IN THE SUPREME COURT
OF FLORIDA

ROBERT SAPP,

Petitioner,

vs. Case no. 86,622

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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

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STATEMENT OF THE CASE AND FACTS

Petitioner accepts Respondent's "additions" to the statement of facts in the initial brief.

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.

Respondent first notes that Petitioner presented to the trial court and appellate court below a claim under the United States Constitution, not a state law claim. This assertion is true because the claim of rights form in this case asserted only rights under the United States Constitution. Consequently, Petitioner only raised those issues before the First District Court of Appeal. In this case, Petitioner respectfully asks this Court to consider, as a matter of this Court's discretion, whether the claim of rights form is valid under the Florida Constitution, pursuant to Haliburton v. State, 514 So.2d 1088 (Fla. 1987).

Since Petitioner wrote the initial brief in this cause, the Second District Court of Appeal in State v. Guthrie, 21 Fla.Law Weekly D136 (Fla. 2d DCA December 29, 1995) decided that a claim of rights form similar to the one in this case was a valid invocation of rights. In Guthrie, supra, the Court considered both Florida and Federal Constitutional claims. The Court in Guthrie certified a conflict with this case concerning the invocation of federal

rights in first appearance. The Guthrie court did not decide that case solely on Florida Constitutional grounds, but rejected the reasoning in this case as to the Federal Constitutional Claim. Consequently, this Court, in its discretion, should consider Petitioner's state law claims or consolidate this case with Guthrie.

Although Respondent has discussed the federal cases cited in the opinion by the First District Court of Appeal below, Respondent has not discussed Petitioner's arguments that these cases are not applicable to this cause because the factual circumstances of these cases are specifically different from this cause. None of these cases have the factual circumstances of this case -- an assertion of Fifth Amendment rights in first appearance court. **See** U.S. v. Thompson, 35 F.3d 100 (2d Cir. 1994)(notice of appearance form filed with Immigration and Naturalization Service); Alston v. Redman, 34 F.3d 1237 (3d Cir. 1994)(signed invocation of rights letter not delivered to prison warden - police were not put on notice); United States v. LaGrone, 43 F.3d 332 (7th Cir. 1994)(rights invoked while Defendant was not in custody); Commonwealth v. Morgan, 610 A.2d 1013 (P.A. Super.Ct 1992)(rights invoked before Defendant was in custody); State v. Warness, 893 P.2d 665 (Wash Ct. App. 1995)(pre-custodial invocation).

The above cases do not address the question posed by this cause; the invocation of Miranda rights while the Defendant is in custody, but not yet being interrogated. Petitioner recognizes that these cases hold that individuals

may not invoke Miranda rights if they are not in custody or not yet subject to custodial interrogation. However, these cases overlook the holding in Edwards v. Arizona, 451 U.S. 477, 1015 S.Ct. 1850, 68 L.Ed.2d. 378 (1981) which bars contact by the police after a request for counsel.

The First District Court of Appeal below essentially adopted respondent's argument that the rights under Miranda v. Arizona, 384 U.S. 436, 88 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d. 704 (1988) may only be invoked during custodial interrogation. Consequently, this holding requires this Court to consider (1) whether the invocation of such rights is always limited to custodial interrogation, (2) if this Court considers the question under Florida law, whether Traylor v. State, 596 So.2d 957 (Fla. 1992) allows the invocation of such rights by an individual, in custody, during first appearance court.

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).

1. The decision in State v. Guthrie, 21 Fla.Law Weekly D.136 (Fla. 2d DCA December 29, 1995).

After the decision by the First District Court of Appeal in this case and after the filing of the initial and answer briefs, the Second District Court of Appeal decided in State v. Guthrie. Guthrie decided the same basic issue presented in this case and certified conflict with this cause. The Guthrie court

stated:

> We cannot agree with the holding in Sapp because it seriously undermines the clearly established right to counsel during custodial interrogation under the Fifth Amendment to the United States Constitution. **See** Miranda. A defendant, having declared in plain terms that he does not wish to be questioned without assistance of his attorney, could be removed from the jail, taken to an interrogation room without notice to counsel, and required again to insist on the right to counsel while facing alone the authority of the state."

The Guthrie court then addressed the state's argument concerning the limits of such an invocation:

> The State's argument that allowing the invocation of rights prior to interrogation would lead to invoking the right to counsel prior to arrest or even the commission of a crime, is without merit. Custodial interrogation triggers a defendant's right to counsel and there is no logical reason why the right to counsel could not be validly invoked upon the defendant being placed in custody. **See** Roberson, 486 U.S. at 687.

The Guthrie court also rejected the argument that footnote 3 of the McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d. 158 (1991) opinion supported the holding in Sapp; the Guthrie court found that footnote 3 was dicta. Amicus Curiae, the Florida Prosecuting Attorney's Association (F.P.A.A.) recognizes that footnote 3 of McNeil is dicta and although it may be persuasive authority, it is not binding as precedent upon this Court. **See** brief of F.P.A.A. (pgs. 8-9).

2. The decision in McNeil v. Wisconsin, supra and Arizona v. Roberson, supra.

Respondent relies upon the federal cases cited above to argue that the

rights claimed in this case must be asserted during custodial interrogation. Respondent argues that Petitioner is somehow trying to argue a merger of the doctrines of the right to counsel under the Fifth and Sixth Amendments to the United States Constitution. Petitioner is simply not making this type of argument. Petitioner realizes that the Sixth Amendment right to counsel is offense specific -- it does not apply in this case. Consequently, Durocher v. State, 596 So.2d 997 (Fla. 1992) is not dispositive of this case. Durocher v. State is distinguishable from this case because (1) the claim there was a Sixth Amendment right to counsel, (2) Durocher reinitiated contact with the police so that Edwards and Roberson did not apply.

Under Edwards or Roberson, the right to counsel is not offense specific -- it applies to my offense. Respondent and Amicus Curiae overlook Petitioner's argument that in Edwards v. Arizona, supra, 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 unless the accused initiates further communication, exchanges or converses with the police. Therefore, any subsequent waiver of the right to undergo questioning without counsel is presumed involuntary; any such subsequent statement made without counsel's presence should be viewed with skepticism. Edwards v. Arizona, 108 S.Ct. at 2097-98.

Notwithstanding the dicta in footnote 3 of McNeil v. Wisconsin, the opinion in Roberson merely speaks of reinterrogation of a suspect (after the

invocation of the right to counsel) in custody. 108 S.Ct. at 2096. Amicus Curiae recognizes that in McNeil, the defendant did not express the desire for the assistance of an attorney in dealing with future custodial interrogation. **See** McNeil v. Wisconsin, 111 S.Ct. at 2209. Consequently, the entire discussion in footnote 3 is hypothetical and dicta. As to this point, this Court should adopt the opinion and reasoning of the Second District Court of Appeal in State v. Guthrie.

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

The holding in this case leads to patently absurd results. If Petitioner had previously invoked his right to counsel during his initial custody (Petitioner waived those rights and talked to the police) before he appeared in first appearance, then the police could not have reinitiated contact and obtained the confessions in this case. Petitioner's later signed invocation of his rights in open court (after talking with an attorney and perhaps realizing it was unwise to talk to the police) is invalid under the State's argument only because it was not invoked during custodial interrogation (although Petitioner was unquestionably in custody). As the Court noted in Guthrie, the police could repeatedly interrogate a defendant in jail and that Defendant would have to reassert the right to counsel even when the defendant had previously asserted this right personally in court. A defendant may believe that the invocation of this right is meaningless because the police may ignore it (as in this case) even though it was asserted in court.

Respondent and Amicus Curiae suggest that Petitioner's position will prevent the police from talking to a suspect, even if the suspect wants to. A suspect can always reinitiate contact. **See** Durocher v. State, supra. The claim of rights form in this case sought to prevent police initiation of contact, unless counsel was notified. Roberson and Edwards attempt to prevent this precise evil.

This Court also need not decide the "slippery slope" questions posed by Respondents. This Court can limit the holding of this case to the facts of this case -- a defendant may assert his Edwards - Roberson rights at first appearance (while he is in custody) after he has been interrogated by the police and then expresses a desire to deal with the police, in the future, (while still in custody) only with counsel present.

D. The 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 realizes that this Court does not have to address the state constitutional claims. However, neither Respondent nor Amicus Curiae have addressed Petitioner's arguments under Haliburton v. State, supra. Petitioner will not repeat those arguments here. **See** Brief of Petitioner, pages 23-25.

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

Respondent and the F.P.A.A. argue that Florida law should not or does not require a different result from the Federal cases, as interpreted by the First

District Court of Appeal. Respondent argues that this Court in Traylor v. State, supra, adopted the Miranda - Edwards rule as a part of Florida jurisprudence. This Court had no choice in this matter because the Miranda - Edwards cases are based upon minimum constitutional standards which apply to all the states. The question in this case is whether this Court in Traylor gave greater protection in this area than required by Miranda - Edwards.

Petitioner relies upon the following language in Traylor under Article I Section 9 of the Florida Constitution:

> Under Section 9, if the suspect indicates in any manner that he or she does not want the be interrogated, interrogation must not begin 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 has 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).

The above language from Traylor is the basis for Petitioner's argument that the claim of rights in this case was valid under Florida law. Petitioner indicated, in any manner, that he didn't want to be interrogated, unless an attorney was present. Under the principles enunciated in Haliburton, supra, this Court can give greater protection to Defendants than required by the U.S. Supreme Court concerning when the right to counsel attaches. This principle of greater constitutional protection under the Florida Constitution is the

compelling reason to extend the Rule enunciated in Miranda - Edwards, if those cases are limited to custodial interrogation. Consequently, the F.P.A.A.'s argument that Petitioner has not given a compelling justification to interpret Florida law differently is without merit.

This Court should also reject the F.P.A.A.'s argument about "utter confusion in law enforcement" due to different state and federal standards. As noted above, this Court has already created different state standards from federal standards in Haliburton and Traylor and no such "utter confusion" has existed. This Court's holding would apply only to state police officers and there would simply be no confusion, even if the federal standards which apply to federal police officers are different.

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.

Respondent has not addressed Petitioner's argument that there was no attempted robbery because there was no attempt whatsoever to take money or property from the victim; there was no forcible attempt to take the property. Therefore, two of the essential elements of robbery were missing in this case. Respondent concentrates his argument on the planning leading up to the attempt to get inside the victim's house. However, this planning did not culminate in an attempt because the group couldn't get in to the house and then try to take property by force.

Under State v. Coker, 452 So.2d 1135 (Fla.2d DCA 1984), Petitioner did not commit some appreciable fragment of all the elements of armed robbery. Petitioner relies upon his arguments made in his initial brief on the issues of abandonment and whether the shooting was outside the scope of the robbery. The claim about whether the shooting was outside the scope of the plan to rob is not frivolous if Petitioner and the others had gained entry into the house and the co-defendant shot someone during an attempt to rob, then the

shooting would have been within the scope of the robbery. However, if the plan was to enter the victim's house by a ruse and that plan failed, then the shooting of the victim through the locked doors as Petitioner left the scene was logically outside that plan. The shooting could not be a part of the plan because the shooting obviously ended any robbery attempt.

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."

As to this issue, Petitioner relies upon his arguments in the initial brief. The comment that the failure of Petitioner to testify was not a comment on the various statements made by Petitioner. The comment was "now his story today, through his lawyer, is..." This is a direct comment on the failure to testify under Eberhardt v. State, 550 So.2d 102 (Fla. 1st DCA 1988). However, Respondent argues the wrong standard of review. Although the abuse of discretion standard may apply to closing arguments, the abuse of discretion standard in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) does not apply to this criminal case. In Canakaris v. Canakaris, supra, the issue of discretion related to an award of alimony which was completely discretionary, i.e., the law did not require a court to act in a certain way - a court had the discretion to award alimony or not award it. In this case, the discretion is not whether a court can do or not do a certain act. The discretion is whether it was proper under the law to allow the arguments made in this case. Therefore, the "reasonable men could differ" standard from Canakaris is not appropriate in this case.

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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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 32301, Arthur Jacobs, 401 Centre St. Fernandina Beach, FL 32301, Raymond Marky, Leon County Courthouse, 301 S. Monroe Street, Tallahasee, FL 32399-2500, Counsel for Florida Prosecuting Attorney's Association, Amicus Curiae, this 29th day of January, 1996.

James T. Miller