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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 87,331

STEVEN R. GUTHRIE, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Facts as written by Petitioner with the following additions:

At the time Respondent was in custody on the charge of grand theft, probable cause existed to arrest him for the charge of sexual abuse, the offense at issue in the present case. [R42]

Respondent did not initiate the questioning regarding the alleged sexual offense. [R54]

The invocation of rights form signed by Respondent states in part the following [R24]:

> By invocation of my 5th Amendment RIGHT TO COUNSEL, under the Miranda and Edwards decisions, I intend this to be an absolute expression of my desire for the assistance of an attorney in dealing with any custodial interrogation by the police about this arrest or any other crime or criminal activity under investigation.

SUMMARY OF THE ARGUMENT

At a preliminary hearing, Respondent, by signing a rights form, clearly expressed his desire to have counsel present during any subsequent custodial interrogation, a fundamental right granted by the Fifth Amendment. Law enforcement breached this right by initiating questioning without counsel being present. The trial court and the Second District Court of Appeal correctly applied the decisions in 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), in ruling that Respondent's responses to the questioning were inadmissible because they were made without the benefit of counsel.

ARGUMENT

ISSUE

DID THE TRIAL COURT ERR IN RULING THAT RESPONDENT'S INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO COUNSEL AT A PRELIMINARY HEARING WOULD HAVE EFFECT DURING THE SUBSEQUENT CUSTODIAL INTERROGATION ON AN UNRELATED CHARGE?

Petitioner argues that Respondent's invocation of his constitutional rights during a preliminary hearing had no effect during a subsequent custodial interrogation. Rejecting this argument, the Second District Court of Appeal held that the invocation of the right to counsel while in custody barred uncounseled interrogation as long as the suspect remained in custody and did not initiate the questioning. This holding is consistent with the decisions of the United States Supreme Court in 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). In these decisions, the Supreme Court established a clearly delineated rule forbidding law enforcement from initiating questioning once a suspect has invoked the Fifth Amendment right to counsel even though the questioning might pertain to unrelated charges. Petitioner would argue, citing Sapp v. State, 660 So. 2d 1146 (Fla. 1st DCA 1995), that this rule should not apply because Respondent did not invoke his rights during custodial interrogation; however, this distinction is not

meaningful and should not result in Respondent's invocation being without effect.

Under Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), a suspect has a Fifth Amendment right to have counsel present during a custodial interrogation. Once this right is invoked, law enforcement cannot question the accused without the presence of counsel unless the accused initiates the questioning. Edwards v. Arizona, 451 U. S. 477. Questioning is prohibited even though the accused may have waived his Miranda rights at the time of the questioning. Id. at 485.

The Supreme Court in Arizona v. Roberson, 486 U. S. 675, extended the holding in Edwards to prohibit an interrogation concerning charges that are unrelated to those which caused the suspect to invoke the Fifth Amendment right to counsel. Roberson was arrested at the scene of a burglary. Id. at 678. When questioned by law enforcement, Roberson responded that he wanted an attorney before answering any questions. While Roberson was in custody for the burglary charge, another law enforcement officer, who was unaware of the prior request for counsel, conducted a second interrogation. Roberson waived his Miranda rights and made incriminating statements. The Supreme Court held that these statements should be suppressed under the holding in Edwards.

The court in Roberson stated the rationale for the its holding and the one in Edwards,

> [I]f a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the

> authorities' behest, and not a the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect.

Id. at 681. The Supreme Court stressed the value of the "bright-line rule" that was established in Edwards, noting that it provided a clear guideline for law enforcement as well as the courts. Id.; See also, Michigan v. Jackson, 475 U.S. 625, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986). (Court holds that rule in Edwards applies to invocation of Sixth Amendment right to counsel.)'

In the present case, the Second District followed the dictates of the above cited cases in holding that law enforcement abridged Respondent's prior invocation of rights by initiating questioning. State v. Guthrie, 666 So. 2d 562 (Fla. 2d DCA 1995). The court questioned the decision in Sapp v. State, 660 So. 2d 1146 (Fla. 1st DCA 1995), a case relied on by Petitioner. In Sapp, the court held the Fifth Amendment right to counsel cannot be invoked until the time of the custodial interrogation. Expressing its disagreement with the First District, the Second District 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. [cite omitted] A defendant, having declared in plain terms that he does not wish to be questioned without assistance of his attorney, could be removed

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'Respondent concedes that the Sixth Amendment right to counsel is not at issue in this case because this right is charge specific. Tavlor v. State, 596 So. 2d 957, 972, n. 46 (Fla. 1992); McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991). Having been invoked at the preliminary hearing on charges unrelated to the sexual abuse allegations, Respondent cannot claim the Sixth Amendment right was violated during the subsequent interrogation.

> 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.

State v. Guthrie, 666 So. 2d at 565.[2]

Although not mentioned by the Second District, Sapp s distinguishable from the present case because Sapp's expression of rights differed from that of Respondent. The court in Sapp quoted the decision in McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), in referring to the expression needed to invoke the Fifth Amendment right to counsel: "[A]n 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"." Sapp v. State, 660 So. 2d at 1149. The First District continued by noting that Sapp had not made any direct reference to having counsel present during police custody or interrogation. Id.

To the contrary, Respondent's invocation of rights clearly expresses the need for counsel to be present during any custodial interrogation. The rights form signed by Respondent states in part [R24]:

> By invocation of my 5th Amendment RIGHT TO COUNSEL, under the Miranda and Edwards decisions, I intend this to be an absolute expression of my desire for the assistance of an

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[2] The Second District also distinguished Sapp by noting that Sapp unlike Respondent had made no claim under the Florida Constitution. This court held in Traylor v. State, 596 So. 2d 957 (Fla. 1992), that the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, provides at a minimum the rights established by Miranda and its progeny.

> attorney in dealing with any custodial interrogation by the police about this arrest or any other crime of criminal activity under investigation.
>
> Therefore, I demand that no local, State or Federal police or prosecution personnel (including jail inmates acting at the request or direction of such personnel), attempt to engage me in any conversation whatsoever, concerning any crime or criminal activity, without first providing me an attorney and having that attorney present.
>
> This Invocation of Rights shall not be deemed to have been waived by me unless an attorney has been provided to me, either retained or appointed, and I execute a written waiver of these rights. . .

Respondent's invocation of the Fifth Amendment right to counsel could not be clearer. Unlike Sapp, Respondent made clear that his request for counsel applied to any future custodial interrogation whether related or unrelated to the preliminary hearing where the invocation occurred.

In arguing that Respondent's signing of the rights form is without effect because the rights were not invoked during a custodial interrogation, Petitioner states in the initial brief, "Although Appellee in the instant case was in custody when he apparently signed the invocation of rights form, it was not done while in a custodial setting." Petitioner's Brief p. 9. The nebulous distinction between "custody" (presumably meaning a judicial hearing) and a "custodial setting" (a custodial interrogation) --a distinction relied heavily upon by Petitioner--exposes the weakness in Petitioner's position. The Supreme Court in Michigan v. Jackson, 475 U. S. at 634, n. 7, expressed its dissatisfaction

at drawing such a distinction, agreeing with the following statement of the Michigan Supreme Court:

> Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests and attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It make little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.

Other than Sapp, Petitioner cites no direct authority that states the Fifth Amendment right to counsel cannot be meaningfully invoked during a preliminary hearing. Petitioner quotes a footnote in McNeil v. Wisconsin for the authority that the right to counsel cannot be invoked anticipatorily. Petitioner's Brief p. 8-9. The Second District correctly noted in its decision that this quoted footnote was dicta. State v. Guthrie, 666 So. 2d at 565. The court in McNeil answered the question in the negative whether the invocation at a bail hearing of the Sixth Amendment right to counsel would also invoke the Fifth Amendment right to counsel for an unrelated offense. McNeil did not answer the question of whether the invocation of the Fifth Amendment right at a preliminary hearing applied to subsequent custodial interrogation on an unrelated charge--the question present in the instant case.

In Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938), the court stated that a court should "indulge every reasonable presumption against waiver of fundamental constitutional rights." The Supreme Court in Arizona v. Roberson, 486 U.S. 675, and its progeny have provided concrete guidelines for law enforcement to follow regarding questioning once a suspect has invoked the Fifth amendment right to counsel. The police in the present case did not follow these guidelines. Because the trial court and the district court correctly applied existing caselaw, this court should affirm the order granting Respondent's motion to suppress.

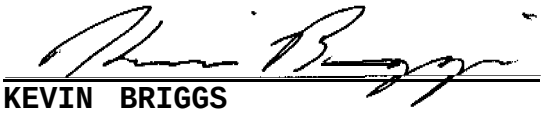
CONCLUSION

Based on the above arguments and authorities, Respondent respectfully requests that this court affirm the trial court order granting his motion to suppress.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to John M. Klawikofsky, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 15th day of August, 1996.

Respectfully submitted,



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