IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs. Case No. 00-062

BRIAN GLATZMAYER,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO.0656879
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(561) 688-7759

ATTORNEY FOR APPELLANT

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PRELIMINARY STATEMENT

Appellant, STATE OF FLORIDA, was the prosecution in the trial court below and will be referred to herein as "Appellant" or "State." Appellee, was the defendant in the trial court below and will be referred to herein as "Appellee", "defendant" or "Glatzmayer." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T."

STATEMENT OF THE CASE AND FACTS

On March 3, 1998, a grand jury sitting in the Fifteenth Judicial Circuit returned a two-count Indictment charging Glatzmayer, along with Codefendants Ramon Franco, Carlos Umana and Charles Israel, with the first degree murder of Eric Schunk, in violation of §§ 775.087(1) and (2) and 782.04(1)(a), Fla. Stat. (1997) (Count I); and attempted robbery while armed with a firearm, in violation of §§ 775.087(1) and (2), 777.04(1) and 812.13(1)(2)(a) (Count II) (R. 33-34). The Indictment was subsequently refiled on November 7, 1998 (R. 90-91). Glatzmayer's trial was severed from that of his codefendants (T. 22). He was found guilty of first degree felony murder and attempted robbery without a firearm. (R 131, T 1079). Glatzmayer was sentence to life in prison on without the possibility of parole on the murder charge and twelve years on the robbery charge. (T 1079).

On appeal, Glatzmayer challenged the trial court’s denial of his motion to suppress his video-taped confession. The district court reversed Glatzmayer’s conviction finding that trial court erred in admitting the confession into evidence. In so doing the court certified a question of great public importance to this Court. Glatzmayer v. State, 25 Fla. La. Weekly D589 (Fla. 4th DCA March 8, 2000).

The Motion To Suppress Hearing.

Prior to trial, Glatzmayer filed a written motion to suppress, seeking to suppress his taped post-arrest statement and any statements he made from the time he allegedly requested counsel forward (R. 81-87). A hearing on the motion to suppress, inter alia, was held on November 23, 1998 (T. 14). Officers Edward J. Flynn and Sergeant Robert J. Brand of the City of Delray Beach Police Department testified on behalf of the State (T. 23, 58). Glatzmayer did not present any witnesses.

Officer Flynn responded to the scene at approximately 2:00 a.m. after hearing the call on his police radio (T. 24). When he first arrived, he met with the supervisor on the scene who briefed Officer Flynn on what had taken place (T. 25). Officer Flynn was then directed to Officer Michael Hicks, who was speaking to a possible witness (T. 25). Officer Hicks told Officer Flynn that Glatzmayer was purchasing an ounce of marijuana (T. 25). During the transaction, a car drove by and fired shots which killed Eric Schunk (T. 25).

Officer Flynn spoke to Glatzmayer at the scene, but did not consider him a suspect at the time; Officer Flynn considered Glatzmayer to be merely a witness (T. 26). Officer Flynn then took Glatzmayer to the police station to continue the interview and try to obtain more details (T. 26). Officer Flynn took a taped statement from Glatzmayer that morning (T. 27-28; State's Motion Hearing Exhibit 1). At the time of this taped statement, Officer Flynn wasn't sure whether Glatzmayer was a witness or a suspect: as the interviewing progressed, some of Glatzmayer's statements did

not match the evidence at the scene (T. 27). For example, Glatzmayer stated that the shooters were driving their vehicle and shot from the vehicle (T. 27). However, the shell casings on the ground at the scene were too far from the roadway to have been fired from a car (T. 27). After this interview, Officer Flynn let Glatzmayer go home (T. 28).

During Officer Flynn's investigation on February 15 and 16, other witnesses gave Officer Flynn information which led him to believe that Glatzmayer was not being truthful (T. 29).

On the morning of February 16, Officer Flynn went to the home of Donnie Clark to show him some photo lineups (T. 29). When Officer Flynn arrived, Glatzmayer was at Donnie Clark's residence (T. 29).[1] While Officer Flynn was there, he also showed the photo lineups to Stephanie Marrell (T. 29-30). Glatzmayer approached Officer Flynn and told Officer Flynn that he wanted give another statement and tell the full truth about what happened (T. 30). Officer Flynn told Glatzmayer that they would go back to the police department and talk there (T. 30). Officer Flynn drove Glatzmayer to the station in his car, but Glatzmayer was not handcuffed (T. 31). Officer Flynn did not have any further conversation with Glatzmayer until they got to the police station (T. 31).

Officer Flynn took Glatzmayer to the interview room (T. 31). While Glatzmayer waited in the interview room, Officer Flynn met with Sergeant Brand and informed him that Glatzmayer wished to make

[1] Officer Flynn testified that he had not intended to come into contact with Glatzmayer until later that day (T. 34).

a statement (T. 32). Officer Flynn went back to the interview room and advised Glatzmayer of his Miranda rights (T. 32-33; State's Motion Hearing Exhibit 2). Officer Flynn's initial conversation with Glatzmayer was not recorded (T. 33). During that time, Glatzmayer did not indicate in any manner that he did not wish to give a statement (T. 33). Glatzmayer then provided a statement about the events that occurred on the early morning of February 15 (T. 34). The conversation off-tape lasted approximately an hour (T. 38).

At the end of the untaped interview, Officer Flynn asked Glatzmayer to put his statement on tape (T. 35). Glatzmayer asked Officer Flynn if he thought Glatzmayer should have an attorney, and Officer Flynn responded "that's not our decision to make, that's yours, it's up to you" (T. 35-36, 38). Glatzmayer then stated "well, maybe I should just talk to my mother" (T. 35-36, 38). At that point, Officer Flynn tried to contact Glatzmayer's mother (T. 36).

Glatzmayer's mother came to the police station approximately an hour later and spoke to Glatzmayer in the interview room (T. 36, 38). Glatzmayer spoke to his mother for about half an hour (T. 38). After Glatzmayer met with his mother alone in the interview room, Officer Flynn took Glatzmayer's taped statement (T. 36, 38; State's Motion Hearing Exhibit 3). Neither Glatzmayer or his mother ever indicated to the officers that Glatzmayer did not wish to give a statement (T. 36-37). Glatzmayer's taped statement did not materially differ from the untaped statement (T. 34, 37).

Prior to cross-examination, the trial court clarified the following: Officer Flynn spoke to Glatzmayer for about an hour before he asked Glatzmayer to give a taped statement (T. 37-38). When Officer Flynn asked Glatzmayer to go on tape, Glatzmayer asked him if he should speak to a lawyer (T. 38). Officer Flynn told Glatzmayer that he couldn't give Glatzmayer that advice (T. 38). Glatzmayer then said he would like to speak to his mother (T. 38). It took Glatzmayer's mother about an hour to get to the police station (T. 38). Mrs. Glatzmayer then met with Glatzmayer for about 30 mins. (T. 38).

On cross-examination, Officer Flynn clarified that the first time he spoke with Glatzmayer was at the scene of the murder (T. 41). Glatzmayer was attempting to assist in helping Eric (T. 41). Glatzmayer was visibly upset that Eric had been shot (T. 41). During Glatzmayer's first statement, Officer Flynn merely thought of Glatzmayer as a witness (T. 42). Glatzmayer was then released (T. 42).

When Officer Flynn learned where the shell casings were found, he discovered that there were some inconsistencies in Glatzmayer's statement (T. 43). When Officer Flynn ran into Glatzmayer later that day at Donnie's house, Glatzmayer told Officer Flynn that he wanted to give another statement (T. 44). At this point, Officer Flynn did not tell Glatzmayer that he was under arrest (T. 45). Officer Flynn then transported Glatzmayer back to the police department (T. 46).

Once they arrived back at the station, Officer Flynn read Glatzmayer his rights (T. 47). Glatzmayer then gave an untaped statement (T. 49). Prior to going on tape, Glatzmayer raised the issue of whether he should have an attorney (T. 49). According to Officer Flynn, if Glatzmayer had wanted an attorney, they would have gotten him an attorney (T. 52). Instead, Glatzmayer wanted his mother, so they got his mother (T. 52). Then the officer took the identical statement on tape. (T 53). When Glatzmayer asked them if he should have an attorney, they told Glatzmayer that it was up to him (T. 54). Then he asked to talk to his mother before he will give a statement on tape. (T 54).

Glatzmayer spoke to his mother in a room that was monitored by a television monitor also equipped with audio (T. 55). Officer Flynn did not know if Glatzmayer spoke to his mother about getting an attorney (T. 54-55). Officer Flynn did not listen to their whole conversation, but he heard that Glatzmayer's mother was upset with him for being involved in this and setting up his friend (T. 55). Officer Flynn did not make either an audio- or video-tape of the conversation (T. 56).

Sergeant Brand transported Glatzmayer from the scene back to the Delray Beach police Department (T. 58). Sergeant Brand never spoke to Glatzmayer at the scene or in the car (T. 58-59). Sergeant Brand participated in Glatzmayer's initial interview on the morning of February 15 (T. 58). The statement was tape-recorded and then Glatzmayer was released (T. 59).

Sergeant Brand came into contact with Glatzmayer Again on the morning of February 16 in one of the interview rooms at the police department (T. 59). Officer Flynn read Glatzmayer his rights and Glatzmayer indicated that he understood those rights (T. 60). Glatzmayer gave another statement which was different from his first statement on February 15 (T. 61). Glatzmayer told the officers about the involvement of Ramon Franco, Carlos Umana and Charles Israel (T. 61).

When Officer Flynn asked Glatzmayer if he would be willing to give a taped statement, Glatzmayer asked their opinion on whether he should have an attorney (T. 62). The officers responded that they were not there to give advice; the decision was strictly up to Glatzmayer (T. 62). Glatzmayer said that he would go ahead and give a statement, but he wanted to talk to his mother first (T. 62). When she arrived, Detective Brand took her into an office and told her that Glatzmayer was under arrest for attempted robbery and murder (T. 63). Mrs. Glatzmayer was given an opportunity to speak to Glatzmayer. (T. 63).

That room had a camera that the officers could use to monitor what was going on in the room (T. 64). Detective Brand did not listen to the whole conversation (T. 64). Detective Brand explained that the video monitor was there for officer safety, to see if anything is handed back and forth between individuals in the room (T. 64). Detective Brand overheard Mrs. Glatzmayer tell Glatzmayer that the best thing he could do was to go ahead and

cooperate with the police (T. 64). After she met with Glatzmayer, Glatzmayer gave a taped statement (T. 64).

On cross-examination, Detective Brand clarified that when he transported Glatzmayer back to the police department, Glatzmayer stayed with Officer Flynn while Detective Brand went back out to the scene (T. 73).

Glatzmayer voluntarily went to the police department with Officer Flynn to give his second statement (T. 76). Glatzmayer then gave a statement that was different from his first statement (T. 77). Glatzmayer was read his rights before the off-tape interview (T. 78). Glatzmayer acknowledged and waived his rights (T. 80). However, before he would give a taped statement, Glatzmayer asked if the officers thought he should have an attorney (T. 80). The officers told Glatzmayer that it was his decision to make (T. 80). The officers told Glatzmayer that were not saying yes or no to the question, and they refused to give an opinion. (T 81-82).

Prior to the taped statement, the sequence of events were that he asked about an attorney, the officers refused to give an opinion, he asked to speak to his mother, and then he ultimately gives a statement. (T 83-84). Glatzmayer then said he wanted to speak to his mother (T. 82). It took about 30-45 minutes to locate her (T. 82). The conversation Glatzmayer had with his mother was monitored, but not recorded (T. 83). Glatzmayer was never advised that the conversation with his mother was going to be monitored (T. 83).

After hearing evidence and argument, the trial court denied Glatzmayer's motion to suppress (T. 137). The trial court made the following findings of fact. On February 16, 1998, Detective Ed Flynn of the Delray Beach Police Department went to the home of a witness to show her a photo lineup. The defendant was present and told Flynn that he wanted to change his statement. He was taken to the police department and along with Sgt. Robert Brand questioned him. He was advised of his Miranda warnings from a standard rights card which was signed by the defendant. After a brief statement, a formal statement was taken. Pursuant to the agreement of the parties, the Court reviewed the statement prior to the hearing. The defendant confessed to his involvement in the murder of Eric Schunk.

Both officers testified that the defendant was not promised or threatened to give a statement, did not appear to be under the influence of any alcohol or drugs, and the he freely and voluntarily spoke with them. After the officer took a statement from him, he was asked if he would put the statement on tape. At that point the defendant asked the officers if “they thought he should get a lawyer?” The officers responded that it was his choice. At that point the defendant requested to speak to with his mother. She was located by the officers and given the opportunity to speak with her son alone for about a half hour. After speaking with his mother, the defendant gave a taped statement. On the tape itself the defendant stated that he understood his rights and that

he was not threatened or promised anything. The defense did not present any testimony. (ROA 141-142, T 135-137).

In denying the motion, the court made the following legal conclusions:

> Based on the totality of the testimony presented and the tape recorded statement of the defendant, the Court finds that the statement given by the defendant was done so after he was properly advised of his Miranda Warnings and that it was done so freely and voluntarily. The evidence demonstrates that the defendant did not invoke his right to counsel, that his question was at best an equivocal request for counsel, and that the officer's [sic] were correct in telling the defendant that whether or not he should get a lawyer was his choice.

(R. 142).

SUMMARY OF ARGUMENT

Issue - The district court erred in finding that Glatzmayer's confession was involuntary under Almeida v. State, 737 So. 2d 520 (Fla. 1999). The police officers correctly told Glatzmayer that any decision on whether he should obtain a lawyer was entirely his choice and that they could not advise him. Consequently Glatzmayer's subsequent confession, after consultation with his mother, was voluntary and admissible.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE OFFICERS PROPERLY DECLINED TO OFFER LEGAL ADVICE TO GLATZMAYER REGARDING WHETHER IT WAS IN HIS BEST INTEREST TO EXERCISE HIS RIGHT TO COUNSEL; HIS SUBSEQUENT CONFESSION WAS VOLUNTARY AND PROPERLY ADMITTED AT TRIAL

Brian Glatzmayer was convicted of first degree felony murder of Eric Schunk. Included in the evidence admitted at trial was his video-taped confession detailing his involvement in the robbery and murder. Prior to trial the defendant filed a motion to suppress the video-taped confession.[2]

The facts adduced at the motion to suppress included the following. After receiving Miranda[3] warnings, Glatzmayer signed a waiver form and provided an oral confession[4] to police. He was then asked if he would repeat that confession on video-tape. Glatzmayer asked the police, "Should I get a lawyer?" Officers Brand and Flynn told Glatzmayer that the decision was his and they could not offer an opinion. (T 35, 36, 38, 62, 80). At that point, Glatzmayer requested that he be allowed to see his mother. (T 62). Mrs. Glatzmayer was contacted and arrived at the station

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[2] Prior to the video-taped confession, Glatzmayer had previously waived his right Miranda rights in writing and made a non-recorded confession which was identical to his taped statement. (T 34, 763).

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

[4] Glatzmayer has never challenged the voluntariness of this confession. (R 84, T 32, 35).

within the hour. After speaking to his mother alone for thirty (30) minutes, Glatzmayer provided a second confession on video-tape. Glatzmayer argued that his question to the officers was an unequivocal request for counsel and therefore all questioning should have ceased. He further contended that the officers' response was inadequate since they did not provide him with direction or guidance. (R 81-86, T 131-135). The trial court denied the motion ruling that as a matter of law, Glatzmayer's question was at best an equivocal request for counsel under Davis v. United States 512 U.S. 452 (1994) and State v. Owen, 696 So. 2d 715 (Fla. 1997). Furthermore, the police officers' refusal to offer advice was proper, noting that any other response would have been tantamount to legal advice. Slawson v. State, 619 So. 2d 255 (Fla. 1993). (T 131 R 141-142). In addition to the written factual findings, the court orally announced that the taped confession revealed that Glatzmayer was cooperative with police, calm, and spoke in a normal voice. (T 137).

On direct appeal, Glatzmayer, relying on Almeida v. State, 737 So.2d 520 (Fla. 1999), claimed that the police failed to make a good faith effort to answer his question. Finding Almeida controlling, the district court agreed and held:

> "[i]n the present case the officers did not ignore the question, but their answer does not comply with Almeida. It was not a 'simple and straightforward answer,' nor was it 'an honest effort to answer [Almeida's] question concerning his right to counsel.' ...Clearly, the only straightforward answer to

> appellant's question would have been some type of affirmative response."

Glatzmayer, at 590.[5] In addition to reversing the trial court's order, the court certified the following question:

> When suspects who are considering waiving their Miranda rights ask law enforcement officers if they should invoke the right to counsel, what does Almeida require of the officers?

Id.

The district court erred in reversing the trial court's order denying the motion to suppress. First, the exchange between Glatzmayer and the officers, including the fact that he was allowed to speak to his mother prior to making the decision to confess, clearly demonstrate that the taped confession was voluntary and therefore admissible. Second, the district court erred in holding that Almeida constitutionally mandates police officers to offer legal advice when requested. Compounding that error is the court's finding that in dispensing such advice police officers must dissuade suspects from providing voluntary admissions. Third, the state asks this Court to clarify its holding in Almeida.

The state asserts that the trial court properly denied the motion to suppress. As already recounted above, when Glatzmayer asked, "should I get a lawyer?", the police instructed him that the decision rested solely with the defendant. Glatzmayer, then asked

[5] The district court pointed out that Almeida v. State, 737 So. 2d 520 (Fla. 1999) had not been decided until after litigation of the motion to suppress. Glatzmayer v. State, 25 Fla. L. Weekly at D590 n. 1

to speak to his mother. That request was honored even though Glatzmayer was not a juvenile. He and his mother spoke for approximately thirty (30) minutes. Immediately thereafter, Glatzmayer gave a video-taped confession. Irrespective of Almeida's impact on confession law in Florida or its applicability to the instant case, Glatazmayer's confession was voluntary and properly admitted at trial. Cf Z.F.B. V. State, 573 So. 2d 1031, 1032 (Fla. 3rd DCA 1991)(upholding admissibility of confession after juvenile was allowed to speak to legal guardian and subsequently confessed) Cruz v. State, 736 So. 2d 711 (Fla. 3rd DCA 1999)(same); cf. Doerr v. State, 383 So. 2d 905, 907 (Fla. 1980)(indicating that juvenile's access to parents when requested is a factor to consider when considering voluntary nature of confession); Allen v. State, 636 So. 2d 494, 496 n.2 (Fla. 1994)(same); Ramirez v. State, 739 So. 2d 568, 576 (Fla. 1999)(same); Snipes v. State, 733 So. 2d 1000, 1005 (Fla. 1999)(same).

In conclusion, the district court erred in ignoring the pertinent facts that Glatzmayer chose to confess after he was allowed to speak with his mother.[6] The court failed to provide any analysis regarding the inapplicability of the these relevant facts and dispositive cases. Reversal is therefore required.

[6] The state asserts that since Glatzmayer was not a juvenile the police were not required to notify his mother. However, the fact that Mrs. Glatzmayer was allowed to speak to her son clearly demonstrates that the police did not coerce him in any way.

Second, to the extent that Almeida is applicable to the instant case, the district court incorrectly interpreted its holding. The court quoting from Almeida found that the police officers' answer was not a "simple and straight forward answer," nor was it "an honest effort to answer [appellant's] question concerning his right to counsel." Glaztmayer, 25 Fla. L. Weekly at D590. The court held that, "Clearly, the only straightforward answer to appellant's question would have been some type of affirmative response. We therefore conclude that the confession must be suppressed." Id. Simply put, the district court has thrust law enforcement into the untenable position of requiring officers to dissuade suspects from providing voluntary admissions. There is nothing in Almeida that even suggests the result reached by the district court. The district court's conclusion is illogical and patently incorrect.

The suppression of confessions based on the failure of police to advise suspects against talking to them without counsel present completely obliterates this Court's stated principle that, "[w]e adhere to the principle that the state's authority to obtain freely given confessions is not an evil, but an unqualified good." Traylor v. State, 596 So. 2d 957 (Fla. 1992). See also Sapp v. State, 690 So. 2d 581, 586 (Fla. 1997)(same). Police, entrusted with the responsibility of investigating crime and apprehending criminals cannot simultaneously be required to advise and dissuade those same suspects from providing voluntary confessions. These dual roles, i.e., investigator and advisor, are mutually exclusive and

therefore cannot be carried out by those individuals who have been entrusted with the responsibility of protecting the citizenry. Recognizing the perilous nature of such a position, this Court has stated:

> Police are not required to disclose every possible ramification of a waiver of rights to a detainee apart from those general statements now required by Miranda and its progeny. Nor are police required to tell detainees what may be in their personal best interests or what decision may be the most advantageous to them personally. Under our system, law enforcement officers are representatives of the state in its efforts to maintain order, and the courts may not impose upon them an obligation to effectively serve as private counselors to the accused. The latter is the obligation of private attorneys or public defenders and certainly must not be shouldered by those whose job it is to police our streets.

Johnson v.State, 660 So. 2d 637, 641-642 (Fla. 1995).

Since Miranda this court has clearly rejected any notion that police officers should be dispensing legal advice. In State v. Craig, 237 So.2d 737, 740 (Fla. 1970), this Court stated:

> When defendant expressed the opinion that an attorney could not help him, the interrogator was not required to convince the defendant that he needed counsel. The Miranda decision does not require the interrogator to give legal advice, but only that defendant is told his constitutional rights and makes an intelligent waiver of counsel. The determination for need of counsel is the defendant's prerogative.

Id. at 740.(emphasis added); See also Sapp 690 So. 2d at 586 (explaining it was never intended that Miranda's purpose was to prevent suspects from making voluntary statements without the

presence of counsel); State v. Moya, 684 So. 2d 279, 280 (Fla. 5th DCA 1996)(finding confession admissible after police tell suspect that she must decide whether to speak with them in response to her statement that she was not sure if she should); cf. Slawson, 619 So. 2d at 258 (Fla. 1993)(finding that suspect's question, "what about an attorney?" was properly answered when the police officer responded by reading the Miranda rights).

Other courts have also refused to create such a conflict or impediment for law enforcement. The Fifth Circuit recognized the following:

> [T]he limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogators and suspect about whether having counsel would be in the suspect's best interests or not. Nor may it incorporate a presumption by the interrogator to tell the suspect what counsel's advice to him would be if he were present. Such measures are foreign to the purpose of clarification, which is not to persuade but to discern. The point is that counsel's advice about what is best for the suspect to do is for counsel, not the interrogator, to give. And it is for him to give after consultation with his client and after weighing where the suspect's best interests lie from the point of view of the suspect, not from that of a policeman be he ever so well intentioned. Until this occurs, it is simply impossible to predict what counsel's advice would be; and even if it were, the right to advice of counsel surely is the right to advice from counsel, not from the interrogator.

Thompson v. Wainwright, 601 F.2d 768, 772 (5th Cir. 1979)(emphasis added);United States v. Fouche, 833 F 2d 1284, 1288 (9th Cir. 1987)(approving investigator's statement to suspect that he could not tell him what to do since he was not an attorney and therefore could not give legal advice); cf. Moran v. Burbine, 475 U.S. 412, 422 (1989)(refusing to require police officers to supply a flow of information to aid a suspect in calculating their self-interest in deciding whether to waive rights).

With these principles in mind, the officers' response was appropriate and did not vitiate the voluntariness of Glatzmayer's confession. The concerns voiced by this Court in Almeida are not present in the instant case. The officers correctly, honestly and in a straightforward manner, told the defendant that they could not offer him any advice and the decision was his and his alone. That response was not evasive, the officers did not skip over the question nor did they try and "steam roll" over Glatzmayer. Almeida, 737 So. 2d at 525. The district court's conclusions to the contrary must be reversed. See Craig; Johnson; Moya; Sapp; Slawson See also See State v. Bailey, 256 Kan. 872 (1995)(ruling that police officer's answer that decision to invoke the right to counsel is not up to the police was proper and confession admissible); State v. Jones, 914 S.W.2d 852 (Mo. 1996)(finding that police officer's response, "I'm not an attorney, I'm an investigator" to suspect's question, "Do I need an attorney?" was proper and confession was properly admitted); State v. Greybull, 579 N.W.2d 161 (N.D. 1998)(finding police officer's reply,

"[T]hat's up to you" in response to suspect's question, "Do I need to get a lawyer?" proper response and confession was admissible) People v. Oaks, 215 Ill. 188, 662 N.E.2d 1328(1996)(finding suspect's question, "Should I see a lawyer," and officer's response, "That's up to you," not a violation of fifth amendment); Smith v. State, 231 Ga.App. 677, 681, 499 S.E.2d 663, 668 (1998)(finding police officer's response, "[I]t was up to her, and that it was her decision to make" in response to suspect's statement that she didn't know what to do was proper and subsequent confession was admissible); State v. Thomas, 30,490 (La. App. 2 Cir.) 711 So. 2d 8080 (1989)(ruling that officer's response, "That's up to you" in response to suspects's question, "But do I--do I need a lawyer" not error and confession was admissible); State v. Davis, 124 N.C. App. 93, 476 S.E.2d 453 (1996)(approving officer's reply, "That is your decision; I can't make that decision for you" in response to "Do I need a lawyer"); State v. Wright, 172 Misc.2d 674, 657 N.Y.S.2d 308 (1997)(finding that police officer's negative response to defendant's question, "Do I need a lawyer?" was not error); Mueller v. Commonwealth, 244 Va.386, 422 S.E.2d 380 (1992)(finding that suspect's question, "Do you think I need an attorney here?" and police officer's shrugging and shaking his head from side to side and responding "You're just talking to us" was not error)[7]; United States v. Ogbuehi, 18 F.3d 807, 813 (9th Cir. 1994)(finding suspect's question, "Do I need a lawyer?" and police

[7] These states have all adopted the reasoning of Davis v. United States, 512 U.S. 452 (1994).

officer's reply, "I can't answer that for you" proper response which did not render confession inadmissible); cf. Mueller v. Angelone, 181 F.3d 557, 573-574 (4th Cir. 1999)(finding suspect's question, "Do you think I need an attorney?" and officer's reply while shrugging his shoulders "you're just talking to us" did not render confession inadmissible); cf. Diaz v. Senkowski, 76 F.3d 61 (2d Cir. 1996)(finding suspect's question, "Do you think I need a lawyer?" and officer's reply, "You have been advised of your rights" not improper).

Unless this Court is prepared to constitutionally require law enforcement to dissuade suspects from providing voluntary confessions, the opinion of the district court must be reversed. In answering the certified question, this Court must reaffirm the rule of law that police officers should refrain from offering legal advice to suspects who are considering whether to waive their Miranda rights.

Moreover, to the extent that a suspect's question indicates that there may be a misunderstanding regarding those rights, the appropriate response would be to simply re-advise the suspects of the Miranda warnings. As the United States Supreme Court acknowledged in Davis, "But the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves." Id 512 U.S. at 460. Cf. Slawson;(finding that suspect's question, "what about an attorney?" was properly answered when the police officer responded by reading the Miranda rights).

Finally, the state would ask this Court to clarify its holding in Almeida regarding the circumstances under which it is applicable. In explaining the application of Davis in Florida this Court previously stated:

> Thus, we hold that police in Florida need not ask clarifying questions if a defendant who has received proper Miranda warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her Miranda rights.

State v. Owen, 696 So. 2d at 719 (Fla. 1997)(emphasis added).

In distinguishing Owen this Court held:

> That issue is not presented in the instant case. Here, we are confronted with a custodial utterance that was prefatory to--and possibly determinative of--the invoking of a right.

Almeida, 737 So. at 523 & n. 7.(emphasis added). Based on this distinction, the district court erred in applying Almeida to the facts of this case. Prior to any questioning, Glatzmayer was read his Miranda warnings, he signed a written waiver, and he orally confessed. Glatzmayer, 25 Fla. L. Weekly at 589. As articulated by Justice Shaw in his concurring opinion in Owen, there is nothing unfair about requiring suspects to make clear and unequivocal request for counsel:

> "For those suspects who feel comfortable enough to waive their rights and proceed with questioning, it is not unreasonable to require that they thereafter express any desire to cut off the interview clearly. It would substantially impede the interview process, would do virtually nothing to advance the

> policy underlying the pre-interrogation warnings, and would in fact undermine the legitimacy of those warnings to require that each interview grind to a halt whenever an otherwise willing interviewee uses any language that might hint at a desire to stop."

See Owen 715 So. 2d at 721,(emphasis added). This Court must reaffirm its prior ruling that Almeida does not apply in those situations as in the instant case, where a suspect has already waived his Miranda warnings. See also Walker v. State, 707 So. 2d 300 (Fla. 1997)(affirming admissibility of confession under Owen since appellant signed waiver form and gave oral statement prior to any equivocal statement); Jones v. State, 24 Fla. L. Weekly S535 (Fla. November 12, 2000)(finding confession admissible as equivocal request for counsel was subsequent to a previous waiver of Miranda warnings); State v. Kipp, 698 So. 2d 1204 (Fla. 1997)(same); State v. Deck, 705 So. 2d 566 (Fla. 1998)(same); Bean v. State, 25 Fla. L. Weekly D150 (5th DCA January 7, 2000)(acknowledging that appellant had never previously waived Miranda and therefore case is controlled by Almeida rather than Owen); Dooley v. State, 743 So. 2d 65, 69 (4th DCA 1999)(same).

In adopting Davis in Florida, this Court recognized, "Our decision today is in harmony with those of other states which have also held in the wake of Davis that police are no longer required to clarify equivocal requests for the rights accorded by Miranda." Id at 720. Those states have similarly held that Davis applies when the equivocal assertion, i.e., question, was posed after a

suspect has waived his Miranda rights. United States v. Posada-Rios, 158 F. 3d 832, 867 (5th Cir. 1998)(finding that defendant's comment, "might have to get a lawyer then, huh?" was an equivocal request for counsel); State v. Saunders, 2000 WL 254552 (Conn.Super.)(finding that suspects question, "When does my lawyer come down here?" was not an unequivocal request for counsel); Matthews v. State, 106 Md. App. 725, 666 A.2d 912 (1995)(ruling that suspects question, "Where's my lawyer?" was not an unequivocal request for counsel); State v. Brown, 589 N.W.2d 69 (Iowa App. 1998)(finding that suspect's question, "Is my lawyer here?" was not unequivocal request for counsel); Brown v. State, 668 So. 2d 102 (Ala. Crim. App. 1995)*on remand* 513 U.S. 801 (1994)(reversing initial suppression of confession after suspect's question, "Is it going to piss y'all off if I ask for my-to talk to a friend that is an attorney?" was not unequivocal request for counsel under Davis).[8]

In conclusion, the state asks this Court to explicitly reject the district court's conclusion that police officers are constitutionally mandated to dissuade suspects from providing voluntary confessions without the presence of counsel. Furthermore, this Court must clearly state that Almeida is limited solely to those situations where, prior to any formal waiver, police are initially advising suspects of their rights.

[8] See also those cases cited at pages 20-21.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court reverse the district court reversal of Glatzmayer's conviction and sentence for first degree murder.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

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CELIA A. TERENZIO
Assistant Attorney General
Fla. Bar No. 0656879
1655 Palm Beach Lakes Blvd.,#300
West Palm Beach, FL 33401-2299
(561) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Michael Salnick, One Clearlake Centre, Suite 1203, 250 S. Australian Ave., West Palm Beach, Fl. 33401, this ____ day of May, 2000.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
CELIA A. TERENZIO
Assistant Attorney General