a promised right (to change one's mind about talking to the police only with counsel) is a limited and meaningless right when asserted in open court to place the police on notice of a defendant's desire not to deal with the police, except through counsel. In this case, the police cavalierly ignored the assertion of rights form and erroneously believed that, if the right had been properly asserted, the right to interrogation except with counsel did not apply to new charges for which the defendant had been arrested or charged (directly contrary to Arizona v. Roberson, supra).

ISSUE II

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL FOR ATTEMPTED ARMED ROBBERY BECAUSE THE EFFORTS OF PETITIONER AND HIS COHORTS (KNOCKING ON A DOOR AND POSING AS A DRUG DEALER TO GET THE OCCUPANT TO OPEN THE DOOR SO THE GROUP COULD ENTER TO ROB) FELL SHORT OF AN ATTEMPTED ROBBERY AND PETITIONER ABANDONED SUCH ATTEMPT BY WALKING AWAY FROM THE DOOR AFTER THE OCCUPANT REFUSED TO OPEN THE DOOR; AND THE COURT ERRED IN DENYING THE JUDGMENT OF ACQUITTAL FOR FELONY MURDER BECAUSE THE SHOOTING WAS OUTSIDE THE SCOPE OF THE ROBBERY.

A. The facts of this cause.

The facts of this cause delineate the border between an illegal attempt of a crime and mere failed planning and preparation for a crime which does not constitute attempt. The plan in this case was for Petitioner to knock on the door of Axson's house; Petitioner would pose as a drug dealer. Once Axson opened the door, the group would force its way inside. There was some disputed testimony by Shawn Whitaker (impeached by deposition testimony and statements to the police), that the group would force its way in if Axson did not open the door. However, there was no testimony whatsoever on how the group would force its way in if Axson did not open the door.

Petitioner knocked on the door and talked to Axson about buying drugs. She would not open the door and said to come back tomorrow. Petitioner then turned and began to walk away. Hanks testified he said, "Let's go." at this point. Calvin Powell then shot through the door and killed Axson. Petitioner then ran off the porch of the house. There was no proof whatsoever that the shooting of Axson was part of

an attempt to get inside the house. The doors were still locked and the group made no attempt to enter the house.

B. The law on attempt.

Florida courts have defined attempt as: 1) a specific intent to commit the crime; and 2) separate overt ineffectual acts done toward its commission. Robinson v. State, 263 So. 2d 595 (Fla. 3d DCA 1972). In Adams v. Murphy, 394 So. 2d 411 (Fla. 1981), the Supreme Court held that attempts are limited to physical acts carried beyond preparation toward proximate accomplishment of a complete crime. In State v. Coker, 452 So. 2d 1135, 1136 (Fla. 2d DCA 1984), the court defined attempt as "a direct movement toward accomplishing the desired result to amount to commencement of the consummation of the crime and some appreciable fragment of the crime must be committed and it must proceed to the point that the crime would be consummated unless interrupted by circumstances independent of the attempter's will."

C. The law of attempt applied to the facts of this cause.

The factors of this cause simply do not constitute attempted armed robbery. Robbery is the forcible (by violence, force or fear) taking of property from another person. In this case, there was no overt attempt to take money or property from Axson. Although there was an attempt to enter Axson's house by a ruse, there was no overt act to obtain her property. There was no commencement of the commission of the crime. **See** State v. Coker, supra. The fact that Axson did not open the door does not make this cause a failed attempted robbery because there were no overt, attempted acts to get her money or property. (There was a plan to do so, but plans

alone do not make an attempt). If the acts of Petitioner were an attempt (a failed robbery because Axson would not open the door), then the initial drive-by was also a failed attempted robbery (prevented by a relative being in the yard). The law of "attempt" obviously does not encompass such absurd results. This Court had a duty to avoid a construction of a statute which produces absurd results. State v. Goodson, 403 So. 2d 1337 (Fla. 1981); Dorsey v. State, 402 So. 2d 1178 (Fla. 1981).

Under Adams v. Murphy, supra, and State v. Coker, supra, there must be some acts committed on each of the essential elements of a crime - enough acts so that the crime would be consummated unless interrupted. In this case, there was no attempt because, after Axson refused to open the door, Petitioner began to leave the home. There was no attempt to obtain money or property by force. There was an attempt to be in a position to begin an attempt to rob, however, there was no commission of an appreciable fragment of the crime of robbery - no fragment of an attempt to obtain property by force.

If this Court finds an attempt in this cause, then such a holding will lead to absurd results. Assume an individual plans a sexual battery. He plans to pose as a repairman to gain entry into a house. Once inside, he plans to commit sexual battery upon the occupant. The perpetrator knocks on the door, but the occupant will not open the door. The perpetrator then leaves. Although the perpetrator had the intent and plan to commit sexual battery, it is an absurd result to say that those acts were attempted sexual battery. If Axson had opened the door and the group tried to push their way in and said, "This is a robbery. Give us your money and drugs." and Axson

was able to close the door before the group was able to enter, then, possibly, an attempted armed robbery occurred.

The alleged plan in this case to force a way in if Axson did not open the door does not make this case an attempted robbery. There were no acts whatsoever to force a way in. The shooting by Calvin Powell ensured the group would not get inside. Moreover, once Axson did not open the door, Petitioner abandoned whatever attempt he had committed - Petitioner was walking away from the door and porch when Powell unexpectedly shot Axson. In a light most favorable to the State, the facts of this cause do not establish an attempt. The facts, at best, establish the requisite intent plus some preparatory acts just prior to the beginning of the commission of armed robbery. In addition, Petitioner abandoned the attempt prior to its completion, if the acts actually constitute an attempt.

If the trial court should have granted the Motion for Judgment of Acquittal on the attempted armed robbery, then the conviction for first degree felony murder (based upon the attempted armed robbery) also cannot stand. This Court should vacate and set aside both the attempted armed robbery and first degree felony murder convictions.

D. The trial court erred in denying the Motion for Judgment of Acquittal on the felony murder because the shooting was outside the scope of the robbery.

The shooting in this cause was outside the planned scope of the robbery. An individual may be liable for a felony murder (even when the individual did not commit the murder) where the murder is committed pursuant to the common design of the

original criminal collaboration and in furtherance of a common scheme or as a probable, predictable, reasonably foreseeable or causally connected result of the underlying felony. **See** Valdes v. State, 626 So. 2d 1316 (Fla. 1993); State v. Amaro, 436 So. 2d 1056 (Fla. 2d DCA 1983); and Jacobs v. State, 396 So. 2d 713 (Fla. 1981).

The shooting in this case was not the foreseeable and predictable result of the planned robbery. Even if there was a plan to force a way into the home, the shooting was not a part of the plan. The shooting occurred after Axson refused to open the door. Petitioner started to leave the porch when Powell shot Axson. The shooting was clearly outside the planned robbery because once Powell shot Axson, the group could not enter the house to commit the robbery. The murder must be in furtherance of the common design of the criminal intent (in this case to commit a robbery). Bryant v. State, 412 So. 2d 347 (Fla. 1982). The shooting was, be definition, outside the scope of the robbery because the shooting ended the robbery attempt. The shooting by Powell was an unplanned, random act. Powell's act was not planned nor contemplated by Petitioner and the others. Consequently, Petitioner should not be held responsible for Axson's death.

ISSUE III

THE PROSECUTOR DEPRIVED PETITIONER OF A FAIR TRIAL BY COMMENTING ON HIS FAILURE TO TESTIFY, STATING THAT THE PROSECUTOR WAS NOT TRYING TO FRAME PETITIONER, TELLING THE JURY THAT IF THEY HAD PROBLEMS BELIEVING THE CO-DEFENDANTS' TESTIMONY, TO CONVICT PETITIONER ANYWAY AND COMPLAIN ABOUT THEIR TESTIMONY TO THE STATE ATTORNEY, AND BY COMMENTING THAT A NOT GUILTY VERDICT WOULD TELL PETITIONER HIS CONDUCT WAS ALRIGHT AND WOULD GIVE PETITIONER A "FREE RIDE."

A. Introduction: The issue in this cause.

The prosecutor made four separate arguments that deprived Petitioner of a fair trial. While these arguments may not individually be reversible error, the cumulative effects of all four errors deprived Petitioner of a fair trial. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). **See** Heuring v. State, 513 So. 2d 122 (Fla. 1987), (effect of cumulative errors required reversal of conviction); Gamble v. State, 492 So. 2d 1132 (Fla. 5th DCA 1986). Consequently, Petitioner will address each of the comments individually and then discuss their cumulative effect in this cause.

B. The improper comments in this cause.

1. Comment on failure to testify.

During closing argument, the prosecutor made a subtle, yet direct, comment on Petitioner's failure to testify (after commenting on Petitioner's statement to the police where he denied involvement in the robbery): "Then he gets arrested. Now his story today, through his lawyer, is that he didn't have the shotgun and he left before the shots were fired. I guess if the trial were to be held a couple of months from now, he might be back to that original statement which was he didn't have

anything to do with it." (T. 615). (Emphasis supplied).

The comment by the prosecutor directly implied to the jury that Petitioner's "story" at trial was not offered by Petitioner, but by his attorney. The comment draws attention to the fact that Petitioner did not testify because it mentions his prior confession to the police and further implies that his story would change again in the future. A comment is impermissible if it is fairly susceptible of being viewed by the jury as referring to the defendant's failure to testify. Dailey v. State, 594 So. 2d 254 (Fla. 1991). How else could the jury view the above statement other than Petitioner's "story" was not told by him, but by his attorney and was, therefore, a direct comment on the failure to testify. In Sgroi v. State, 634 So. 2d 280 (Fla. 4th DCA 1994), the Court found an improper comment on the failure to testify where the prosecutor commented that the only evidence on Sgroi's motion was offered by another witness. (Sgroi did not testify.) The comment in this case is similar because the State commented that the defendant's story was presented by another witness (or in this case, by an attorney). **See Also** Dixon v. State, 627 So. 2d 19 (Fla. 2d DCA 1993), (prosecutor improperly commented that Defendant failed to refute testimony of a witness).

The First District Court of Appeal in Eberhardt v. State, 550 So. 2d 102 (Fla. 1st DCA 1989), directly considered the issue presented in this cause. In Eberhardt v. State, supra, the Court held that:

> "The reference to Eberhardt's claim of intoxication `through counsel' amounts to a comment on his failure to take the stand and testify to the facts himself, in derogation of the defendant's right to remain silent." 550 So. 2d at 107.

The reference in this case to Petitioner's "story" though his counsel is analogous to the comment disapproved of in Eberhardt, supra.

2. The prosecutor's personal argument that she was not framing Petitioner.

As the prosecutor addressed the questions of whether Petitioner was guilty of felony murder or whether the shooting of Axson was an independent act of Calvin Powell's outside the scope of the planned, yet uncompleted, robbery, the State commented:

> "That's not an independent act, doesn't even come close to being an independent act, and it's amazing to me that the State Attorney's Office, myself, who I've got enough files upstairs, Lord knows, that I would go through all this trouble to frame poor little..." (T. 656).

The above comment was improper because it told the jury that the prosecutor was personally too busy to bring cases to trial which were not good cases; the comment also personally stated that the prosecutor would not frame Petitioner. Such comments which suggest that the prosecutor would not prosecute (or, in this case, frame an innocent person) a person who was not guilty are improper. **See** Riley v. State, 560 So. 2d 279 (Fla. 3d DCA 1990), (the prosecutor said he would not have prosecuted defendant unless he was guilty); Williamson v. State, 459 So. 2d 1125 (Fla. 3d DCA 1984); McGuire v. State, 411 So. 2d 939 (Fla. 4th DCA 1982); Clark v. State, 632 So. 2d 88 (Fla. 4th DCA 1994), (prosecutor argued police would not place their jobs on the line by not telling the truth). Munnerlynn v. State, 639 So.2d 1106 (Fla. 5th DCA 1994), (the prosecutor improperly argued that the jury should trust him

to present evidence because he would not waste their time).

3. The comment that, if the jury had credibility problems with the co-defendants, they could complain to the State Attorney for the Fourth Judicial Circuit.

The State argued to the jury that if they had a problem with the deal given to Arthur Hanks (one of Petitioner's co-defendants), they should write a letter to Harry Shorstein (the State Attorney for the Fourth Judicial Circuit). The State further told the jury to "tell him that the State, Mr. Borello, Ms. McCallum [the prosecutors in this case] did a terrible job in giving these two guys a deal, they should not have done it. Complain about us." (T. 656).

Petitioner has been unable to find any cases which are analogous to this argument. However, the comment is improper because it tells the jury to ignore possible credibility problems with such witnesses and complain to the State Attorney about the use of such witnesses. This proposed extrajudicial solution is improper because it asks the jury to decide the case on matters outside of the trial itself. It tells the jury if you have problems with the deal given (and its possible effect on credibility) to a co-defendant, do not let that stop you from convicting Petitioner - if you have any problems, complain instead to Harry Shorestein, State Attorney.

4. The prosecutor improperly inflamed the jury by arguing that Petitioner was trying to get a "free ride" and a not guilty verdict tells Petitioner that it is alright to try to rob people and shoot them.

The State made the following argument before Petitioner's counsel addressed the jury:

> "Ladies and gentlemen, this Defendant wants you to give him a free ticket. He planned a robbery, he went on it, he knocked on the door, had discussions with the victim, he had a shotgun in his hand. The co-defendants' had guns and the victim was killed. Robert Sapp wants you to give him a free ride for that. He wants you to tell him that what he did was not wrong, that it was not a crime. Ladies and Gentlemen, that's not right and it's not the law. A not guilty verdict says to this Defendant that you can try to rob people, that you can bring guns to their house, shoot them, whatever..." (T. 618-19).

The Circuit Court overruled the objection to the comment because the State carefully characterized it as this defendant's message. (T. 620). Petitioner never made such an argument or message; Petitioner never argued it was right to rob or shoot someone. This Court must remember that the prosecutor made those remarks before Petitioner made his closing statement.

The comments were improper because the issue in a criminal jury trial is whether the State has proved its allegations beyond a reasonable doubt, not whether certain conduct is right or wrong. Petitioner never asked for a "free ride" - he never argued that it is right to rob or kill someone. Consequently, the State's comments were not fair rebuttal to comments by Petitioner. The comments referred to matters outside the evidence and were contrary to the spirit of a trial based upon the reasonable doubt standard. **See** Adams v. State, 585 So. 2d 1092 (Fla. 3d DCA 1991); Taylor v. State, 583 So. 2d 323 (Fla. 1991); Jackson v. State, 522 So. 2d 802 (Fla. 1988); cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 153 (Fla. 1988). The comments also suggested that the jury teach Petitioner a lesson - to not let him get away with a "free ride" (by arguing that the State had not proved its case). **See**

Green v. State, 557 So. 2d 894 (Fla. 1st DCA 1990), (improper to argue that defendant was violating "American dream" by committing armed robbery of hard working victim). However, the comments in this case are all the more flagrant because they were made before Petitioner made his closing argument.

5. The cumulative effect of the improper prosecutorial comments.

The cumulative effect of the above-described errors deprived Petitioner of a fair trial. The State's case depended largely upon the testimony of co-defendants. These co-defendants had obvious motives to lie and place blame upon Petitioner. Their testimony was impeached and was inherently inconsistent. The various comments by the State either commented on Petitioner's failure to testify or inflamed prejudice against Petitioner. Given the somewhat dubious testimony of the co-defendants, these improper arguments could have tipped the scales against Petitioner. Even if the jury completely believe the co-defendant's testimony, there was still legal questions as to Petitioner's guilt. The improper comments could have again convinced the jury that Petitioner was guilty.

A single isolated improper comment may not be reversible error. However, the four arguments described above combined to deprive the Petitioner of a fair trial. Therefore, this Court should resolutely condemn the comments and reverse Petitioner's convictions and remand for a new trial.

CONCLUSION

This Court should answer the certified question as "Yes". If this Court exercises its discretion to review the other issues in this case, it should either: 1) find the evidence is insufficient to convict Petitioner of felony murder an attempted armed robbery; or 2) find that a new trial is appropriate due to the prosecutor's inflammatory arguments in this case.

Respectfully submitted,

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FLORIDA BAR NO. 0293679

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been delivered, by mail, to Assistant Attorney General Ed Hill, at the Office of the Attorney General, Department of Legal Affairs, The Capital Building, Tallahassee, FL this 17th day of November, 1995.

James T. Miller

IN THE SUPREME COURT
OF FLORIDA

ROBERT SAPP,

Petitioner,

vs. Case no. 86,622

STATE OF FLORIDA,

Respondent.

APPENDIX A

Decision on Motion for Clarification
of First District Court of Appeal

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ROBERT SAPP,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

v.

STATE OF FLORIDA,

CASE NO. 94-1938

Appellee.

_____/

Opinion filed September 22, 1995.

An appeal from the Circuit Court for Duval County.
Alban Brooke, Judge.

James T. Miller and Thomas M. Bell of Corse, Bell & Miller, P.A., Jacksonville, for Appellant.

Robert A. Butterworth, Attorney General; Edward C. Hill, Jr., Assistant Attorney General, Tallahassee, for Appellee.

REVISED ON MOTION FOR CLARIFICATION

BENTON, J.

Robert Sapp appeals convictions and sentences for attempted armed robbery and first degree (felony) murder. We affirm. We believe one of his arguments raises a question of great public importance, however, which we certify as such to the Supreme Court of Florida. The question concerns the scope of the prophylactic rule designed to safeguard a criminally accused

citizen's right to counsel under the Fifth Amendment.

Mr. Sapp was initially arrested on charges other than those for which he was convicted and sentenced in the proceedings below. At the time of his arrest on a separate robbery charge, he was advised of his Miranda[1] rights, waived them, and agreed to speak to the police. After his arrest, he was taken to jail.

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[1] In Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966), the United States Supreme Court held

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

(Footnote omitted.)

Within 24 hours, he was led from his jail cell to a holding room for a "chute speech," a talk in which an assistant public defender gives advice and explains first appearance court procedures. Among other topics, the assistant public defender discusses a claim of rights form, copies of which bailiffs distribute. This form reads:

> DEFENDANT'S CLAIM OF RIGHTS
>
> 1. The Defendant, together with the undersigned counsel, the Public Defender for the Fourth Judicial Circuit of Florida, hereby asserts his/her right not to make any statements, oral or written, regarding the facts or circumstances of the offense(s) with which he/she is charged, or regarding the facts or circumstances of any criminal offenses for which he/she is not charged (but is merely a witness or suspect), unless his/her attorney is present during any questioning and/or making of any such statements. The Defendant claims his/her right to counsel and the right to remain silent pursuant to Amendments 5 and 6 of the Constitution of the United States.
>
> 2. Defendant further asserts that any future waiver of the right to have counsel present or to remain silent must be in writing (with reference to this notice), and only after notice has been given to his/her attorney of the Defendant's intention to waive this right and an opportunity provided for the Defendant and his/her attorney to discuss the waiver of these rights.

Prisoners sign these forms (before they appear in court, as a matter of "judicial convenience") and bailiffs give the signed forms to the assistant public defender, who sees to it that the original is filed with the Clerk of the Court. The Public Defender's office keeps a copy, a copy goes to the State

Attorney, and a copy is stapled to the accused's jail papers. Mr. Sapp signed such a claim of rights form, which was duly distributed in the customary fashion.

Still in jail a week later, awaiting trial on the original robbery charge, Mr. Sapp was taken to the "homicide office," where a police detective initiated an interrogation, on the morning of June 9, 1993, concerning the facts of the present case. Before he was questioned, Mr. Sapp was again advised of his Miranda rights,[2] and again signed a form waiver. Without requesting an attorney, he talked about the circumstances that gave rise to the present case and signed a written statement.

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[2] He was furnished a form which stated:

YOUR CONSTITUTIONAL RIGHTS

You have the following rights under the United States constitution:

You do not have to make a statement or say anything.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before you make a statement or before any questions are asked of you, and to have the lawyer with you during any questioning.

If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish.

If you do answer questions, you have the right to stop answering questions at any time and consult with a lawyer.

After talking to other suspects, the same detective approached Mr. Sapp a second time twelve hours later. Again Mr. Sapp signed a form waiver of constitutional rights, agreed to talk to the detective, and signed a (second) written statement.

By motion to suppress filed before trial, Mr. Sapp argued that his statements to the detective should not be admitted at trial, on grounds that he had invoked his Fifth Amendment right to counsel when he signed the claim of rights form. He contended that his subsequent police-initiated custodial interrogation, without counsel present, was unlawful under Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), and that evidence obtained as a result should be excluded. The trial court denied the motion to suppress, and allowed the extrajudicial statements in evidence at trial, over objection.

Fifth Amendment Prophylaxis

The United States Supreme Court has outlawed custodial interrogation, defined as "questioning initiated by law enforcement officers after a person has been . . . deprived of his freedom of action in any significant way," unless the suspect has been informed of certain Fifth Amendment rights, including the privilege against self-incrimination and the right to counsel during interrogation. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966).

> 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 compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Miranda, 384 U.S. at 473-74, 86 S. Ct. at 1627-28 (footnote omitted). Once invoked, the Supreme Court has since held, the Fifth Amendment right to counsel cannot be waived simply by responding to further police questioning.

> [A]lthough we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see North Carolina v. Butler, supra, 441 U.S., at 372-376, 99 S. Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold 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 has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the

> authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378, 386 (1981) (footnote omitted). The Court has made clear that the Edwards rule applies even where "the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." Roberson, 486 U.S. at 677, 108 S. Ct. at 2096 (1988). In this connection, the Court "attach[ed] no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel." Id. at 687, 108 S. Ct. at 2101.

Offense-Specific Sixth Amendment Rights Not Implicated

In McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207, 115 L. Ed. 2d 158, 166 (1991), the Court distinguished between the Fifth Amendment right to counsel and the Sixth Amendment right to counsel, in addressing a question originally certified to the Wisconsin Supreme Court by the Wisconsin Court of Appeals:

> Does an accused's request for counsel at an initial appearance on a charged offense constitute an invocation of his fifth amendment right to counsel that precludes police interrogation on unrelated, uncharged offenses?

When McNeil was arrested on charges of armed robbery and advised of his Miranda rights, he refused to answer any questions, and

the interview was terminated, but he did not ask for a lawyer at that time. McNeil, 501 U.S. at 173, 111 S. Ct. at 2206. After an attorney had been appointed at his initial appearance, McNeil was questioned in jail regarding unrelated crimes, signed a waiver of his Miranda rights, and answered the questions, without counsel's presence or knowledge. Id. McNeil argued that his request for an attorney on the armed robbery charge was an invocation under Miranda of his Fifth Amendment right to counsel and that the subsequent, uncounseled waiver was invalid. Id. at 174, 111 S. Ct. at 2207.

The McNeil Court reaffirmed the rule that "once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present." McNeil, 501 U.S. at 177, 111 S. Ct. at 2208, citing Roberson, 486 U.S. 675, 108 S. Ct. 2093 (1988). But the Court ruled that McNeil's request for counsel invoked only his rights under the Sixth Amendment and held that "'[t]o find that [the defendant] invoked his Fifth Amendment right to counsel on the present charges merely by requesting the appointment of counsel at his arraignment on the unrelated charge is to disregard the ordinary meaning of that request.'" McNeil, 501 U.S. at 178-79, 111 S. Ct. at 2209, quoting State v. Stewart, 113 Wash. 2d 462, 471, 780 P.2d 844, 849 (1989), cert. denied, 494 U.S. 1020, 110 S. Ct. 1327, 108 L. Ed. 2d 502 (1990). The Court ruled that an invocation of the Miranda right to counsel

"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." Id.

Open Question

Here Mr. Sapp unambiguously expressed a desire for and claimed the "right to counsel and the right to remain silent pursuant to Amendments 5 and 6 of the Constitution of the United States," without, however, any explicit reference to police custody or interrogation. Dissenting in McNeil, Justice Stevens wrote:

> The predicate for the Court's entire analysis is the failure of the defendant at the preliminary hearing to make a "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." Ante, at 2208-2209. If petitioner in this case had made such a statement indicating that he was invoking his Fifth Amendment right to counsel as well as his Sixth Amendment right to counsel, the entire offense-specific house of cards that the Court has erected today would collapse, pursuant to our holding in Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), that a defendant who invokes the right to counsel for interrogation on one offense may not be reapproached regarding any offense unless counsel is present.
>
> In future preliminary hearings, competent counsel can be expected to make sure that they, or their clients, make a statement on the record that will obviate the consequences of today's holding.

McNeil, 501 U.S. at 184, 111 S. Ct. at 2212 (Stevens, J., dissenting). The majority in McNeil responded to the dissent in a footnote.

> 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, (citations omitted). 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. Assuming, however, that an assertion at arraignment would be effective, and would be routinely made, the mere fact that adherence to the principle of our decisions will not have substantial consequences is no reason to abandon that principle. It would remain intolerable that a person in custody who had expressed no objection to being questioned would be unapproachable.

McNeil, 501 U.S. at 182, n.3, 111 S. Ct. at 2211, n.3. When Mr. Sapp initially asserted a Fifth Amendment right to counsel, he did so "outside the context of custodial interrogation." Although he was in custody, he was not being interrogated at the time, and no interrogation took place till a week later.

We have not found definitive Florida authority on the question whether a criminally accused citizen can assert the

right to counsel under Miranda and Edwards at or shortly before his or her first appearance, when interrogation is not imminent. The Florida cases are clear, however, that mere invocation of the Sixth Amendment right to counsel does not avail in this regard. Happ v. State, 596 So. 2d 991 (Fla. 1992); Owen v. State, 596 So. 2d 985 (Fla. 1992); Keys v. State, 606 So. 2d 669 (Fla. 1st DCA 1992); State v. Lints, 596 So. 2d 523 (Fla. 5th DCA 1992). Appellant does not rely on his right to counsel under the Florida Constitution. See Traylor v. State, 596 So. 2d 957 (Fla. 1992). At oral argument, his counsel expressly disavowed any state law claim.

The Supreme Court of Appeals of West Virginia and the Superior Court of Pennsylvania, each citing footnote 3 to the majority opinion in McNeil, have rejected the notion that the Fifth Amendment right to counsel can be invoked under Miranda when the accused is not in custody. State v. Bradshaw, 1995 WL 139943 (W. Va. March 27, 1995) (holding that the defendant's attempt to invoke Miranda rights before being taken into custody was an "empty gesture"); Commonwealth v. Morgan, 610 A.2d 1013 (Pa. Super. Ct. 1992), appeal denied, Commonwealth v. Morgan, 619 A.2d. 700 (Pa. 1993) (holding that even though "the police officer took the precautionary step of reading Miranda rights to a non-custodial suspect," the defendant could not assert the Fifth Amendment right to counsel outside the context of custodial interrogation). Accord, State v. Warness, 893 P.2d 665 (Wash.

Ct. App. 1995). Here, of course, Mr. Sapp was in custody when he invoked his Fifth Amendment right to counsel, in writing. But he declined, again in writing, to invoke his Miranda right to counsel in interrogation settings both before and after signing the form claim of rights.

Since McNeil, at least four federal courts of appeals have addressed the question whether the Fifth Amendment right to counsel explicated in Miranda can be invoked outside the context of custodial interrogation, and each has answered in the negative. United States v. LaGrone, 43 F.3d 332, 338-39 (7th Cir. 1994) (holding that asking to call an attorney for advice on how to respond to a request for consent to search the accused's business did not invoke any right to counsel, on grounds a request for consent to search is not an interrogation); United States v. Thompson, 35 F.3d 100 (2nd Cir. 1994) (holding that counsel's seeking certain records and filing a form "Notice of Entry of Appearance as Attorney or Representative" with the Immigration and Naturalization Service did not invoke the client's right not to respond to custodial interrogation without counsel present); Alston v. Redman, 34 F.3d 1237, 1249 (3rd Cir. 1994), cert. denied, 115 S. Ct. 1122 (1995) (holding that pretrial detainee's signing form letter addressed but never delivered to prison warden, stating that defendant did not wish to speak to law enforcement personnel without a public defender present, was not an effective invocation of the Fifth Amendment

right to counsel, in part because "no interrogation was impending or imminent"); United States v. Wright, 962 F.2d 953, 955 (9th Cir. 1991) (holding that defense counsel's statement that she wished to be present during any interview of her client was not effective to invoke the client's Fifth Amendment right to counsel).

We acknowledge the logical force of Justice Stevens' dissent in McNeil, but we also recognize the McNeil majority's hesitation to apply the Miranda-Edwards rule to situations like the one in the present case, and the apparently unanimous view of the lower courts that the Court will not do so. We affirm accordingly. In so doing, we certify the following question to the Florida Supreme Court as a question of great public importance:

> 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?

ERVIN, J., CONCURS; MINER, J., CONCURS IN RESULT AND QUESTION CERTIFICATION.