IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. FSC No. 87,331

STEVEN GUTHRIE,

Respondent.

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

BRIEF OF PETITIONER ON THE MERITS

EARL MORELAND
STATE ATTORNEY

PETER J. LOMBARD0
ASSISTANT STATE ATTORNEY/
Florida Bar No. 0740829
2071 Ringling Blvd,
Fourth Floor,
Sarasota, FL 34237-7000
(941) 953-7158

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
SENIOR ASSISTANT ATTORNEY GENERAL,
CHIEF OF CRIMINAL LAW,
Florida Bar No. 0238538

JOHN M. KLAWIKOFSKY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0930997
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE AND FACTS

On October 27, 1993, Appellee was arrested for grand theft auto. (R. 36). At his first appearance, Appellee signed an invocation of Constitutional Rights form. (R. 1). Hours later, Appellee was questioned with regard to an unrelated, unfiled sexual abuse charge. (R. 25). During this questioning, Appellee gave a statement admitting the allegations of sexual abuse. State v. Guthrie, 666 So. 2d 562, 563 (Fla. 2d DCA 1995). Appellee was subsequently charged with ten counts of sexual activity with a child by a person in familial or custodial authority. (R. 11).

At the Suppression hearing, the State called Corporal Steven Becker of the Manatee County Sheriff's Office. Corporal Becker testified that he went to Lee's Motel at approximately 12:30 a.m. on October 27, 1993. (R. 36). Appellee was placed under arrest for grand theft auto and a warrant out of New York. (R. 39). After Appellee's arrest, his daughter informed Corporal Becker of the sexual abuse committed by Appellee. (R. 42).

Detective Kent Huff of the Manatee Sheriff's Office later spoke to the victim about the sexual abuse committed upon her by Appellee. (R. 47). On the afternoon of October 27, 1993, Detective Huff went to the Manatee County Jail and spoke to Appellee. Detective Huff informed Appellee of the sexual abuse allegations.

Appellee agreed to speak to the detective. (R. 48). Appellee was read his Miranda rights, which he waived. (R. 48-49). Appellee informed the detective that he preferred not to talk about the grand theft auto charge, but he would talk about the sexual abuse allegations. (R. 49-50).

Assistant Public Defender Steven Walker testified that he was doing first appearances on October 27, 1993. (R. 57). Mr. Walker had no independent recollection of doing first appearances that morning, but recognized his signature on the Invocation of Rights form. (R. 57). The signing of this form was routine at the first appearance and it would not have been in response to custodial interrogation. (R. 59-60).

The circuit court granted Appellee's Motion to Suppress. (R. 25). The State filed a timely notice of appeal. The Second District Court of Appeal affirmed the circuit court's suppression of the statements and certified conflict with Sapp v. State, 660 so. 2d 1146 (Fla. 1st DCA 1995).

SUMMARY OF THE ARGUMENT

The Appellee's Fifth Amendment Right to Counsel was not violated because the appellee never invoked his right during custodial interrogation. Appellee's signing of the Invocation of Rights form during first appearances has no Fifth Amendment effect in this case because the appellee could not invoke that right anticipatorily for other unfiled and unrelated charges.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN SUPPRESSING APPELLEE'S STATEMENTS?

The Second District Court of Appeal affirmed the circuit court's suppression of Appellee's statements. The Court held that the defendant's signed invocation of rights form prevented the use of his confession which was obtained by police initiated interrogation while the defendant was in custody on unrelated charges. The Second District certified conflict with Sapp v. State, 660 So. 2d 1146 (Fla. 1st DCA 1995).

In Sapp, supra, the First District held that an accused in custody cannot effectively invoke his Fifth Amendment right to counsel under Miranda when he signs a claim of rights form at or shortly before a preliminary hearing, specifically claiming a Fifth Amendment right to counsel.

The facts of the instant case mirror those of Sapp. In Sapp, the defendant appealed his convictions for attempted armed robbery and first degree felony murder. Sapp was initially arrested on an unrelated robbery charge. He was advised of his Miranda rights, waived them, and agreed to speak with the police. Within twenty four (24) hours, Sapp was brought into his first appearance and signed an invocation of rights form. 'Prisoners sign these forms (before they appear in court, as a matter of "judicial

convenience")... Sapp 660 So. 2d at 1147. A police detective interrogated Sapp a week later with regard to the case in question. Sapp was again re-Mirandized and again waived these rights without requesting an attorney.

In holding that the trial court was correct in denying Sapp's Motion to Suppress, the First District cited to footnote No. 3 in McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), the Supreme Court of Appeals of West Virginia (State Bradshaw, 193 W. Va. 519, 457 S.E. 2d 456 (1995) (defendant's attempt to invoke Miranda prior to being taken into custody was an "empty gesture"), and the Superior Court of Pennsylvania (Commonwealth v. Morgan, 416 Pa. Super. 145, 610 A. 2d 1013 (1993) (defendant could not assert Fifth Amendment right to counsel outside the context of custodial interrogation).

Although Sapp was in custody, he declined to invoke his Miranda right to counsel in an interrogation setting before and after signing the claim of rights form. Sapp 660 So. 2d at 1150.

The Sapp court also cited to four federal courts which have held that Miranda rights cannot be invoked outside the context of custodial interrogation. See United States v. Lagrone, 43 F.3d 332, 338-339 (7th Cir. 1994); United States v. Thompson, 35 F. 3d 100 (2d Cir. 1994); Alston v. Redman, 34 F. 3d 1237, 1249 (3d Cir.

1994); United States v. Wright, 962 F. 2d 953, 955 (9th Cir. 1992).

Accordingly, the First District held that "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..." Sapp, 660 So. 2d at 1150.

Like the defendant in Sapp, Appellee also was arrested on an unrelated charge and signed an invocation of rights form at his first appearance on that unrelated grand theft auto charge. Appellee waived his Miranda rights when he was subsequently questioned regarding the sexual abuse allegations.

In Ponticelli v. State, 593 So. 2d 483 (Fla. 1991), vacated on other grounds, 113 S. Ct 32, 121 L. Ed. 2d 5 (1992), affirmed after remand, 618 So. 2d 154 (Fla. 1993), the defendant was questioned by police in a non-custodial setting, without a Miranda warning. At the end of that questioning, Ponticelli asked for a lawyer. A second and third questioning of the defendant was done without Miranda. A fourth round of questioning was done while the defendant was in custody, and he was read Miranda before the last interrogation.

In their Fifth Amendment analysis, the Florida Supreme Court held that their was 'no merit to Ponticelli's claim that the other

three statements should have been suppressed because they were taken after he expressed a desire for an attorney at the end of his first statement. Ponticelli was not in police 'custody at the time of his request for counsel or at the time the second and third statements were made." Ponticelli, 593 So. 2d at 488. See Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (when accused invokes right to have counsel present during custodial interrogation, the accused is not subject to further interrogation until Counsel **has** been made available...).

The Florida Supreme Court held that there must be both custody and interrogation at the time of the invocation of one's Miranda rights to have any effect. Ponticelli, supra.

In Segarra v. State 596 So. 2d 740 (Fla. 2d DCA 1992), the court interpreted Traylor v. State 596 So. 2d 957 (Fla. 1992) (the appointment of an attorney to represent defendant on Alabama charge did not preclude Florida police from questioning him regarding Florida homicide under state right to counsel constitutional provision since right to counsel was charge specific). In Segarra, the court set forth the procedural safeguards the state must follow when, during **a** custodial interrogation, the **assistance of counsel** is requested:

> [I]f the suspect indicates in any **manner that**

> he or she does not want to 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 until the lawyer is present.

Segarra, 596 So. 2d at 744, n. 2.

Under Traylor and Segarra the accused must therefore ask for an attorney during custodial interrogation for it to have any effect.

In McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115, L. Ed. 2d 158 (1991), the United States Supreme Court held that the Sixth Amendment right to assistance of counsel is offense specific. In footnote 3, Justice Scalia wrote:

> 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.

McNeil v. Wisconsin, 111 S. Ct. At 2211, n. 3.

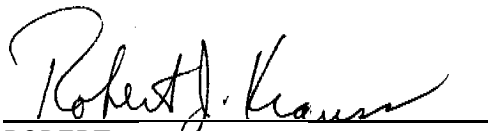
Although Appellee in the instant case was in custody when he apparently signed the invocation of rights form, it was not done while in a custodial setting. Moreover, the signing of the invocation of rights form at the first appearance occurred more as a matter of "judicial convenience" rather than as a defendant's assertion of his rights in response to custodial interrogation. (R. 59-60). Therefore, Appellee's waiver of his Miranda rights prior to the interrogation on the sexual abuse allegations was valid. Appellee's motion to suppress these statements should therefore have been denied by the trial court.

CONCLUSION

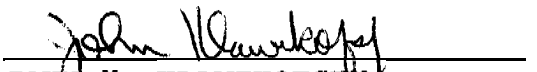
In light of the foregoing facts, arguments, and citation of authority, Petitioner respectfully requests that this Honorable Court reverse the trial court's order of suppression and remand this case for trial.

Respectfully Submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ROBERT **J. KRAUSS**
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 0238538
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739



JOHN M. KLAWIKOFSKY
Assistant Attorney General
Florida Bar No. 930997
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) **873-4739**

for PETER J. LOMBARDO
ASSISTANT STATE ATTORNEY
Florida Bar No. 0740829
2071 Ringling Blvd,
Fourth Floor,
Sarasota, FL 34237-7000
(941) 953-7158

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Kevin Briggs, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer P.D., Bartow, 33831 on this 24th day of July 1996.

OF COUNSEL FOR PETITIONER